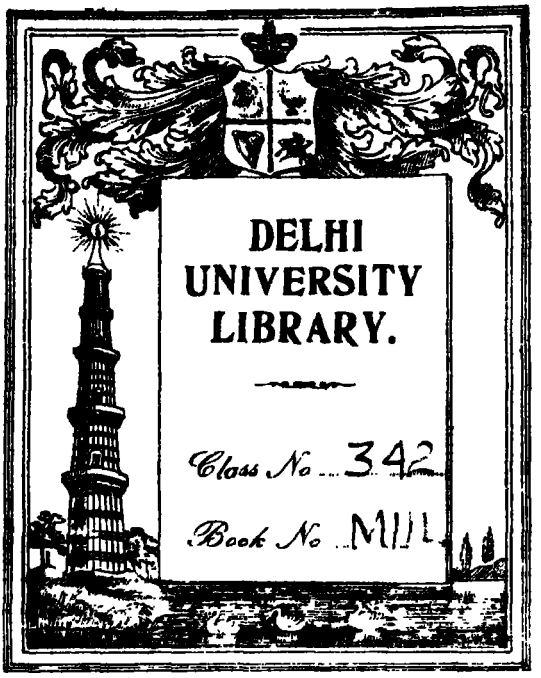

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THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE

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THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE

BY

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PREFACE

Broadly construed the term "municipal home rule" has reference to any power of self-government that may be conferred upon a city, whether the grant of such power be referable to statute or constitution. In American usage, however, the term has become associated with those powers that are vested in cities by constitutional provisions, and more especially provisions that extend to cities the authority to frame and adopt their own charters. Powers thus conferred by the people of a state through the medium of their fundamental law create for the city constitutional rights which may, like the similar rights of private persons, be defended in the courts against invasion by the legislative arm of the government. Such rights it would seem are appropriately designated rights of home rule. This is certainly the sense in which the term "home rule" is descriptively employed by our courts in an ever increasing number of cases, although in point of fact the term has never been given legal definition and can scarcely be regarded as a term of our law at all. It is in this restricted sense, therefore, which is likewise in fair harmony with the popular conception of what it imports, that the term "home rule" has been used to describe the general subject-matter of this volume.

There are now twelve states in which certain or all cities enjoy the power to frame and adopt their own charters. Wherever in any state this right has been enjoyed and exercised for a considerable length of time it has given rise to numerous difficult questions. These have of necessity been presented to the courts for solution. The cases upon this subject already constitute a distinct and important branch of our state constitutional law. It seems obvious that the time has arrived when this branch of law should as a whole be

subjected to review and critical analysis. This is one of the objects of this work. It is submitted with the hope that, having accomplished this object with moderate success, it may be of referential service alike to the courts and to the legal profession, especially in the states which have conferred upon cities the charter-making power.

This is not, however, the primary object of this study. The law of municipal home rule — if such it may be called — is preëminently public law. It is, or should be, of less importance to the practitioner than to the student of politics, to the maker of constitutions and of laws, to the active but serious-minded reformer, and to that vast host of laymen who, with or without participation, are deeply interested in the betterment of municipal government in the United States. There is perhaps no subject that lends itself more readily to fluent discourse than this subject of home rule for cities. Arguments without number may be readily adduced in its favor — arguments that are none the less of compelling force because of their splendid generality. The fact is, however, that home rule in practice is a matter of harassing details, of knotty problems of law, and of concrete questions that require yes-or-no answers. It is in the face of these that generalities fail to suffice. In this work the smooth path of general argument has been wholly eschewed. It has been assumed that home rule as a general, political, and more or less abstract concept is desirable; and it is recognized that whether desirable or not it is a legal actuality in one-quarter of the states of the Union and an imminent probability in others. Without sentiment, therefore, and without appeal to all that is picturesquely indefinite in the notion of self-government, this study strikes into the rough and only partly broken field of the applied problems of home rule. The effort has been made to study the cases not only for the legal principles declared but also in the light of the practices both of cities in the making of charters and of legislatures in the enactment of laws. In other words, in so far as is possible, the attempt has been made to set forth the net governmental results of home rule in the states in which it has been put into operation. This, then, is the primary object of this work — to wit, that the specific questions that have arisen may be marshaled into review; that the difficulties, real and otherwise, which the courts have encountered in construing

home rule provisions of constitutions may be understood and appreciated; and that the actual relation in law between the city as an autonomous unit and the state government as its restricted superior may be comprehended to the extent at least to which it has been settled by judicial decree and by charter and statutory practices.

It seems probable that few if any of the more recent constitutional provisions granting home rule powers have been framed with an accurate and detailed knowledge of the legal problems to which similar provisions have elsewhere given rise. If they *have* been drafted with such knowledge at hand, the least that can be said is that the authors of these provisions have been inexcusably short-sighted. They have certainly imposed an unnecessary onus upon the courts — already much abused for their failure to respond to our individual views respecting the policies which we in large measure compel them to determine by the use of vague and undefined phrases in our constitutions. It may be that it is impossible to confer broad powers of home rule in terms of such definiteness and precision that the courts will find no difficulty in the matter of construction and application. But it seems patent that the makers of constitutions should wrestle earnestly with the task of avoiding the various pitfalls of uncertainty which the courts have discovered in most of the constitutional provisions upon this subject, and that they should endeavor to give unmistakable answer at least to those concrete questions which have been recurrently presented elsewhere. It is idle to seek the solution of a problem without an understanding of its practical difficulties. Many, though by no means all, of the difficulties of the home rule problem have found exposition and a measure of wise or unwise solution in the books. No constitutional provision granting home rule powers should be drafted without an accurate and detailed knowledge of the origin and nature of these difficulties. It is unjust that the courts should be compelled to give precise definition to terms which have no precision of meaning and be forced to determine complicated questions of public policy which the framers of constitutions have either lightly ignored or deliberately dodged. This book has been written with the end in view that those who may be interested in or responsible for the writing of constitutional provisions conferring home rule powers may have

before them in convenient form a fairly comprehensive review of the actual experience of the states in which cities have enjoyed the right to frame and adopt their own charters. Its purpose will have been accomplished if, without dampening the ardor of the advocates of home rule, it nevertheless serves to bring the discussion of this all-important subject a little closer to earth and to point the way forward, even to a limited extent, by blazing the entire field of the law as it has been evolved and the practice as it has been affected by the law.

Owing to important differences from state to state not only in the phraseology of home rule provisions but also in the history of these provisions before the courts, it has seemed advisable to treat the subject-matter of the text by states rather than by topics. Whatever disadvantages inhere in this method of approach have been sought to be overcome by frequent cross-references in the text and cross-citations in the notes.

I have inflicted neither colleagues, students, nor other friends with the burden of assisting me in the preparation of this work. I am free from obligations, therefore, only at the loss of valuable criticisms which I might have had. Such debt as I owe is to an institution which to the utmost of its means cherishes and fosters the spirit of research and which to that end has enabled me to find time from the exactions of routine to contribute this small offering to the advancement of legal learning and the progress of political reforms.

HOWARD LEE McBAIN

New York City,
October, 1915.

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THE SCOPE OF LEGISLATIVE POWER OVER CITIES

AT the close of the colonial period of American history there existed in the several states of the newly welded Union sixteen corporate entities known as cities or boroughs. In New England where the township furnished a type of government suitable alike for rural and simple urban conditions no municipal corporation proper had been established. But in New York there were three such corporations, in New Jersey four, in Pennsylvania four, in Maryland one, in Virginia three, and in North Carolina one.[1]

In the transition from colony to commonwealth these corporations remained unaffected; but a highly significant change was made in the source of their authorities. Each of the municipal corporations established in the colonies owed its origin to a charter issued by the governor acting under grant of authority from the crown or proprietor. After the Revolution the power to issue corporate charters became vested in the legislatures of the several states, and it was the legislatures that succeeded to whatever authority the governor as agent of the crown or proprietor enjoyed with respect to existing municipal charters. The first constitutions of New York, Pennsylvania, and Maryland expressly recognized the transference of this competence to the legislature.[2] Else-

[1] Fairlie, *Essays in Municipal Administration*, pp. 50-60. There had been two "paper" incorporations in Maine prior to its absorption by Massachusetts; and the corporation of Germantown, Pennsylvania, had existed for a few years.

[2] The constitution of New York (1777), art. xxxvi, expressly validated and continued the charters of bodies politic granted by the king of Great Britain or his predecessors and provided specifically for the manner in which the officers of corporations established under such charters should be appointed "*until otherwise directed by the legislature.*"

where the legislature succeeded to this power by tacit implication; for it was early settled in practice and later in law that the governor enjoyed only such powers as were expressly conferred upon him by the constitution or by statute,[1] while the legislature acted under a general and unenumerated grant of legislative or policy-determining power. Under this view it could not have been asserted that the governor succeeded by implication or otherwise to any power of his colonial predecessor unless such power was specifically conferred upon him by the constitution or a valid act of legislation. In no state did the constitution vest the governor with the power to grant or alter charters of municipal corporations; and the question has never arisen whether a statutory grant of such power to the executive would or would not be an unconstitutional delegation of legislative power — a question which would certainly be resolved against the validity of such a grant — for the very obvious reason that no legislature has ever contemplated the abdication of so important a power.

It was thus that the legislatures of the several states came into possession of a power, the exercise of which presented at a later period of our history the most serious problem that the American city has encountered in the working out of its salvation.

It is not surprising that the difficulties arising out of the power which the legislature enjoyed to grant and alter charters of municipal corporations did not become serious until many years after the beginning of our history as a nation. At the present time we count a city of twenty thousand among the very minor municipalities of the country; but in 1820 there were only six cities in the entire country with a population that exceeded that number. By the middle of the nineteenth century the number of such cities was only

The constitution of Pennsylvania (1776), sec. 9, vested the general assembly with power to "grant charters of incorporation" and to "constitute towns, boroughs, cities, and counties."

The constitution of Maryland (1776), art. xxxvii of the Declaration of Rights, declared that the "city of Annapolis ought to have all its rights, privileges and benefits, agreeable to its charter, and the acts of assembly confirming and regulating the same, *subject nevertheless to such alteration as may be made by this convention, or any future legislature.*"

[1] Goodnow, *Principles of the Administrative Law of the United States*, p. 95.

twenty-nine. New York had more than half a million inhabitants, but only five other cities — Boston, Philadelphia, Cincinnati, Baltimore, and New Orleans — had crossed the one hundred thousand mark. Brooklyn with a population of ninety-six thousand and St. Louis with seventy-seven thousand were the seventh and eighth cities of the country. It is true that many nascent communities received charters of incorporation during the years that fell between 1780 and 1850, while existing charters were during this period amended from time to time and occasionally completely revised. But generally speaking the era of legislative activity with the affairs of cities had not arrived, even though here and there perhaps an ominous finger of warning might have been directed to the handwriting on the wall.

Legislative "Interference" with Cities

Delivering an opinion in the year 1815, in which he referred to a statute that had been passed amending the charter of New York City, Judge Ambrose Spencer declared that, although the act contained "no recitals, stating that it was passed on the application of the corporation of New York, yet we must presume that it was so passed, it being almost the invariable course of proceedings, for the legislature not to interfere with the internal concerns of a corporation, without its consent signified under its common seal." [1] If this may be taken as a true statement of the early practice of the New York legislature toward the municipal corporations of that state, such practice certainly stands in striking contrast with that which prevailed in Albany, as well as in most other state capitals, at a later period in the history of the country.

It is unnecessary here to attempt to trace the changes in municipal conditions which brought about an abandonment of this early attitude of legislative deference toward the will and the pleasure of municipal corporations. It is sufficient to say that it was not until cities developed in number and in population, not until they began to expand their activities in the direction of im-

[1] Mayor, etc., of New York *v.* Ordronaux, 12 John. (N.Y.) 122. 1815.

proving the conditions of municipal life in many respects, and not until the demand arose for the supply of such great public services as water, gas, and transportation, that the large rewards which lay in their offices, their contracts, and the franchises in their streets became the mark of the political spoilsman in the state legislature. It was at this time that legislators, discarding their considerate practice of earlier years, became zealously active in the enactment of laws regulating the affairs of cities.

Nor is it either important or possible to name the exact date at which this period of legislative zeal as to the affairs of cities arrived. It is sufficient to remark that in few if any states did the practice of legislative "interference" with cities develop symptoms of extremis before the middle-century mark had been passed, and that the most onerous burdens of legislative domination were thereafter felt by cities in different states at different times.

The practice of enacting innumerable laws relating to cities had not been under way for many years before vigorous protests were raised. Thus it was as far back as the first decade of the second half of the century that the mayors of the city of New York began to voice their disapproval of the frequency with which the charter of that city was subjected to alteration by the legislature. Said Jacob A. Westervelt in his annual message of 1854:

> I cannot but deprecate the practice which has grown into use of late years, of applying, almost annually, to the legislature of the state for amendments to the charter, whose necessity is urged to meet special emergencies, or alleged exigencies. We are now governed by portions of four distinct charters; and although their various provisions do not absolutely conflict with each other, I cannot but feel, that a more complete organization of our municipal affairs would have been better secured by one complete and perfect instrument.
>
> Various state laws are also in operation, affecting the internal regulations of our city, which, in my judgment, could have been carried as successfully into operation by the action of the municipal authorities, without the intervention of the legislature. This disposition, of late years, to apply to the legislature for amendments and alterations in our charter, as well as to existing state laws affecting our municipal organization, is, in my opinion, pernicious in its tendency, and derogatory to the dignity and character of our city.

Originally possessing powers ample for all possible contingencies, and fully adequate to meet the demands of municipal government, powers, conferred on us as a city, and guaranteed as to their permanency and efficiency by the constitution of our state,[1] and which rendered us actually independent of legislative interference, we have permitted ourselves to be subjected to the control of the state authorities, until, although we stand first among the cities of the Union, we have, in truth, as few powers, and as few rights as the least of them, and the legislative action of each year takes from us some powers, and divests us of some rights.

It cannot be expected that legislators, uninformed by observation as to the actual wants of our city, and unacquainted with its actual resources, can legislate always for our best interests; and that public interests and public good are often made subservient to private interests and private ends, is abundantly demonstrated by our experience.

The sentiments thus expressed were repeated by Mayor Fernando Wood in his annual message of 1855.[2] Referring to the chaos of laws under which the city was governed, the mayor declared that it was "beyond the ability of any man, exercising the duties of his office under the city charter, to give this people that government which appears to be so generally expected, and which is certainly so much required."

In 1857 the legislature of New York enacted the first of a series of statutes by the terms of which certain important branches of the government of New York City were transferred to the control of state-appointed commissions.[3] This was the famous act creating the Metropolitan Police District — an act which was vigorously protested[4] and so violently resisted that its enforcement led to riot and bloodshed in the city. Five years later it was the matter of "interference" in the financial affairs of the city that Mayor George Opdyke made the subject of an earnestly uttered complaint.[5]

[1] [In this broad statement the mayor was unquestionably in error.]

[2] *Documents of the Board of Aldermen*, 1855, No. 1. [3] *Infra*, 36.

[4] See, for example, the dignified protest of Mayor Daniel F. Tieman, *Documents of the Board of Aldermen*, 1858, No. 1.

[5] George Opdyke, *Official Documents, Addresses, etc.*, pp. 4, 5. He remonstrated especially against the practice of the legislature in saddling "doubtful claims" upon the city and against the absurd and discriminatory practice of requiring that appropriations of New York City should be annually approved by the legislature.

In spite of these and many similar protests legislative "interference" in and domination over the affairs of New York City went merrily and perniciously on from session to session of the legislature. Other cities of the state, in rough proportion to their size and political importance, suffered likewise. The resulting situation in which the cities of New York found themselves in relation to the legislature was debated at length upon the floor of the constitutional convention of 1867–68;[1] but the work of this convention was defeated at the polls. A few years later a commentator upon the amendments proposed by the New York "Constitutional Commission" of 1873 made an ingenious calculation which showed that, on the basis of the time required for the performance of the mere routine steps in the progress of every bill through the legislature, the time that would be consumed in the enactment of the number of laws annually turned out would, if these steps were actually followed, be two and a half times the total length of the prescribed session of one hundred days.[2]

A very considerable proportion of these special and local laws were laws applying to cities and villages. This was specifically shown by the Evarts Commission, which was appointed in 1877 to devise a plan for the government of the cities of New York. In the report which this commission filed it was pointed out that of the 808 acts passed during the session of the legislature in 1870, 212 were acts relating to cities and villages, that 94 of these related to cities and 36 to the city of New York alone. "These 212 acts," declared the report, "occupied more than three-fourths of the two thousand pages of the laws of that year."[3] As one evil of great magnitude rising out of this multiplicity of laws, the commission called attention to the confusion that existed as a result of legislation that was so hastily and inconsiderately enacted as to be fre-

[1] *Proceedings and Debates of the New York Constitutional Convention*, 1867–68, IV, pp. 2926–3180.

[2] L. Bradford Prince, *The Proposed Amendments of the Constitution of New York*, pp. 9–13. This was a pamphlet written for and indorsed by the law committee of the New York City Council of Political Reform.

[3] *Report of the Commission to Devise a Plan for the Government of the Cities of New York State*, 1877, p. 19.

quently conflicting. This resulted naturally in general obscurity and uncertainty as to the meaning of the law and consequently in an enormous amount of unnecessary litigation. As Chief Justice Church declared in the case of In the Matter of Kiernan: [1]

> It is scarcely safe for any one to speak confidently of the exact condition of the law in respect to public improvements in the cities of New York and Brooklyn. The enactments in reference thereto have been modified, superseded, and repealed so often and to such an extent, that it is difficult to ascertain just what statutes are in force at any particular time.

Referring to the fact that some of the laws enacted by the legislature were passed at the behest of citizens who were genuinely interested in promoting the good government of particular cities, the Evarts Commission reported:

> It may be true, that the first attempts to secure legislative intervention in the local affairs of our principal cities were made by good citizens in the supposed interest of reform and good government, and to counteract the schemes of corrupt officials. The notion that legislative control was the proper remedy was a serious mistake. The corrupt cliques and rings thus sought to be baffled were quick to perceive that in the business of procuring special laws concerning local affairs, they could easily outmatch the fitful and clumsy labors of disinterested citizens. The transfer of the control of the municipal resources from the localities to the capital had no other effect than to cause a like transfer of the methods and arts of corruption, and to make the fortunes of our principal cities the traffic of the lobbies. Municipal corruption, previously confined within territorial limits, thenceforth escaped all bounds, and spread to every quarter of the state. Cities were compelled by legislation to buy lands for parks and places because the owners wished to sell them; compelled to grade, pave, and sewer streets without inhabitants, and for no other purpose than to award corrupt contracts for the work. Cities were compelled to purchase at the public expense and at extravagant prices, the property necessary for streets and avenues, useless for any other purpose than to make a market for the adjoining property thus improved. Laws were enacted abolishing one office and creating another with the same duties, in order to transfer official emoluments from one man to another; and laws to change the functions of officers with a view only to a new distribution of patronage, and to lengthen the terms of offices, for no other purpose than to retain in place officers who could not otherwise be elected or appointed.

[1] 62 New York, 457. 1875.

If any one questions the mischievous results of these practices he has but to note the increase of debt and taxation in the city of New York from 1860 to the present time, during which legislative intervention in the local affairs of that city has been most extensively asserted. The debt has increased from eighteen millions to one hundred and thirteen millions; and taxation for annual expenditures from nine to twenty-eight millions.

A committee of the New York Senate, commonly known as the Fassett Committee, which made a report in 1891, showed clearly that the practice of the legislature in respect to "interference" in the affairs of cities had been wholly unaffected by the findings of the Evarts Commission. They declared that in the period of six years from 1884 to 1889, 1284 statutes had been enacted in application to the thirty cities of the state, of which number 390 acts had related exclusively to the city of New York.[1] They especially condemned the large number of mandatory laws which had been passed by the legislature during the preceding twenty years. It was the view of the committee that this was "the worst form which special legislation assumes, the evils of which, and the necessity of curing which, have so long been known, and in regard to which there is apparently an almost complete unanimity of opinion, as shown chiefly through the long series of official documents emanating from the mayors and chief financial officers of all the cities of the state."[2]

While there is perhaps no state of the Union in which cities suffered more grievously at the hands of the legislature and in which the remonstrance of cities was more energetically and persistently voiced, New York was by no means unique in this respect. As far back as 1868 Mayor Tomppert, of Louisville, Kentucky, was heard to thunder reproof at the general assembly of that state for the "confused and fragmentary condition" of the city charter and for the enactment of vitally important laws that had "never been thought or heard of" by the people of the city but had been

[1] *Senate Committee Reports*, Vol. 5, p. 459.

[2] As indicative of the extremely sinister character of some of this legislation, see two veto messages of Governor Fowler in 1892 and 1894 respectively. *Messages of the Governors, State of New York*, Lincoln ed., IX, pp. 64, 490.

"'lobbied' through by individuals who have private and selfish ends to attain." [1] So at a somewhat later date the common council of Milwaukee was heard to utter in no uncertain terms a formal remonstrance against the practice pursued by the Wisconsin legislature of increasing the salaries of city officials without the recommendation of the council.[2] And fifteen years later the council of the same city prepared a memorial to be submitted to all of the cities of the state in order that some plan might be devised to induce the legislature to cease tinkering with city charters for the "benefit of the few" and for "political spite." [3]

In his valedictory address of 1889 Mayor Ames of Minneapolis declared that the greatest calamity that had been inflicted upon the city of Minneapolis had been the "meddlings" of the legislature. "Through this agency our charter has been tinkered up to suit the private whims of obscure citizens, and we are to-day cursed with conflicting laws unintelligible to citizens and inexplicable by the courts." [4] So in his annual message of 1893 Mayor Pingree of Detroit declared that it had "long been the custom of individuals and corporations to secure legislation affecting the people of Detroit for purely selfish motives, with the result that we have to-day a charter of patchwork that divides the responsibilities in many channels and practically ties the hands of the people's representatives, and renders them unable to carry out their wishes for progressive local government." [5] A year later the same chief executive felt it necessary to apologize to his fellow-citizens for the burden of oppressive legislation under which the city had just been placed "because her mayor happened to be under the ban of the influences which dominated the last legislature." [6]

These instances of protest are selected very nearly at random. Similar utterances might be cited in tedious and limitless reiteration; but this would be merely to accumulate evidence in support of a well-known and almost wholly undisputed historical fact. In

[1] *Municipal Reports of Louisville*, 1867, pp. 6, 7.
[2] *Proceedings of the Common Council of Milwaukee*, 1886–87, p. 382.
[3] *Ibid.*, 1901–02, p. 1373. [4] *Annual Reports, City of Minneapolis*, 1889.
[5] *Annual Reports of Detroit*, 1893, p. 5. [6] *Ibid.*, 1894, p. 12.

practically every state in which one or more important cities existed, the same conditions of frequent charter amendments prevailed, and vigorous but futile protests were raised against the continuance of a practice that was fraught with so many and such obvious evils.

It was perfectly manifest that unless state legislatures could be induced of their own volition to alter their attitude and reform their practices in the matter of enacting laws relating to cities, some other remedy would have to be found for the solution of the distressing problem of the city. In most states, however, it was difficult to create state-wide interest in this problem. It seemed well-nigh impossible to arouse a public opinion that was strong enough to intimidate legislatures. Rural inhabitants were naturally indifferent. Nor were the inhabitants of one city always responsive to the sufferings of another. The direct and indirect rewards, whether of a partisan or a personal character, which were offered to legislators in return for the continuation of the practice were, to say the least, alluring. Moreover, many members were indifferent; many others were ignorant of the actual effect of laws for which they voted; still others were willing to swap their votes in return for votes in favor of legislation relating to their own localities; and there was everywhere and at all times that ever present strong inducement in this, as in other matters of legislation, to follow the party leaders with eyes closed and perhaps with hands opened. In spite of the fact, therefore, that local remonstrance was frequently raised and public attention was sought to be aroused in the evil as a matter of state-wide concern, legislatures for the most part were fairly secure in continuing the policy of dominating "interference" in the affairs of cities.

The Doctrine of an Inherent Right of Local Self-government

In a few states the courts came to the rescue of harassed and oppressed cities with a half-measure of protection by announcing a doctrine to the effect that, wholly in the absence of any express provision of the constitution, municipal corporations enjoyed

certain inherent rights of local self-government. The earliest formulation of this rule of law is usually ascribed to the opinion that Judge Cooley handed down in the somewhat famous case of the People *ex rel.* Le Roy *v.* Hurlbut [1] decided in 1871. It is open to question, however, whether the part of his opinion that is commonly quoted in support of this doctrine was not merely dictum; for in the end he declared that "*so far as is important to the decision of the case before us,* there is an *express* recognition of the rights of local authority by the constitution." Nor is it absolutely clear that any Michigan case was ever decided solely upon the application of this rule.[2] There can be no question, however, that the rule was pertinently applied in three cases in Indiana,[3] in one case in Kentucky,[4] and in one case in Iowa.[5] In Nebraska it received support for a period of three years, when it was summarily overturned.[6] In Texas the rule was applied in a single case by the court of criminal appeals,[7] a court of last resort in the state, but was in the same year utterly repudiated by the supreme court,[8] which was the court of last resort in civil actions. Cases in other jurisdictions have sometimes been cited as sustaining this doctrine; but in spite of certain general and unguarded expressions of opinion, which when isolated from their context seem to lend color of support, a careful examination of the opinions delivered in these cases reveals the fact that in every one of them decision was reached by the construction and application of some specific

[1] 24 Mich. 44. 1871.

[2] The cases usually cited as supporting this rule are People *ex rel.* Attorney General *v.* Lothrop, 24 Mich. 235 (1872); People *ex rel.* Park Commissioners *v.* The Common Council of Detroit, 28 Mich. 228 (1873); People *ex rel.* Park Commissioners *v.* The Mayor of Detroit, 29 Mich. 343 (1874); Moreland *v.* Millen, 126 Mich. 381 (1901); Davidson *v.* Hine, 151 Mich. 294 (1908); Davock *v.* Moore, 105 Mich. 120 (1895).

[3] State *ex rel.* Holt *v.* Denny, 118 Ind. 449 (1888); Evansville *v.* State *ex rel.* Blend, 118 Ind. 426 (1888); and State *ex rel.* Geake *v.* Fox, 158 Ind. 126 (1901).

[4] City of Lexington *v.* Thompson, 113 Ky. 540. 1902.

[5] State *v.* Barker, 116 Ia. 96. 1902.

[6] State *ex rel.* Attorney General *v.* Moores, 55 Neb. 480 (1898); overruled in Redell *v.* Moores, 63 Neb. 219 (1901).

[7] *Ex parte* Lewis, 45 Tex. Crim. App. 1. 1903.

[8] Brown *v.* City of Galveston, 97 Tex. 1. 1903.

that this is a correct statement of the generally accepted rule of law upon this subject.[1] (The well-known distinction between the municipality as an agent of the state and as an organization for the satisfaction of purely local needs, or, as otherwise stated, between the city in its public and governmental capacity and in its private and proprietary capacity — a distinction that is drawn in many branches of the law of municipal corporations — has no application whatever where there is involved a question of legislative authority over such corporations in the absence of constitutional restriction.) As Mr. Justice Hunt declared in Barnes *v.* District of Columbia,[2] "We do not view its acts as sometimes those of an agency of the state, and at others those of a municipality; but that, its character remaining at all times the same, it is great or small according as the legislature shall extend or contract its sphere of action." Indeed, so widely is this rule accepted as to the absolute supremacy of the legislature (barring the expression or clear implication of constitutional restriction) that the courts in most jurisdictions are seldom requested to declare void a law regulating a municipal affair except by reference to some constitutional provision in point. And certainly state legislatures have from the beginning of our history as a nation acted upon the assumption of their complete legal supremacy in this regard. No matter what historical facts or legal theories may be advanced against the rule of law in question, and no matter how deplorable may have been the results of its application, no one can question the fact that legislatures have applied this rule *in practice* upon a far more extensive scale than any other rule relating to their competence. And after all, a *fact* of substantially universal and uncontested legislative practice for more than a century gives infinitely greater weight to a rule of law than any amount of reiteration by the courts.

[1] Mr. Amasa M. Eaton expresses the view, without, however, presenting any detailed analysis of the cases, that the pronouncement of this rule has commonly been in the nature of dictum. See 25 *Rep. Am. Bar Ass.*, 292. It is true, perhaps, that so widely accepted and so fundamental a rule of law has found a somewhat unessential place in the general introduction to a number of opinions. Even so, it is highly questionable whether the enunciation of the rule may be regarded as dictum in many of the cases that are cited by Mr. Eaton in support of this view.

[2] 91 U. S. 540. 1875.

When the deep-rooted evil of legislative domination in the affairs of cities grew into such proportions that it became no longer tolerable, reformers set about to find a remedy. The general means to be employed was of course obvious. The American system of protecting private rights against governmental interference was well known. It had proved perhaps in some respects all too successful. It involved the writing into constitutions of limitations upon the powers of the government — and especially upon the powers of the legislature — and the vesting of authority in the courts to declare void any statute enacted in violation of these limitations. It was thus that our sphere of private rights and immunities against governmental encroachment was established, with the courts as guardians and conservators. Here were municipal corporations, however, suffering under an unbearable amount of legislative "encroachment" upon their "rights." What was more natural than the establishment, by means of the introduction of prohibitions into the constitution, of a sphere of municipal immunity against the tyranny of the legislature. In the evolution of our state institutions we have sought to outlaw innumerable legislative abuses through the medium of constitutional provisions. Not only have we occupied large portions of the legislative field by the incorporation of affirmative provisions, and to that extent imposed negative limitations upon the legislature, but we have also laid down many positive and emphatic prohibitions. This method of reform appeared to be a peculiarly appropriate remedy for the unhappy situation of our cities; for there was not a little in common between the rights of persons to liberty and property — the protection of which had been the object of most of the early limitations imposed upon legislatures — and the "rights" to liberty and property which were now demanded for cities.

The Degree of Protection which Cities enjoy under the Clauses of the Federal Constitution guaranteeing Rights and Immunities to Persons

Before we attempt to marshal in brief review the various provisions that were introduced into state constitutions with the end in

view of affording protection to the city, it seems appropriate to remark that the municipal corporation is everywhere a legal person, endowed like private corporations with the capacity to sue and be sued, to take title to property, to contract, and to perform other acts similar to the acts of natural persons. Now as everybody knows the constitution of the United States, as well as the constitutions of the several states, contains certain important limitations upon the powers of the states in behalf of the rights of persons. Broadly speaking, it may be said that since the adoption of the fourteenth amendment with its well-known sweeping phrases the more important prohibitions of the state constitutions in this regard have been gathered into the national constitution. In other words, the more important questions relating to personal or property rights have become federal questions. As bearing upon the subject in hand it is obviously pertinent to make inquiry concerning the extent to which the city has been regarded as being a person within the meaning of the clauses of our constitutions — and especially of our federal constitution — which offer protection to persons generally.

One of these great clauses declares that no state shall pass any law impairing the obligation of a contract. In the famous Dartmouth College case[1] Chief Justice Marshall held that a corporate charter issued by public authority constituted a contract between the state and the corporators. From the viewpoint of public policy this doctrine has produced certain disastrous consequences even when limited in its application to private corporations. As applied to public municipal corporations, its results would have been little short of monstrous. In the Dartmouth College case it was clearly intimated that the doctrine would not be applicable to charters of public corporations; and as soon as the question was squarely presented to the Supreme Court this intimation was transformed into a declaration. Thus Mr. Justice Clifford, referring to municipal corporations in the case of Mt. Pleasant *v.* Beckwith,[2] said:

[1] Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518. 1819.
[2] 100 U. S. 514. 1879.

They cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature of the state, because there is not and cannot be any reciprocity of stipulation between the parties and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact.

In other words, it was clearly declared that a charter of a municipal corporation is emphatically not to be regarded as a contract between the state and the city. The claim cannot be made, therefore, under any circumstances that legislation which interferes with the "rights" or powers of a municipal corporation as established by its charter impairs the obligation of a contract with the state.

The United States Supreme Court has never departed from this view which wholly denies the existence of anything like a contractual relation between the city and the state arising out of the city's charter of incorporation.[1] And although it must be admitted that in two fairly recent cases views of somewhat doubtful import have been expressed by the court upon this

[1] Referring to the transference from the colonial governor to the state legislature of the power to grant municipal charters, Professor Goodnow says: "This difference in the incorporating authority was destined to have an important influence on the position of the community that was incorporated. For the charter that was granted by the governor was, like the municipal charter which was granted in England by the crown, regarded as something in the nature of a contract between the executive part of the colonial government and the community incorporated. The municipal charter, on that account, was not believed to be capable of amendment except as the result of an agreement between both parties to the contract. When, however, a charter was granted by the legislature, it was regarded not so much as in the nature of a contract, but as an ordinary act of legislation which, like all acts of legislation, was capable of amendment by the action of the legislature alone." *City Government in the United States*, pp. 47–48. While the municipal charter may not have been "believed to be capable of amendment" without the consent of the corporation, it must not be understood that this was an established rule of law in the colonies. In point of fact such charters were not often amended, and it is probable that the question as to whether the governor enjoyed the power to amend them without corporate consent was never presented to the courts. It was doubtless the practice to amend them only upon application. But this was a practice that was also usually followed by state legislatures in the early days of their exercise of this power. See *supra*, 5.

point,[1] it nevertheless remains that the court has never clearly established the doctrine that even in its "private and proprietary rights and interests" — whatever definitive scope that phrase may import — the city enjoys immunity from legislative interference under the contract clause.[2] It is significant, moreover, that no law of any state has ever been held void by the highest court of the land upon the ground that it impaired the obligation of a contract entered into by the state with one of its cities.

In the reported decisions of the state courts a few cases may indeed be found in which this clause has been successfully invoked to defeat legislation interfering with the "rights" of cities,[3] and a few other cases may be found in which the applicableness of this clause has been put forth in the nature of dictum.[4] In none of these cases, however, did the courts go so far as to declare that the charter of a municipal corporation constituted an inviolable contract with the state. They merely asserted or implied that as to some specific right — and in most of these cases the right claimed was a property right — the city enjoyed a *degree* of protection against legislative spoliation under the contract clause of the federal constitution because, in the view of the court, the particular right involved was enjoyed by the city in a capacity somewhat

[1] New Orleans *v.* New Orleans Water Works Co. 142 U. S. 79 (1891); Covington *v.* Kentucky, 173 U. S., 231 (1898). For a discussion of these cases see McBain, "The Rights of Municipal Corporations under the Contract Clause of the Federal Constitution," in *National Municipal Review*, 3 : 284 ff.

[2] For a contrary assertion see McQuillin, *Municipal Corporations*, I, pp. 378, 549.

[3] Grogan *v.* San Francisco, 18 Cal. 590 (1861); Spaulding *v.* Andover, 54 N. H. 38 (1873); Webb *v.* The Mayor etc. of New York, 64 Howard's Pr. 10 (1882). For discussion of these cases see *National Municipal Review*, 3 : 284. The cases of Trustees *v.* Bradbury, 11 Me. 118 (1834); Ellerman *v.* McMains, 30 La. Ann. 190 (1878); and Town of Milwaukee *v.* City of Milwaukee, 12 Wis. 103 (1860), although sometimes cited in support of this doctrine, are not in fact in point. See *National Municipal Review*, 3 : 292, n. 17.

[4] Benson *v.* The Mayor etc. of New York, 10 Barb. (N. Y.) 223 (1850); Darlington *v.* The Mayor etc. of New York, 31 N. Y. 164 (1865); County of Richland *v.* County of Lawrence, 12 Ill. 1 (1850); State *v.* Haben, 22 Wis. 97 (1867); Dubuque *v.* Ill. Central Railroad Co., 39 Ia. 56 (1874); Gutzweller *v.* The People, 14 Ill. 142 (1852); People *v.* Morris, 13 Wend. (N. Y.) 325 (1835); Sinton *v.* Ashbury, 41 Cal. 525 (1871); San Francisco *v.* Canavan, 42 Cal. 541 (1872). For discussion of these cases see *National Municipal Review*, 3 : 293–297.

vaguely described as its "private or proprietary" capacity.[1] It is a highly significant fact, however, that it is possible to cite only three specific instances in which cities have actually received at the hands of state courts any protection founded upon the view that the legislature had entered into a contract with the city. Moreover, it is quite possible to cite numerous decisions of the courts in which the doctrine has been laid down without qualification of any kind — even as to "private and proprietary rights and interests" — that the city enjoys no protection whatever in its rights, powers, or privileges under the contract clause of the federal constitution. It seems not unreasonable to conclude, therefore, that for practical purposes municipal corporations have enjoyed a very negligible degree of protection under this famous clause of the federal constitution — a clause which, under judicial interpretation following the Dartmouth College case, became so powerful an instrument of unreasonable and impolitic protection to private corporations that the states were compelled to nullify its effect by the enactment of general statutory or constitutional provisions reserving the power to amend, alter, and abolish the charter of any such corporation.

As a protector of the liberty and property rights of persons against adverse legislative action on the part of the states, the clause of the fourteenth amendment which declares that no state shall deprive any person of life, liberty, or property without due process of law came later in point of time than the contract clause, which was a part of the original instrument. As events proved, however, this clause established a degree of protection for persons both natural and corporate which was far more efficacious than that afforded by the contract clause. Moreover, it was beyond the power of states to nullify even in part the effect of the guarantee of due process of law as they had been able to emasculate in its application to corporate charters the effect of the guarantee of the inviolability of contracts. Now the question arises: what degree

[1] For a discussion of the vagueness of this capacity as concretely evidenced by the decision of the courts upon this subject, see *ibid.*, p. 302.

of protection does the city as a legal person enjoy under this far-reaching provision of the fourteenth amendment? In considering this question, it is necessary to hark back to the decisions of state courts antedating the adoption of the fourteenth amendment to the federal constitution; for it is a fact that many of the earlier state constitutions embodied in their bills of rights provisions which were either identical with or similar in purport to this guarantee as it was in 1868 incorporated into the fundamental law of the nation.

The phrase "due process of law" has been considered by the courts of the states, as well as by the Supreme Court of the United States, in its application to the rights of municipal corporations from a number of different angles. In consideration of the declared supremacy of the legislature over municipal corporations, of the extended scale upon which state legislatures have "interfered" with cities, and of the fact that such corporations commonly possess a large amount of property, it is not surprising that the applicableness of the guarantee of due process of law to the case of cities should have been presented in a variety of forms. This broad question cannot be discussed here in anything like completeness. A few important points may, however, be indicated.

First, then, it may be stated that even at the crest of their high-handedness state legislatures have seldom ventured so far as to attempt to transfer the property of a city directly to a private person. Only in a few instances have such attempts been made. In these the courts have not hesitated to declare that against such audacious legislative spoliation the city, like any other person, enjoys the protection of the guarantee of due process of law.[1]

[1] In Benson *v.* The Mayor, 10 Barb. (N. Y.) 223 (1850), the court declared that the city of New York could not be deprived of its ferry franchises because of the sacredness of vested rights; but in last analysis the opinion of the court in this regard seems to have been dictum. Proprietors of Mt. Hope Cemetery *v.* City of Boston, 158 Mass. 509 (1893) is doubtless the leading case upon this point. See also New Orleans, Mobile & Chattanooga Rd. Co. *v.* New Orleans, 26 La. Ann. 517 (1874), where a legislative attempt to transfer a municipal waterfront to a railway company was defeated; Memphis Freight Co. *v.* Mayor etc. of Memphis, 4 Cold. (Tenn.) 419 (1867), where a somewhat similar question was decided; Portland & Willamette Valley R. R. Co. *v.* Portland, 14 Ore. 188 (1886), where a like

The only exception to this seems to be, by the judgment of the highest court of the land, that the legislature may require a municipal corporation to restore to taxpayers any property that has been acquired by taxation, no matter what form such property may have assumed.[1] Naturally, however, restitution of this character has seldom been forced upon a municipal corporation.

On the other hand, a wholly different question has arisen where the legislature has essayed to transfer the property of a city with or without a divergence of use to another public agency — such, for example, as a state-appointed commission, or another local corporation, whether upon a change of boundaries by division or annexation of territory, or simply upon the creation over the same or practically the same territory of a public corporation wholly distinct from the city as such. An intelligible discussion of the manifold phases of the complicated problem presented by such legislative actions would necessitate a critical examination of numerous cases — an examination which it seems wholly unnecessary to make here. Let it suffice to say, without the citation of cases, which would be confusing and meaningless in the absence of analysis, that many of the opinions expressed by the courts upon the points thus involved are far from convincing even from the viewpoint of abstract justice, and that the books hold very few cases indeed in which the "rights" of the city under these various circumstances have been successfully defended under the guarantee of due process of law. It is in cases of this kind that with few exceptions the doctrine of legislative supremacy over the political subdivisions of the state has been upheld with little if any regard for the property rights of these subdivisions. The personal character of the city has, in other words, been ignored or lost sight of in its political and subdivisional character. Not even the dis-

question was discussed, but where decision was given against the right of the city to protection, on the ground that a railroad company was a public agency of the state; Milam County *v.* Bateman, 54 Tex. 153 (1880), where, however, the title of a county to school lands over against the claims of preëmptors favored by the legislature was apparently established by an express provision of the state constitution.

[1] Board of Commissioners of Tippecanoe County *v.* Lucas, 93 U. S. 108 (1876); Essex Public Road Board *v.* Skinkle, 140 U. S. 334 (1890).

tinction between the public or governmental property of the corporation and its private or proprietary property has been applied with much actual advantage to the city.

Again it may be remarked that, while the constitutionality of so-called curative acts as applied to the relations of private persons has been fully recognized, it would not be difficult to show that in practice the allowance by the legislature of claims against cities has not infrequently been tantamount to the creation of such claims where none in fact existed, either in morals or in equity. It is doubtless true that most of the innumerable cases in which legislation of this kind has been considered have involved nothing more than the curing of technical irregularities that stood in the way of the legal enforcement of claims that were otherwise entirely just. It is to be noted, nevertheless, that the arguments advanced by the courts in support of the validity of remedial statutes as applied to cities have often been wholly different from the arguments employed to sustain curative acts generally. Thus in one of the leading cases upon this subject, which has perhaps been somewhat modified but never overruled, the competence of the legislature in this regard was rested upon its power to compel a municipal corporation to impose taxes for any purpose whatever.[1] In other cases the authority of the legislature has been upheld upon the familiar ground that the city is merely a political subdivision of the state and as such is subject to the control of the legislature.[2] It is needless to say that the application of such doctrines places the city in respect to the matter of curative legislation in a position that is fundamentally different from that of private persons. It is worthy of note also that statutes of this kind have been sustained although they in fact deprived municipal corporations of all opportunity to contest before the courts the amounts of the claims that were validated.[3]

[1] Guilford *v.* The Supervisors of Chenango County, 13 N. Y. 143. 1855.

[2] New Orleans *v.* Clark, 95 U. S. 644 (1877); People *ex rel.* Blanding *v.* Burr, 13 Cal. 343 (1859).

[3] Guilford *v.* The Supervisors of Chenango County, *supra;* Brewster *v.* Syracuse, 19 N. Y. 116 (1859), where the claim was in fact, however, against property owners rather than the city; Guthrie National Bank *v.* Guthrie, 173 U. S. 528 (1898);

It is not without significance, moreover, that the books hold very few cases indeed in which the legislative validation of a claim against a municipal corporation has been defeated by the application of the guarantee of due process of law.[1] On the other hand, it is unquestionable that in practice the legislature has frequently gone so far as to create a claim against a city where none of any kind in fact existed. There are a few cases at least which apparently sustain this competence.[2]

Matter of Cullen, 53 Hun (N. Y.) 534 (1889); Syracuse *v.* Hubbard, 64 N. Y. App. Div. 587 (1901). In these cases the point here noted was not even adverted to.

[1] The following cases may be noted, although this principle was clearly applied in few of these and the doctrines of most of them are open to grave criticism.

People *ex rel.* Baldwin *v.* Haws, 37 Barb. (N. Y.) 440 (1862) and Baldwin *v.* Mayor etc. of New York, 45 Barb. (N. Y.) 359 (1865), where in the light of the doctrine of the Guilford case, *supra*, which was not overruled, an utterly sophistical course of reasoning was employed — reasoning which was severely criticized by the highest court of the state in a dictum expressed in Darlington *v.* The Mayor, 31 N. Y. 164 (1865); Horton *v.* The Town of Thompson, 71 N. Y. 513 (1878), and Hardenbergh *v.* Van Keuren, 16 Hun (N. Y.) 17 (1878), which applied the extremely attenuated doctrine of People *v.* Batchellor, 53 N. Y. 128 (1873); Marshall *v.* Silliman, 61 Ill. 218 (1871); Wiley *v.* Silliman, 62 Ill. 170 (1871); Barnes *v.* Town of Lacon, 84 Ill. 461 (1877); Williams *v.* Town of Roberts, 88 Ill. 11 (1878); Gaddis *v.* Richland County, 92 Ill. 119 (1879). All of these Illinois cases involved acts which sought to validate bond issues in aid of railways. Their wholly unconvincing reasoning was doubtless prompted by the determination of the courts to check the speculative recklessness of municipal corporations. See McBain, "Taxation for a Private Purpose," in *Political Science Quarterly*, 29: 185.

Other cases in which such curative acts were held void were Hasbrouck *v.* Milwaukee, 13 Wis. 42 (1860); Shawnee County *v.* Carter, 2 Kan. 115 (1863); Berkeley *v.* The Board of Education, 58 S. W. 506 (1900). In any fair view it must be said, however, that these cases are wholly contrary to an overwhelming weight of authority. Shearer *v.* The Board of Supervisors, 87 N. W. 789 (1901) was in harmony with the highly questionable doctrine of the Illinois railway aid cases. Hoagland *v.* Sacramento, 52 Cal. 142 (1877) declared an act void on the clear and understandable ground that it created a claim where none of any kind existed; but this case is unique.

Numerous other cases are sometimes cited as instances of curative acts held void; but a careful reading of these cases discloses the fact that most if not all of them turned upon one of the following propositions: (1) that the legislature could not validate a claim growing out of an unconstitutional act; or (2) that the remedial statute must itself conform to the requirements of the constitution.

[2] See, for example, State *ex rel.* Hernandez *v.* Flanders, 24 La. Ann. 57 (1872); Matter of Cullen, 53 Hun (N. Y.) 534 (1889); and possibly Creighton *v.* San Francisco, 42 Cal. 446 (1871).

In view, therefore, not only of the law as laid down by the courts but also of the well-known fact that municipal corporations have in countless instances been outrageously imposed upon in this matter of the validation of claims by the legislature, it seems fair to conclude that on the whole the city has enjoyed nothing like the degree of protection which a private person or corporation in similar plight might have invoked under the requirement of due process of law.

In a few cases the doctrine has been asserted that for the legislature to compel a municipal corporation to levy a tax or incur a debt for a strictly local purpose would be to deprive such corporation of property without due process of law. This doctrine has, however, received only a very limited acceptance and is utterly refuted by the common practice of state legislatures from time immemorial.[1] It may be dismissed as of negligible consideration.

In a few cases also statutes which limit the hours of labor or fix minimum wages on municipal public works, whether carried on by direct employment of labor or under contract, have been declared void on the ground that such statutes impaired that freedom of contract which is guaranteed by the requirement of due process of law.[2] But the contrary rule has been applied in perhaps a larger number of jurisdictions, including that of the United States Supreme Court, whose opinion upon this subject is manifestly controlling.[3] Moreover, there is little question that even where this right of freedom of contract has been sustained the courts have been influenced by consideration of the rights of contractors rather than the rights of municipal corporations; and certainly this doctrine has in practice been utterly ignored by the legislature in those almost universal charter provisions which impose upon cities limitations in respect to their

[1] For a discussion of this doctrine see McBain, "Due Process of Law and the Power of the Legislature to Compel a Municipal Corporation to Levy a Tax or Incur a Debt for a Strictly Local Purpose," in *Columbia Law Review*, 14: 407.

[2] People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1 (1901); Cleveland *v.* The Clements Bros. Construction Co., 67 Oh. St. 197 (1902); Street *v.* Varney Electrical Sup. Co., 160 Ind. 338 (1902).

[3] Atkin *v.* Kansas, 191 U. S. 207 (1903); *In re* Dalton, 61 Kans. 257 (1899); Keefe *v.* People, 37 Colo. 317 (1906); Malette *v.* Spokane, 77 Wash. 205 (1913). See also Burns *v.* The City of New York, 121 N. Y. App. Div. 180 (1907).

contractual operations. Would the courts, for example, sustain for an instant a law which required private persons to award every contract to a highest bidder after advertising for sealed proposals?

The foregoing discussion indicates very briefly the principal forms in which the question has been or could be presented as to the extent to which a municipal corporation may successfully invoke the guarantee of due process of law to secure protection against legislative encroachment upon its rights as a legal person. Even from this inadequate survey it is manifest that in the cases which have or might have dealt with one or more phases of this broad subject there has been an ever present conflict between the doctrine of legislative supremacy over the subordinate political divisions of the state and the doctrine of vested rights as applied to such divisions upon the basis of their corporate character. It cannot be said that the protection of due process of law has been always beyond the reach of the invaded city. In some situations it has been and still is available. In comparison, however, with the extent to which this protection would be obviously accessible to private corporations under more or less similar circumstances, it must be frankly recognized that the rights which the city has been able to assert under this safeguard have been almost negligible.

As for the federal guarantee of the equal protection of the laws it need merely be stated that there have been only one or two cases in which the contention has been put forward that this guarantee was in any wise applicable to municipal corporations.[1] Such contention was, as might have been expected, summarily denied. Had the court ruled otherwise, the whole complex subject of the reasonableness of classifying cities for purposes of legislation would apparently have become a federal question, and the clauses by which, as we shall see,[2] the guarantee of general legislation for cities was introduced in many state constitutions would have been wholly unnecessary. It is perhaps superfluous to remark that no such situation developed.

[1] Williams v. Eggleston, 170 U. S. 304 (1897); Mason v. Missouri, 179 U. S. 328 (1909).

[2] Ch. III.

On the whole, then, since under the adjudications of the courts the municipal corporation has enjoyed practically no protection under the contract clause, has found security of only a very limited character under the guarantee of due process of law, and has been wholly unable to invoke the guarantee of the equal protection of the laws, it is manifest that if the city desired successfully to combat the whole miserable practice of legislative "interference" in its affairs, it could not rely solely upon the fact that, being a corporation, it was a legal person. The rights and immunities extended generally to persons by our constitutions have not been applied to cities in sufficient measure to meet and to solve with satisfaction the difficult problem of relations between the city and the state of which it is a part.

CHAPTER II

CONSTITUTIONAL LIMITATIONS DIRECTED AT SPECIFIC LEGISLATIVE ABUSES

THE fact has been noted that the revolutionary constitutions of New York (1777), Pennsylvania (1776), and Maryland (1776) made specific reference to municipal corporations, but that the provisions in question did not in any sense guarantee to cities immunity from legislative control. It is interesting to observe, however, how in the evolution of the state constitutions that followed these early instruments of government, provisions came to be inserted which by expression or implication erected certain barriers to absolute legislative control over municipal affairs. It seems scarcely open to question that some of these provisions, which were later construed by the courts to have created this or that legal right for cities, were incorporated into state constitutions largely by inadvertence — that is, with little if any conscious design to outlaw a specific legislative abuse. Moreover, there were unquestionably some instances in which constitutional conventions acted more or less blindly in taking over certain provisions relating to cities from the constitutions of other states — provisions in respect to the origin of which they probably knew very little indeed. On the other hand, it is a matter of no difficulty whatever to locate the precise legislative abuse that was aimed at by many of these provisions and to find their origin in the book of bitter experience.

Clauses guaranteeing the Right of Local Selection of City Officers

The Louisiana constitution of 1812 contained what was perhaps the first definite guarantee of a home rule right that was ever incor-

porated into an American constitution. It declared [1] that "the citizens of the town of New Orleans shall have the right of appointing the several public officers necessary for the administration and the police of the said city; pursuant to the mode of election which shall be prescribed by the legislature." Here then was an explicit guarantee to one city of the right of local selection of municipal officers — a specific right which at a later period of our history many a city of the country would have been glad to possess. The origin of this provision is not far to seek. The New Orleans charter of 1805, issued by the territorial legislature, had like many other charters of the period provided for the appointment of the mayor of the city by the governor. It was manifestly the purpose of the convention that framed the constitution to abolish this system; and in doing so they extended the right of local choice to cover all municipal officers. It is improbable that the small city of New Orleans had actually suffered from the fact that its mayor had been appointed by the governor of the territory. The provision may perhaps be taken rather as a single concrete instance in which expression was given to a popular belief that was being asserted at that time — the belief, namely, that the system of central appointment of county and city officers should be abandoned in favor of the more democratic system of local selection.

This provision of the first constitution of Louisiana was repeated in the successive constitutions of the state [2] down to the reconstruction constitution of 1868, when it was omitted. It is of interest to note that almost immediately thereafter the legislature of the state began to gather into its own hands control over the administrative departments not only of the city of New Orleans but of other local governments as well [3] — a practice which was brought to an end by

[1] Art. VI, sec. 23.

[2] Const. of 1845, Title VI, art. 128; of 1852, Title VI, art. 124; of 1864, Title VIII, art. 133. In the constitution of 1864, however, an important exception was made in that police commissioners were required to be appointed by the governor.

[3] Referring to the establishment of centralized control over the schools of New Orleans by legislative enactments of 1870 and 1873, Judge Poche said in Labatt v. New Orleans, 38 La. Ann. 283 (1886): "The most striking feature of that legislation, a feature which distinctly characterized the legislation of that disastrous period of Louisiana's history, was to strip the city of New Orleans and the parishes of the

the reintroduction of the clause in question into the constitution of 1879, at which time its guarantee was extended to all the cities of the state.

New York began its history as a state with the system of central appointment of the mayors of cities firmly fixed by colonial practice. This system was perpetuated by the constitution of 1777 save that the legislature was expressly authorized to alter it.[1] This the legislature steadily declined to do, for it was by no means indifferent to the far-reaching political significance of the enormous patronage in local offices which under the scheme of centralization lay in the hands of the governor and the council of appointment. One of the prime motives for calling the constitutional convention of 1821 was that it might abolish the council of appointment and with it the centralized system of control which functioned through it. So far, however, as cities proper were concerned the New York constitution of 1821 did not go as far as did the Louisiana constitution of 1812 in creating a legal right of local selection of *all* officers for New Orleans. In practice all municipal officers in New York except the mayor were already subject to local election or appointment.[2] The convention struck directly at this one element of centralization when it wrote into the constitution that "the mayors of all cities in the state shall be appointed annually by the common councils of the respective cities."[3] That it did not declare emphatically for the principle of local selection of all local officers shows almost conclusively that it was engaged merely in reforming an existing system rather than in the task of imposing limitations upon the legislature with a view to freeing the city from legislative domination in its affairs.

In 1833 this provision of the constitution relating to the selection of mayors was amended so as to require that the mayor of New

state of all power of effective management and control of the public schools and of other local affairs within their respective corporate limits, and to concentrate all powers connected therewith in the state authorities."

[1] *Supra*, 3.

[2] The recorder was also subject to central appointment, but this officer being wholly a judicial officer may be omitted from consideration here.

[3] Art. IV, sec. 10.

York City should be elected by direct vote of the people. Six years later the legislature was by another amendment permitted but not required to provide a similar mode of selecting the mayor in the other cities of the state. Here again there was small evidence of any effort to tie the hands of the legislature. The application of the principle of direct election to the office of mayor had been steadily growing in favor throughout the country; and the amendments of 1833 and 1839 in New York were unquestionably due to the fact that the convention of 1821 had, in the course of abolishing a centralized system of administration, made the mistake of providing a single specific mode by which the mayor might be chosen.

In seeking an explanation for the clause upon this subject which found expression in the third constitution of New York, that of 1846, reference must be made to another clause that was incorporated in the constitution of 1821. After providing expressly for the local election or appointment of the more important county officers, who had formerly been subject to appointment by the governor and council, and after providing for the selection of mayors in the manner indicated, the constitution of 1821 declared generally that "all officers heretofore elected by the people shall continue to be elected; and all other officers whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as may by law be directed." [1] It may be said in passing that this provision was apparently entirely superfluous. If the "all officers heretofore elected" referred to officers of the state government, it may be remarked that there were comparatively few such officers who had been subject to election, and that the new constitution made specific provision in respect to these. If the phrase referred to local officers, it may be remarked that no officers had been "heretofore elected" in cities except members of common councils, and that practically no officers had been elected in counties. As to the second declaration contained in the provision, which apparently purported to confer upon the legislature express power to determine the manner in which a choice might be made of officers for whose

[1] Art. IV, sec. 15.

election or appointment no provision was made in the constitution, it is sufficient to note that the legislature, in the absence of constitutional limitation, would obviously have enjoyed this power without any express grant of authority. The clause was doubtless inserted in the constitution out of abundant caution, in view of the fact that the convention was completely overturning the established system of the state under which numerous official relationships had been created.

The convention of 1846, then, when it came to examine the provisions of the existing constitution relating to the choice of officers, found the twice amended provision concerning the selection of mayors and this provision relating generally to the choice of officers "heretofore elected" and "hereafter created" — a provision so inconsequential and unnecessary in character that it had not once in the quarter century of its existence been the subject of judicial construction. What was more natural than that they should have hit upon the plan of amalgamating these provisions into a single section dealing generally with the choice of officers? This section[1] read as follows:

> All county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town, and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct.

It is easy to read into this provision of the New York constitution of 1846 an intention on the part of the framers of that instrument to reform some legislative abuse by creating a definite though limited constitutional right of home rule. It is highly improbable that any such intention existed. The principle of local selection of local officers was at that time solidly established in

[1] Art. X, sec. 2.

practice. There had been no indication that the legislature contemplated an abandonment of this practice. The probable truth of the matter is that the convention of 1846, without much conscious thought of guaranteeing a specific right to cities, rephrased the provisions of the constitution about to be superseded so as to bring them into conformity with the actually existing facts of municipal government in the state — facts which, except as applied to the office of mayor, the legislature had voluntarily created without any constitutional mandate whatever. It is certainly significant that when the courts were called upon to construe and apply this clause of the constitution not a single expression could be instanced from the records of the convention which indicated a deliberateness of purpose on the part of that body to create a definite legal right for municipal corporations.[1]

Obviously, however, no matter how inadvertent its origin may have been, the clause in question *did* in fact create a very definite legal right — the right of local selection of city officers. It was introduced, moreover, not long before the period at which the ripening opportunities that lay in municipal spoils began to dazzle the eyes of state legislatures under the promptings of astute political buccaneers. It is not surprising, therefore, that the legislature of New York, when it began to make vigorous assault upon municipal treasuries, and especially upon the treasury of the largest city of the state, found itself confronted with a formidable fortification in the shape of this apparently harmless provision of the fundamental law of the state. For it was manifest that the coffers of cities could be flung wide with far greater ease if their affairs could be put in the hands of officers controlled by the legislature instead of remaining in the hands of officials locally chosen.

[1] People *ex rel.* Wood *v.* Draper, 15 N. Y. 532 (1857). Brown, J., who dissented in the case, declared: "I am quite sure that there is not a single line or expression in that record which favors the intention implicated to them. Neither in the debates nor in the organic instrument which they framed, is there the slightest manifestation of a design to leave the legislature in possession of a power which might be wielded to the prejudice, far less to the destruction, of the rights and privileges reserved to the local communities." It is to be noted, however, that the learned judge was able to cite, as indicative of the convention's intention, only the evidence of silence in the record.

In construing the term "city officers" as used in this provision of the constitution it would have been quite possible for the courts to introduce the distinction between those officers who perform functions of local or city *concern* and those who, though commonly subject to local selection, are nevertheless regarded as *state* officers by reason of the nature of their functions. By the introduction of this distinction the actual scope of the right conferred upon cities could have been greatly restricted. It is a fact, however, that this distinction has found little or no place in the recorded decisions involving an interpretation of this provision. By expression or implication the term "city officers" has been broadly construed to include not only such officers as police, health, tax, excise, and election officers, but also clerks of local courts, commissioners of jurors, and registers of conveyances. Any one of these officers might, not without reason, have been held to be not a *city* officer as such but from the viewpoint of his functions a *state* officer.

In spite of the liberality of construction which refused to apply this well-known though somewhat uncertain distinction, the New York legislature was, with judicial sanction, able to find escape from the rigor of the rule of local selection of officers which was apparently prescribed by the constitution of 1846, and which was continued without alteration in the constitution of 1894.[1] Evasion of the requirement was accomplished in three different ways.

In the first place, in the years following 1846 numerous laws were enacted which created special commissions endowed with power to construct municipal bridges and buildings and to locate, lay out, and embellish highways, boulevards, parks and public grounds. For the most part these commissions were named by the legislature itself. Acts of this character went for many years unchallenged. When finally certain of them were brought before the courts they were sustained upon the ground that the constitutional provision in question did not prohibit the central appointment of officers who were to perform *temporary* functions within a city but only of officers "intrusted with the performance of *permanent* functions of

[1] Art. X, sec. 2.

the city government."[1] Thus was one important avenue of legislative encroachment upon cities kept open and a serious legislative abuse permitted by what appears to have been a highly strained construction of the constitutional guarantee of the right of local selection of local officers.

In the second place, it is to be noted that while the provision in question required the local selection of all county, city, town and village officers, it also placed in the discretion of the legislature the mode of selection of "all officers whose offices may hereafter be created by law." These subsequently created offices were early construed to include local offices as well as offices of the central government. In the year 1857 the state legislature devised a simple but truly ingenious scheme for effectuating a system of central control over local officers. This scheme was to abolish an existing "city office" as such, create a geographical district larger than the city, provide for the central appointment of the officers of this district, and empower them to carry on the functions formerly performed by city officers. Would not the officers of such a district be "officers whose offices" were "created by law" *after* the adoption of the constitution of 1846?

Such was the scheme that was employed for the first time in the act establishing the Metropolitan Police District over a territory somewhat similar to that which was forty years later included in the city of Greater New York.[2] This act was sustained, by the line of reasoning just indicated, in the famous case of People *ex rel.* Wood *v.* Draper.[3] Emboldened by the success of this patent subterfuge, the legislature subsequently took similar control of the police of Albany, creating a district that included Albany, West Troy, and the village of Cohoes. To this district the city of Troy was later

[1] Greaton *v.* Griffin, 4 Abb. Pr. (New Ser.) (N. Y.) 310 (1868); Hanlon *v.* Supervisors of Westchester, 57 Barb. (N. Y.) 383 (1870); People *ex rel.* McLean *v.* Flagg, 46 N. Y. 401 (1871); People *ex rel.* Kilmer *v.* McDonald, 69 N. Y. 362 (1877); People *ex rel.* Commissioners *v.* Supervisors of Oneida County, 170 N. Y. 105 (1902). See also Mayor etc. of New York *v.* The Tenth National Bank, 111 N. Y. 446 (1888), where, however, the point here noted was not expressly made.

[2] The only substantial difference was that Westchester county was included in the police district while no part of Queens was so included.

[3] 15 N. Y. 532 (1857).

added, as was also the city of Schenectady, the New York Central railroad tracks between Albany and Schenectady being used as a ridiculous link to furnish territorial contiguity for this Capital Police District.[1] So also were two adjacent towns of negligible importance united with the city of Buffalo to form the Niagara Frontier Police District. In only a single instance was a law of this character held void. The court could not bring itself to sustain an act which, in order to secure central control over the police department of Troy, established the Rensselaer Police District over a territory that was almost though not quite identical with that of the city itself.[2]

Nor was this specious means of circumventing the constitutional requirement of local selection of local officers confined to police departments. Other departments which held an alluring patronage or other political significance were likewise taken over. Thus the various health services of the city of New York were placed in charge of a centrally appointed board with jurisdiction over the Metropolitan Sanitary District, territorially identical with the police district.[3] Within a few years after its establishment this same board was also constituted a Metropolitan Board of Excise with somewhat smaller territorial jurisdiction.[4] So also at a much

[1] Sustained in People *ex rel.* McMullen *v.* Shepard, 36 N.Y. 285. 1867.

[2] People *ex rel.* Bolton *v.* Albertson, 55 N. Y. 50 (1873). See also People *ex rel.* Townsend *v.* Porter, 90 N. Y. 68 (1882), where, however, a wholly different question was involved.

[3] Sustained in Metropolitan Board of Health *v.* Heister, 37 N. Y. 661 (1868), upon the doctrine of the Draper case. No mention was made of the early case of In the Matter of Whiting, 2 Barb. (N. Y.) 513 (1848), in which a lower court, holding that the health officer of the port of New York was not a "city officer," had sustained a provision of the law empowering the governor and the senate to fill a vacancy in that office. It is highly improbable that this provision of the law represented an overt act of aggression by the legislature or a conscious attempt to circumvent the constitutional requirement.

[4] Westchester county was excluded. Sustained in Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657 (1866), but the constitutional guarantee of local selection of local officers was apparently not invoked. However, as bearing upon the question whether excise officers are "city officers" see People *ex rel.* Haughton *v.* Andrews, 104 N. Y. 570 (1887), where the statutory phrase "all appointments to office in the city of New York" was construed to include commissioners of excise. While these officers, said the court, "may be in one sense, and that a technical one,

later date — indeed, long after the statutes creating these other districts had been repealed, as most of them were in 1870 — the courts sustained the competence of the legislature to create a Metropolitan Elections District over territory somewhat larger than the city of New York and to place such district in charge of a superintendent of elections appointed by the governor.[1] These are the most important instances in which statutes of this kind were contested before the courts,[2] although it is probable that they do not constitute the entire list of statutes that avoided collision with the constitutional guarantee of the right of local selection of local officers by the artful device of creating a new civil district.

In the third place, the legislature of New York was under judicial sanction permitted to make provision for the appointment by state authority of any officer in any city provided the functions of that officer had not been performed in that particular city by some local officer prior to 1846. In other words, as the activities of this or that city expanded the legislature was in no wise compelled to vest control over new municipal services in locally chosen officers. Thus an act of 1865 creating the Metropolitan Fire District, with boundaries similar to those of the other metropolitan districts, was sustained not upon the theory that the commissioners' offices were thereafter created, the *district* being new, but upon the view that historically the officers of the New York City fire department were

state officers, their dependence upon the city and the municipal government is manifest, and we see no reason to suppose that they are not within the purview of the statute."

[1] Matter of Morgan *v.* Furey, 186 N. Y. 202 (1906). The ground on which this act was upheld was somewhat different from that of the other cases mentioned in this connection. *Infra*, 40, n. 2.

[2] A somewhat similar rule of construction was applied in the early case of Litchfield *v.* McComber, 42 Barb. (N. Y.) 288 (1864), to sustain an act which vested in the Long Island Railroad Co. authority to appoint a collector of assessments which were levied against property in a specially created district in Brooklyn, which assessments were to compensate the company for property and franchises that were appropriated in the interest of the public. See also People *ex rel.* Board of Education *v.* Bennett, 54 Barb. (N. Y.) 480 (1867), where the court sustained the competence of the legislature to consolidate several school districts in the village of Saratoga Springs and to name the members of the board of education, on the ground that school trustees in that village were not county, city, town, or village officers but "other officers" and that this district was *thereafter* created by law.

not "public or civil officers," being officers of a separate corporation which was not, in the view of the court, "a municipal or political body." [1] Apparently the legislature need not have created the larger district; it could just as competently have provided for the appointment by the governor and senate of fire commissioners for New York City alone. So also the Commissioners of Central Park, appointed by the governor and senate, could be empowered to open certain streets because the power to open streets in this particular section of the city had never been specifically conferred upon the common council.[2] Even the officers of the Croton Aqueduct Department in New York could be appointed by the legislature itself, for prior to 1846 this department had not been established directly by law but only by ordinance enacted under express sanction of law.[3] The commissioners of records of the city and county of New York, named directly by the legislature in an act passed in 1855, were new officers, their functions being quite different from those of the register of the city and county.[4] The commissioner of jurors, being a county officer in Kings, could not be made subject to appointment by the appellate division of the supreme court; but, contradictory as it may seem, the same officer in New York could be made subject to such mode of appointment.[5] The members of a board of examiners to pass upon building certificates could be appointed by certain non-political organizations in New York because this function had not previously been performed by any local officer and the members of this board were not in fact officers at all.[6] Commissioners to assess "special franchises" could be appointed by the governor because this species of property

[1] People *v.* Pinckney, 32 N. Y. 377. 1865.

[2] In the Matter of the Commissioners of Central Park, 35 How. Pr. (N. Y.) 255 (1868); Astor *v.* Mayor etc. of New York, 62 N. Y. 567 (1875).

[3] People *ex rel.* Bradley *v.* Stevens, 51 How. Pr. (N. Y.) 103 (1869). It appears, however, that this attempted appointment by the legislature never became effective.

[4] People *ex rel.* Kingsland *v.* Palmer, 52 N. Y. 83. 1873.

[5] People *ex rel.* Taylor *v.* Dunlap, 66 N. Y. 162 (1876); Matter of Brenner, 170 N. Y. 185 (1902); and Matter of Allison *v.* Welde, 172 N. Y. 421 (1902). These cases are difficult to reconcile.

[6] N. Y. Fire Department *v.* Atlas Steamship Co., 106 N. Y. 566. 1887.

had never been assessed before by any authority, either central or local, and the fact that certain tangible property that had formerly been locally assessed was subject to assessment by such commissioners was of no material consequence.[1] So also might the governor be empowered to appoint a superintendent of elections whose duties as an "investigator of registration" had "never been exercised before."[2] An act passed in 1871 which named the members of a board of water commissioners for the village of Dunkirk and gave them apparently a life tenure was not proscribed by the constitutional guarantee in question, for since the village had not had a water works before, these commissioners' offices were created by law *after* 1846.[3] So likewise might the legislature name certain persons and empower them to audit outstanding "equitable" claims against the city of Syracuse because the power thus conferred "was beyond the auditing power possessed by the common council in 1899, or at the time of the adoption of the constitution."[4]

In the light of the facts above recited, showing the extent to which the legislature of New York was permitted by the courts to dodge in three distinct ways the constitutional requirement that local officers should be locally elected or appointed, it is manifest that, whatever may have been the origin and purpose of this clause of the constitution, it was highly ineffective in results. The city of New York was naturally the principal sufferer. On the floor of the constitutional convention of 1867–68[5] it was declared that "of the entire amount raised for the annual support of the city of New York more than three-fourths — seven dollars out of eight it has been asserted — are disbursed by those who hold their appointments under state authorization and who are in no way responsible to the people of the city, if indeed they are responsible to anybody, for the amount or manner of their expenditures." Certainly there is no state of the Union in which there has been a larger amount of legislative "interference" with the right of local

[1] People *ex rel.* Met. St. Ry. Co. *v.* Tax Commissioners, 174 N. Y. 417. 1903.
[2] Matter of Morgan *v.* Furey, 186 N. Y. 202 (1906); *supra*, 38, n. 1.
[3] Hequembourg *v.* City of Dunkirk, 49 Hun 550. 1888.
[4] City of Syracuse *v.* Hubbard, 64 App. Div. (N. Y.) 587. 1901.
[5] The constitution submitted by this convention was defeated at the polls.

selection of local officers than in New York — and this in spite of an apparently significant constitutional guarantee of protection against such interference.

It must not be thought, however, that this guarantee has been wholly useless. It has been applied by the courts of New York to defeat a considerable number of statutes "interfering" with the right of cities to select their own officers, although the reasoning of many of the cases upon this subject appears to be somewhat forced.[1] Especially has this clause of the constitution been used to

[1] Thus it was early held, in apparent mitigation of the decision in the Draper case, that police court clerks could not be appointed by the Metropolitan Police Board; Devoy *v.* Mayor etc. of New York, 36 N. Y. 449 (1867); and that this board could not be empowered to exercise practically all of the power of the city to enact police ordinances, on the ground that while legislative power could be delegated to a city, this being the only universal exception to the rule, it could not be delegated to state officers; People *v.* Acton, 48 Barb. (N. Y.) 524 (1867). So also the commissioner of taxes and assessments of the city of New York was held to be a city officer who could not be made subject to appointment by the governor and senate; People *v.* Raymond, 37 N. Y. 428 (1868). In another early case — People *ex rel.* Brown *v.* Blake, 49 Barb. (N. Y.) 9 (1867) — it was declared that the legislature might not itself name the first trustees of a newly incorporated village, although why the offices of these trustees were not regarded as *being thereafter* created by law does not appear.

About three decades passed before the courts again applied this constitutional guarantee with effect to protect cities against legislative interference. In this later era it was held, by a greatly overstrained construction of the provision under review, that a statute requiring the election of a bi-partisan board of four police commissioners for Albany, under a restriction that no member of the council could vote for more than two commissioners, was void; this did not amount to a local election or appointment; Rathbone *v.* Wirth, 150 N. Y. 459 (1896). So it was held, by an equally strained construction, that the civil service law of 1899, which required that the appointing officer of a city should appoint the person "graded highest" on the competitive list, was void because the "local authorities designated by the legislature [*i.e.*, by the charter of Binghamton, the board of street commissioners appointed by the mayor] are absolutely deprived of any power of selection" and thus "the real power of appointment is transferred from the authorities *in which it is vested by the constitution* to the civil service commissioners." The fact that the local civil service commissioners might, in certain circumstances not involved in this case, be subject to central appointment was adverted to, but was apparently not controlling. The fact that the local civil service commissioners were themselves in this case local appointees was apparently ignored. There was no intimation that the feature of the statute providing for the removal of local commissioners and their appointment by the state commission was the offending provision of the law because the local commissioners were "city officers." People *ex rel.* Balcom *v.*

prevent the statutory extension of the terms of office of incumbent local officers, upon the theory that an extension of term by the legislature was tantamount to a legislative appointment. It must be said, however, that the pronouncements of the courts upon this point have not always been wholly free from contradictions.[1] On the whole it seems fair to conclude that, so far as practical results are concerned, the clause of the New York constitution which since 1846 has guaranteed to cities the right to elect or appoint their own officers has been construed out of the way of the legislature far more effectually than it has been applied as a barrier to legislative encroachment.

In the Wisconsin constitution of 1848 the provision of the New York constitution on this subject was taken over without verbal

Mosher, 163 N. Y. 32 (1900). See also, as bearing upon the relation between the civil service statutes and the requirement of local selection of local officers, Rogers *v.* Common Council of Buffalo, 123 N. Y. 173 (1890); Pearce *v.* Stephens, 18 App. Div. (N. Y.) 101 (1897); People *ex rel.* Weints *v.* Burch, 79 App. Div. (N. Y.) 156 (1903).

By still another stretch of the provision in question it was held that the legislature could not provide for the election of city magistrates in Brooklyn while such officers in the rest of the city of New York were subject to appointment by the mayor; People *v.* Dooley, 171 N. Y. 74 (1902). In what appears to have been a dictum, for the point was not involved in the case, it was declared that the legislature could not make the police commissioner of New York subject to the governor's absolute power of removal; People *ex rel.* Devery *v.* Coler, 173 N. Y. 103 (1903). An act consolidating the board of sewer and water commissioners with the board of street commissioners in the village of Saratoga Springs and naming the first members of the consolidated board was held void; Village of Saratoga Springs *v.* Van Norder, 75 App. Div. (N. Y.) 204 (1902). So also was an act providing for the filling of vacancies in the board of health of Oswego by the county judge; People *ex rel.* Bush *v.* Houghton, 182 N. Y. 301 (1905). In this latter case no reference was made to the early case of In the Matter of Whiting, 2 Barb. (N. Y.) 513 (1848), *supra*, 37, n. 3.

[1] People *ex rel.* McCune *v.* Metropolitan Police Board, 19 N. Y. 188 (1859); People *ex rel.* Loew *v.* Batchelor, 22 N. Y. 128 (1860); People *ex rel.* Williamson *v.* McKinney, 52 N. Y. 374 (1873); People *ex rel.* Lord *v.* Crooks, 53 N. Y. 648 (1873); People *ex rel.* Leroy *v.* Foley, 148 N. Y. 677 (1896); In the Matter of Burger, 21 Misc. (N. Y.) 370 (1897); People *ex rel.* Eldred *v.* Palmer, 154 N. Y. 133 (1897); Kelly *v.* Van Wyck, 35 Misc. (N. Y.) 210 (1901); In the Matter of Hause, 88 App. Div. (N. Y.) 242 (1903); People *ex rel.* White *v.* York, 35 App. Div. (N. Y.) 300 (1898); People *ex rel.* Lahey *v.* Partridge, 74 App. Div. (N. Y.) 291 (1902); People *ex rel.* Burns *v.* Partridge, 38 Misc. 697 (1902); Sugden *v.* Partridge, 174 N. Y. 87 (1903). This last mentioned case was not in line with most of the other cases here cited.

alteration of any kind;[1] and the Virginia constitution of 1850 embodied a provision that was very nearly identical in purport.[2] In neither state does there appear to have been any conscious attempt to interdict an existing or threatened legislative abuse of the principle of local self-government; for in both states the custom of local selection of local officers was firmly set in the laws. The probability is that in each instance the provision in question was copied from the constitution of New York without any profound contemplation of its restrictive significance. Moreover, the judicial records of these states do not disclose that the provision ever had any important history in application, although this is not to declare that it did not in fact operate to lay a restraining hand upon possible legislative action.[3]

The Michigan constitution of 1850 contained a clause somewhat similar to, although not nearly so explicit as, that of the New York constitution of 1846. It declared[4] that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." Fifteen years after the adoption of this constitution the supreme court of Michigan found no difficulty in sustaining, without even referring to this clause, an act of the legislature which provided a state-appointed police commission for the city of Detroit.[5] But a few years later in the famous case of the People *ex*

[1] Art. XIII, sec. 9.

[2] Art. VI, sec. 34. Repeated verbatim in constitution of 1864, Art. VI, sec. 33.

[3] In the Virginia constitution of 1870 the clause of the New York constitution of 1846 was copied verbatim. Art. VI, sec. 20. In the same article it was ordained that every city should *elect* certain judges and court officers, a commonwealth's attorney, a sergeant, treasurer, commissioner of revenue, and a mayor. The latter's powers and duties were outlined in some detail, and collateral reference was also made to the common councils of cities. This enumeration of officials is doubtless accounted for in part by the fact that the constitution provided in detail for the scheme of county government, and since in Virginia the county has little if any jurisdiction over a city which it includes, it was necessary also to provide at least for certain municipal officers corresponding to county officers. See also Amendment of 1876 adding section 23 to Art. V, and see the elaborate provisions for city government in the constitution of 1902, Art. VIII, slightly amended in 1913.

[4] Art. XV, sec. 14.

[5] People *ex rel.* Drake *v.* Mahaney, 13 Mich. 481. 1865.

rel. LeRoy *v.* Hurlbut [1] — the case in which Judge Cooley indulged in many expressions of opinion that have since been cited as supporting the doctrine of an inherent right of local self-government [2] — the court relied upon this provision of the constitution in declaring the incompetence of the legislature to provide a state-appointed board of public works for the same city. In effect the court read into the provision certain important words that were found in the New York clause but were omitted from the Michigan clause. The provision in question was construed to mean that judicial officers of cities and villages should be *locally* elected and that all other officers of such corporations should be *locally* elected or *locally* appointed, as the legislature might direct.

Following the decision of the Hurlbut case this clause of the Michigan constitution was successfully invoked in a series of cases to defeat legislative assaults upon the right of cities to have their officers locally chosen.[3] In these cases the difficult distinction (which was never raised in New York and which apparently would not have received judicial support if it had been raised) was drawn between municipal officers whose functions are primarily of interest to the state and those officers whose functions are "purely municipal" or local in character. Thus the early decision upholding the authority of the legislature to create a state-appointed police commission for a city was never overruled, although the opinion expressed in that case was certainly delimited and modified. So also the competence of the legislature to establish a state-appointed health board for Detroit was sustained upon the same theory.[4]

In the Kentucky constitution of 1850 a provision very similar

[1] 24 Mich. 44. 1871.

[2] *Supra*, 13.

[3] People *v.* Lothrop, 24 Mich. 235 (1872); People *v.* Common Council of Detroit, 28 Mich. 228 (1873), involving the legality of a state-appointed park commission; People *v.* Mayor of Detroit, 29 Mich. 343 (1874), involving the same question; Moreland *v.* Millen, 126 Mich. 381 (1901), holding void an act providing for the provisional appointment of a superintendent of public works for Detroit; Davidson *v.* Hine, 151 Mich. 294 (1908), invalidating an act creating a state-appointed police and fire commission for Bay City.

[4] Davock *v.* Moore, 105 Mich. 120. 1895.

to that of the Michigan constitution was introduced.[1] But the provision does not appear to have been construed into an effective guarantee of a right to have municipal officers locally selected in that state.

On the whole, then, it may be said that, so far at least as the books disclose, the grant to cities of the right to select their own local officers proved to be a partially effective guarantee of home rule only in New York and Michigan. In any case it must be noted that while this specific "right" may be regarded as of fundamental importance, it is a "right" which under legislative practice municipal corporations have with comparatively few exceptions enjoyed very widely since the early years of our national history. Even with the possibility eliminated of direct appointment of municipal officers by state rather than local authority, it is obvious that almost limitless opportunity remains for legislative "interference" with the affairs of cities.

Clauses prohibiting the Appointment of Special Commissions in Control of Municipal Affairs

Somewhat similar in purport to those provisions which guaranteed to cities the right of local selection of local officers were certain provisions which, although first incorporated into state constitutions at a much later period, are nevertheless because of their subject matter appropriately mentioned at this point.

It was noted above that the provision of the New York constitution of 1846 which required that "city" officers should be locally elected or appointed was not construed by the courts of that state to prevent the legislature from providing for the state appointment of special commissions of a temporary character with power to undertake municipal improvements. In the decades preceding and following the opening of the Civil War the cities of Pennsylvania — and more particularly the city of Philadelphia — suffered especially under the tyranny of the legislature in the matter of such commissions — commissions which in some instances were endowed

[1] Art VI, sec. 6. This clause did not specifically require *local* election and made no mention whatever of appointments.

with legal power to make almost limitless drafts upon the municipal treasury. The constitution of that state which was adopted in 1873 sought to tie the hands of the legislature in this regard by declaring as follows: [1]

> 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 held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

Two years after this provision became a part of the fundamental law of Pennsylvania an amendment was adopted in New Jersey which provided that the legislature should pass no special act "appointing local officers or commissions to regulate municipal affairs." [2] As in Pennsylvania, the grievance of the cities of New Jersey in the matter of such commissions was founded upon bitter experience through many years.[3] The Pennsylvania provision on this subject was also incorporated practically without alteration in the constitutions of Colorado [4] in 1876, of California [5] in 1879, of Montana [6] and Wyoming [7] in 1889, and of Utah [8] in 1895. In none of these other states, however, with the possible exception of California, can this prohibition be said to have originated in a genuine experiential need.

It is entirely probable that as a guarantee of a specific home rule right this prohibition upon the competence of the legislature to create special commissions charged with the performance of municipal functions might in certain states and at certain periods of our history have proved to be a highly beneficial protection to cities. But the truth of the matter is that in most of the above-mentioned states such a prohibition was incorporated into the constitution at

[1] Art. III, sec. 20.

[2] Amendment of 1875 adding section 7 to Art. IV of the constitution of 1844.

[3] See in Attorney General *ex rel.* Booth *v.* McGuinness, 78 N. J. L. 346 (1909), a partial list of acts in which the legislature between 1845 and 1875 had created special municipal commissions the members of which were neither locally appointed nor locally elected; pp. 358-366.

[4] Art. V, sec. 35.

[5] Art. XI, sec. 13.

[6] Art V, sec. 36.

[7] Art. III, sec. 37.

[8] Art. VI, sec. 29.

a somewhat late date and along with a comprehensive prohibition on *all* special legislation for cities.[1] Under such circumstances it was largely if not wholly superfluous. In Pennsylvania the only important case in which this provision has been construed involved a consideration of the effect of the provision upon a previously constituted commission.[2] In New Jersey its protection has apparently been invoked in no case. In California, although referred to or discussed in a number of cases,[3] this guarantee of immunity has certainly been of no great importance.[4] In Montana, Wyoming, and Utah — states with few if any important cities — it appears to have had no history before the courts. The absence from the books of cases in which a constitutional provision has been invoked is not, of course, conclusive evidence of its uselessness; but in this instance it seems at least fairly conclusive when taken in conjunction with the obvious fact that a general prohibition on *all* special legislation for cities would naturally embrace a specific prohibition on the establishment of special municipal commissions.

Only in Colorado, then, may this prohibition be said to have had an interesting judicial history. In this state the constitutional provisions on the subject of special legislation for cities [5] were held not to prevent the legislature from amending by special act the charter of any city which had not voluntarily organized under a general law.[6] Such a city was Denver, the only important city in the state. When the legislature by special acts transferred a large

[1] *Infra*, Ch. III. [2] Perkins *v.* Slack, 86 Pa. St. 270. 1878.

[3] See for example Board of Commissioners *v.* Board of Trustees of the City of Sacramento, 71 Cal. 310 (1886); Boys' and Girls' Aid Society *v.* Reis, 71 Cal. 627 (1887); Pennie *v.* Reis, 80 Cal. 266 (1889); Davies *v.* The City of Los Angeles, 86 Cal. 37 (1890); Woodward *v.* Fruitvale Sanitary District, 99 Cal. 554 (1893); Yarnell *v.* City of Los Angeles, 87 Cal. 603 (1891); City of Los Angeles *v.* Teed, 112 Cal. 319 (1896); Banas *v.* Smith, 133 Cal. 102 (1901).

[4] Indeed it has in a few cases been held to be a restriction upon the cities of California, which, as we shall see, were by the constitution of 1879 vested with power to frame and adopt their own charters. This construction was based upon the view that what the legislature might not do the city exercising charter-making powers is also prohibited from doing.

[5] Art. V, sec. 25; Art. XIV, secs. 13, 14; Art. XV, sec. 2.

[6] Brown *v.* The City of Denver, 7 Colo. 305 (1884); Carpenter *v.* The People, 8 Colo. 116 (1884); Darrow *v.* The People, 8 Colo. 426 (1885).

part of the functions of this city to two powerful commissions the members of which were appointed by the governor, the supreme court of that state did not hesitate to declare that these commissions, in charge of "regular departments" of the city government, were not included in the "special commissions" which the legislature was prohibited from establishing.[1] Thus was a provision which might unquestionably have been construed to afford the city protection against such encroachment effectually emasculated at the hands of the court.

On the whole, it can scarcely be said that these clauses prohibiting special municipal commissions have played a very important rôle in the course of our institutional progress toward municipal home rule.

Clauses relating to the Financial Powers of Cities

In the Tennessee constitution of 1834 there was introduced a provision which declared that "the general assembly shall have the power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporate purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principle established in regard to state taxation."[2] In the phrasing of this clause there was certainly nothing to indicate that the convention intended it to be in the nature of a limitation upon legislative action, except perhaps as to the manner in which the power of taxation might be exercised by municipal corporations under legislative sanction. Nor was there apparently anything in the history of Tennessee legislation prior to the constitution of 1834 to indicate the necessity of such limitation. The vesting in the legislature of competence to delegate the power of taxation to local public corporations was manifestly wholly superfluous; for the competence of

[1] *In re* Senate Bill Providing for a Board of Public Works in the City of Denver, 12 Colo. 188 (1888); *In re* Fire and Excise Commissioners, 19 Colo. 482 (1894). Reaffirmed also in The City of Denver *v.* Londoner, 33 Colo. 104 (1905) and The City of Denver *v.* Iliff, 38 Colo. 357 (1906).

[2] Art. II, sec. 29. Repeated in the constitution of 1870; Art. II, sec. 29.

the legislature in this regard had never been seriously doubted in Tennessee or in any other state. It might easily be argued, however, that a provision of this kind must have some meaning. It could not be regarded as wholly supererogatory. Having no positive significance, it had to be construed into a negation of power. And so it was construed in at least one case, although it was not in that case actually applied to afford protection to the city.[1]

In the Illinois constitution of 1848 a clause very similar to that of the Tennessee constitution was introduced.[2] Again it does not appear what the origin of the clause may have been, although it was probably copied from the Tennessee provision without much thought as to its purport. But the courts of Illinois, beginning with People *ex rel.* McCagg *v.* Mayor of Chicago[3] decided in 1869, construed this provision in such a manner as to make it afford a somewhat effective check upon legislative interference with municipal corporations in certain respects.[4] In effect it was held that the legislature under this express authorization to delegate the taxing power could not vest the "power to assess and collect the taxes for corporate purposes" in any *other* than the local corporate authorities — could not, for example, vest such power in a commission or board appointed by the state itself. It was also held that while the legislature might *confer* such power it could not *compel* a municipal corporation to impose a tax for a corporate purpose. On the other hand, the question seems never to have arisen in Illinois whether under the apparent grant, thus construed into an actual negation of power, the legislature could confer the

[1] Nicol *v.* The Mayor of Nashville, 9 Humph. (Tenn.) 252 (1848), where it was declared that "the legislature most clearly has no power to delegate to a county or corporate town the power to levy taxes for any other than county or corporate purposes;" but in the opinion of the court the levy of a tax for the purpose of purchasing railway stock — which was the issue before the court — was a "corporate purpose."

[2] Art. IX, sec. 5.

[3] 51 Ill. 17. 1869.

[4] Lovingston *v.* Wider, 53 Ill. 302 (1870); Wider *v.* East St. Louis, 55 Ill. 133 (1870); Marshall *v.* Silliman, 61 Ill. 218 (1871); Wiley *v.* Silliman, 62 Ill. 170 (1871); Barnes *v.* Town of Lacon, 84 Ill. 461 (1877); Williams *v.* Town of Roberts, 88 Ill. 11 (1878); Gaddis *v.* Richland Co., 92 Ill. 119 (1879); Cairo etc. Rd. Co. *v.* Sparta, 77 Ill. 505 (1875).

power of taxation upon a municipal corporation for other than a corporate purpose.

A clause similar to that of the Tennessee and Illinois constitutions was incorporated in the South Carolina constitution of 1868[1] and in the West Virginia constitution of 1872;[2] but in neither of these states does it appear to have been inspired by the desire to restrict legislative action or to have had any important history as a guarantee of municipal immunity from legislative encroachment. On the whole, therefore, the conclusion seems inevitable that even in Illinois, the only state in which such a clause was successfully invoked in behalf of municipal home rule, the protection which the courts were able to read into the provision was a protection which those who framed it little dreamed they were writing into the fundamental law of the state.

In the Illinois constitution of 1870 the provision of the earlier constitution upon this subject was rephrased in such wise as to express in more positive terms the meaning which the courts ultimately read into the provision of the constitution of 1848. It was expressly declared[3] that the general assembly should "not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law." There could certainly be no question that under this provision the legislature was prohibited from compelling cities to levy taxes for corporate purposes.

Somewhat different in spirit and intent was the provision which was incorporated into an amendment added to the New York constitution in 1874.[4] In this amendment it was specifically declared that no county, city, town, or village should be "allowed to incur any indebtedness except for county, city, town or village purposes." Although this restriction was obviously positive in

[1] Art. IX, sec. 8. [2] Art. X, sec. 9. [3] Art. IX, sec. 10.

[4] Amendment adding sec. 11 to Art. VIII of the constitution of 1846. This amendment imposed certain other restrictions upon the legislature in the matter of municipal finances. See *infra*, 58.

character, it was never applied with anything like the rigidity of construction that was given by the Illinois courts to a constitutional provision of far less emphatic declaration. For example, the New York courts seem never to have been called upon to determine whether the word "allow" as thus used implied that the legislature might not under any circumstances *compel* a municipal corporation to incur a debt for a corporate purpose.[1] Certainly the legislature of New York in numerous instances subsequent to the adoption of this amendment did impose mandatory expenditures upon the cities of the state. Indeed the only important cases in which it was contended before the courts that this provision operated to guarantee any right to municipal corporations were cases involving the authority of the legislature to compel or authorize the expenditure of municipal funds upon an undertaking that lay wholly or in part outside the corporate jurisdiction.[2] It may be said, therefore, that the provision never furnished the foundation upon which there was erected in that state any home rule right of a substantial character.

Still more comprehensive in scope and emphatic in tone was the provision on this same subject which found lodgment in the Colorado constitution of 1876.[3] Here it was declared that "the general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by law, vest in the corporate authorities thereof respectively the power to assess and collect taxes for all purposes of such corporation." There could be no mistaking the fact that the convention which framed this provision clearly intended it to be in the nature of a positive restraint upon legislative action. But this clause, as we shall see, was introduced some years after restrictions of various kinds upon

[1] The nearest approach which the courts made to a consideration of this question was perhaps in the case of In the Matter of the Application of the Mayor etc. of New York, 99 N. Y. 569 (1885), where it was held, however (p. 584), that no decision of the point was necessary since the city had in this case consented to the incurrence of the debt.

[2] People *ex rel.* Murphy *v.* Kelly, 76 N. Y. 475 (1879); In the Matter of the Assessment of Lands in the Town of Flatbush, 60 N. Y. 398 (1875); In the Matter of the Application of the Mayor etc. of New York, 99 N. Y. 569 (1885).

[3] Art. X, sec. 7.

legislative action in relation to municipal corporations had been introduced into many constitutions. Indeed, by 1876 the era of constitutional prohibitions upon legislative interference with municipal corporations was well under way. The provision in question appears to have had no career of construction in the Colorado courts.

Practically identical in phraseology was a provision incorporated in the California constitution of 1879.[1] And although there were introduced into the same constitution a number of other highly important restrictive provisions in behalf of the rights of cities,[2] the courts of that state have been called upon to apply this clause in a number of important cases affecting the constitutional immunity of cities from legislative attack. A like provision in the Washington constitution of 1889,[3] which also included other important provisions establishing a sphere of municipal liberty,[4] appears to have received practically no construction and application by the courts — a fact, however, which does not necessarily imply that it was wholly superfluous.

Of a character somewhat different from the foregoing provisions was a clause which was inserted in the New York constitution of 1846. This clause read as follows:[5]

> It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations.

Obviously this provision was merely directory in character. It was introduced at a time when cities were everywhere undertaking the construction of public works upon a far more extended scale than formerly; and it is probable that the convention, while it hesitated to devise a scheme of positive restriction, nevertheless deemed it wise to sound in the fundamental law of the state a note of warning to the legislature as to its moral obligation to impose salutary financial restraints upon cities. It is difficult to say

[1] Art. XI, sec. 12.
[2] Art. XI, sec. 12.
[3] Art. VIII, sec. 9.
[4] *Infra*, Chs. VII–XI.
[5] *Infra*, Ch. XII.

whether this clause of the New York constitution was copied into the constitutions of certain other states without any affirmative intent whatever — as in some instances seems likely — or whether constitutional conventions in other states were inspired by the same motives that probably prompted its writing in New York. However that may be, a practically identical provision was incorporated into the constitutions of Wisconsin in 1848,[1] California in 1849,[2] Michigan in 1850,[3] Ohio in 1851,[4] Oregon in 1857,[5] Kansas in 1859,[6] Nevada in 1864,[7] Alabama in 1867,[8] and the constitutions of North Carolina,[9] South Carolina,[10] and Arkansas [11] in 1868.

Constitutional provisions of a directory character have perhaps more often than not been useless. Legislatures do not take very seriously the occasional efforts of conventions to set up elements in a moral code for their guidance. It is enough usually if they keep within the numerous positive restrictions of the fundamental law. In its utter failure to accomplish anything of substantiality this provision directing the legislature to circumscribe the financial powers of municipal corporations was typical of directory provisions generally. It was soon manifest that nothing short of a definite limitation would achieve the desired result. In this respect the Iowa constitution of 1857 led off with the following declaration: [12]

> No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum of the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.

[1] Art. XI, sec. 3. [2] Art. IV, sec. 37. [3] Art. XV, sec. 13.
[4] Art. XIII, sec. 6. For a discussion of this Ohio clause see *infra*, 70.
[5] Art. XI, sec. 5.
[6] Art. XII, sec. 5. Provision like that of Ohio; see *infra*, 85.
[7] Art. VIII, sec. 8.
[8] Art. XIII, sec. 16. In this constitution, however, a positive debt limit was also fixed; see *infra*, 54.
[9] Art. VIII, sec. 4.
[10] Art. IX, sec. 9.
[11] Art. V, sec. 49. Provision like that of Ohio; see *infra*, 88. Also a positive debt limit was fixed; see *infra*, 54.
[12] Art. XI, sec. 3.

Thereafter provisions imposing either a debt limit, a tax rate limit, or a restriction as to the conditions under which debts might be incurred, were incorporated into the constitutions of Alabama in 1867,[1] Arkansas in 1868,[2] Illinois in 1870,[3] West Virginia in 1872,[4] Pennsylvania in 1873,[5] Wisconsin [6] and Louisiana [7] in 1874, Missouri in 1875,[8] Texas,[9] Colorado,[10] and North Carolina [11] in 1876, Georgia [12] and Maine [13] in 1877, California in 1879,[14] Indiana in 1881,[15] New York in 1884,[16] Idaho,[17] Montana,[18] North Dakota,[19] South Dakota,[20] Washington,[21] and Wyoming [22] in 1889, Kentucky in 1890,[23] South Carolina [24] and Utah [25] in 1895, Virginia in 1902,[26] and Oklahoma in 1907.[27]

[1] Art. IV, sec. 36. Changed from debt to tax rate limit in constitution of 1875, Art. X, sec. 7. This was retained in constitution of 1901, Art. XI, sec. 216.

[2] Art V, sec. 47. Changed from debt to tax rate limit in constitution of 1874, Art. XII, sec. 4. See also Art. XVI, sec. 1.

[3] Art. IX, sec. 12.

[4] Art. X, sec. 8.

[5] Art. IX, sec. 8.

[6] Amendment to Art. XI, sec. 3 of constitution of 1848.

[7] Amendment adding Art. 163 to constitution of 1868, prohibiting New Orleans absolutely from increasing her debt and containing other elaborate provisions for the liquidation of her existing debt. See also constitution of 1879, Arts. 209, 254, and amendment of 1906, Art. 281.

[8] Art. X, secs. 11, 12. Amended 1900 and 1902.

[9] Art. XI, secs. 4, 5.

[10] Art. XI, sec. 8.

[11] Art. VII, sec. 7.

[12] Art. VII, sec. 7.

[13] Amendment adding Art. XXII to constitution of 1819.

[14] Art. XI, sec. 18.

[15] Amendment substituting a new section for Art. XIII.

[16] Amendment to amendment of 1874 which added sec. 11 to Art. VIII of constitution of 1846. See also constitution of 1894, Art. VIII, sec. 10 as amended in 1905.

[17] Art. XII, sec. 4.

[18] Art. XIII, sec. 6.

[19] Art. XII, sec. 183.

[20] Art. XIII, sec. 4. Amended in 1896 and 1902.

[21] Art. VIII, sec. 6.

[22] Art. XVI, sec. 5.

[23] Sec. 158.

[24] Art. VIII, sec. 7.

[25] Art. XIV, secs. 3, 4.

[26] Art. VIII, sec. 127.

[27] Art. X, secs. 26, 27.

It cannot be said that these provisions imposing debt and tax limitations were projected solely for the purpose of securing the city in a right against legislative domination. To a considerable extent they were aimed at abuses committed voluntarily by the corporate authorities where the legislature had given nothing but its sanction. In this aspect such provisions were in the nature of a curtailment rather than an extension of the liberties of cities. It is beyond question, moreover, that in practical application these restrictions have come to be regarded as guarantees to the taxpayers of a degree of immunity against municipal extravagance and incapacity. On the other hand, it must be remembered that many of the debts of municipal corporations were incurred at the direct command of the legislature. Viewed in the light of the usual legislative practice in this respect, these constitutional provisions were certainly in the nature of limitations in behalf of the city. The probable truth of the matter is that they were directed both to the legislature and to the city, with the taxpayer chiefly in mind. That cities have come to regard them as restrictive rather than protective is due to the fact that *within* the debt or the tax limit imposed the power of the legislature over municipal finances remained unimpaired.[1] As bearing upon the evolution of home rule rights secured by constitutional guarantees such provisions may be said merely to have assisted in establishing the practice of dealing with the problem of the city through the medium of constitutional provisions.

Clauses prohibiting Cities from aiding Public Improvement Corporations

In the fifth, sixth, and seventh decades of the nineteenth century, there were written into the statute books of American states innumerable laws which usually authorized but sometimes compelled municipal corporations to issue bonds for the purpose of

[1] It ought to be mentioned perhaps that as incorporated into certain later constitutions such provisions were solely in the nature of restrictions upon the city as such, for the legislature was more or less effectively prevented by other provisions of these constitutions from directly requiring the incurrence of debts or the levying of taxes.

subscribing to the stock of, or making donations to, railway corporations. The country went literally mad over the alluring prospects of limitless development and prosperity as a result of railway construction. Counties and cities tread ruthlessly upon one another's heels in their efforts to further the building of railways the prospectuses of which seemed to offer convincing proof of the fact that Romes could be erected in a much shorter time than the proverbial tedious day. It was an era of inconceivably reckless speculation; and the public through the medium of the ballot and its duly constituted agencies of government participated with a zeal that was truly spectacular in its precipitateness. But the day of faith was as short-lived as the day of reckoning was bitter. The doctrine of no taxation for a private purpose proved unavailing.[1]

It was Ohio that led the way to reform by declaring in her constitution of 1851[2] that "the general assembly shall never authorize any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association." Indiana followed closely with a provision in her constitution of the same year.[3] This provision applied, however, only to counties. It allowed them to make a stock subscription if paid for in cash but prohibited the borrowing of money for such purpose. In 1857 there was added to the Pennsylvania constitution an amendment similar to the Ohio provision;[4] and a like clause was incorporated into the Oregon constitution[5] of the same year and into the Missouri constitution of 1865.[6]

The Maryland constitutional convention of 1867 was a little more timid. It was provided that no county should contract any debt in the construction of a railway or other public improvement

[1] McBain, "Taxation for a Private Purpose," in *Political Science Quarterly*, 29: 185.

[2] Art. VIII, sec. 6.

[3] Art. X, sec. 6.

[4] Amendment adding sec. 7 to Art. XI.

[5] Art. XI, sec. 9.

[6] Art. XI, sec. 14.

except by authority of the legislature given after publication of notice in the county.[1] An absolute prohibition in this respect was placed only upon the city of Baltimore.[2] So also the Georgia constitution of 1868[3] went no further than to prohibit a subscription or contribution except upon a vote of the people. Of similar purport was the provision written into the Mississippi constitution of 1868.[4] In the same year there was incorporated into the constitution of North Carolina[5] a clause which asserted that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." While this somewhat unusual provision has received very little construction at the hands of the courts,[6] it was doubtless aimed at action extending the credit of municipal corporations to railways. In the Tennessee constitution of 1870 municipal corporations were forbidden to loan their credit to private persons or corporations except upon a three-fourths vote of the electors; and although a considerable number of counties were by name exempted from this limitation, only a majority vote being required prior to the year 1880, all municipal corporations were thereafter subject to the requirement of the extraordinary vote.[7] By an amendment to the Minnesota constitution adopted in 1872[8] the amount of bonds which a municipal corporation might issue in aid of railway construction was limited to ten per centum of the valuation of property within the corporation; and this amount was reduced to five per centum by another amendment adopted some years later.[9]

[1] Art. III, sec. 54.

[2] Art. XI, sec. 7.

[3] Art. III, sec. 6, par. 4. Repeated in somewhat changed form in the constitution of 1877; Art. VII, sec. 6, par. 1.

[4] Art. XII, sec. 14.

[5] Art. VII, sec. 7. Repeated in the constitution of 1876; Art. VII, sec. 7.

[6] For a single instance see Fawcett *v.* Town of Mt. Airy, 134 N. C. 125. 1903.

[7] Art. II, sec. 29.

[8] Amendment adding sec. 14 (b) to Art. IX.

[9] Amendment adding sec. 15 to Art. IX.

Absolute prohibitions upon the power of the legislature to authorize or compel the extension of aid by municipal corporations to private persons or corporations were incorporated into the constitutions of New York [1] and Arkansas [2] in 1874; Alabama,[3] Nebraska,[4] and New Jersey,[5] in 1875; Colorado[6] and Texas[7] in 1876; Connecticut[8] and New Hampshire[9] in 1877; and California in 1879.[10] In the year 1879 Louisiana also came forward with a somewhat half-hearted provision restricting the legislature in its power to allow municipal corporations to levy taxes "in aid of public improvements or railway enterprises" to taxes that "shall not exceed the rate of five mills per annum nor extend for a longer period than ten years." [11]

As in the case of general financial restrictions it can scarcely be said that the provisions of this character which found way into so many constitutions before 1880 were aimed at securing to the city a right against legislative spoliation. In point of fact most of the railway aid legislation had been permissive rather than mandatory. Municipal corporations themselves had sinned quite as heavily as they had been sinned against. The constitutional limitations that were imposed sought to protect the city not only against the legislature but also against itself. It is doubtful, therefore, whether the incorporation of the provisions here referred to can properly

[1] Amendment adding sec. 11 to Art. VIII of the constitution of 1846.

[2] Art. XII, sec. 5.

[3] Art. IV, sec. 55.

[4] Art. XII, sec. 2.

[5] Amendment adding secs. 19 and 20 to Art. I of constitution of 1844.

[6] Art. XI, secs. 1, 2.

[7] Art. III, secs. 51, 52; Art. XI, sec. 3.

[8] Amendment XXV to constitution of 1818.

[9] Amendment to Part II, sec. 5 of constitution of 1792.

[10] Art. IV, sec. 31. Sec. 30 of the same article prohibited also the giving of any donation to a sectarian institution.

[11] It ought to be mentioned that railway aid was outlawed in Iowa, although originally sustained in Dubuque County *v.* D. & P. R. R. Co., 4 Greene (Ia.) 1 (1853), upon the slim pretext that the constitution of 1857 contained a clause declaring that "this enumeration of rights shall not be construed to impair or deny others retained by the people." State *ex rel.* The B. & M. R. R. Co. *v.* Wapello, 13 Ia. 388 (1862). Reaffirmed in McClure *v.* Owen, 26 Ia. 243 (1868), and Hanson *v.* Vernon, 27 Ia. 28 (1869).

be cited as steps in the direction of constitutional home rule. The most that can be said is that state legislatures had been active participants in the whirlwind of public corporate speculation that ensued, and that these constitutional provisions effectively checked them in their "liberality."

Clauses prohibiting Legislative Interference with Streets and Street Franchises

One of the early grievances of the city against the state arose out of the common legislative practice of passing special acts vacating streets at the behest of private persons in interest and of opening and improving streets at the behest of land speculators and contractors. To cite only one specific instance that is a matter of historical record outside the statute books (in which innumerable laws of this character bear eloquent testimony to the extent of this reprehensible practice) there existed in the year 1870 in the one small town of West Farms, which lay close to the city of New York, five or six special commissions each named specifically by the legislature for the purpose of laying out a particular road or avenue and each endowed with "power to contract debts or expend moneys for the town, to a certain amount in most instances, but in several cases without any limitation." [1]

As early as 1850 this practice of ordering the vacating or opening of streets by special laws began to receive attention in constitutions. The Michigan constitution of that year declared [2] that the legislature should pass no special act "vacating or altering" any road laid out by commissioners of highways, or "any street in any city or village, or in any recorded town plat." A similar provision was incorporated in the constitution of Indiana in 1851,[3] and in that of Iowa [4] and of Oregon [5] in 1857. In the Missouri constitution of 1865 the prohibition extended not only to the vacating but also to the establishment and alteration of streets,

[1] Hanlon *v.* Supervisors of Westchester, 57 Barb. (N. Y.) 383 (1870), *supra*, 36.
[2] Art. IV, sec. 23.
[3] Art. IV, sec. 22.
[4] Art. III, sec. 30.
[5] Art. IV, sec. 23.

alleys, and avenues.[1] Before the year 1890 a comprehensive prohibition of this character had been incorporated into the constitutions of at least five additional states.[2] At the present time a prohibition upon the legislature in respect to this specific matter is found in the constitutions of a majority of the states, although in a number of instances this prohibition appears to be sufficiently covered by other broader limitations imposed upon the powers of the legislature over the affairs of cities.

Another specific abuse by the legislature of its absolute power over city streets arose out of the development of street railways. When the system of rail transportation began to be introduced in American cities during the decade immediately preceding the Civil War, it was the more common, though not invariable, practice to secure the necessary franchise for this new and unusual use of the public streets from the legislature of the state under a special act. Some of the early grants, and especially those made during the experimental state of the street railway business, required local consent and contained surprisingly strict guarantees protecting the interests of the public. But no sooner had the potential profits of the business become manifest to promoters and politicians than legislatures throughout the country entered upon a season of great activity in bartering away, often in perpetuity and without compensation of any kind, enormous values in the public streets. Indeed it was the state legislature which during this era paved the rough way along which many a city is still traveling toward the almost impossible solution of its transportation problems. It is not surprising that this shameless legislative practice soon became a conspicuous target for the reformers among an outraged people, and that a constitutional limitation should have been resorted to as the only possible remedy for the evil.

The reconstruction constitution in Missouri, adopted in 1865, was the first constitution in which a provision aimed specifically

[1] Art. IV, sec. 27.

[2] New York amendment of 1874 adding section 18 to Art III of the constitution of 1846, New Jersey amendment of 1875 adding section 7 to Art IV of the constitution of 1844; Texas constitution of 1876, Art. III, section 56, Louisiana constitution of 1879, Art. 46, California constitution of 1879, Art IV, sec. 25.

at this abuse was incorporated. It was there simply provided that the legislature should not pass any special law "granting to any individual or company the right to lay down railroad tracks in the streets of any city or town." [1] Obviously such a prohibition would not of necessity result in the enactment of sound legislation governing the matter of future franchise grants; but it would go a long step in that direction by eliminating the element of *specific* application in such grants. Legislatures have through heedlessness and inattention, as well as through positive corruption, enacted innumerable laws of specific application embodying principles and policies which they would have hesitated to incorporate into general laws.

In the Illinois constitution of 1870 there was included a provision of somewhat different import which nevertheless imposed an important restriction upon the legislature in the matter of street railway grants. It was declared that the legislature should enact no law "granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having control of the street or highway." [2] Here was a clear case of the establishment of a home rule right — the right to have every such proposed grant referred to the local authorities. An identical provision was incorporated into the West Virginia constitution of 1872.[3]

Beginning with the year 1860 the legislature of New York summarily abandoned its first policy in the matter of street railway grants. Up to that time, under a general law enacted in 1854, this policy had been commendably sane and considerate toward the interest of cities. There followed, however, an era of special legislative grants that showed a callous disregard for the "rights" of the public and a criminally prodigal liberality toward private interests that made secret or open application to the legislature for wholly unreasonable concessions. The situation became intolerable. It was met by the adoption in 1874, after much irretrievable damage had been wrought, of an amendment to the constitution

[1] Art. IV, sec. 27.

[2] Art. XI, sec. 4.

[3] Art. XI, sec. 5.

which not only prohibited special legislation on the subject of street railway grants but also required local consent and elaborated in some detail the manner in which such grants might be legally acquired.[1] So thoroughly, however, had the field of possible street railway construction been occupied under previous special grants that it was not until ten years later that the legislature found it necessary to enact the general law which the amendment commanded.

In 1875 the legislature of New Jersey was by a constitutional amendment prohibited from granting the right to lay tracks under special acts.[2] Provisions were incorporated in the Alabama and Missouri constitutions of the same year requiring the acquiescence of local authorities in such matters.[3] The Colorado constitution of 1876 contained both provisions.[4] The Texas[5] and Georgia[6] constitutions of 1876 and 1877 respectively made local consent obligatory; while the Louisiana constitution of 1879[7] followed the plan of prohibiting any street railway grant by special law. It was thus by one or the other or both of these methods that the people in more than one state sought to outlaw the grievous abuse of legislative domination over the "rights" of the city in its streets.

This sketchy review of the provisions that were introduced into state constitutions with the end in view of proscribing specific and outrageous legislative abuses of the "rights" of cities is doubtless sufficient to indicate the general direction in which events were moving. The practices of state legislatures toward cities had been scandalously opprobrious. We in America had accustomed ourselves to meet such situations not through the medium of the ballot-box and the active play of public opinion but through the medium of our all-powerful fundamental laws. Reverence for these sacred instruments of our government we easily and perhaps naturally transformed into a sublime faith in our ability to discover the auto-

[1] Amendment adding section 18 to Art. III of the constitution of 1846.
[2] Amendment to section 7 of Art. IV of the constitution of 1844.
[3] Ala., Art. XIII, sec. 24; Mo., Art. XII, sec. 20.
[4] Art. V, sec. 25; Art. XV, sec. 11.
[5] Art. III, sec. 7, par. 20.
[6] Art. X, sec. 7.
[7] Art. 46.

matic in political institutions. Was not ours a "government of laws and not of men"? What mattered the pathology of the case? We were experts in anatomy. And so with deft and confident hands we applied our surgeon's knife to the more irritating sore spots that appeared upon the body politic. Some relief we found; but the lesion was too deep-seated for such surface treatment. Lying as it did in the mental attitude and the firmly fixed habits of state legislatures, it affected the entire gamut of relations between the city and the state. But this is only to say that it affected every minute aspect of municipal life; for the city, be it remembered, was completely subordinated to the will of its superior, the legislature. Obviously, then, since without hesitation we pinned our faith to the efficacy of constitutional restrictions upon the power of the legislature over cities, it seemed unavoidable that we should endeavor to reach the lesion and cure the whole grievous ailment by imposing upon legislatures constitutional limitations of a more general and comprehensive character.

CHAPTER III

CONSTITUTIONAL PROHIBITION AGAINST SPECIAL LEGISLATION FOR CITIES

THE first shaft that was ever leveled in the United States against the development of industry under corporate form found expression in the New York constitution of 1821. With the object of imposing a limited check upon the increasing activities of the legislature in granting corporate charters, it was provided that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill . . . creating, continuing, altering, or renewing any body politic or corporate." [1] There was here no express exception made of municipal corporations. Literally construed the requirement obviously included all corporate charters. On the other hand, there is no question whatever that it was especially directed to the case of the charters of private corporations and more especially perhaps the charters of banking and insurance companies. The convention which drafted this constitution does not appear to have considered its application to and effect upon the legislative power over the charters of cities proper.[2] An objection was made upon the convention floor that the provision would necessitate a vote of "two-thirds of the legislature to incorporate a village, bridge, or turnpike;" and answer was given that "two-thirds would never be wanting" for such purpose.[3] But this was the beginning and end of the discussion upon this point.

It is not certain whether in practice the legislature of the state did or did not construe this provision as applying to the charters of

[1] Art. VII, sec. 9.

[2] Only four cities existed in New York in 1821.

[3] Carter and Stone, *Proceedings and Debates of the New York Constitutional Convention of 1821*, p. 446.

municipal corporations.[1] But however this may have been, it is certain that no judicial determination in respect to the matter was reached until 1835, when in the case of The People *v.* Morris [2] the supreme court, delivering through Chief Justice Nelson, declared that the provision in question had no application to municipal charters. This decision was based upon the ground that the provision certainly did not apply to counties and towns, which nevertheless were bodies "politic and corporate," for if so "most of the legislation of the state must be in conformity to this provision," and on the further ground that the intention of those who drafted the constitution was only to prevent the multiplication of private corporations.[3] The *Morris* case was collaterally reaffirmed by the court of errors five years later in the case of Warner & Ray *v.* Beers.[4] But in 1842 the court of errors by a vote of thirteen to eleven overturned the doctrine of the Morris case and held that municipal corporations were included within the limitation set upon the legislature by this provision.[5] Here, then, was a very early instance in American constitutional development of a provision which was construed as imposing an express limitation upon the legislature in its power over municipal charters. And although it must be admitted that it was somewhat slight in its scope and that it was in-

[1] In Purdy *v.* The People, 4 Hill (N. Y.) 384 (1842), Senator Paige in the course of his opinion declared (p. 399) "that the entire current of legislative precedent since the constitution went into effect has been against the doctrine I have been combating. I do not recollect an instance, during the period of my connection with either branch of the legislature, when, on a bill creating or altering the charter of a city or village, the question on its final passage was not put as upon a two-thirds bill."

A quite contradictory view of the legislative practice in this regard was given by Chancellor Walworth in Warner & Ray *v.* Beers, 23 Wend. (N. Y.) 103, 126 (1840). He said: "The legislature has also given the same practical construction to this constitutional provision in a great variety of cases, by giving to towns and counties corporate powers for many purposes, by mere majority bills, and by altering and amending the charters of cities and villages and other public corporations in the same manner, for the purpose either of enlarging, restricting or modifying their political powers and privileges."

[2] 13 Wend. (N. Y.) 325. 1835.

[3] The learned chief justice was himself a member of the convention of 1821.

[4] 23 Wend. (N. Y.) 103. 1840.

[5] Purdy *v.* The People, 4 Hill (N. Y.) 384 (1842), affirming The People *v.* Purdy, 2 Hill (N. Y.) 31 (1841).

troduced if not wholly by inadvertence certainly without studied design to afford protection to municipal corporations, it nevertheless did as ultimately construed and applied by the courts set up a degree of protection that was by no means inconsiderable.

This requirement of the New York constitution of 1821 was copied into the Michigan constitution of 1835;[1] but it does not appear that the courts of that state were ever called upon during the fifteen years of the existence of this constitution to determine whether or not the provision in question extended to cover municipal charters.[2]

As an effective check upon the legislature in the matter of issuing charters even to private corporations the provision in New York requiring a two-thirds vote proved largely a failure.[3] In the course of a few years it became manifest also that the real evil to be avoided lay not so much in the number of corporations that might spring into being as in the inequality of powers and privileges that were conferred upon such corporations under their special charters. This evil, it was rightly thought, could be remedied in larger part by depriving the legislature entirely of its power to incorporate companies by special acts and requiring that charters be issued under the authority of general laws.

Prohibitions on Special Legislation for Private Corporations

The Louisiana constitution of 1845 led off with a provision of this kind. It was declared that "corporations shall not be created in this state by special laws, except for political or municipal purposes."[4] An identical clause was incorporated into the Iowa constitution of 1846.[5] In the New York constitution of the same year a similar provision was introduced, but even as to private

[1] Art. XII, sec. 2.

[2] A similar provision in the Texas constitution of 1845 was expressly limited to *private* corporations, Art. VII, sec. 31.

[3] "In the session of 1823, the first session of the legislature under the operation of this check, there were thirty-nine new private companies incorporated, besides numerous other acts, amending or altering charters." Kent's *Commentaries* (14th ed.), II, pp. 415, 416.

[4] Title VI, art. 123.

[5] Art. VIII, sec. 2.

corporations it was emasculated by the insertion of a proviso to the effect that corporations might still be created under special acts "when in the judgment of the legislature the objects of the corporation cannot be attained under general laws." [1]

When the proposition was made upon the floor of the New York convention to except municipal corporations from the operation of the proposed clause relating to special acts of incorporation, Delegate Henry C. Murphy of Brooklyn argued brilliantly and forcefully in favor of a policy of general legislation for municipal as well as for private corporations.[2] There is no question, however, that his interest in the establishment of such a policy was prompted by concern, not for the "rights" of cities as such, but for the rights of persons and of property which were subjected to inequalities as the result of wide variations in the charter provisions of cities. A municipal charter, he declared, "is a piece of empiricism by the wiseacres of the place where it is to be put in force. After being prepared at home, it is sent to the legislature to be passed. When it reaches that body, no one except the representative from that locality cares what it contains. It is thus left in charge of the same interest as that which prepared it. He would appeal to every member of the convention who had been a member of the legislature if that was not the course pursued in reference to all local bills." [3] In consequence of this practice, "every city may be said to be a law unto itself; and the sovereignty of the state, instead of being exercised in its behalf, is absolutely surrendered to it, to be used at its own discretion." [4] In other words, it was the burden of his complaint that in practice special legislation for cities resulted in too great liberty of action and not in too great restriction or interference. In fact "he believed the grossest violations of personal rights were to be found in our municipal corporations;" and however important the prohibition on special acts of incorporation "might be in reference to other corporations, it was still more so in regard to them." [5] As specific instances of the

[1] Art. VIII, sec. 1.

[2] *Debates and Proceedings in the New York State Convention of 1846* (Croswell & Sutton ed.), pp. 738–741.

[3] *Ibid.*, p. 739.

[4] *Ibid.*, p. 740.

[5] *Ibid.*, p. 738.

evils he decried, he cited in some detail the differing provisions of the charters of New York, Brooklyn, Albany, Rochester, and Buffalo on the subject of the opening of streets and the levying of special assessments,[1] which provisions resulted in radical inequalities of the rights of, or the burdens upon, the property owners of one city as compared with those of another.

To this really able argument against what was at that time doubtless the principal evil of the special municipal charter, practically no counter-argument was interposed upon the floor of the convention. But however convinced its members may have been of the existence of this evil, they were evidently not convinced of the desirability of meeting it by the heroic method of inhibiting all special legislation for cities. In the final form in which the clause was incorporated into the constitution, municipal corporations were expressly and wholly excepted from its application.

This provision of the New York constitution of 1846 was copied verbatim into the Wisconsin constitution of 1848.[2] The California[3] constitution of 1849 and the Michigan[4] constitution of 1850 followed the Louisiana and Iowa provisions. It remained for the Ohio[5] and Indiana[6] conventions of 1850–51 to extend the prohibition upon special acts of incorporation to include municipal corporations.

Prohibition Against Special Legislation for Cities in the Ohio Constitution of 1851

In the case of Ohio it can scarcely be said that the debates of the convention disclose a deliberateness of purpose to interdict a legislative abuse from which the cities of the state had greatly suffered. On the contrary, it seems tolerably clear that special legislation for municipal corporations was prohibited along with special legislation for private corporations chiefly because no very

[1] As showing further that Mr. Murphy's interest was primarily in the property owner and not in the city, see the argument which he advanced against the power of a city to condemn private property for opening streets and to pay for such improvement by special assessments. He held that the opening of streets was far more a private than a public purpose. *Ibid.*, pp. 810, 811.

[2] Art. XI, sec. 1. [3] Art. XV, sec. 1. [4] Art. XI, sec. 13.

[5] Art. IV, sec. 31. [6] Art. XIII, secs. 1 and 2.

adequate objections to the establishment of such a policy were advanced, and perhaps also because one of the main reasons for the call of the convention was that it should deal effectively with the general legislative practice of the special act in all of its aspects. The convention did not provide even a committee on cities. When the committee on corporations reported the comprehensive section, which was ultimately adopted, to the effect that "the general assembly shall pass no special act conferring corporate powers," [1] it was asserted by the chairman of the committee, referring to similar provisions of other recent constitutions, that "there was no very definite conclusion come to on the part of the committee, whether this exception [of municipal corporations] should be named or not." They concluded, nevertheless, "to make this report without a section of that nature," believing "that all the corporations of the state could be as well regulated by general as by special acts of incorporation." So far as he personally was concerned, "it was a matter of little moment whether the power to pass [special] laws for the government of cities was given to the legislature or not." [2]

Another member "desired any gentleman to point out the exception — any legitimate object of a [municipal] corporation which could not be as well provided for and secured by a general as well as [sic] a special act — let him point it out and he would go with him for the exception. But if this thing could not be done in favor of municipal corporations then he would go for retaining the section as it stands." [3] Another "considered that there was no necessary difficulty about legislating by general law upon the subject of municipal corporations." [4] And although doubt was expressed by one or two members as to the advisability of requiring general laws for cities, [5] while one asserted that he did not apprehend "that there was any necessity for a general law on this subject," [6] and still

[1] Art. XIII, sec. 1.

[2] Remarks of Mr. Norris, *Report of Debates and Proceedings of the Ohio Convention of 1850–51*, I, p. 340.

[3] Remarks of Mr. Stanton, *ibid.*, I, p. 342.

[4] Remarks of Mr. Hawkins, *ibid.*, I, p. 347.

[5] Remarks of Mr. Hitchcock, *ibid.*, I, p. 346; of Mr. Norris, *ibid.*, I, p. 351.

[6] *Ibid.*, I, p. 346.

another declared that the provision as proposed "goes beyond the most experimenting state in the Union," [1] there was apparently very little solid discussion either of the reasons for, or of the arguments against, the requirement of general legislation for cities. The requirement was simply swept into the constitution upon the tide of numerous other restrictions upon legislative action.

In addition to the prohibition of special acts "conferring corporate powers," no exception being made of municipal corporations, there was inserted in the same article of the Ohio constitution a section which declared that "the general assembly shall provide for the organization of cities, and incorporated villages, *by general laws*, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." [2] It will be observed that, with one significant difference, the phrasing of this section was precisely identical with that of the provision which had been written into the constitutions of New York (1846), Wisconsin (1848), California (1849), and Michigan (1850),[3] and which was manifestly intended to impose a sort of moral obligation upon the legislature to restrain municipal corporations in their financial affairs. The significant difference lay in the words "by general laws;" but manifestly these words only served to make more certain and explicit the policy which the convention was consciously inaugurating of providing for the government of cities under general statutes. No particular importance, therefore, can be attached to the fact that this provision was adopted without a single word of debate.[4]

The first legislature which met under the Ohio constitution of 1851 fulfilled the duty imposed upon it by these provisions without hesitation or equivocation. A general act "to provide for the organization of cities and incorporated villages" was promptly enacted.[5] By this law all municipal charters then in force were

[1] Remarks of Mr. Hitchcock, *Report of Debates and Proceedings of the Ohio Convention of 1850–51*, I, p. 348.

[2] Art. XIII, sec. 6.

[3] *Supra*, 52, 53.

[4] See brief of counsel, 20 Oh. St., at p. 26.

[5] Act of May 3, 1852; Laws of Ohio, 1852, pp. 223–259.

wiped completely out of existence and a uniform government was imposed upon each of the two classes of cities that were created.[1] In the course of a year or two it was found necessary or advisable, as might have been expected, to amend this general law in certain respects;[2] but there was no indication of a disposition on the part of the legislature to vitiate its most important characteristic — namely, its generality. This gave high promise of a continuance of legislative deference toward the letter and spirit of this new and wholly unusual requirement.

Then suddenly, in 1856, the legislature made bold to enact, without any effort whatever at disguise, an unmistakably special law regulating matters pertaining to justices of the peace and constables in the city of Cleveland.[3] In 1857 two other laws of this special character were enacted for Cleveland,[4] and another act conferred a specific power upon the "incorporated village of Bethel."[5] In 1858 seven laws applicable to specific cities or villages were incorporated into the statutes.[6] In 1859 fifteen such acts were passed.[7]

It is difficult to explain what may have been the probable theory of the legislature as to its constitutional competence to enact laws

[1] All cities of over twenty thousand inhabitants constituted the first class; all other cities wese grouped into the second class. As a matter of fact most of the provisions of the law applied uniformly to all cities, the chief difference between the two classes being as to the larger number of administrative offices provided for first-class cities.

[2] Act of March 11, 1853; Laws of Ohio, 1854, pp. 29, 30, 47, 62, 68, 79, 125, 131.

[3] Laws of Ohio, 1856, p. 234.

[4] *Ibid.*, 1857, pp. 252, 262.

[5] *Ibid.*, p. 254.

[6] Laws of Ohio, 1858. These acts were as follows: "to authorize the board of education of the city of Hamilton to borrow money" (p. 175); "to authorize the city council of the city of Lancaster to borrow money to erect a city hall and other buildings" (p. 169); "authorizing the board of education of the incorporated village of Athens to borrow money" (p. 168); "to authorize the council of the incorporated village of Painesville to borrow money" to improve Main street (p. 178); "to authorize the incorporated village of Washington to take testimony and establish the corner or point from which to make future surveys" (p. 190); and to authorize the boards of education of Logan and of New Lexington to borrow money (pp. 181, 192).

[7] Laws of Ohio, 1859, pp. 204, 256, 257, 258, 262, 263, 273, 278, 280, 281, 284, 289, 299.

of this character. If the manifestly attenuated view was held that, having provided as the constitution commanded "for the organization of cities and incorporated villages by general laws," the legislature was not prohibited from thereafter enacting special laws for cities and villages under the general law, it was nevertheless obvious that practically every one of these acts was a "special act conferring corporate powers." As such it was within the plain inhibition of a comprehensive provision of the constitution from the operation of which "corporations for municipal purposes" had by express design of the convention *not* been excluded. But whatever interpretation the legislature may have put upon these requirements of the constitution, the fact of importance remains that the number of special acts of this kind steadily increased from session to session of the Ohio legislature. Nor was this practice ever questioned before the courts until the year 1870 — eighteen years after the constitution became effective and fourteen years after the first of these statutes was enacted.

The question of the competence of the legislature to enact such laws was first presented to the courts in a case involving the validity of a statute extending the boundaries of Cincinnati.[1] Relying upon the above-mentioned provisions of the constitution and referring to the proceedings and debates of the convention of 1851, the court declared that "it was one of the ends and aims of the constitutional convention, and of the people who adopted the framework of a constitution which that convention presented for their adoption or rejection, to cut up by the roots, at once and forever, all capacity of the general assembly to confer by special act any *powers whatsoever upon any corporate body whatsoever.*" It was held that the act in question conferred upon the city general powers of municipal government over territory not formerly embraced within the city and that in consequence it was a "special act conferring corporate powers." It was, therefore, "clearly in contravention of the restrictive provisions of the constitution and of no binding force and validity."

[1] State *ex rel.* The Attorney General *v.* The City of Cincinnati, 20 Oh. St. 18 (1870). The law in question was enacted April 16, 1870.

In rendering this decision the court did not refer to the innumerable acts of similar character which had been passed by the legislature with impunity throughout a long series of years, although the attention of the court was directed to this mass of legislation by counsel in the case.[1] The decision had the effect, however, of putting an abrupt stop to the policy of enacting undisguised special laws for cities. At the same time it only accelerated another practice of the legislature which had been gaining ground in Ohio since 1856.

When the general law of 1852 was enacted, Cincinnati, being the only city of the state with a population of more than twenty thousand inhabitants, found itself the sole representative of "cities of the first class."[2] Within a few years, however, Columbus and Cleveland had pressed forward into this class; and there was almost immediately a noteworthy change of attitude on the part of the legislature. In 1856 two laws were enacted which in effect ignored the general classification established four years earlier, and inaugurated the policy of special classification.[3] From this time on the practice of enacting special laws for cities under the thin guise of specious classifications grew steadily in legislative favor, its popularity being naturally increased by the decision of 1870. In fact the constitutional requirement of general legislation was in course of time so completely circumvented by this subterfuge that the situation became little short of ridiculous.

In 1902 this practice was brought to a sudden termination by the revolutionary decision of the supreme court in the case of the State *ex rel.* Knisely *v.* Jones.[4] A long line of decisions was abruptly overturned, and the rule was laid down that the classification of cities for any purpose whatever was wholly unconstitutional. Under this decision almost the entire legal foundation upon which

[1] *Ibid.*, p. 20.

[2] According to the census of 1850, the population of Cincinnati was 115,436; of Columbus, 17,882; of Cleveland, 17,034; of Dayton, 10,977.

[3] Laws of Ohio, 1856, p. 214 (excepting cities of over 100,000 inhabitants) and p. 57 (applicable only "to such cities of the first class as at the last federal census had a population of less than 80,000 inhabitants").

[4] 66 Oh. St. 453. 1902.

the governments of the cities of the state rested was utterly destroyed. The legislature was hastily summoned to meet the extraordinary situation and a uniform charter applicable to every city of the state without classification was substituted for the statutory chaos which in the latest view of the court had been declared to be wholly invalid.[1]

To sum up the history of the requirement of general legislation for cities as incorporated into the Ohio constitution of 1851, it may be said (1) that the requirement was apparently not designed by its framers with the specific end in view of prohibiting an existing legislative abuse — to wit, "interference" with city affairs; (2) that there appeared, nevertheless, to be no ambiguity as to its meaning and that it should have effectively prevented at least all *special* interference; (3) that it partially failed in this respect because the legislature, in spite of the plainness of the requirement, did in fact pass numerous special laws applicable to cities — a practice which was not contested before the courts until 1870, when it was emphatically interdicted;[2] (4) that to some extent before, but more especially after, 1870 the requirement was in large part avoided by the practice of refined classification under which cities were in plain fact extensively interfered with; and (5) that it was not until fifty years after the constitution went into effect that this practice was declared unconstitutional and the cities of Ohio actually realized the full measure of the kind of protection that such a requirement ought to afford.

Prohibition against Special Legislation for Cities in the Indiana Constitution of 1851

As in the case of the Ohio mid-century convention, one of the avowed objects of calling the Indiana convention of 1850–51 was

[1] Every city of Ohio was governed under this code until the home rule amendment of 1912 went into operation. *Infra*, Ch. XVIII.

[2] It should be noted that most of the special laws that were enacted prior to 1870 were laws which *conferred* powers and usually financial powers. It can scarcely be said, therefore, that they were acts of interference, the probability being that they were in most instances sought by the corporate authorities of specific cities.

that it should devise a means of putting an end to the flood of local and special laws which the legislature annually poured out upon the state. The recorded debates of the convention do not disclose, however, that the evil aimed at was an evil in respect to which the cities of the state had just reason to complain. Indeed almost nothing was said upon the floor of the convention about the case of cities as such.[1] In the end the convention adopted a section prohibiting seventeen specific varieties of local and special laws.[2] As this section was originally adopted it provided that special laws should not be enacted "for the creation of private corporations" nor "in relation to municipal corporations, such as congressional townships, school districts, cities, boroughs, towns, and villages."[3] But in the final revision of the constitution both of these provisions were omitted, and there was written into the article dealing with banking corporations the following comprehensive section: "Corporations, other than banking, shall not be created by special act, but may be formed under general laws."[4] In addition to this prohibition the Indiana constitution of 1851 required that the legislature should enact general laws in all cases "where a general law can be made applicable."[5] Furthermore, the schedule attached to the constitution declared somewhat vaguely — and, it would seem, utterly unnecessarily — that "all acts of incorporation for municipal purposes shall continue in force under this constitution until such time as the general assembly shall, in its discretion, modify or repeal the same."[6]

Upon the basis of these three provisions of the constitution the power of the legislature over the corporate charters of the cities of Indiana had to be determined. With such uncertainty, however, did these provisions give expression to the intent of the convention — if, indeed, definiteness of intent upon this subject may be imputed to that body — that the subsequent curious rulings of the courts are scarcely a matter for remark.

[1] *Debates and Proceedings*, II, pp. 1422, 1765–1773.
[2] Art. IV, sec. 22.
[3] *Debates and Proceedings*, II, p. 1768.
[4] Art. XI, sec. 13.
[5] Art. IV, sec. 23
[6] Clause 4.

In 1852, immediately upon the heels of the effectuation of the constitution, the legislature disclosed its apparent interpretation of the constitutional requirements in question by the enactment of a general law for the incorporation of cities.[1] Under the terms of this statute new towns and cities might become incorporated. Existing towns and cities might voluntarily abandon their special charters and organize under the general law. Within a few years many existing cities of the state accepted this general charter law, which was in the course of the next twenty years frequently amended and revised without impairment to its generality.[2] But the practice of special legislation for cities was not during these years wholly abandoned by the Indiana legislature. In the first place, it seems that from the very beginning the legislature never regarded the prohibition against the "*creation*" of corporations by special act as operating to prevent the amendment by such means of the charters of *existing* corporations, private or public.[3] The first law of this character which was made applicable to a municipal corporation appears to have been enacted in 1853 [4] and the second in 1858.[5] After 1865 the number of such laws increased;[6] but the number never became very large for the obvious reason that most of the cities of the state had of their own accord become organized under the general charter law. The legislature evidently did not hold the view that it was competent to amend this general law in its application to a specific city.

It was not until 1869 that the validity of a special law of this kind was drawn into question before the supreme court. The

[1] Act of June 18, 1852.

[2] *In 1850 the most important cities of Indiana were as follows: New Albany,* with 8181 inhabitants; Indianapolis, with 8091; Madison, with 8012; Lafayette, with 6129; Fort Wayne, with 4282; Terre Haute, with 4051; and Evansville, with 3235.

[3] In 1898 the court declared: "The legislature, commencing with its first session of 1852, after the constitution took effect, again and again, by special acts, enlarged *the powers and privileges of such [preëxisting] corporations.*" *City of* Indianapolis *v.* Navin, 151 Ind. 139.

[4] Laws of Ind., 1853, p. 119.

[5] Laws of Ind., 1858, p. 116.

[6] Laws of Ind., 1865, pp. 81, 82, 113; Sp. Sess., 1865, pp. 76, 83, 85, 97, 102; 1867, pp. 121, 123; 1873, pp. 115, 149; 1875, pp. 62, 70; 1879, p. 98; 1881, pp. 22–28; etc.

authority of the legislature to enact such a law was upheld upon the ground that under the schedule the legislature was empowered to "modify or repeal" any municipal charter that existed in 1851.[1] It may be observed that the provision of the schedule was wholly negative as to whether such modification or repeal might be made by special law or only by general law; but there was apparently no doubt in the mind of the court that it might be effected by a special enactment. This doctrine was reaffirmed in a number of cases thereafter,[2] and thus for certain cities of the state whatever barrier it may have been thought that the constitution interposed between the city and the special act was completely swept away.

Another class of special acts relating to cities which the legislature evidently considered itself competent to enact consisted of curative statutes.[3] Special laws curing defects or irregularities in such matters as the issue of bonds or the annexation of territory were enacted both for cities under special charters and for those under the general law. What may have been the constitutional theory of the legislature as to its power to pass such laws does not appear. Nor does it appear that the courts were ever asked to pass upon their validity.

In 1871 the policy of classification was first introduced into the general laws of Indiana relating to cities.[4] No general classes were established, but the practice of creating a special class for the application of this or that so-called general law became thereafter increasingly common.[5] The supreme court of the state attributed

[1] Longworth's Executors *v.* Common Council of the City of Evansville, 32 Ind. 322. 1869.

[2] City of Evansville *v.* Bayard, 39 Ind. 450 (1872); Eichels *v.* Evansville Street Ry. Co., 78 Ind. 261 (1881); Chamberlain *v.* City of Evansville, 77 Ind. 542 (1881); Warren *v.* City of Evansville, 106 Ind. 104 (1885); Corporation of Bluffton *v.* Studabaker, 106 Ind. 129 (1885); City of Evansville *v.* Summers, 108 Ind. 189 (1886); Wiley *v.* Corporation of Bluffton, 111 Ind. 152 (1887).

[3] Laws of Ind. 1871, p. 8; 1875, pp. 92, 151–161; 1877, pp. 77, 78, 79; 1879, pp. 16, 17, 18, 99, 100, 101; etc.

[4] Laws of Ind., 1871, p. 20.

[5] Laws of Ind., 1873, p. 64; 1879, pp. 85, 87, 88; 1881, pp. 12, 14; 1883, pp. 89, 103; 1885, p. 13; 1887, p. 15; 1889, pp. 32, 222, 247, 432; etc.

the inauguration of this practice to the early case of Thomas *v.* The Board,[1] where the rule was announced that whether a general law could, within the meaning of the constitution, "be made applicable" to any particular subject of legislation was a judicial and not a legislative question.[2] In this, however, the court was manifestly in error, for the Thomas case had been completely overruled by the case of Gentile *v.* The State,[3] which was decided two years before the legislature first adopted the policy of classifying cities. The greater probability is that this plan was borrowed from Ohio, where its "effectiveness" had for some years received practical proving.

At the time, however, it was certainly the view of the Indiana court that the Gentile case had removed the only obstacle of the constitution that had stood in the way of special laws applicable to cities. Indeed as late as 1895 the court took occasion to rebuke the legislature for its stupidity and to upbraid it for its lack of candor in adopting the silly method of subterfuge which found expression in the enactment of laws applicable to thinly disguised "classes" of cities.[4] It was baldly declared that an act of 1891 (which was not, however, under review) which applied to "all cities having a population of more than 100,000 inhabitants" would have been just as valid under the constitution if it had been made to apply specifically to Indianapolis by name "because it is a subject on which the applicability of a general law [since the overturning of the rule of the Thomas case] has been left by the constitution to the exclusive judgment of the legislature."

Three years later, however, the opinion expressed in this dictum was somewhat modified by recurrence to the clause prohibiting the creation of corporations by special act. It was held, nevertheless, that an act imposing a three-cent fare upon street railways in cities of over 100,000 inhabitants was not unconstitutional even though

[1] 5 Ind. 4. 1854.

[2] As to the court's view of the effect of this decision upon the subsequent legislative practice of classification, see Mode *v.* Beasley, 143 Ind. 306. 1895.

[3] 29 Ind. 409. 1868.

[4] Mode *v.* Beasley, 143 Ind. 306. 1895.

special in character,[1] the decision being based upon the ground that the act in question did not "create" a corporation nor "confer any new corporate power" but merely "regulated" an existing corporation — here the railway company, although the city's power was also affected by the act. It is highly significant that in this case both the city and the street railway company were corporations organized under *general* laws passed *subsequent* to the adoption of the constitution.[2]

In the case of Longview *v.* City of Crawfordsville,[3] decided in 1904, the court finally brought the provisions of the constitution of 1851 upon this subject to a state of equilibrium. In that case a law providing for the extension of the boundaries of cities having a population "of between six and seven thousand" inhabitants was declared void on the ground that it was a special act inhibited by the constitution. In effect the dictum of 1895 was completely repudiated. The court refused to sustain the validity of this special city law and to defer to the judgment of the legislature that a general law could not be made applicable. It pointed to the fact that the constitution also prohibited the "creation" of any corporation — municipal or otherwise — by special act. It was still declared that the legislature might by special enactment "regulate" the exercise of a power already conferred upon a corporation, either public or private, which was organized under general laws; but it was the view of the court that an act providing for the annexation of a town to a city amounted to the "creation" of a new corporation within the meaning of the constitution because it conferred a new power or at least extended existing power over new territory. The court had repeatedly declared that "the constitution cannot be evaded by the creation of a corporation by general act and the subsequent grant to it of extraordinary powers

[1] City of Indianapolis *v.* Navin, 151 Ind. 139 (1898); reaffirmed in *In re* Bank of Commerce, 153 Ind. 460 (1899); Smith *v.* Indianapolis Street R. Co., 158 Ind. 425 (1901).

[2] On petition for a rehearing of this case, the Indiana court mildly reproved the United States Circuit Court which, in the case of Central Trust Co. of New York *v.* Citizens' St. R. Co., 80 Fed. Rep. 218 (1897), reached a different conclusion upon the same point of law.

[3] 164 Ind. 117. 1904.

by special act;" [1] but this was the first case in which this somewhat vague and uncertain line of distinction was applied to defeat a legislative act.[2]

It was thus that the intent of the Indiana convention of 1851 in regard to special legislation for cities was read into the provisions which they drafted more than fifty years after the constitution went into operation. Meantime special legislation had been practised by the law-making body upon an extensive scale (1) by the direct amendment of early and unsuperseded special municipal charters, (2) by the passage of curative statutes, and (3) by the enactment of laws that were general in no respect save as to their form. Even at the present time it would seem that the Indiana legislature is entirely competent to enact laws applicable to specific cities provided such laws are, in the judicial view, merely "regulatory" in character — whatever that may mean.

The decision of the court in the Longview case doubtless convinced the legislature that many, if not most, of the colorable "general" city laws which had been enacted through a period of many years would be declared void if contested before the courts. In 1905, therefore, the legislature enacted a general mandatory charter for each of five general classes of cities.[3] Since that date the special act has largely disappeared in Indiana.[4]

In the light of these facts it can scarcely be said that the Indiana convention of 1851 consciously attempted to establish within the constitution a guarantee to cities of freedom from legislative interference in their affairs. The probability is that the idea of protection for cities as such never occurred to any member of that convention. And in any case, whatever may have been the purpose of the convention, it is clear that the courts not only found great difficulty in discovering their intent but also, even in ultimate in-

[1] Smith *v.* Indianapolis Street R. Co., 158 Ind. 425 (1901). See also City of Indianapolis *v.* Navin, 151 Ind. 139 (1898), and *In re* Bank of Commerce, 153 Ind. 460 (1899).

[2] The Bank of Commerce case, *supra*, differed only in that it held void a law which extended in perpetuity the special charters of certain private corporations created before 1851.

[3] Acts of 1905, ch. 129.

[4] Indianapolis is the only city of the first class.

terpretation, did not construe the provisions in such wise as to prohibit special legislation for cities in its entirety.

Prohibition against Special Legislation for Cities in the Iowa Constitution of 1857.

The Iowa constitution of 1857 declared that the legislature should pass no special law "for the incorporation of cities and towns," this being one of six enumerated subjects of special legislation which were proscribed.[1] General laws were also required "in all other cases where a general law can be made applicable."[2] While the phraseology employed was slightly different from both the Ohio and the Indiana provisions, there appears to be little doubt that that idea was borrowed from the provisions of one or both of these other states, and that it was incorporated with no thought whatever of affording a definite protection to cities against legislative interference in their affairs. According to the federal census of 1850, the largest city of Iowa in that year was Burlington, with the metropolitan population of 4082 souls. The provision relating to cities was adopted without any debate upon the floor of the convention, so far at least as the printed debates and proceedings disclose.

It was early decided by the supreme court of Iowa that the constitution of 1857 prohibited not only the first incorporation of any town or city by special act but also the amendment of any existing charter by such an act.[3] This opinion was founded upon a very liberal interpretation of the meaning of the word "incorporation" as well as upon the view (supported by the doctrine of the Indiana case of Thomas *v.* The Board,[4] which was later overruled in that state) that the courts alone were vested with power to determine when a general law could be made applicable to a specific subject of legislation. However open to question the soundness of these views

[1] Art. III, sec. 30. [2] *Ibid.*

[3] *Ex parte* Pritz, 9 Ia. 30 (1859); Davis & Bro. *v.* Woolnough, 9 Ia. 104 (1859); Hetherington *v.* Bissell, 10 Ia. 145 (1859).

[4] *Supra*, 78.

may be, the legislature was obviously directed at once into a straight and narrow path. The principal questions which were thereafter presented to the courts of Iowa were questions in respect to the constitutionality of the schemes of classification employed by the legislature.

In respect to the evolution of the home rule idea in the United States there is one point of considerable interest connected with the first policy in the enactment of laws for cities which was inaugurated by the legislature of Iowa under the constitution of 1857 and which was commented upon in an early decision of the supreme court of that state. In 1858 the legislature, following the Ohio precedent of 1852, enacted a comprehensive general law for the government of towns and of cities of two classes.[1] This law, however, unlike the Ohio law which was mandatory upon all existing cities, applied with one minor but highly significant exception only to municipalities that might *thereafter* become incorporated. Neither was provision made, as in the Indiana law of 1852, whereby existing cities might surrender their special charters and become organized under the law. By this law, however, unlimited power was conferred upon such cities *to mend their charters without legislative intervention.*[2] It was evidently the view of the legislature that the constitutional requirement of general legislation had, to a very considerable extent, ushered in an era of

[1] Laws of Iowa, 1858, ch. 157.

[2] Sec. 111 read as follows: "The charter or act of incorporation of any city or town in this state may be amended in manner following, to wit: When one-fourth the qualified voters of said city or town as shown by the vote at the charter election immediately previous, petition the legislative body of said city or town for the amendment of the charter or act of incorporation, the said legislative body shall immediately propose sections amendatory of said charter or act of incorporation as petitioned for, and submit them to the qualified voters of said city or town at the first ensuing charter election. At least ten days before said election, the mayor or chief officer of said city or town shall issue his proclamation setting forth the nature and character of such amendment, and the said proclamation shall be immediately published in some newspaper published in said town, and be posted up in some conspicuous place in the office of said mayor or chief officer. . . . On the day specified, the said amendment shall be submitted to the qualified voters of the corporation for adoption or rejection, and the form of the ballot shall be, 'for the amendment,' or 'against the amendment.'"

municipal home rule. Moreover, this view was apparently shared by the courts; for in the case of *Ex parte* Pritz [1] it was declared:

> We think the intention was to require the legislature to pass general laws upon this subject, under which the towns and cities of the State could frame their articles of incorporation and amend them at any time, in any manner not inconsistent with the constitution, or the general laws, and it was designed to leave these matters with the people composing the corporation, instead of consuming the time of the legislature in the consideration of local and special laws.

In another early case the court remarked: [2]

> If the design of the constitution was to take from the general assembly the power to engage in special legislation, and to leave to cities and towns the control of their own municipal affairs, subject to the constitution and the general laws of the state, then it would be violated in its letter and its spirit as much by repealing as by amending such special acts. It is as practicable for the legislature to pass a general law under which all cities and towns may proceed to repeal their previous charters and substitute others of their own formation and creation, as to give the general power to amend, change, or modify such charters.

It should be observed that this Iowa general law of 1858 created a somewhat curious situation. It provided in great elaboration and detail for the government of towns and of cities which might in the *future* become incorporated. Presumably the legislature did not intend that such a town or city, having once become incorporated, might at pleasure amend the general law as applicable to itself. By this law the charter of such a city was fixed. The home rule right, therefore, was extended only to cities already incorporated under special charters antedating the constitution. The curiousness of this situation was only accentuated when the legislature four years later followed the Indiana precedent of permitting cities under special charters to abandon such charters by their own action and become organized under the general law.[3]

[1] 9 Ia. 30. 1859.

[2] Davis & Bro. *v.* Woolnough, 9 Ia. 104 (1859). See also Hetherington *v.* Bissell, 10 Ia. 145 (1859), where the court asserted that "the inhabitants of the city are as competent to amend the charter in this respect [*i.e.* as to the establishment of a police court] as in any other."

[3] Laws of Iowa (Ex. Sess.), 1862, p. 23.

A city which took this action apparently lost the right to amend its charter, which was thereafter the general law itself. In the course of time most of the cities of Iowa that existed in 1857 surrendered their special charters and accepted the general law. A few cities of the state, however, still retain their ancient charters.[1] The provision of the law conferring upon such cities the power to amend their own charters has never been repealed.[2]

It is probable that the power to amend their own charters was never extensively exercised by the cities of Iowa because of the cumbersomeness of the amending process provided. An amendment could be initiated only by a petition of one-fourth of the municipal voters — a requirement that rendered the entire scheme well-nigh unworkable. The power did not lie completely dormant, however, and the competence of the legislature to confer such power was specifically and unhesitatingly sustained by the supreme court of the state.[3] A discussion of the soundness of this doctrine of law would be inappropriate at this point. It is sufficient merely to remark that the weight of authority is overwhelmingly opposed to such doctrine, the theory being based upon the rule that the legislature may not delegate legislative powers.

It is of interest and importance to note, however, that both the legislature and the courts of Iowa originally construed the prohibition against special legislation for cities as a constitutional grant to the legislature of power to delegate the charter-making authority. On the other hand, in enacting general laws for cities (a few of these being mandatory upon the special charter cities, but most of them being applicable only to the cities which accepted the general law in its entirety) the Iowa legislature *in practice* soon abandoned the earlier view that was taken, although the provision in question was never repealed. The cities of Iowa have in fact had their governments determined by the legislature in quite as much fullness as the cities of other states and in more fullness than

[1] In 1914, Dubuque, Davenport, Muscatine, Glenwood, and Wapello were still operating under early special charters. *Iowa Official Register*, 1913–14, p. 707.

[2] Iowa Code of 1897, sec. 1047. The section is incorporated under a chapter containing provisions that relate only to cities under special charters.

[3] Von Phul v. Hammer, 29 Ia. 222. 1870.

the cities of a few states. The home rule right as embodied in a statutory enactment in that state has, therefore, been little more than a legal theory.

Prohibition against Special Legislation in the Kansas Constitution of 1859

In the year 1859 Kansas was ushered into the Union with a constitution that contained provisions [1] in regard to legislation for cities that were practically identical with those of the Ohio constitution of 1851. The largest city of Kansas in 1860 was Leavenworth with a population of 7429, while Atchison, with 2616 inhabitants, was the second city of the state. It is not reasonable to suppose that these cities had endured great "tyranny" under the special acts of the territorial legislature. The probability is that the provisions in question were copied out of the Ohio constitution without much, if any, serious consideration.

This probability is strengthened by the fact that several successive legislatures which assembled under the constitution paid no attention whatever to these provisions. They proceeded to enact special laws for cities without the slightest apparent hesitation.[2] In 1866 it occurred to certain property owners who objected to a street improvement in the city of Atchison to contest the validity of an act passed in January of that year which amended the city charter "in respect to the mode of collecting assessments for improving streets so as to change the rate and proportionate bearing upon the property." The law in question was promptly declared to be void.[3] While the court, in its effort to show the intent of those who drafted the constitution, could not point to much beyond the unequivocal phraseology of the provisions in question, it is interesting to note that in the judicial view this limitation upon the power of the legislature over cities had been introduced in behalf of the rights of private property under municipal charters

[1] Art. XII, secs. 1, 5.

[2] Laws of Kansas, 1861, pp. 25, 168, 174, 175; 1862, pp. 405, 406, 407, 408; 1863, pp. 39, 40; 1864, pp. 140, 141, 142; 1865, pp. 92, 109.

[3] Atchison v. Bartholow, 4 Kans. 124. 1866.

and not at all with the object of protecting cities themselves against legislative interference — a view which, it will be recalled, was identical with that urged before the New York convention of 1846 in support of the proposal of requiring general legislation for cities.[1]

Referring to the consequences of the decision in this case, the opinion recited:

> The court is aware of many of the disastrous consequences which must necessarily follow this decision; and if in conscience it could have done so, would gladly have avoided them. It had but a single duty to perform. It has endeavored thoroughly to understand the subject, and has acted in accordance with its convictions. If the conclusion at which it has arrived be erroneous, the regrets of the sufferers will not be keener than those of the members of this tribunal. But if the decision is correct, it is better that it be now declared, than that the blow should fall with greater effect hereafter.

Acting upon this decision the Kansas legislature created two classes of cities and enacted mandatory charters for each class.[2] A year later a third class was established and an optional charter law was made applicable to the class.[3] But in spite of the emphatic decision of the court in 1866, the practice of enacting special laws for municipal corporations in Kansas appears by no means to have been brought to a sudden and effectual termination. Indeed this practice seems to have continued for many years thereafter,[4] although the validity of only a few of these laws was contested before the courts, with the invariable result of their being declared void wherever contest was raised.[5] The enactment of such laws

[1] *Supra*, 67.

[2] Kansas General Statutes, 1868, chs. 18 and 19. Cities of more than 15,000 inhabitants were formed into the first class, and cities of from 2,000 to 15,000 inhabitants were constituted cities of the second class.

[3] This class included all cities of from 800 to 2000 inhabitants. Laws of Kansas, 1869, pp. 80–101.

[4] Laws of Kansas, 1868, pp. 69, 93, 97, 99, 101; 1869, pp. 149, 231, 258, 259, 260, 261; 1870, pp. 54, 73, 114, 151, 221, 254, 255, 256, 261; 1871, pp. 142, 195; 1872, pp. 13, 14, 25, 33, 135, 146, 292, 395, 415; 1873, pp. 18, 24, 69, 109, 136, 181, 197; 1874, pp. 3, 4, 153, 158, 214, 215, 216; 1877, pp. 5, 8, 10, 98, 134, 256, 260, 266; etc.

[5] City of Wyandotte *v.* Wood, 5 Kans. 603 (1870); National Bank of Cleveland *v.* City of Iola, 9 Kans. 689 (1873), decided by the U. S. Circuit Court.

seems to have disappeared from the practice of the Kansas legislature only by a very gradual process.

Provisions of Nevada (1864), Nebraska (1867), Arkansas (1868), Tennessee (1870), and Virginia (1870) Constitutions

Nevada came into the Union under well-known exceptional circumstances with a constitution which provided first, that "the legislature shall pass no special act in any matter relating to corporate powers except for municipal purposes;" [1] and second, that "the legislature shall provide for the organization of cities and towns by general laws and restrict their financial powers." [2] So far as the record of debates and proceedings discloses these provisions were adopted without debate by the convention that framed the constitution. They were evidently taken over from the constitutions of other states, and so little care was observed in the borrowing process that they were, it will be observed, not made to harmonize at all. The supreme court of the state early held that these provisions did not operate to prohibit special legislation for cities.[3] In effect, therefore, the provision in respect to general laws was declared to be merely directory.

The Nebraska constitution of 1867 provided that the legislature should "pass no special act conferring corporate powers" and should "provide for the organization of cities and incorporated villages by general laws and restrict their financial powers" [4]—provisions which were obviously copied verbatim from the Ohio constitution of 1851,[5] as was frankly admitted by the Nebraska supreme court.[6] According to the national census of 1860 Nebraska had not a single city of more than two thousand inhabitants;[7] and the practice of the legislature under this "exotic"

[1] Constitution of 1864, Art. VIII, sec. 1.

[2] Art. VIII, sec. 8.

[3] City of Virginia *v.* The Chollar-Potosi G. & S. M. Co., 2 Nev. 609. 1866.

[4] Art. VIII, secs. 1, 4. Practically identical provisions were incorporated into the constitution of 1875, Art. III, sec. 15.

[5] *Supra*, 70.

[6] State *ex rel.* Jones *v.* Graham, 16 Neb. 74. 1884.

[7] Nebraska City had a population of 1922; Omaha, of 1883.

requirement of the constitution is, therefore, of scarcely sufficient import to necessitate a detailed survey. Suffice it to say that when in 1884 the supreme court of the state was called upon to pronounce upon the validity of a law applicable to "cities of the second class having more than ten thousand inhabitants" — Lincoln being the only such city — it was declared broadly that the expedient of classifying cities for purposes of legislation had been borrowed from Ohio and that classification might "in the discretion of the legislature be extended to any number of classes or sub-classes." [1] Faithful to this liberality of view the legislature has ever since kept Omaha, South Omaha, and Lincoln — the only sizable cities of the state — in "classes" that enjoy the distinction at least of the largest possible exclusiveness.

The reconstruction convention of Arkansas, which met in 1868, wrote into the constitution of that state provisions requiring the enactment of general laws conferring "corporate powers" and "for the organization of cities." [2] These provisions, once again, were precisely identical with those of the Ohio constitution.[3] The convention provided a committee on cities;[4] but the provisions in question were proposed by the committee on the legislative department [5] and were adopted, as was most of the constitution except the parts that related directly or indirectly to the status of negroes, with practically no debate. They were evidently taken over bodily from the Ohio constitution without much, if any, well-defined purpose.

The first legislature which met under the constitution hastily adopted an ill-considered general law "for the incorporation of cities and towns," which law could be accepted by any city of its own volition.[6] A year later the legislature met the requirement of the constitution with boldness. Another act [7] "to regulate the incorporation and organization of cities and towns" was passed;

[1] State *ex rel.* Jones *v.* Graham, 16 Neb. 74. 1884.
[2] Art. V, secs. 48, 49. Repeated in the constitution of 1874, Art. XII, secs. 2, 3.
[3] *Supra*, 70.
[4] *Debates and Proceedings of the Arkansas Convention of 1868*, pp. 60, 208, 471.
[5] *Ibid.*, p. 208.
[6] Act of July 23, 1868.
[7] Act of April 9, 1869.

and this statute not only repealed the general law of the previous year but also wiped out all special charters then in force. Uniform organization was thus introduced at one stroke into the government of all the cities of the two general classes established by the law. It may be said further that the Arkansas legislature has never materially departed from the policy thus early established.[1] Under such legislative practice it is not surprising that the courts have had little occasion to declare the meaning of the constitutional provisions in question.[2]

The Tennessee constitution of 1870[3] contained the following provision:

> No corporation shall be created, or its powers increased or diminished, by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested.

It appears that at the time of the adoption of this provision, the Tennessee convention voted down a proposal to limit its operation to private corporations.[4] The legislature, however, did not act upon the view that this clause imposed an absolute prohibition on special legislation for cities.[5] In 1879 the supreme court of the state conceded somewhat reluctantly that public corporations were included within the restriction noted;[6] but four years later this ruling was overturned, it being held that by reason of the context the word "corporation" should be "restricted to that class of cor-

[1] The optional commission government law of 1913 created a new class consisting of cities having a population of from 18,000 to 40,000 inhabitants.

[2] See State v. Jennings, 27 Ark. 419 (1872) and Babcock v. City of Helena, 34 Ark. 499 (1879). In the latter case, it was said: "This clause clearly indicates an intention of the legislative body to produce a strict uniformity in the organization and government of all the cities and towns in the state, each after its class, but there is no warrant for going further, and presuming that the legislature [by the general law of 1869] meant to take away any special powers, theretofore granted them by special acts, and not affecting their organization or government."

[3] Art. XI, sec. 8.

[4] Luehrman v. Taxing District, 2 Lea (Tenn.) 425, 431. 1879.

[5] State v. Wilson, 12 Lea (Tenn.) 246, 259. 1883.

[6] Luehrman v. Taxing District, *supra*.

porations which seems to have been alone contemplated by the provisions."[1] While there has been in Tennessee a considerable amount of legislation made applicable to transparently disguised "classes" of cities, there has been no palpable reason whatever, under this interpretation of the constitution by the courts, for the employment of this all too common artifice. Moreover, special legislation without any disguise at all has been frequently resorted to. In fact no policy of any kind has been consistently pursued by the legislature of this state. Certainly the cities of Tennessee have enjoyed the protection arising out of the guarantee of general legislation neither in legal theory nor in fact.

The Virginia constitution of 1870, which was drafted in 1867–68, embodied provisions of a very elaborate character in respect to the government of the cities.[2] Indeed certain important elements of all city charters were written in detail into the fundamental law. It was provided in addition that "general laws shall be passed for the organization and government of cities, and no special act shall be passed except in cases where, in the judgment of the general assembly, the object of such act cannot be attained by general laws."[3] This provision was doubtless phrased after a study of the provisions upon this subject that were found in certain other constitutions that we have noted. The debates of the Virginia convention of 1867 were never completely published,[4] and it is in consequence impossible to discover what, if any, precise purpose may have been in the minds of those who framed the provision in question. It is manifest, however, that it was not borrowed without some careful consideration. Its meaning was unmistakable. The legislature was directed to inaugurate a policy of general legislation for cities, but at the same time it was permitted to exercise an untrammeled discretion in deciding in every instance whether a special law was or was not necessary. In other words, only a moral obligation was imposed upon the law-making body to provide for the

[1] State *v.* Wilson, *supra*, 89, n. 5. Reaffirmed in Ballentine *v.* Mayor and Aldermen of Pulaski, 15 Lea (Tenn.) 633. 1885.

[2] Art. VI, secs. 14–21.

[3] Art. VI, sec. 20.

[4] Only the first volume was published.

government of cities by general laws. The provision was merely directory.

It cannot be said that the legislature of Virginia ever gave any heed to the constitutional direction in this matter. The first legislature that assembled under the constitution enacted several general city laws of minor significance;[1] but a large number of laws were passed in application to specific cities and towns.[2] Precisely the same policy was followed at the next session of the legislature.[3] In fact the legislature made no change whatever in its previous policy of dealing with municipal corporations through the medium of special laws. Nor does it appear that its practice in this regard was ever commented upon by the courts.[4]

From the above history of constitutional provisions requiring general legislation for cities it seems reasonable to conclude that in not one of the states already mentioned were such provisions written into the constitution with the specific end in view of eliminating a legislative abuse under which cities as such had suffered. In their inception such provisions were not put forward as a salutary guarantee to cities of protection against legislative "interference" with and "domination" over their affairs. They were not looked upon as being in the nature of a constitutional axe laid to the root of a legislative evil — that evil being the tyranny of the legislature over the "rights" of cities. In most, if not all, of these states there had in fact been no such "crying" evil. Whatever "protection" cities came to enjoy under these requirements was an incident

[1] Acts of Va., 1869–70, pp. 118, 149, 447.

[2] *Ibid.*, pp. 120–146, 148, 149, 154–161, 162, 324–328, 344, 353, 365, 457–462, 497–500, 519–526, 527, 569.

[3] Acts of Va., 1870–71, pp. 4, 37, 45, 59, 124–133, 134, 146, 147, 160, 175, 187–204, 229–241, 247, 248, 252, 255, 258, 261, 265, 271, 305, 326, 329, 370, 387, 388, 389.

[4] In Ould & Carrington *v.* City of Richmond, 23 Gratt. (Va.) 464 (1873), and in Humphreys *v.* City of Norfolk, 25 Gratt. (Va.) 97 (1874), the court had under review provisions of completely new charters which had since the adoption of the constitution been enacted for the two most important cities of the state; but no reference was made to the fact that the legislature had, in passing these charter laws, ignored the directory provision of the constitution on the subject of general legislation for cities.

rather than the direct fruition of definite design. Moreover, the evidence seems convincing that in a number of these states such provisions were incorporated into constitutions by a process of somewhat blind adaptation, with little if any conscious purpose.

Prohibition against Special Legislation in the Illinois Constitution of 1870

It was in the Illinois convention of 1869–70 that the proposal of requiring general legislation for cities appears to have been offered for the first time in specific behalf of the "rights" of cities.[1] One member indeed declared upon the floor of that convention that he saw no necessity for such a provision because he had "heard no complaint at all of abuses in either the granting or the amendment of the charters of municipal corporations";[2] but this view was contradicted by other delegates and especially by delegates from the city of Chicago. Specific instances of such abuses were cited, and although these instances were neither numerous nor particularly outrageous as compared with what many cities of the country have been compelled at times to endure from the hands of legislatures, there is nevertheless no question whatever that the makers of the Illinois constitution of 1870, in adopting the provisions which they devised upon this subject, had definitely in view the object of extending a degree of protection to the cities of the state against legislative encroachment.

On the other hand, it is not easy to determine just what degree of protection these constitution-makers conceived themselves to be creating.[3] There is considerable evidence to show that it was the view of some members at least — and perhaps of the entire convention — that the adoption of a prohibition on special legislation for cities would result in the enactment of a general law, similar

[1] *Debates and Proceedings of the Constitutional Convention of Illinois, 1869–70*, pp. 591–608. [2] *Ibid.*, p. 591.

[3] It is difficult, for example, to follow what many of the members were driving at in the proposals that were made for coupling this requirement of general legislation with a requirement for a referendum to the voters of each city on charter amendments. An earnest fight was made for such a provision.

to the Iowa statute noted above,[1] under which cities would be vested with the power to make and amend their own charters.

As the constitution came from the convention it held the provision that "no corporation shall be created by special laws, or its charter extended, changed, or amended, . . . but the general assembly shall provide, by general laws, for the organization of all corporations hereafter created." [2] And as to *municipal* corporations, it was further and more specifically provided that the general assembly should not pass any local or special law, among other enumerated subjects, for "incorporating cities, towns, or villages, or changing or amending the charter of any town, city or village." [3] This was the least uncertain provision upon this subject which had up to the time of its writing found its way into any constitution. In fact there could be little if any doubt as to its meaning, as also there was little if any doubt as to the intention of those who drafted it. In comparatively few cases, therefore, have the courts of Illinois been called upon to explain and apply the provision in question.

It may be noted in passing that the Illinois legislature did not meet this restriction upon its power over cities by conferring upon such corporations the authority to amend their own charters. A general municipal charter law was enacted in 1872. Under this law no general classes of cities were created.[4] Communities seeking initial incorporation were compelled to organize under its provisions. Existing corporations were allowed to do so at their own option. With the exception of a number of insignificant municipalities all the cities of the state availed themselves of this privilege.[5] Chicago [6] and Aurora have for many years found the pri-

[1] *Supra*, 82. This provision was read with high approval before the convention. *Ibid.*, p. 592.

[2] Art. XI, sec. 1.

[3] Art. IV, sec. 22.

[4] Some classification has been introduced into this general code.

[5] Some of these cities have, within recent years, adopted the amendment to the general city law which, enacted in 1910, provided for the commission form of government. But many of the provisions of the earlier general law are still in force in such cities.

[6] Chicago adopted the general law in 1875.

mary source of their governments in precisely the same general statutes. In one respect, however, the Illinois legislature did confer unusual discretionary powers upon the cities that elected to organize under the general law — a fact which doubtless accounts for the early and widespread local acceptance of the law. While this law is in some aspects elaborate and detailed in charter, it does not establish a complete and rigid governmental organization. A council and a few specified administrative officers are obligatory. Certain other designated officers may be provided by ordinance at the "discretion" of the council;[1] but additional and unenumerated offices may be established and their powers and duties prescribed in like manner.[2] Under the authority thus bestowed by the legislature a considerable part of the departmental organization of the government of Chicago rests upon ordinances rather than upon the detailed requirements of the law.

The competence of the legislature to confer such liberal powers upon cities has apparently never been directly questioned in the courts of Illinois, although in at least one case views were expressed which seem to be wholly out of harmony with the legislative practice in this regard.[3] That practice, however, is a fact of more than forty years' standing; and it is scarcely to be presumed that the courts, if called upon, would at this late day venture to undermine its foundation.

Further Development of Prohibitions against Special Legislation for Cities

It seems unnecessary to pursue in further detail the development of constitutional provisions that imposed upon state legislatures a requirement of general legislation for cities. Enough has been said to indicate that Illinois, in 1870, appears to have been the first state in which such a provision was adopted with the deliberate purpose of affording a definite measure of security to the city as

[1] Laws of Illinois Relating to Cities, Villages, and Incorporated Towns, compiled 1902, sec. 81.

[2] *Ibid.*, sec. 82.

[3] People *ex rel.* Miller *v.* Cooper, 83 Ill. 585. 1876.

such against legislative intermeddling with its affairs. Suffice it to add that since 1870 this method of affording "protection" to cities has been introduced into many other constitutions. Provisions which either unmistakably prohibit or have been construed by the courts to prohibit all special acts relating to cities are now found in the constitutions of twenty-nine states.[1] Three more constitutions prohibit special legislation for the smaller cities of the state;[2] and three other constitutions, while not prohibiting the special act, impose a check upon the legislature in its enactment.[3]

[1] Ohio, 1851, *supra*, 70, *infra*, Ch. XVII; Indiana, 1851 (which does not completely prohibit, but perhaps ought to be included in this list), *supra*, 75; Iowa, 1857, *supra*, 81; Kansas, 1859, *supra*, 85; Nebraska, 1867, *supra*, 87, *infra*, Ch. XVII; Arkansas, 1868, *supra*, 88; Illinois, 1870, *supra*, 93; Pennsylvania, 1873, Art. III, sec. 7; New Jersey, amendment of 1875, Art. IV, sec. 11; Missouri, 1875, Art. IV, sec. 53, Art. IX, sec. 7, *infra*, Chs. VI, VII; Colorado, 1876, Art. XIV, secs. 13, 14, *infra*, Ch. XIV; California, 1879, Art. XI, sec. 6, *infra*, Chs. VII–XI; Washington, 1889, Art. II, sec. 28, Art. XI, sec. 10, *infra*, Ch. XII; North Dakota, 1889, Art. II, sec. 69, Art. VI, sec. 130; Wyoming, 1889, Art. III, sec. 27, Art. XIII, sec. 1; South Dakota, 1889, Art. III, sec. 23, Art. X, sec. 1; Idaho, 1889 (which did not completely prohibit — see Butler *v.* Lewiston, 11 Id. 393 — but perhaps ought to be included in this list), Art. III, sec. 19, Art. XII, sec. 1; Kentucky, 1890, secs. 59, 156, 160, 166; Mississippi, 1890, Art. IV, sec. 88; Wisconsin, amendment of 1892, Art. IV, sec. 31; Minnesota, amendment of 1892, Art. IV, sec. 33, *infra*, Ch. XIII; South Carolina, Art. III, sec. 34, Art. VIII, secs. 1, 2; Utah, 1895, Art. VI, sec. 26, Art. XI, sec. 5; Oregon, amendment of 1906, Art. XI, sec. 2, *infra*, Ch. XVI; Alabama, 1901, Art. IV, sec. 104; Oklahoma, 1907, Art. V, sec. 46, Art. XVIII, secs. 1, 2, *infra*, Ch. XV; Michigan, 1908, Art. VIII, sec. 20, *infra*, Ch. XVI; New Mexico, 1912, Art. IV, sec. 24; Arizona, 1912, Art. IV, div. 2, sec. 19, Art. XIII, sec. 1, *infra*, Ch. XV.

[2] West Virginia, 1872, Art. VI, sec. 39 (cities of less than 2000); Texas, 1876, Art. XI, sec. 5 (cities of less than 10,000), *infra*, Ch. XVII; Louisiana, 1898, Art. 48 (cities of less than 2500).

[3] In Georgia, 1877, there must be publicity in the city affected, Art. III, sec. 7, par. 16. (A similar provision in Louisiana, 1898, sec. 50, is construed in practice to apply to acts affecting cities of more than 2000 inhabitants. Like provisions are found in the constitutions of Pennsylvania, 1873, Art. III, sec. 8; New Jersey, amendment of 1875, Art. IV, sec. 7; and Missouri, 1875, Art. IV, sec. 54; but in these constitutions the significance of such a provision, as applied at least to legislation for cities, is not clear in view of the fact that special legislation of this character is entirely prohibited.) In New York, 1894, Art. XII, sec. 2, the city is given a suspensive veto on every special law that affects it. See *infra*, 101. In Virginia, 1902, Art. IV, sec. 51, Art. VIII, sec. 117, unusual legislative procedure and an extraordinary majority vote is required for the enactment of a special law relating to any city.

It would be a gross mistake to assume that all of these provisions have found their way into state constitutions as a result of actual legislative abuses that were sought to be proscribed. In a number of instances such provisions were doubtless copied with more or less blindness from the constitutions of other states, or at least with no more specific design than to forestall in the particular state the rise of an evil which was known to have been encountered elsewhere. On the other hand, such provisions were certainly in a number of states, as in Illinois in 1870, incorporated for the express purpose of giving the city a degree of freedom under the constitution from legislative domination.

The Nature of the "Protection" afforded to Cities by Prohibitions against Special Legislation

It seems pertinent to inquire whether the requirement of general legislation for cities was devised to establish anything that might with propriety be called a home rule right. The Iowa supreme court, as we have seen, evidently thought at one time that the constitutional provision in that state did create such a right; but the ultimate practice of the legislature, which was never denied by the courts, showed conclusively that the scope of that right depended entirely upon the legislative will. The Illinois legislature, as well as the legislatures of one or two other states,[1] conferred upon cities under the general law somewhat liberal powers over their own organization; but it is obvious that such powers were referable to the law and not to the constitution. Indeed it is manifest at a glance that, even where the legislature fulfills a constitutional requirement of general legislation for cities not only as to the letter but also as to the full spirit of such requirement, there is imposed upon the law-makers no necessity whatever of granting to cities any considerable measure of home rule. The general law may provide — and let it be remarked usually has provided — an

[1] For example, Arkansas, in the general law applicable to the two classes of cities; Pennsylvania, in the general law applicable to cities of the third class; Montana, in the general law applicable to the two classes of cities.

elaborate and complete organization of municipal government. It may regulate in superabundant detail many minute operations of such government. Where a law is made uniformly applicable to cities of widely varying populations it is true that the legislature must of practical necessity eliminate some of these details. It cannot, for example, regulate such matters as the salaries of numerous officers or the number of members of the police force, as it could in special charters. But aside from a few details of this character a city may be put in a straight-jacket of general law that is very nearly if not quite as restrictive as any special charter could be.

The only right, then, that can accrue directly from the constitutional requirement of general legislation is the right to be free from legislative assaults that are directed against a *specific* city for ulterior, sinister, or ill-considered purposes. There is no question that assaults for such purposes are rendered practically impossible where the laws for the governance of cities are general in fact as well as in form. A legislature will seldom if ever have such purposes toward all the cities of a state; and few legislatures would be so high-handed as to execute their ill-begotten designs upon numerous cities with the end in view of reaching only one of the number.

It is open to question, nevertheless, whether constitutional immunity from attacks of this character may properly be referred to as a "right" of municipal home rule. It is certainly not a right of self-government, for, as has already been said, general laws may offer to the city an exceedingly narrow latitude of action. On the other hand, such a requirement clearly establishes an element of protection for the city against a particular kind of legislative encroachment. It is almost precisely comparable to the constitutional guarantee to the private person or corporation of the equal protection of the laws. So far as this latter provision of the constitution alone is concerned, the legislature may encroach to whatever extent it chooses upon the liberties of the individual provided there is no *inequality* of encroachment. The "right" of the individual extends no farther than the right not to be discriminated

against. And so with the city under the guarantee of general legislation. The "right" of the city is certainly no more than the right to be on an exact equality under the law with other cities of the state. If the right of the private person to the equal protection of the laws may properly be referred to — as it commonly is — as a right of individual liberty under the constitution, so with like propriety the right of the city to have its government established under general laws may be described as a right of municipal liberty. But liberty imports self-rule, whether of the individual or of the city; and the idea of non-discrimination has no necessary connection with the concept of self-rule that is embodied in the term liberty. In the strict logic of terms, therefore, it is quite as inappropriate to include the guarantee of equal protection of the laws among the rights of the individual's liberty under our constitutional system as it is to include the city's guarantee of general legislation among the rights of municipal home rule.

But this is merely a terminological quibble. The question of importance is as to the practical results of the guarantee of general legislation for cities upon the relation between the city and the state legislature. Some of these results have already been indicated in our outline of historical beginnings. It seems unnecessary to detail here the full measure of results in every state. The practices of legislatures under this requirement have been exceedingly various. In application to these diversified practices the courts have been called upon to create rules of interpretation in a formidable and ever increasing number of cases. To present an adequate conception of concrete results would require a fine writing of the history of legislative practices in many states and a following of the devious windings of the courts through many decisions. The purposes of our study seem to obligate nothing more than a brief summary.

Speaking broadly, then, it may be said that the requirement of general legislation has been largely a failure. Paradoxical as it may seem, it has failed in many instances to produce general legislation at all. This has resulted chiefly from the legislative practice of classifying cities. Legislatures have not hesitated, when they

chose to do so, to enact innumerable laws for the application of each of which a so-called "class" of cities was created, although in plain point of fact only a single city was embraced in such class. Special classification of this kind is only a ludicrous euphemism for special legislation. Even where legislatures have established general classes of cities and have in their subsequent enactments pursued a fairly consistent policy of passing laws applicable to these fixed classes, they have not refrained from placing this or that city in a class by itself, and the more important a city, the more usually has this distinction been conferred upon it. The "generality" of a law that is applicable to a class of cities embracing only one city is about as obvious a reality as the fourth dimension in pure science. Nor have the courts, when once the right to classify has been conceded, evolved any *principles* that could be invoked to prevent a designing legislature from casting a more or less solemn guarantee of the constitution into the discard.[1]

Moreover, the requirement of general legislation has been evaded by other, though less usual, subterfuges. It has been evaded by the enactment of optional statutes, available to any city or any city of a class, but in fact passed at the behest of a particular city and with no thought of its being adopted by any other. It has been evaded by the passage of laws which were general in form but which could not, by reason of their subject-matter, apply to any but the specific city for which they were intended. It has been evaded in a few cases by the establishment over a city of a new and independent corporation charged with the performance of certain functions commonly given over to cities. And even when there has been no attempt to circumvent the letter and spirit of this restriction its net result, for reasons that it is unnecessary to detail, has often been not the establishment of a large degree of uniformity in the government of cities but the introduction into the body of statutes relating to these governments of an amount of confusion,

[1] It should be remarked that the constitutional provisions of Arkansas, Arizona, California, Colorado, Idaho, Missouri, Oklahoma, South Carolina, South Dakota, Utah, Washington, and Wyoming expressly recognise the authority of the legislature to classify cities for purposes of general legislation. In Kentucky, Minnesota, and New York, classes of cities are established by the constitution itself.

uncertainty, and chaos that has been as inexcusable as it has been harassing.

It is easy, however, to magnify the failure of the requirement of general legislation for cities. The number of instances in which it has in practical effect been read out of constitutions looms large in the survey of its history. Such instances are much more than occasional exceptions. But the more or less happy experience of a large company of cities — and especially of small cities — which have found and still find themselves organized under laws that are applicable to others than themselves is apt to be overlooked. These cities enjoy no mean degree of protection from legislative indiscretions — to put it mildly — that might under other circumstances be directed against them individually. They are released from the annoyance of a constant tinkering with their charters. They do not have to maintain vigilant lobbies at the state capital. If their governments as established under these general laws lack principle, symmetry, and simplicity, if they pinch at this point and hang loose at that, they have at least the virtue of considerable permanence and stability.

Apart, however, from the fact that the requirement of general legislation for cities has so frequently been wholly nullified in practice, such a requirement, as has already been indicated, obviously falls short of satisfying in full the demands of an adequate relation in law between the city and the state. It may indeed, operating at its best, afford protection to the city against exploitation and despoilment at the hands of a conscienceless or indifferent legislature; but it does not *inherently* grant to the city any measure of opportunity for self-development. Had the original view of the Iowa supreme court as to the logic of such a requirement [1] been adopted by state legislatures generally, and had it been judicially sustained as a valid exercise of legislative power, it is entirely conceivable that the vexatious question of home rule would long since have ceased to occupy a place in the front rank of state political problems. Cities would not only have been emancipated from special interference but would also have enjoyed large opportunity

[1] *Supra*, 83.

to expand their functions and to determine their organic life in accordance with local ideals. But the fact remains that the general laws relating to cities have seldom offered any such opportunity. The requirement of general legislation has been in a measure destructive of a legislative abuse. To that extent it has afforded protection to cities. But on the constructive side such a requirement contains practically no element of liberation. Indeed in this aspect of the matter the requirement has of necessity operated to forge the grip of statutory restrictions more tightly upon the city than formerly; for under general laws a city seeking a change in its government has often been compelled not only to convince the legislature of the wisdom of its proposal but also to enlist the support of other cities that would be affected.[1]

Special Legislation under the New York Constitution of 1894

Mention should be made in conclusion of the provision on the subject of cities that was incorporated into the New York constitution of 1894. The convention which framed this fundamental law was unwilling wholly to prohibit special legislation for cities. Briefly described, the provision[2] which was adopted divided the cities of the state into three classes on the basis of population and declared that laws "which relate to a single city, or to less than all the cities of a class, shall be deemed special laws." A bill proposing such a law must, after adoption by the legislature, be submitted to the mayor in the case of first-class cities — New York, Buffalo, and Rochester — and to the mayor and council in the case of all other cities; and these corporate authorities are required, after a public hearing, to approve or reject the proposal. If rejected, the bill may nevertheless be reënacted by the legislature without the necessity of an extraordinary majority vote. In other words, every city of the state is given a suspensive veto upon special laws relating to its government.

[1] This fact unquestionably accounts for the steadily increasing practice of enacting optional general laws relating to cities.

[2] Art. XII, sec. 2.

This New York provision defines a "general city law" as one that applies to all the cities of a class and a "special city law" as one that applies to less than all the cities of a class. The power of the legislature to enact general city laws is complete, for such laws need not be submitted to the local corporate authorities. In point of fact, however, the legislature has made very little use of its authority to enact general city laws. The most important law of this kind provided the so-called "uniform charter of cities of the second class" — Albany, Schenectady, Syracuse, Troy, Utica, and Yonkers. But even in application to these cities the legislature has enacted innumerable special city laws which have had the effect of supplementing or modifying this uniform charter. So far as the other cities of the state are concerned their governments have been provided almost wholly by special laws.

It may be remarked in passing that although the New York courts have decided a considerable number of cases involving the distinction between "a private or local bill" and a "general law" as these terms are used in another article of the constitution,[1] there has been scarcely any judicial interpretation of the distinction between a "general city law" and a "special city law" as those terms are employed in the article of the constitution relating to cities. The constitution itself, as has been said, defines the words "general" and "special" as used in this connection; but "city laws" are merely defined somewhat vaguely as "laws relating to the property, affairs, or government of cities."[2] The absence of judicial controversy as to whether this or that law does or does not relate to the property, affairs, or government of a city has been due to the liberal practice pursued by the legislature. In order to avoid doubt in respect to this matter practically every bill of special application, regardless of its subject-matter, has been submitted to the city or cities concerned.

[1] Art. III, sec. 18.

[2] When Art. III, sec. 18, is contrasted with Art. XII, sec. 2, it is apparent that the constitution divides all laws into two primary classes — namely, (1) "laws" and (2) "city laws." Each of these classes is in turn divided into two sub-classes; the first class embraces (*a*) "private or local laws" and (*b*) "general laws"; the second class includes (*a*) "special city laws" and (*b*) "general city laws."

This right of a suspensive veto has unquestionably been highly beneficial to the cities of New York. Indeed it has in very large measure, though not entirely, put an end to positive legislative interference in their affairs; for it is wholly unwarranted to declare that the legislature is "interfering" with, or "dominating" over, or "imposing" itself upon a city in the enactment of special laws which receive the endorsement of the local corporate authorities and which more often than not are enacted by the legislature at the direct request of such authorities. In the nineteen years following the adoption of the constitution of 1894, only one hundred and forty-three special acts relating to cities were passed over the heads of the cities affected. This was an average of only seven and a half acts per session. Moreover, in later years there has been a noticeable annual diminution in the number of laws thus enacted. The session of 1907 — selected wholly at random — may be taken as fairly typical of the legislative practice in this regard. During that session, about one hundred and sixty special laws relating to cities were passed. Nearly one-third of these related exclusively to the city of New York. Of these one hundred and sixty acts, only eleven were enacted without the approval of the designated corporate authorities of the city concerned. Seven of these were laws applicable to New York. Moreover, it is highly significant that from 1902 to 1914 there were five hundred and twenty-four instances in which the legislature, by its failure to reënact statutes, allowed the vetoes of the cities of the state to stand effective.[1] It cannot perhaps be said, as Mr. Seth Low has declared, that "it is only in matters of the first consequence that the judgment of the city is ever overruled by the legislature;"[2] yet the fact remains

[1] This information was collected by my student, Mr. L. C. Carter.

[2] Bryce, *The American Commonwealth*, 1910 ed., I, p. 664. A glance at the eleven acts passed over the heads of cities in 1907 shows that the most important of them was the law creating the two public service commissions of the state, one of which was given jurisdiction in New York City. Others of greater or less importance were: an act creating a park board for Utica; an act authorizing the appointment of a commission to inquire into the local government of the city of New York; and an act amending an act to provide for the construction and maintenance of a sanitary trunk sewer in Westchester County, which was accepted by Yonkers but rejected by Mt. Vernon. All the other acts in question were distinctly petty and

that, as compared with the practices of the legislature before the adoption of the constitution of 1894, and in consideration of the number, size, and the importance from numerous political angles of the cities of the state of New York, the provision of the constitution of 1894 has operated to eliminate in large part, though not entirely, positive legislative interference in the affairs of cities.

On the other hand, this is not to say that the cities of New York have not in most instances been operating since 1894 under complicated schemes of government founded, in part at least, and often in major part, upon innumerable acts of "interference" prior to that date. Nor is it to say — and this is of far greater significance — that the legislature has not "interfered" in countless instances by refusing to give to the corporate authorities of cities the opportunity to decide for themselves upon changes of great or minor importance in the governments of their cities. To put the situation otherwise, while there has been little positive imposition of changes by the legislature against the will of cities, there has been a considerable amount of legislative negation upon changes that were sought.[1]

overbearing in character. One of them required New York City to bear the entire cost of widening Livingston Street in Brooklyn in spite of the fact that the Board of Estimate and Apportionment had settled upon the plan of assessing costs upon the owners of abutting property. Another amended the charter of Olean in respect to the matter of the fees of the police justice. Another provided for a recount of the votes cast for the office of mayor in New York City at an election held on November 7, 1905 (nearly two years before the enactment of the law), and this was supplemented by an act imposing the cost of making such recount upon the city. Another established a police pension fund in the city of Poughkeepsie. Another directed the Board of Estimate and Apportionment of New York to provide in the hall of records room for the office of the clerk of the county of New York and his records. Still another regulated the removal of dangerously sick patients from hospitals in the city of New York.

[1] The experience of the city of Buffalo under this provision of the constitution is eminently illustrative of its shortcomings from the viewpoint of the city. In 1908 active agitation began in that city for the establishment of the so-called commission form of government. For four long years the forces behind this agitation were compelled to wage earnest warfare at Albany to secure the adoption of the necessary charter law. In the Assembly they were unable to make substantial headway until they had elected a number of members of that body upon the specific issue of whether they would or would not support the movement to give the people of Buffalo the opportunity to decide this charter question for themselves — and

In this respect, then, the provision of the New York constitution is somewhat similar to the requirement of general legislation so far as that requirement has been met without subterfuge. It gives large measure of freedom from positive interference but almost no measure of independent opportunity for constructive local action. Its restrictive effect upon the city is less binding than an absolute prohibition of the special act in that the city seeking a change in its government does not in its appeal to the legislature have to reckon upon the attitude of other cities. But its restrictive effect is, on the other hand, more binding than an absolute prohibition in that the legislature may, and sometimes does, by the enactment of a special law which it would probably not be willing to make general in application, impose its will upon a specific city in spite of all local opposition. Considering the fact, however, that legislative practice in this latter respect has not been very extensive, and that the New York scheme enables the legislature not only to meet the diversified needs of cities but also to give some deference to what may doubtless be denominated the "individuality" of cities, there seems to be little question that the legal relation thus established between the city and the state is, in spite of its limitations, more satisfactory than that which in the letter of its requirement necessitates that the governments of many cities shall spring from a single mold of general law.

Mention should be made in this connection of an amendment which was added to the constitution of Illinois in 1904, by the terms of which the legislature was permitted to enact special laws applicable to the city of Chicago subject to the approval of the voters at

this in spite of the fact that in November, 1909, the people had upon a referendum voted in favor of submitting a new charter to a direct vote. In 1913 a charter was at length got through the legislature, but instead of providing for a popular referendum it merely followed the constitutional requirement of submission to the mayor. The mayor, who was known to be of a political party which had taken a firm stand against the type of government proposed, promptly vetoed the charter. Immediately the battle-ground was reshifted to Albany, where a futile effort was made to get the charter enacted over the mayor's veto. Early in 1914 citizen delegations made once more their pilgrimage to the capital. A new charter was again put through the legislature and this time provision was made for a referendum. This charter was ratified at the polls at the general election in November, 1914.

a general or special election. The adoption of this amendment was hailed as opening up large possibilities for the reorganization and development of the government of our inland metropolis along locally acceptable lines. This expectation has not been appreciably realized. A new charter drafted by a special municipal commission and enacted by the legislature after some objectionable revamping was defeated at the polls in 1906. Since that date only one or two acts — the most important being that which created the municipal court of Chicago — have entered the statute books by the route provided in this amendment of 1904. That more extended use of this process has not been made may doubtless be ascribed in large part to the fact already mentioned [1] — to wit, that under the general municipal law of 1872, which was adopted by Chicago in 1875, the city enjoys an uncommonly large freedom of action.[2]

[1] *Supra*, 94.

[2] The Michigan constitution of 1908 (Art. V, sec. 30) provides that "no local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected." For a discussion of this provision see *infra*, Ch. XVI.

PART II

HOME RULE IN THE STATES WHICH HAVE GRANTED CHARTER-MAKING POWERS TO CITIES

CHAPTER IV

THE FEDERAL IDEA AS APPLIED TO RELATIONS BETWEEN THE CITY AND THE STATE

WHATEVER may have been the historical or legalistic origin of the federal system of government in the United States, it is a fact that under this system a large measure of what may with strict propriety be called home rule was secured to the several states of the Union. This was accomplished by the division of governmental powers that was made in the national constitution between the central government on the one hand and the states on the other. So precisely, moreover, was this division marked by the enumeration of the powers of the national government and the reservation of other powers to the states that, in spite of numerous judicial controversies of varying degrees of importance, and in spite of the gradual expansion of national functions, it can be said in a general way that the system has operated with smoothness and tolerable satisfaction, interrupted though it was by the contest over the right of secession and the resulting giant conflict of arms — a contest and conflict which were certainly in essence of economic rather than of legal origin. The states of the Union, though they have on occasion offered stubborn resistance to actual or alleged encroachments upon their legal rights, have in fact enjoyed a very substantial and considerable freedom from interference "within their sphere of action" by the government of the nation.

If it be conceded that this federal system, notwithstanding the political exigencies out of which it arose and notwithstanding its obvious and proved limitations, was on the whole happily applied to the solution of a relation in law between the nation and its integral units, may it not be asked why the same principle could

not be beneficially applied in the establishment of a satisfactory legal relation between the city and the state. Indeed it would seem to be even more reasonable to apply such a principle to relations between cities and the state government than to relations between the states and the national government. State lines are largely historical accidents. They establish more or less arbitrary territorial units. The political problems of a state of the Union arise out of many and varying factors. Scarcely one of these can be said to inhere in the conditions of people of the state *as such*. The state simply carries on those governmental functions which are necessary or appear to be desirable and which are *not* within the scope of powers delegated to the national government. It makes no difference whether the state itself is or is not a natural or logical unit for the performance of such functions. In point of fact there is little or nothing in the actual economic or sociological interests of the people of a state that makes it a logical unit for most of its governmental activities. The city, on the other hand, is quite otherwise. The prime factor of its existence is a congested population. Mere congestion of people creates problems that are peculiar to the city itself. To a very considerable extent, therefore, it is a natural economic and sociological unit. As such it is a perfectly logical governmental unit. Surely the application of the federal principle may be urged with much force where the contemplated local units are of this wholly unartificial and unarbitrary character.

It is a great mistake to assume that the difficulties of cities in their relations with the state have arisen wholly or even in chief part from the narrow grants of substantive powers which legislatures have bestowed upon them. Certain it is that many cities have had just reason to complain that their charters failed to confer this or that needed power and to inveigh against the rules of somewhat strict construction of their charter powers which courts have laid down. Any reasonable extension of the principle of home rule would unquestionably imply a slight increase in the number of substantive powers that the city might exercise. It would imply, for example, that the city itself (though not necessarily its governing authorities) should determine whether it should

own and operate a particular public utility. But this is not all. A casual reading of American municipal charters and codes of legislative origin is sufficient to show that in plain fact most cities are not laboring under the handicap of a *very* restricted list of powers. Indeed most of the enumerations are quite elaborate and some of them are far-sweeping in scope. The principal pinch which the city feels is due to the fact that, having outlined the grant of powers, the charter proceeds to restrict in many ways the *manner* in which these powers may be exercised. It provides in infinite detail the form of government, including the number, duties, powers, rights, and relationships of officials and employees. It imposes mandatory expenditures. It determines in numerous respects the conditions and procedure under which the activities of the city must be conducted. Indeed the major portion of the average municipal charter consists of provisions which are in the nature of important or minor restrictions upon the exercise of the powers that are conferred.

We commonly think of municipal charters as first conferring a group of powers and secondly determining a form of government. Many advocates of home rule have entertained the notion that the solution of the problem of relations between the city and the state requires nothing more than the widening of this group of powers, perhaps under a general grant rather than a specific enumeration.[1] The fact is that the part of the usual municipal charter which makes the grant of powers to the city cannot possibly be separated from that larger part which we describe as determining the "form of government." Thus among the list of the city's powers may be included the power to "construct and maintain a waterworks." When, however, it is discovered that the charter in another connection requires the city to take over the plant of an existing water company, prescribes in considerable detail the departmental organization for the management and control of the works, limits the amount of bonds that may be issued for the purpose and the manner of this issuance, fixes rates

[1] See, for example, remarks of Mr. Robert S. Binkerd in *Proceedings of the Academy of Political Science*, V, no. 2, p. 72.

that may be charged, and compels the city to extend mains upon the demand of property-owners — when such provisions as these are found, it is manifest that the naked power to own and operate is clothed with such voluminous and important restrictions that it is little short of ridiculous to consider the power as of vital significance and the restrictions as of minor consequence, as pertaining only to the "form of government." Indeed it is these limitations in connection with provisions determining the so-called "form of government" which have on the whole proved more harassing to cities than the lack of substantive powers. If our national government, without enjoying the authority to deprive the states *in toto* of a single power which they now possess, were nevertheless competent to determine the form of their government in the sense here indicated, it is obvious that the home rule powers of the states would be very nearly negligible in character.

It is quite conceivable that a municipal charter might be framed which would confer ample powers for the expression and development of local political ideals and which would prescribe the organization of the government in the briefest possible outline. It is a fact, however, that we have no fixed standards either in law or in practice to apply in determining the point at which the limit has been reached in the matter of providing the organization of a city government. For example, so far as practice is concerned we are by no means in agreement as to the extent to which administrative departments and offices should be established by the terms of a charter; and when we create a particular department we regulate it in as much or as little elaboration as we choose. But to the extent that we elaborate we usually impose restrictions upon the city in the exercise of some power conferred. This being the case, it is very nearly inconceivable that a satisfactory relation between the city and the state could be established by a constitutional grant of substantive powers to the city while the legislature retained the power to provide the organization of the city's government. In other words, it would be practically impossible to confer upon cities adequately broad powers of home rule without conferring upon them also the power to make their own charters.

It may have been that the members of the Missouri constitutional convention of 1875 analyzed the situation in some such manner as this when they decided to grant charter-making powers to St. Louis and other cities of more than 100,000 inhabitants. Or it may have been that they were influenced by the analogy of the relation between the national government and the states. It is to be regretted that the debates and proceedings of this convention were not published and that so little is known of the origin of this proposal. Suffice it to say that it marked the most important step that had ever been taken in the United States in the direction of securing home rule to cities through the medium of a constitutional provision. The plan originated, moreover, not in an Eastern state, where with respect to important cities the problem of legislative control had been slowly evolving aggravating symptoms, but in a Middle-Western state with a single important city — and that a city of fairly recent metropolitan growth. To say the least, in spite of Missouri's thirty-five years of standing as a state, it certainly exemplified something of the pioneer's daring originality of spirit in the matter of political institutions. It was introduced, too, only a few years after the scheme of prohibiting special legislation for cities had been first urged (in Illinois) in behalf of their protection and before this scheme had had any adequate try-out.

The Missouri precedent was followed by California in 1879, by Washington in 1889, Minnesota in 1898, Colorado in 1902, Oregon in 1906, Oklahoma and Michigan in 1908, Arizona, Ohio, Nebraska, and Texas in 1912. Thus in a period of thirty-seven years had one-fourth of the states of the Union attempted by this somewhat heroic method to liberate their cities from the dominating "interference" of the legislature.

As might be expected the constitutional provisions by which this system of liberation was accomplished differ somewhat from state to state. For general purposes of reference and comparison certain of the features of the system, as embodied primarily in constitutions and to a less extent in statutes, are set down in tabular form here at the outset of our discussion of the legal and practical results of these constitutional provisions.

TABLE OF HOME RULE PROVISIONS AS DETERMINED

1 State	2 Applicable to	3 Method of Initiation	4 Drafting Body	5 Ratification	
				Municipal	State
Missouri (1875)	Cities of over 100,000 [3]	Ordinance for election of freeholders [4]	Elected board of 13 freeholders	¾ of those voting *at* a general or special election [5]	None
California (1879) [7]	Cities of over 3500	⅔ vote of council for election of freeholders; compulsory on petition of 15% of voters	Elected board of 15 freeholders	Majority voting *thereon* at a general or special election	Concurrent resolution of absolute majority in legislature, without amendment
Washington (1889)	Cities of 20,000 or more	Ordinance for election of freeholders; compulsory on petition of 25% of voters [8]	Elected board of 15 freeholders	Majority voting *thereon* at a general or special election	None
Minnesota (1896) [12]	Any city or village	Judge of district court may appoint freeholders, compulsory on petition of 10% of voters [13]	Permanent board of 15 freeholders appointed for 4-year terms [14]	⅘ [15] of those voting *at* a general or special election [16]	None
Colorado (1902)	Cities of 2000 or more	On 5% petition council must submit proposal for charter convention [18]	Board of 21 taxpayers chosen at special election	Majority voting *thereon* at a special election	None
Oregon [19] (1906)	Any city or town	New charter may be submitted by petition of not more than 15% of voters,[20] or by council	Council or petitioners	Council itself, or a majority voting *thereon* at general or special election [21]	None

[1] Considering all constitutional and statutory amendments down to and including 1914. All provisions are taken from constitutions except as otherwise indicated by footnotes.

[2] The names of most home rule cities are given in the text. Figures are from the census of 1910.

[3] There is a specific constitutional provision for St. Louis.

[4] Determined by law, the constitution being silent: Rev. Stat., 1909, sec 9706. In St. Louis the constitutional method was by order of the city council and the county court assembled in joint session "at the request of the mayor."

[5] In St. Louis only a majority.

[6] In St. Louis initiation of election of freeholders is by the "law-making authorities," and ratification of new charter is by majority vote *at* election, which may, however, be special.

[7] Amended as to procedure in 1887, 1892, 1908, 1911, and 1914.

[8] Laws of 1889–90, p. 215 ff., sec. 3, required "legislative authority" to act by ordinance. Laws of 1895, ch. 27, sec. 1 made ordinance mandatory on petition of one-fourth of voters.

[9] Right to propose by initiative petition extended by Laws of 1903, ch. 186

[10] Laws of 1890, p. 215 ff. The extent to which the method of amendment may be regulated by charter is uncertain; see *infra*, 411–425.

[11] Special election sustained in State *ex. rel.* Hindley *v.* Superior Court, 70 Wash. 352 (1912), in spite of the fact that the constitution and the law (Laws of 1903, ch. 186) apparently required general elections only.

[12] Amended 1898.

[13] Made mandatory by law upon petition; Laws of 1899, ch. 251; of 1901, chs. 129, 323; of 1903, ch. 238.

BY CONSTITUTIONS AND SUPPLEMENTARY STATUTES[1]

6 Method of Amendment		7 Future General Revision	8 No. of Cities that	
Initiation	Ratification		Might Adopt	Have Adopted[2]
Legislative authority of city may propose	‡ of those voting *at* a general or special election	Same as under 3, 4, and 5 [6]	2	2
May be proposed by legislative authority of city or by 15% petition	Same as under 5	Same as under 3, 4, and 5	53	32
May be proposed by legislative authority of city, or by petition of 15% of voters,[9] or charter may provide [10]	Majority voting *thereon* at a general election, but charter may provide at a special election [11]	Same as under 3, 4, and 5	5	4
May be proposed by board of freeholders or by petition of 5% of voters [17]	‡ of those voting *at* a general or special election [18]	By permanent board of freeholders presumably ratified as under 6 not 5	About 80	More than 40
May be proposed only on petition of 5% of voters	Majority voting *thereon* at a general election; but if by 10% petition, at a special election	Same as under 3, 4, and 5	28	5
Same as under 3, and 4 (applies to amendment of existing legislative charters)	Same as under 5	Same as under 3, 4, and 5	Nearly 100	5 [22]

[16] *Constitution limits* term to not exceeding six years, *legislature has fixed it at* four years; *ibid.*

[18] Constitution requires "in cities having patrol limits now established" a majority of three-fourths of those voting *at* the election to change such limits.

[19] Although constitution requires charters and amendments to be submitted "at the next election," the law permits either a general or special election; Laws of 1899, ch. 351; of 1903, ch. 238, sec. 6; and the courts have sustained submission of a charter at a special election; State *ex rel.* Nicholas *v.* Kiewel, 86 Minn. 136 (1902).

[17] Provision for petition method is supplied by statute; Laws of 1903, ch. 238, sec. 6.

[18] The constitution compelled Denver to adopt a charter.

[19] No procedure is prescribed by the constitution, but initiative and referendum provisions have been held to extend to making of charters and amendments.

[20] The exact number of petitioners and other matters pertaining to initiative and referendum procedure may be regulated by ordinance in each city; *State ex rel.* Duniway *v.* City of Portland, 133 Pac. 62 (1913). In absence of such ordinance these are regulated by state law; Laws of 1907, p. 405 ff., secs. 10–12.

[21] Under the state law (and presumably also under local ordinances) a charter or an amendment, whether proposed by the council or by petitioners, may be "ordained" by the council, in which event it is submitted to the voters only upon a petition for a referendum.

[22] Most of these have not adopted completely new charters but have merely revised their charters fundamentally by amendments.

TABLE OF HOME RULE PROVISIONS AS DETERMINED BY

1 State	2 Applicable to	3 Method of Initiation	4 Drafting Body	5 Ratification	
				Municipal	State
Oklahoma (1908)	Cities of over 2000	Ordinance for election of freeholders; election compulsory on petition of 25% of voters	Board of freeholders, two elected from each ward	Majority voting *thereon* at a general or special election	Governor must approve if not in conflict with state constitution and laws
Michigan [3] (1908)	Any city or village	Council by ⅔ vote may submit proposal for charter commission, compulsory on petition of 25% of voters	Charter commission, one elected from each ward, three at large	Majority voting *thereon* at a general or special election	Governor must approve before vote at polls; veto may be overridden by ⅔ of commission
Arizona (1912)	Cities of over 3500	Ordinance for election of freeholders; election compulsory on petition of 25% of voters	Elected board of 14 freeholders	Majority voting *thereon* at a general or special election	Governor must approve if not in conflict with state constitution and laws
Ohio (1912)	Any city or village	Legislative authority by ⅔ vote may submit proposal for charter commission; compulsory on petition of 10% of voters	Elected board of 15 electors	Majority voting *thereon* at a general or special election	None
Nebraska (1912)	Cities of over 5000	Law-making body of city may submit proposal for election of freeholders; compulsory on petition of 5% of voters	Elected board of 15 freeholders	Majority voting *thereon* at a general or special election	None
Texas [4] (1912)	Cities of over 5000	Legislative authority by ⅔ vote may propose charter commission; compulsory on petition of 10% of voters	Elected commission of not less than 15 nor more than one for each 3000 population [7]	Majority voting *thereon* at a general or special election	None

[1] Considering all constitutional and statutory amendments down to and including 1914. All provisions are taken from constitutions except as otherwise indicated by footnotes.

[2] The names of most home rule cities are given in the text. Figures are from the census of 1910.

[3] Procedure prescribed entirely by law; Laws of 1909, no. 279.

[4] Since constitutional amendment of 1912.

CONSTITUTIONS AND SUPPLEMENTARY STATUTES[1] (*Contd.*)

6 Method of Amendment		7 Future General Revision	8 No. of Cities that	
Initiation	Ratification		Might Adopt	Have Adopted[2]
May be proposed by legislative authority of city, or by petition of 25% of voters	Same as under 5	Same as under 3, 4, and 5	Nearly 60	About 20
May be proposed by ¾ vote of legislative body of city or by petition of 25% of voters (applies to amendment of existing legislative charters [3])	Same as under 5, except that governor's veto may be overridden by ¾ vote of council	Same as under 3, 4, and 5	About 116	16 (12 more have amended legislative charters) [4]
May be proposed by legislative authority of city, or by petition of 25% of voters	Same as under 5	Same as under 3, 4, and 5	8	1
May be proposed by legislative authority of city by ¾ vote, or by petition of 10% of voters	Same as under 5	Same as under 3, 4, and 5[5]	82	9
May be proposed by law-making body of city, or by petition of 5% of voters	Same as under 5	Same as under 3, 4, and 5	12	None
May be proposed by legislative authority of city, or by petition of 10% of voters (applies to amendment of existing legislative charters)	Same as under 5	Same as under 3, 4, and 5	40	7 (about 11 others have amended legislative charters)

[1] In the list of sixteen are included all cities which have revised their charters through the medium of elected commissions, although some of these merely adopted fundamental amendments. In the list of twelve are included only those which have adopted amendments since Nov., 1912, previously adopted amendments having been held void.

[3] Procedure prescribed entirely by law; Laws of 1913, ch. 147.

[4] The law does not declare who shall determine the exact number.

CHAPTER V

HOME RULE IN MISSOURI — CONFLICT BETWEEN STATE LAWS AND CHARTER PROVISIONS

As the Missouri constitution of 1875 came from the hands of the convention, it contained the following complicated provision relating to the city of St. Louis:[1]

Sec. 20. The city of St. Louis may extend its limits so as to embrace the parks now without its boundaries, and other convenient and contiguous territory, and frame a charter for the government of the city thus enlarged, upon the following conditions, that is to say: The council of the city and county court of the county of St. Louis, shall, at the request of the mayor of the city of St. Louis, meet in joint session and order an election, to be held as provided for general elections by the qualified voters of the city and county, of a board of thirteen freeholders of such city or county, whose duty shall be to propose a scheme for the enlargement and definition of the boundaries of the city, the reorganization of the government of the county, the adjustment of the relations between the city thus enlarged and the residue of St. Louis county, and the government of the city thus enlarged, by a charter in harmony with and subject to the Constitution and laws of Missouri, which shall, among other things, provide for a chief executive and two houses of legislation, one of which shall be elected by general ticket; which scheme and charter shall be signed in duplicate by said board, or a majority of them, and one of them returned to the mayor of the city and the other to the presiding justice of the county court within ninety days after the election of such board. Within thirty days thereafter the city council and county court shall submit such scheme to the qualified voters of the whole county, and such charter to the qualified voters of the city so enlarged, at an election to be held not less than twenty nor more than thirty days after the order therefor; and if a majority of such qualified voters, voting at such election, shall ratify such scheme and charter, then such scheme shall become the organic law of the county and city, and such charter the organic law of the city, and at the end of sixty

[1] Art. IX.

days thereafter shall take the place of and supersede the charter of St. Louis and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme.

Sec. 21. A copy of such scheme and charter, with a certificate thereto appended, signed by the mayor and authenticated by the seal of the city, and also signed by the presiding justice of the county court and authenticated by the seal of the county, setting forth the submission of such scheme and charter to the qualified voters of such county and city, and its ratification by them, shall be made in duplicate, one of which shall be deposited in the office of the Secretary of State, and the other, after being recorded in the office of the recorder of deeds of St. Louis county, shall be deposited among the archives of the city, and thereafter all courts shall take judicial notice thereof.

Sec. 22.[1] The charter so ratified may be amended by proposals therefor submitted by the lawmaking authorities of the city to the qualified voters thereof, at a general or special election held at least sixty days after the publication of such proposals and accepted by three-fifths of the qualified voters voting for or against each of said amendments so submitted; and the lawmaking authorities of such city may order an election by the qualified voters of the city of a board of thirteen freeholders of such city to prepare a new charter for such city, which said charter shall be in harmony with and subject to the constitution and laws of the State, and shall provide, among other things, for a chief executive, and at least one house of legislation to be elected by general ticket. Said revised charter shall be submitted to the qualified voters of such city at an election to be held not less than twenty nor more than thirty days after the order therefor, and if a majority of such qualified voters voting at such election ratify such charter, then said charter shall become the organic law of such city, and sixty days thereafter shall take effect and supersede the charter of such city and all special laws inconsistent therewith.

Sec. 23. Such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri, except only that provision may be made for the graduation of the rate of taxation for city purposes in the portions of the city which are added thereto by the proposed enlargement of its boundaries. . . .

Sec. 25. Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State.

[1] [As amended in 1902. The original of Sec. 22 read as follows: "The charter so ratified may be amended, at intervals of not less than two years, by proposals therefor, submitted by the lawmaking authorities of the city to the qualified voters thereof at a general or special election, held at least sixty days after the publication of such proposals, and accepted by at least three-fifths of the qualified voters voting thereat."]

Acting under the power thus conferred, the corporate authorities of the city and the county of St. Louis set the prescribed machinery in motion almost immediately after the constitution became effective. A board of freeholders was elected; and this board drafted, first, a "scheme" for the enlargement of the city and for its separation from the county, and second, a charter for the city. These two instruments were ratified at the polls on August 22, 1876.[1] The charter thus drafted and effectuated by the city of St. Louis itself — the first of its kind in the United States — survived with a few amendments until it was superseded by a charter adopted in similar fashion on June 30, 1914.[2]

In addition to the above-noted provisions applicable specifically to St. Louis the Missouri constitution of 1875 extended the right to frame its own charter to any city having a population of more than 100,000 inhabitants. This was a provision looking to the future, for at the time of its adoption St. Louis was the only city of such size in the state. In 1889, however, Kansas City, having attained the required population,[3] adopted a charter under the authority conferred by this general grant; and in 1908 a second charter was framed and adopted by this city in like manner.[4] According to the federal census of 1900 St. Joseph, the third city of the state, had a population of 102,979 inhabitants. By 1910 this number had fallen off to 77,403; the city had thus lost the right to frame its own charter.

Aside from the fact that the general provision applicable to cities of more than 100,000 inhabitants is not complicated by any

[1] The "scheme" was declared to have been ratified only after the returns were corrected by judicial proceedings. State *ex rel.* Beach *v.* Sutton, 3 Mo. App. 388 (1877); State *ex rel.* Beach *v.* Finn, 4 Mo. App. 347 (1877).

[2] A charter submitted January 31, 1911, was overwhelmingly defeated at the polls.

[3] This fact was determined by a municipal census taken in 1885. See State *ex rel.* Attorney General *v.* Dolan, 93 Mo. 467. 1887.

[4] Kansas City's first proposed charter was rejected at the polls, January 30, 1888. Another charter was accepted April 8, 1889. Amendments were adopted in 1890, 1892, 1895, 1897, and 1903. A new charter was rejected at the polls March 7, 1905. Another charter was adopted August 4, 1908, and amendments were ratified July 19, 1910.

"scheme" for the separation of city and county governments,[1] it is with a few slight differences practically identical with the above-quoted provision specifically applicable to St. Louis.[2]

[1] Art. IX, sec. 15 declares: "In all counties having a city therein containing over one hundred thousand inhabitants, the city and county government thereof may be consolidated in such manner as may be provided by law."

[2] The slight differences are as follows: (1) The general provision does not indicate how proceedings for drafting a charter may be initiated. The St. Louis provision does so indicate. This omission in the general provision has been supplied by statute. Rev. Stats. of 1909, secs. 9706, 9707, Laws of Mo., 1887, pp. 42 ff. (2) The general provision does not clearly provide for the election of a board of freeholders to undertake a complete revision of an existing home rule charter. The St. Louis provision, by the amendment to sec. 22 adopted in 1902, expressly covers this point. It has been held, however, that the general provision confers a "continuing" right to frame charters. Morrow *v.* Kansas City, 186 Mo. 675 (1904); *infra*, 197. (3) The general provision requires for the adoption of any charter the favorable vote of four-sevenths of the qualified electors voting *at* a general or special election. The St. Louis provision requires only a majority ratification. (4) The general provision gives the board of freeholders only ninety days in which to draft a charter. The St. Louis provision imposes no time limit. (5) The general provision requires as a feature of the charter "two houses of legislation." The St. Louis provision, since the amendment of 1902, requires only one house. (6) The charter drafted under the general provision becomes effective thirty days after ratification at the polls. Under the St. Louis provision, it becomes effective sixty days after ratification.

The general provision (Art. IX) reads as follows:

"Sec. 16. Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of thirteen freeholders, who shall have been for at least five years qualified voters thereof, to be elected by the qualified voters of such city at any general or special election; which board shall, within ninety days after such election, return to the chief magistrate of such city a draft of such charter, signed by the members of such board, or a majority of them. Within thirty days thereafter, such proposed charter shall be submitted to the qualified voters of such city at a general or special election and if four-sevenths of such qualified voters voting thereat shall ratify the same, it shall, at the end of thirty days thereafter, become the charter of such city, and supersede any existing charter and amendments thereof. A duplicate certificate shall be made, setting forth the charter proposed and its ratification, which shall be signed by the chief magistrate of such city and authenticated by its corporate seal. One of such certificates shall be deposited in the office of the Secretary of State and the other, after being recorded in the office of the recorder of deeds for the county in which such city lies, shall be deposited among the archives of such city, and all courts shall take judicial notice thereof. Such charter, so adopted, may be amended by a proposal therefor, made by the lawmaking authorities of such city, published for at least thirty days in three newspapers of largest circulation in such city, one of which

It will be observed that those who drafted these provisions of the Missouri constitution were at great pains to keep the city, thus liberated as to its "own government," in subordination to the state. In fact so carefully was this purpose sought to be expressed that literally taken the provisions in question embody hopelessly irreconcilable contradictions. Upon ratification by the voters, the locally made charter shall "supersede any existing charter and amendments thereof." [1] At the time of the first exercise of these home rule powers this existing charter and amendments are, of course, nothing more nor less than state laws It is plainly declared, therefore, that the charter is to supersede certain existing state laws. In the same breath, however, it is provided with abundant repetition that the charter so framed and adopted shall be "consistent with and subject to the constitution *and laws* of this state" and that it "shall always be in harmony with and subject to the Constitution *and laws* of the state."

Now it will be noted that the term "laws," which all home rule charters must be "consistent with," "in harmony with," and "subject to," is given neither general nor specific definition. Literally it embraces any law which the legislature is not prohibited from enacting. The legislature of Missouri was not prohibited by this constitution from enacting laws relating to the government of cities. It was indeed provided that such laws should be

shall be a newspaper printed in the German language, and accepted by three-fifths of the qualified voters of such city, voting at a general or special election, and not otherwise; but such charter shall always be in harmony with and subject to the Constitution and laws of the State.

"Sec. 17. It shall be a feature of all such charters that they shall provide, among other things, for a mayor or chief magistrate and two houses of legislation, one of which at least shall be elected by general ticket; and in submitting any such charter or amendment thereto to the qualified voters of such city, any alternative section or article may be presented for the choice of the voters, and may be voted on separately, and accepted or rejected separately, without prejudice to other articles or sections of the charter or any amendment thereto."

[1] The St. Louis provision, according to the amendment of 1902, declares that the "said charter shall become the organic law of such city, and sixty days thereafter shall take effect and supersede the charter of such city and all special laws inconsistent therewith." The provision in this regard under which the first charter was adopted was very nearly the same.

general in character and that not more than four classes of cities should be created for the purposes of enacting such laws.[1] Even this limitation, however, in its application to St. Louis and Kansas City, was largely read out of the constitution by legislative practice that was ultimately sustained by the courts.

As throwing at least some light upon the question of what "laws" a freeholders' charter was made "subject to" it seems advisable here at the outset to examine briefly the rulings of the Missouri court in respect to this requirement of general legislation for cities in its specific application to the case of St. Louis and Kansas City. From the very beginning the legislature evidently did not believe in its own competence to enact laws specially applicable to these cities by name; for practically the only statutes of this character that were enacted were a few which supplemented the "scheme" of separation by imposing duties on St. Louis officials which were elsewhere in the state laid upon the officers of counties.[2] For all other purposes the legislature contented itself with enacting laws applicable to "cities of the first class" (those of over 100,000 inhabitants); or, without reference to any class, to "cities of over 100,000 inhabitants" (of which St. Louis and, after 1885, Kansas City were the sole representatives); or to "cities of over 300,000 inhabitants" (the only such city being St. Louis); and occasionally — diversion and variety being the only apparent object — laws were enacted for "cities of over 350,000" or "400,000" or "500,000" inhabitants.

For many years after the ratification of the constitution of 1875 such legislative practice prevailed in Missouri without being brought to dispute before the courts. At length, however, in the case of Murnane *v.* City of St. Louis,[3] decided in 1894, it was declared that an act applying to cities of 300,000 or more inhabitants was special to the city of St. Louis because, since the legislature had created four general classes of cities, the first of which em-

[1] Art. IX, sec. 7.

[2] See, for example, Laws of Mo., 1877, pp. 187, 188, 191, 341; of 1879, pp. 39, 40, 98; Rev. Stats. of 1899, sec. 4160; Laws of 1893, p. 117; of 1901, p. 207.

[3] 123 Mo. 479 (1894); *infra*, 155.

braced those of more than 100,000 inhabitants, this act in effect created a fifth class, and this was inhibited by the constitution.[1] This rule of construction was reaffirmed in the case of Kansas City *ex rel.* North Park District *v.* Scarritt,[2] and was applied with even greater emphasis in St. Louis *v.* Dorr,[3] decided four years later.

Then suddenly, and without any reference whatever to these cases, it was declared in Kansas City *v.* Stegmiller[4] to be perfectly "plain that the framers of the constitution *ex vi termini* excluded from its legislative classification the city of St. Louis, which it expressly authorized to adopt its own scheme and charter, and all such cities as it authorized by section 16, article IX, to frame and adopt their own charters." It was asserted that "these cities constitute two constitutional classes distinct from those chartered by the legislature." This was merely an adoption, without warning, explanation, or reference, of the view of the dissenting judges in the Dorr case; but this view was reaffirmed in like manner in State *ex rel.* Hawes *v.* Mason.[5] Finally in the case of the State *ex rel.* McCaffrey *v.* Mason,[6] the fact that the earlier cases had been overruled without specific reference was recognized and the doctrine of Murnane's case was in express terms repudiated.

The course of the decisions upon this subject is fairly illustrative of the carelessness and disregard for previous utterances which the Missouri court has so frequently shown in interpreting the confusing clauses of the constitution relating to cities. The point to be noted, however, is that ultimately it was declared that St. Louis and Kansas City were in "special" constitutional classes, wholly separate from the four general classes which the legislature was authorized to create. Laws applicable to St. Louis might refer

[1] The point was also made that the act was special because it was so worded as not to apply to any city which might in the future attain a population of 300,000 inhabitants.

[2] 127 Mo. 642 (1894); *infra*, 157.

[3] 145 Mo. 466 (1898); *infra*, 160.

[4] 151 Mo. 189 (1899); *infra*, 148.

[5] 153 Mo. 23 (1899); *infra*, 135.

[6] 155 Mo., 486. 1899.

to that city by name.[1] It is not certain that the court intended to declare that laws might be enacted in the same manner for Kansas City. What was probably intended was that laws might be made applicable to "cities" which had adopted charters under the allowance of section 16, article IX, of the constitution — Kansas City having been in fact for many years the only such city.[2] It was thus, at any rate, that the substance of the constitutional requirement of general legislation for cities was construed out of that instrument so far as the two home rule cities of the state were concerned.

Let us return, then, to our examination of the meaning of the term "laws" as used in the provisions of the constitution granting to cities the power to frame charters, and let us view that term in the light of this *ultimate* pronouncement by the courts on the subject of the prohibition against special legislation for cities.

If cities under freeholders' charters do not enjoy even the constitutional guarantee of general legislation that is extended to all other cities, it is manifest that in any strict interpretation of terms the provisions of the Missouri constitution upon this subject are so utterly contradictory as to be practically meaningless. For by what logic is a freeholders' charter made to supersede the state laws which constitute its existing legislative charter, if the legislature may immediately re-enact the laws thus repealed? These re-enacted laws would certainly be "the laws of the state." As such it would seem that the locally made charter would of necessity be "subject to" them. Nor would they, in the above-mentioned view of the court, be void by reason of their speciality. What element of the constitutional grant of the right to frame a charter remains if at the same time the legislature is empowered to occupy the charter field to whatever extent it chooses by the enactment of "laws" with which such charter must be "in har-

[1] Even since this ruling the legislature has continued for the most part to enact laws for St. Louis by making them applicable to "cities" of a designated population.

[2] In other words, should St. Joseph attain a population of more than 100,000 inhabitants and adopt a charter for its own government under section 16, it is probable that the legislature would be compelled to enact laws applicable alike to both cities as being representative of this "special" constitutional class.

mony"? Clearly the constitutional provisions, read as to their letter, are very nearly inexplicable. At best they embody nothing more than the grant of a right the substance of which is referable to the grace of the legislature rather than to the fundamental law of the state. And this fact is further emphasized by the altogether incomprehensible utterance of the final clause of the provision relating to St. Louis — to wit, that "notwithstanding the provisions of this article, the general assembly shall have the same power over the city . . . of St. Louis that it has over other cities . . . of this state." In view of the fact that the power of the legislature over other cities of the state included the power to determine every particular of their charter laws, it is difficult to conjecture what strange concept the framers of this constitution entertained as to the nature and meaning of the "right" which they sought to confer upon cities.

It was inevitable that in the course of time question should be raised as to the order of precedence between state laws and charter provisions where the two were found to be in conflict. And naturally it was the courts who were required to read some semblance of coherence and understanding into the strangely contradictory declarations of the fundamental law. It is small wonder that they encountered difficulty.

In taking up for consideration the Missouri cases dealing with questions of conflict between state laws and provisions of home rule charters, it must be admitted at the outset that no great profit can be derived from their study. Considered as a whole they do not resolve much of lucidity out of the nebulous provisions of the constitution. As late as 1904 the supreme court of the state frankly acknowledged the futility of examining its own opinions for light:[1]

> It is unnecessary, and would be futile at this time, to tread again the mazes of adjudication, perhaps to become lost in the labyrinth of the ingenious and divergent reasons which pervade the cases in respect to the power of municipalities incorporated under article nine of the constitution,

[1] State *ex rel.* Goodnow *v.* Police Commissioners of Kansas City, 184 Mo. 109 (1904); *infra*, 136.

and in respect to the power of municipalities to adopt charters regulating matters of mere local concern, with which the state at large has no concern, which have the effect of repealing prior general state laws on the same subject, or which place such cities in respect to such matters beyond state control. The views of the author hereof on these questions are well known, and were expressed in Owen *v.* Baer, 154 Mo. 434, at great length with painful care, after exhaustive investigation, and with such poor results, that repetition or reiteration here would be offensive.

This is certainly either a bald admission of the absolute meaninglessness of the constitutional provisions on this subject or an amazing confession of judicial incompetence. Both the admission and confession are perhaps justified. The constitutional provisions in question are undoubtedly pregnant with ambiguity. Even so, that ambiguity seems scarcely sufficient to warrant all of the "mazes of adjudication" through which the Missouri court has permitted itself to wander.

In spite of the barrenness of the study of Missouri cases involving questions of conflict between state laws and freeholders' charter provisions, it seems worth while to review some of these cases briefly, first, because the Missouri constitution was the pioneer in this field; and second, because it is not without interest to view in some detail the confusion of the constitution as it has been reflected in the confusion of the judicial mind; and third, because notwithstanding the heavy mists, one or two interpretative lights may be discovered.

Does a State Law supersede a Charter Provision regulating Matters pertaining to Taxes and Licenses?

In the early case of the State *ex rel.* Halpin *v.* Powers [1] it was contended that the provisions of the first home rule charter of St. Louis by which an annual assessment of real property was required to be made were void as being in conflict with the general law which provided for biennial assessments. In ultimate conclusion the court held that by an act of 1877 the provision of the general law for biennial assessments had been repealed and that there-

[1] 68 Mo. 320. 1878.

fore no conflict prevailed. It was nevertheless implied, by the elaborate discussion of the general law which was entered upon, that had conflict been found to exist the requirements of the general law would have prevailed. No intimation was thrown out that this or any other state law was not the kind of law which a freeholders' charter must be "consistent with" and "subject to." It is to be noted, of course, that the assessments of property made by the city were for purposes of state as well as municipal taxation, but this fact was not adverted to by the court in the opinion rendered.

Fifteen years after the decision of the Halpin case action was brought by the city collector of St. Louis to recover back taxes assessed upon certain railway property within the city. The state law divided railway property into two classes one of which was to be assessed by the state board of equalization and the other by assessing authorities of local corporations and subdivisions of the state. The law further required that taxes on this second, or local, class of property should be "levied and collected according to the provisions of" state law; and these provisions ordained, among other things, that the taxes assessed upon such property should be extended "on a separate tax book, to be known as the railroad tax book," this duty being performed by the clerk of the county court and by a "corresponding officer" in the city of St. Louis. On the other hand, the St. Louis charter provided that *all* taxes should be extended on the assessment books, and the municipal board of assessment was empowered to prescribe the kind of books that might be used.

Here, then, was a clear case of conflict between the law and the charter, although it is obvious that the point of conflict was extremely petty in character. In the case that arose[1] it was declared broadly that "the legislature had and has the power to alter and amend the charter of the city of St. Louis."[2] The article of the general revenue law relating to the assessment and taxa-

[1] State *ex rel.* Ziegenhein *v.* St. Louis and San Francisco Ry. Co., 117 Mo. 1. 1893.

[2] On this point, Ewing *v.* Hoblitzelle, 85 Mo. 64, 78 (1884) was cited. See *infra*, 141.

tion of railroads "professes to provide the method for the entire state for extending and collecting taxes on railroad property," and "in the most explicit terms" the entire article is made "applicable to the city of St. Louis." It was held, therefore, that the state law upon this subject superseded and controlled the charter provisions and that taxes extended on other than "a separate book known as the 'railroad book'" were void.

While the court in this case referred to the general character of the law, the point was not made that the taxation of railroads was a matter of state as distinguished from local concern. In plain fact the revenue derived from the tax in question belonged to the city, although it may be that this right of ownership was referable to the law rather than to the constitutional grant of the right to frame a charter. The opinion did not delve into this aspect of the matter at all. It was apparently enough that the will of the legislature had been written. The particular subject of the legislation mattered not.[1]

Prior to 1893 all liquor licenses in St. Louis were issued by the city collector. Every dramshop keeper was required to have both a state and a city license, the former being issued by the collector under authority of state law and the latter by the same collector under authority of municipal ordinance enacted in pursuance of a charter provision. In that year the legislature passed a law which vested in an excise commissioner appointed by the governor "exclusive authority to grant dramshop licenses" in St. Louis. Upon an application for mandamus to compel this excise commissioner to issue a liquor license upon the payment of one fee instead of a fee for the state license and another for the city license, the court held in the case of the State *ex rel.* Hunt *v.* Bell[2] that, notwithstanding the charter and ordinance, the newly appointed commissioner was the only officer in St. Louis who could "issue a license whether it be on behalf of the state or the city." This rule was founded upon an unqualified assertion of competence in the legislature to enact laws in contravention of the provisions

[1] For subsequent interpretation of this opinion by the court itself, see *infra*, 132.
[2] 119 Mo. 70. 1893.

of a home rule charter or of ordinances passed in pursuance of such provisions. The opinion recited broadly:

> That the legislature has the power to repeal or modify ordinances of the city of St. Louis, is no longer an open question. It is true the repealing clause of the act of 1893 does not in terms mention city ordinances; and we are cited to one act passed at the same session where the repealing clause makes special mention of ordinances (Acts of 1893, p. 53), from which it is sought to draw the conclusion that the general assembly did not intend to repeal any ordinance by the act now in question. The repealing clause of the act of 1891 does not make special mention of ordinances of any city, yet there can be no doubt but the eighth section of that act would and did have the effect to repeal any city ordinance in conflict with it. We think it was the purpose of the act of 1893 to provide for a commissioner who should have the sole power to issue city dramshop licenses as well as licenses on behalf of the state; and, this intention appearing, the ordinances of St. Louis must give way to the act as far as they are in conflict with it.

Here again, it will be noted, there was no consideration whatever of the subject of the law which could "repeal or modify ordinances of the city." Apparently it was the view of the court, following the literal wording of the constitution, that a charter provision of any kind was "subject to" any state law on the same subject.[1]

In the case of the City of St. Louis *v.* Meyer,[2] decided in 1904, the question at bar concerned the authority of the city to enact a revenue ordinance imposing a license tax upon "peddlers or hawkers" and defining a hawker in such manner as to include farmers who sold products of the soil by outcry or by going from place to place. There existed at the time of the passage of this ordinance a provision in the general revenue laws of the state defining peddlers, and from the definition therein laid down, itinerant persons who sold "agricultural and horticultural products" were expressly excluded. Was the ordinance of the city under these circumstances of conflict valid? It was held to be invalid. It was urged upon the court that the definition prescribed

[1] "The state law now in force [on the subject of dramshops and the excise commissioner] largely if not entirely supersedes the city ordinances on the subject." Note of the compiler and annotator of *Rev. Code of the City of St. Louis*, 1907, p. 122.

[2] 185 Mo. 583. 1904.

by the general law was only for purposes of state taxation and that it "nowhere evinced an intention to define who are and who are not peddlers for the purpose of prohibiting municipalities from exacting a license from such persons;" but this fairly reasonable contention was summarily rejected.[1] Coming to what was perhaps the most significant point that was made in the case, the court declared:

It is insisted by counsel for respondent that the exceptions contained in section 8861, which embraces the class in which defendant must be placed, can be of no avail to appellant, for the reason that the exception, as applicable to him, was not enacted until long after the adoption of the charter of the city of St. Louis; and it is argued that to apply the exception to him would in effect be amending the charter, which can only be done by a vote of the people. In support of this contention, we are cited to the case of St. Louis *v.* Dorr, 145 Mo. 466.[2] An analysis of that case will demonstrate its want of application to the question involved in the case at bar. "Matters of purely municipal and local concern the Constitution intended to commit to local self-government," and the boulevard act, involved in that case, was a subject of strictly municipal concern. That is not this case; the regulation and licensing of peddlers and hawkers is not a subject which can be limited to one of strictly municipal concern. It is one in which the people of the entire State have an interest, and is a subject to which general legislation may be directed, and when the State speaks upon the subject by a general enactment its force and vitality are not limited to any particular locality. This much was conceded by the learned judge in the Dorr case. He said: "In respect of those topics which involve the relations of the city to the State, there can be no doubt that the legislative power of the State may properly be exercised over the city of St. Louis, as has been done in many instances disclosed by decisions in the *Missouri Reports*. . . . The General Assembly has, furthermore, undoubted power to legislate for St. Louis, as for all other cities, in the

[1] Reliance upon this point was placed on the decision of The City of Moberly *v.* Hoover, 93 Mo. App. 663 (1902) — a case which, on the same general grounds advanced here, held void an ordinance of Kansas City imposing a license tax on peddlers of books. This Moberly case was quoted at some length as establishing the general (but certainly utterly vague) principle that when "the exercise of *any* jurisdiction cannot be brought within the scope of the grant of its powers without a conflict with the laws of the state, the exercise of such jurisdiction cannot be allowed." This was a principle from which the supreme court itself had previous to this time (1904) already departed. See *infra*, 153–155, 157–159, 166, 167.

[2] See *infra*, 160.

full exercise of the police power of the State, as well as to enforce direct mandates of the fundamental law by appropriate statutes, and to pass all proper laws that are general throughout the State. State *ex rel.* Ziegenhein *v.* Railroad (1893), 117 Mo. 1 (22 S. W. 910), affords an illustration of legislation of the latter sort. In that case a law intended to prescribe rules for assessing railroad property throughout the State was held applicable to St. Louis and operative to repeal charter provisions on that subject."

Here, at last, was recognition of a wholly new doctrine to be applied to the determination of what laws a home rule charter must be "consistent with" and "subject to" — a doctrine which was founded upon the distinction between matters of state-wide concern and matters of merely local concern and which, as the court admitted and as we shall later see,[1] had prior to this decision of 1904 been introduced into the judicial interpretation of the constitutional provision here under review. The superiority of a state law over a charter provision was to be determined by applying the test of whether it did or did not deal with a matter of state as contrasted with local concern. In other words, the court had in part clarified the ambiguity of the constitution by declaring that freeholders' charters must be "in harmony with" and "subject to" those "laws of the state" *which are of general as distinguished from local concern.*

It is certainly somewhat difficult to see why the classification and definition of persons for the purpose of collecting license taxes that are levied largely, if not indeed wholly, with the object in view of raising local revenue, is a subject "in which the people of the entire state have an interest." On this point the Missouri court was characteristically dogmatic. It may well be that in one view of the matter the whole subject of any local revenue policy, in all of its details, is one in which the state has an interest, on the theory that state and local policies in such a matter should be planned and developed with reference to each other, that they should in fact constitute a single harmonious unit.[2] But the court did not see fit to offer this or any other argument

[1] *Infra*, 153–155, 157–159, 166, 167.
[2] *Infra*, 278.

in support of its didactic ruling. The affair was a state affair simply because the court so declared it to be.[1]

As we shall have occasion to note in another connection,[2] the Missouri court has from the beginning been somewhat liberal in its sanction of the exercise of financial powers by home rule cities where no question of conflict with a state law has been raised. But there is no instance of record in which a charter provision on the subject of local revenue has been held to be paramount to a state law with which it chanced to be out of harmony. Nor have the opinions employed any satisfactory course of reasoning or laid down any definite rules that may be applied in the determination of issues of supremacy involving questions of this character.

Does a State Law supersede a Charter Provision in Matters pertaining to the Police?

Prior to the adoption of freeholders' charters in either St. Louis or Kansas City the police departments of each of these cities had been placed by law under the control of state-appointed commissions. The St. Louis police commission had been established in 1861; that of Kansas City in 1874. In their home rule charters neither of these cities had attempted to upset this arrangement and take over complete control of the police upon the theory that the right to resume such control was properly included in the right to "frame a charter for its own government." The St. Louis charter expressly provided[3] "that no system of police shall be established or maintained other than the present metropolitan system as long as the same is established by law." The charter of Kansas City contained one or two provisions relating to the subject of police. Under such circumstances it is not surprising that the courts were not early called upon to determine any issue of paramountcy between state laws and charter provisions upon this subject.

[1] See in contrast the broad view of the California court on the subject of licenses for revenue purposes. *Infra*, 277.

[2] *Infra*, 173–176.

[3] Art. III, sec. 26, sub-sec. 2.

In a very early case, however, the court was presented with a question which trenched somewhat closely upon this point.[1] An act of 1875 provided for the election of one constable in each ward of St. Louis. A city ordinance of 1878 consolidated two wards into a single district for the purpose of electing constables and provided for the election of three such officers in this district. The municipal ordinance was thus clearly in violation of the state law, and action was brought to oust the persons who had been elected under authority of the ordinance. The court held that it was highly doubtful whether the charter itself conferred upon the legislative body of the city the power to enact the ordinance in question. But in any case, it was declared, "if the number of constables is insufficient, it is for the general assembly to increase the number." This ruling was apparently founded, in part at least, upon the view that "the constable is not a city officer, he is a state officer. It is an office created by general law for every township in the state, and every ward in the city. He is a state officer in the same sense that sheriffs and clerks of courts of record are state officers, although they can only discharge the duties of their respective offices within a limited territory and not throughout the state."

If the point that was made as to the insufficiency of the charter grant of power to the municipal legislature be taken as not having been in the mind of the court a conclusive determination of the case, it may be said that this was the first Missouri case in which the distinction between a state and a local affair was applied in the settlement of a conflict between state law and charter provisions. It cannot, however, be said to have been unmistakably applied. It was not at this time clearly declared that the laws with which charter provisions must be "consistent" were those laws which dealt with matters of state concern. Moreover, it is important to note that in numerous cases decided at a later date this distinction was wholly ignored. The probability is that the court merely stumbled into this discussion of the "state" character of the office of constable without any very clear notion as to the direct

[1] State *ex rel.* Attorney-General *v.* McKee, 69 Mo. 504. 1879.

relation of such discussion to the clauses of the constitution conferring the charter-making power.

In the course of the opinion rendered in this case, one interesting declaration was made. It was asserted that "the city has ample means to maintain the peace and good order of the city by providing for a police force and increasing it from time to time." It does not appear, however, whether the court intended to say that the city had this "means" by grant of authority in the law by which the state police commission was established or by grant of authority to frame its own charter. Further than the bare expression quoted the opinion did not go.

In 1899 the St. Louis police law of 1861 was repealed and another law embodying practically the same principles was enacted in its stead.[1] The constitutionality of this act was attacked upon several grounds but not upon the ground that it was in conflict with the provisions of the local charter for the obvious reason that the charter of St. Louis, as has already been noted, expressly recognized the binding force of the state law creating a "metropolitan police system." However, the following excerpt from the opinion handed down in the case that arose [2] is of considerable interest and importance as presaging the ruling that would be adopted by the court whenever the specific question of conflict should be presented. Referring to the police acts of 1861 and 1899, the opinion declared:

> Laws like these and those of other States providing a metropolitan police system for large cities, are based upon the elementary proposition that the protection of life, liberty, and property and the preservation of the public peace and order in every part, division and sub-division of the State is a governmental duty which devolves upon the State and not upon its municipalities any farther than the State in its sovereignty may see fit to impose it upon or delegate it to the municipalities. The right to establish the peace and order of society is an inherent attribute of government, whatever its form, and is co-extensive with the geographical limits thereof, and touching every part of its territory.
>
> From this duty existing in the very nature of the State government, flows the corresponding power to impose upon municipalities of its own

[1] Act of March 15, 1899.

[2] State *ex rel.* Hawes *v.* Mason, 153 Mo. 23 (1899); *supra*, 124.

creation a police force of its own creation, and to compel its support out of the municipal funds. Such is the conceded doctrine by the most learned of our writers upon constitutional law, and such is the consensus of judicial decision throughout the United States.

Wherever the legislature has the right to assume control of a municipal office, it has likewise the right to compel the city to provide for defraying the expenses of such office, and while it is sometimes difficult to draw the line and distinguish whether a given office is of a public or State character or is simply one to subserve a municipal function, it is almost universally conceded that police boards and metropolitan police forces are State officers and fall clearly within legislative control.

Five years after the decision of this case the court was at length called upon to apply the views thus expressed in the determination of a direct instance of conflict between state law and a charter provision relating to a matter of police control. Among the very few provisions of the Kansas City charter on the subject of police was one which regulated the making of removals from the force. The state law of 1874 regulated the same matter in a different manner. An officer who had been removed according to the requirements of the law sought reinstatement, alleging that the charter provisions had superseded the law. Relying upon the views expressed in the St. Louis case last mentioned above, the court, in the case of the State *ex rel.* Goodnow *v.* Police Commissioners of Kansas City,[1] declared as follows:

It follows, without more discussion or elaboration, that article XI of the charter of Kansas City, adopted in 1899, did not have the effect of superseding or repealing the act of 1874, and that so long as that act remains in force it is beyond the power of Kansas City to repeal it or to create a board of police commissioners or a police force of its own. It also follows that the defendants hold their offices by virtue of the act of 1874, and the amendments thereto, and not by force of the city charter, and that the same is true of the relator. It also follows that when relator was appointed a member of the police force, by virtue of the act of 1874, he accepted that appointment subject to all the terms and provisions of that act as fully as if those terms had been specified in his commission. By the terms of that act he could not be removed for any reason personal to himself, except upon charges, with notice and after trial. But by the terms of that act, he, like every one else similarly appointed, held for a

[1] 184 Mo. 109. 1904.

term of three years, subject however to that term becoming reduced and subject to the possibility of removal, without notice, charges or trial, in the event that the exigencies of any extraordinary emergencies made it necessary, in the judgment of the board, to reduce the number of the police force, and of that necessity the board was the sole and final arbiter, and in such event any one, officer or private, of the force selected by the board could be discharged to meet the exigency.

By the decision of this case it was directly determined that a freeholders' charter could not supersede a state law relating to the subject of police; and if it could not supersede an existing law, certainly it would have to be "in harmony with" and "subject to" any such law that might be subsequently enacted. Moreover, the specific reason advanced in support of this determination was that the control of police was a matter of general or state rather than of local or municipal concern.

This doctrine as applied to the relative competence of the state and the city in matters of police control received additional affirmation in the case of the State *ex rel.* McNamee *v.* Stobie,[1] decided in 1905.

At the time when the St. Louis charter and "scheme" of separation were adopted the police force of the city was, under the terms of the law of 1861 as amended, given jurisdiction in the county of St. Louis. This jurisdiction was continued by the provisions of the "scheme" — whether because it was actually desired or because the freeholders who drafted the scheme and charter doubted their competence to alter this situation does not appear. The act of 1899, which repealed the act of 1861 and amendments, made no provision for the exterritorial jurisdiction of the municipal police. In 1905 the notoriously lawless condition of affairs at Delmar race-track, where there was open violation of the gambling and liquor laws of the state as well as frequent crimes and disturbances of the peace, attracted widespread attention. Governor Folk directed the board of police commissioners of the city to detail police officers with orders to proceed into the county and arrest the offenders. He based his authority to issue this direction upon the fact that "the metropolitan police

[1] 194 Mo. 14. 1905.

force of the city of St. Louis is by the Scheme . . . given the same jurisdiction in the county as in the city." A writ of prohibition against the police officers detailed for this purpose was sought and was granted by the court, the view being taken that while the provisions of the "scheme" and charter conferring exterritorial jurisdiction upon the police were valid under the law of 1861 because they were "in harmony with" that law, they nevertheless were rendered inoperative by the act of 1899, the provisions of which "clearly indicated the purpose and intention of the legislature to divest the officers of the police system of the city of St. Louis of all authority to exercise jurisdiction in the county of St. Louis." In the most emphatic manner the court reiterated the opinion that the control of police was a matter of state and not of municipal concern, and the view was expressed not only that the framers of the "scheme" and charter "had nothing to do with the creation of the metropolitan police system of the city" and "were without authority to prescribe the powers and duties" of police officers in the absence of "some existing law upon which to predicate it," but also that they never contemplated that the provisions in question "should continue in force regardless of the fact that the law which conferred such powers should be repealed." Throughout the opinion the police laws under review were referred to as "general" laws — general, that is, not in respect to their application, for in this respect they could scarcely have been more special and local in character, but general in the sense that they dealt with a subject of general or state concern.

Does a State Law supersede a Municipal Ordinance enacted in the Exercise of the Police Power?

It is a well-known fact that municipal corporations are universally endowed with the power to enact ordinances of a police nature. And it is likewise well known that these ordinances frequently — perhaps more frequently than not — regulate matters that are also the subject of regulation by state law. Questions of conflict between such ordinances and such laws are not there-

fore peculiar to cities with home rule charters. It seems utterly beside the purpose of our study here to enter upon any detailed discussion of the fairly established rule by which the supremacy of state laws over ordinance provisions is determined. The point of importance is that in the application of these rules there is no material difference — and there is obviously no inherent reason why there should be difference — between the case of home rule cities and of cities under legislative charters.

A single case from the Missouri jurisdiction will serve both to indicate the general rule that is applied and to illustrate the absence of consequential differences between cities of the two classes. In the case of St. Louis *v.* De Lassus [1] the question was raised as to the validity of an ordinance providing a fine of from twenty-five to one hundred dollars for selling meat on Sundays after the hour of nine in the morning because of its being in conflict with a state law which made the selling of "goods, wares, or merchandise" on Sunday a misdemeanor punishable by a fine not to exceed fifty dollars. The court said:

> The St. Louis charter, article 3, section 26, paragraphs 5, 10 and 14, conferred the power to pass this ordinance and unless the ordinance is void because in conflict with the Constitution and laws of the State, the judgment of the Court of Criminal Correction is wrong. It cannot be held invalid because it imposes a fine for an act which the statutes of the State denounce as a criminal offense and provide a punishment therefor. [State *v.* Muir, 164 Mo. 610; State *v.* Gustin, 152 Mo. 108.] But notwithstanding the charter is sufficiently comprehensive to authorize the ordinance in question, we are required by the demurrer of the defendant to inquire whether in the language of section 23 of article 9 of the Constitution, the charter provision is "in harmony with and subject to the Constitution and laws of Missouri." We take it this was one of the principal contentions of the defendant in the Court of Criminal Correction. . . .
>
> Two inconsistencies apparently suggest themselves. First, section 2243 of the statute makes it a criminal offense to sell "goods, wares or merchandise" at any hour or at any moment on Sunday, whereas the ordinance only prohibits it after 9 o'clock in the forenoon. Is this difference fatal to the latter? This question was answered for us by this court in St. Louis *v.* Cafferata, 24 Mo. 94. The general law of this state was the same at that time as now, being section 36 of article 8 of chapter 50, Revised

[1] 205 Mo. 578. 1907.

Statutes 1855. The charter powers on this subject were ample to authorize regulation by the city of trade, etc., not repugnant to the Constitution. The defendant was prosecuted under an ordinance which provided that "whoever shall, in the city, on Sunday . . . after the hour of nine o'clock in the forenoon of that day keep his store, shop or other place of business open, shall be deemed guilty of a misdemeanor." Judge Leonard, on this point, said: "The general Legislature have regulated the subject for the whole State as they deemed proper, and the city government have made such local regulations as they thought fit for the good order and peace of the city. The provisions of the two laws are different, but there is no such inconsistency between them as to annul or in any way affect the provisions of the local law (St. Louis *v.* Bentz, 11 Mo. 61); and the defendant was subject to both laws and amenable to the penalties they prescribed." Merely because the city did not make its ordinance as broad as the statute did not render it so inconsistent as to make it void. It could have made its ordinance as broad as the statute and in no wise have conflicted with the Constitution or general laws of the State. [St. Louis *v.* Schoenbusch, 95 Mo. 618; City of DeSoto *v.* Brown, 44 Mo. App. 152; Kansas City *v.* Hallett, 59 Mo. App. 160.]

Does the fact that the Legislature fixed the punishment for the sales on Sunday prevent the city making a higher fine? We think not, and so it was ruled in Kansas City *v.* Hallett, *supra*. The scope and purpose of the statute and ordinance are the same, the one reaching the supposed evil by making it a criminal offense; the other, providing by ordinance for the civil prosecution. In State *ex rel. v.* Field, 99 Mo. 352, Judge Black, speaking for this court, of cities organized under section 16 of article 9 of the Constitution and the provision that they shall be "consistent with and subject to the Constitution and laws of the State," said: "Charters thus adopted will, of necessity, be more or less at variance, and that they will be unlike, in many respects, is within the contemplation of the Constitution." This statement has since been expressly adopted and reiterated in Kansas City *v.* Marsh Oil Co., 140 Mo. 458, and Kansas City *v.* Bacon, 147 Mo. 259. In the latter case, it was added; "'Consistent with' does not import exact conformity, but means substantial harmony with the principles of the Constitution."

The opinion thus expressed would doubtless have been precisely the same had St. Louis enacted the ordinance in question under authority granted by a legislative charter, except that no reference would have been made to any constitutional provision. It is certainly quite in line with opinions expressed in many other jurisdictions in which no power to frame charters has been con-

ferred upon cities. The whole problem of the relation between state police laws, under which criminal prosecutions may be brought, and municipal police ordinances on the same subject, which may be enforced by civil or quasi-criminal actions, is one which deserves more consideration than has been given to it and more satisfactory adjustment than has been reached either in law or in practice. But it is not a problem that is in any wise peculiar to the city endowed with power to frame its own charter.[1]

Does a State Law supersede a Charter Provision governing Matters pertaining to Elections?

Under the first freeholders' charter of St. Louis power was conferred upon the mayor to appoint election officials who, it may be remarked, performed their functions in respect to *all* elections whether state or local that were held within the city. In 1883 the legislature enacted a law which made it the duty of the recorder to appoint these officials. In the case of Ewing *v.* Hoblitzelle[2] action was brought by the mayor seeking to restrain the recorder from exercising this authority of appointment, the validity of the law being assailed upon the ground, among other things, that the charter provision took precedence over the law. The opinion that was handed down is of interest chiefly because it is eloquently illustrative of the early narrow view which the Missouri court entertained as to the scope of the home rule powers conferred by the constitution — a view which, considering the literal phraseology of the constitution, was certainly not wholly unjustified. The opinion recited:

It is argued that inasmuch as these sections authorized the voters of the city of St. Louis to frame and adopt a charter for the government of the city, which, when adopted in the manner therein provided, should

[1] See also as showing how the general rule has been applied by the Missouri courts indifferently to home rule cities and to cities under legislative charters: City of St. Louis *v.* Bentz, 11 Mo. 61 (1847); City of St. Louis *v.* Cafferata, 24 Mo. 94 (1856); State *v.* Cowan, 29 Mo. 330 (1860); City of Independence *v.* Moore, 32 Mo. 392 (1862); *Ex parte* Hollwedell, 74 Mo. 395 (1881); City of St. Louis *v.* Schoenbusch, 95 Mo. 618 (1888).

[2] 85 Mo. 64. 1884.

take the place of and supersede the charter theretofore granted by the legislature and all amendments thereto, that as to all matters of local self-government an *imperium in imperio* was created, and as to such matters the city was emancipated from state and legislative control. These sections will satisfactorily show, if examined by themselves, and would show, were it in our province to examine them in the light of the debates, when they were the subjects of discussion in the convention which formulated the constitution, conclusively, that the chief object sought to be accomplished by them was not to emancipate the city from legislative control, but to allow it to enlarge its limits and cut it loose, when thus enlarged from the county, so as to free it from county government and exempt the property therein from taxation for county purposes. It is true that constitutional authority was given to the people of the city to frame and adopt a charter which should supersede the charter and all amendments to it in existence at the time of its adoption, but the idea that it was thereby intended to create a sovereignty, and deny to the state the right of control, is, we think, completely overthrown by the following limitations or conditions imposed by section 23, article 9 viz.: "Such charter and amendments shall always be in harmony with and subject to the constitution and laws of the state of Missouri." "Subject to," that is, placed under the authority, the dominion of the constitution and laws of the state. That it was never designed to free the city from state control is further shown by section 25, of article 9, which is as follows: "Notwithstanding the provisions of this article the general assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this state."

At the time of the adoption of the scheme and charter, there was, and is now, a law of the state in force providing for a board of police commissioners in the city of St. Louis, consisting of five persons, of whom the mayor of the city is one, and the other four appointees of the governor, and confirmed by the senate. These commissioners have control of the entire police force of the city, and are invested with large powers affecting the local government of the city. Suppose that the charter of the city when framed and adopted, in conformity with the scheme authorizing it, had contained a provision for a board of police commissioners, consisting of five persons, one of whom should be the mayor and the other four his appointees, and investing them with the same power of control over the police force of the city which the law of the state invested in those appointed by the governor, which would have prevailed, the law of the state or the charter provision? If the charter provision in that respect is to prevail the law of the state would then be subject to the charter in the face of the constitution, which declares that the charter shall be subject to the law of the state. Public corporations are the auxiliaries of the state

in the important business of municipal rule and are called into being at the pleasure of the state, and the same voice which speaks them into existence can speak them out. State *ex rel. v.* Miller, 66 Mo. 328. And it was never intended by the constitutional provisions above referred to (as I have attempted to show), that the municipality of the city of St. Louis should rise higher than the fountain head. The state at large is as much interested in the method of conducting elections in said city, at which all state as well as municipal officers are elected, which method by the act of 1883 it assumes to prescribe, as it is in having a well-regulated police in the city, which it has assumed to provide for in the law creating a board of police commissioners, who are state as well as municipal officers, and into whose hands the important trust is confided of controlling its police force.

We do not hold that the legislature in exercising the power referred to in section 25, article 9, of the constitution, can exercise it by the passage of a local or special law; but that it can do so by a general law we have no doubt, and when it is exercised, as we think it has been exercised in the act of 1883, by a general law, and such law is, in any of its provisions, in conflict with a charter provision that the law prevails over the charter in obedience to the mandates of the constitution that "such charter and amendments shall always be in harmony with and subject to the constitution and laws of the state."

It will be observed here that the court did refer to the interest of the state in the methods of conducting elections "at which state as well as municipal officers are elected," and the analogy was drawn between the state's interest in such a matter and its interest in the police department. It was by no means clearly declared, however, that the charter provision was "subject to" the state law in question *because* this state law related to a matter of general as distinguished from local concern. Indeed the opinion as a whole breathed the idea that where *any* "general" law "is, in any of its provisions, in conflict with a charter provision," such "law prevails over the charter." [1] Incidentally it may be remarked again that this interpretation of the constitution as requiring "general"

[1] The Ewing case was cited a few years later in support of the doctrine that an election law applicable to cities of more than 100,000 inhabitants had repealed certain provisions of the then existing *legislative* charter of Kansas City. State *ex rel.* Attorney General *v.* Dolan, 93 Mo. 467 (1887). There was no intimation whatever that a legislative charter and a freeholders' charter did not stand on precisely the same footing in their relation to state laws.

as distinguished from "special" legislation for St. Louis was subsequently expressly overruled by the Missouri court.[1]

In the case of the State *ex rel.* Faxon *v.* Owsley,[2] decided ten years after the Ewing case, it was held, among other points settled, that a state law creating the office of recorder of voters in Kansas City took precedence over any charter provision with which it might be in conflict. It may be noted that the charter of the city recognized the binding force of the law requiring registration of voters which was in existence at the time the charter was framed.[3] Relying upon this fact and upon the doctrine of the Ewing case, the court declared that it was "unnecessary to review the argument of counsel, questioning the power of the legislature to pass the act, so far as its general scope and purpose is concerned; or to make any observations on the claim of the relators, citizens of Kansas City, that it is obnoxious to the principle of local self-government which it is said pervades the constitution." No new or additional light, therefore, was shed upon the broad doctrine announced in the first case dealing with this subject. And this may be said also of the case of the State *ex rel.* McCurdy *v.* Slover [4] which in effect simply reaffirmed the decision of the Ewing case.

It is obvious that the Missouri cases involving questions of conflict between state election laws and charter provisions are not wholly convincing. In view of the fact that in a number of cases the court ultimately laid down the rule that the "laws" which home rule charters must be "consistent with" and "subject to" are laws relating to matters of general or state-wide concern and not to matters of local or municipal concern, it would seem that in the later cases on the subject of election provisions this rule might with propriety have been more fully discussed and

[1] *Supra*, 124.

[2] 122 Mo. 68. 1894.

[3] Charter of 1889, Art. I, sec. 8; Art. 17, secs. 27, 39, 141.

[4] 126 Mo. 652 (1894). The Faxon case decided also that the "legislature had the constitutional right to require the city to pay the expenses of holding all elections, whether national, state, or municipal held in such city, out of revenue raised by the city." This rule, which was reaffirmed in State *ex rel.* Lynn *v.* Board of Education of the City of St. Louis, 141 Mo. 45 (1897), was wholly independent of any question of conflict between state law and charter provision.

applied. Apparently the court has never unmistakably declared that the regulation of strictly municipal elections is a matter of state concern. In practice, however, the legislature of the state has acted under this assumption, and St. Louis and Kansas City have acquiesced. The article of the St. Louis charter of 1876 dealing with "elections and registration" was not regarded as operative after the decision of the Ewing case save as to the time of holding the general city elections,[1] which matter the legislature never attempted to regulate. The 1914 charter of the same city regulates only a few matters pertaining to elections that are not covered by state law.[2] The brief provisions on this subject terminate with an indirect appeal for larger powers by declaring that "whenever it may be done in harmony with the state constitution and laws, the board of aldermen shall by ordinance provide for and regulate municipal elections and registration of voters and may provide by ordinance for non-partisan nominations, preferential voting, or proportional representation." [3] Lest the few charter references to the "board of election commissioners" should at some subsequent time be made invalid by the repeal of the state law creating this board,[4] it is provided that any such reference "shall be taken to include any board or person having charge of elections in the city." [5] The 1908 charter of Kansas City likewise contains very limited provisions on the subject of elections,[6] and some of these merely adopt state laws or are expressly declared to be subject to such laws.[7]

On the whole, therefore, it seems reasonable to conclude that the doctrine of the Missouri cases has been taken to mean that as to *all* matters concerning elections — municipal or otherwise — a

[1] The compiler and annotator of the charter declares that "all the original provisions" of Article II except the first section "were superseded by the state statutes, which now control elections. The charter provisions are therefore omitted here." *Revised Code of St. Louis*, 1907, p. 303.

[2] Charter of St. Louis, 1914, Art. II.

[3] *Ibid.*, sec. 9.

[4] Acts of Mo., 1903, p. 170.

[5] Charter of St. Louis, 1914, Art. XXV, sec. 7.

[6] Charter of Kansas City, 1908, Art. XVIII, secs. 23–25, 29, 34, 35.

[7] *Ibid.*, secs. 23, 29, 34.

state law supersedes and controls a contrary provision in a home rule charter.

Does a State Law supersede a Charter Provision regulating the Annexation of Territory?

It will be recalled that one of the powers specifically conferred upon the city of St. Louis in adopting its first home rule charter and the "scheme" of separation from the county was the power to "extend its limits." [1] Such extension was effected by this "scheme" and charter.[2] The charter, however, made no provision for any future annexation of territory to the city — a policy of omission which was followed also in the charter of 1914. Naturally, therefore, so far as St. Louis is concerned, no question has ever arisen over a conflict between state law and charter provision on the subject of the annexation of territory. Indeed there appears also to be no state law upon the subject that is applicable to St. Louis; [3] and the city is in consequence utterly incapable of taking any action looking to an enlargement of its boundaries.

Not so with Kansas City. In 1887 the legislature adopted a so-called "enabling act" which cleared up several uncertainties in the procedure by which "cities having a population of more than one hundred thousand inhabitants" might frame their own charters,[4] and which — to employ the language of the supreme court — "was designed to aid cities in organizing under" the home rule provision of the constitution. Among other things this act empowered cities to extend their limits "by ordinance" whenever a proposed extension should be approved by a four-sevenths vote of the people to be included. No action by the voters of the city itself was required.

Now, as every one knows, one of the characteristic features of practically every municipal charter is the description of the ter-

[1] *Supra*, 118.

[2] "Scheme," sec. 1; Charter, Art. 1, sec. 2.

[3] See the compilation of state laws applicable to St. Louis in *Revised Code of St. Louis*, 1907, pp. 77–223.

[4] Revised Statutes of Mo., 1909, secs. 9703 ff.

ritorial jurisdiction of the city. The Kansas City charter of 1889 contained such a description. Shortly after its adoption Kansas City attempted to annex the suburban city of Westport *by ordinance*, action being taken under the law of 1887 the terms of which had also been embodied in the charter.[1] Contest over the validity of this act of annexation was raised in the case of the City of Westport *v.* Kansas City.[2] The court declared that it was "too plain to admit of any doubt that any act on the part of Kansas City which contracts or expands its territorial jurisdiction is an amendment of its charter." But the constitution itself provided the procedure to be followed in amending a freeholders' charter, including among other requirements the taking of a referendum vote.[3] In this instance amendment was sought to be effected merely by ordinance. The point was made by the court that, while the legislature was unquestionably competent to amend such charter, in view of the fact that it was expressly declared to be "subject to" the laws of the state,[4] yet "the legislative will must be exercised in a manner which is consistent with the constitution." This law, which in effect empowered Kansas City to amend its charter by ordinance, was void because "the plain language of the constitution" required that every proposed amendment "must have the assent of three-fifths of the voters voting upon the proposition." In other words, while the constitution recognized the right of the legislature *directly* to amend home rule charters without subjecting such laws to a referendum vote, it did not recognize the right of the legislature to *confer* the power of amendment to be exercised in a manner differing from that laid down in the fundamental law.

Under this view this act of annexation could have been effected by a law directly establishing it, unless such law would be invalid by reason of further constitutional inhibition. Such a law, however, would of necessity refer to Kansas City and Westport by

[1] Charter of Kansas City, 1889, Art. I, sec. 7.

[2] 103 Mo. 141. 1890.

[3] *Supra*, 121.

[4] Citing Ewing *v.* Hoblitzelle, *supra*, 141, and State *ex rel.* Kansas City *v.* Field, *infra*, 153.

name or at least by such specific description that it would be obviously special in character. It would probably, therefore, be unconstitutional.[1] The logical deduction from this was that the only way by which the legislature could deal with the subject of annexation of territory to home rule cities was through the medium of a law conferring the power to annex but requiring that the power be exercised, so far at least as the city itself was concerned, by the procedure laid down in the constitution for the making of charter amendments. The attention of the court was called to this practical result of its decision, but the rejoinder was promptly given that "if the foregoing provisions of the constitution bring about that result, then that ends the matter so far as the courts are concerned."

It may be remarked that the legislature did not amend (and never has amended) the provision of the law of 1887 relating to the matter of annexation. That part of the law which provides for the taking of a vote of the people residing upon the territory to be annexed has been regarded in practice as valid. The annexation that was involved in the Westport case was subsequently validated by submitting the proposition to a vote of the people of Kansas City in the form required for the adoption of charter amendments. This action was fully sustained by the court in the case of Kansas City *v.* Stegmiller,[2] where it was broadly asserted that "in so far as the action of Kansas City alone is concerned, there is a plain constitutional grant of the power to extend its limits and a definite mode pointed out."

It will be observed that the court here carefully limited this declaration to "the action of Kansas City *alone*." The opinion was not expressed that a home rule city might, wholly in the absence of state law, enlarge its boundaries by the process of charter amendment. This point was not raised for the obvious reason that, *so far as the action of the people residing in the territory to be annexed was concerned*, there existed a state law the validity of which was not, and could not reasonably have been, assailed as

[1] *Supra*, 124, 125.
[2] 151 Mo. 189. 1899.

to such provision specifically.[1] It is not to be believed, however, that the Missouri court would in the absence of this or a similar law have upheld the authority of the city to annex territory at will without the consent of the extra-urban inhabitants affected. This would be to give the home rule city exterritorial power of enormous consequence. It would be little short of ridiculous to hold that the grant of authority to frame a charter included any such power. The question has never been directly passed upon in Missouri because, as already mentioned, St. Louis has never attempted to annex territory under a freeholders' charter, and as applied to Kansas City the exterritorial effect of the city's action is governed by state law.

It will be noted also that neither of the annexation cases mentioned above involved specifically any question of conflict between state law and charter provision. No freeholders' charter in Missouri has ever embodied a provision upon this subject except the Kansas City charter of 1889, which merely incorporated the provision of the law of 1887.[2] So far as relates to the action of the city itself, it seems to be fully settled that neither a state law nor a charter provision can provide any other mode for the effectuation of annexation than that prescribed for the making of charter amendments. As to this phase of the matter, therefore, there is no necessity for either statutory or charter regulations, and conflict of provision is a highly remote possibility. So far as relates to extra-urban action, it seems reasonable to conclude that any pertinent law would supersede a contrary charter provision for the plain reason that, with or without the law, the charter provision would be void as being upon a subject beyond the competence of the city to control through the medium of a locally made charter.

Does a State Law take Precedence over a Charter Provision relating to the Control of Privately Owned Municipal Utilities?

No case has ever been presented to the Missouri courts involving a question of conflict between a freeholders' charter provision on

[1] The validity of the entire act was assailed upon the ground of its being special legislation (*supra*, 124) and upon certain other flimsy pretexts.

[2] Omitted from the charter of 1908.

the subject of public utilities and a state law enacted *after* the constitution of 1875 went into effect. At least a partial reason for this is that the constitution expressly prohibited the legislature from granting the right to construct and operate any street railway or authorizing the transfer of the franchise of such railway "without the consent of the local authorities."[1] Two cases have arisen, however, involving the relation of charter provisions to a law that antedated the constitution itself and therefore all home rule charters. This law, enacted in 1860 and known as the "third parallel law," prohibited a street railway from being constructed parallel to an existing line on any street within three blocks from the said existing line. The St. Louis charter of 1876 conferred upon the municipal assembly (the council) the *sole* power to grant the right to construct street railways; and the question that arose was whether in the exercise of this "sole power" the municipal assembly was nevertheless limited by the "third parallel law." It should perhaps be mentioned that the legislative charter of St. Louis had been revised in 1866, and the power to grant the right to construct street railways had been conferred on the lawmaking body of the city in practically the same terms as those employed in the freeholders' charter of ten years later. In this act of revision no reference was made to the "third parallel law" of 1860.

In the first case that arose over the relation of the charter to this law,[2] the court declared:

> The charter now in force in the city of St. Louis, under which the ordinance authorizing the defendant to build its road was passed, was framed and adopted in pursuance of the provisions of section 20, Article IX of the Constitution of 1875, and vests the legislative power of the city in two houses, styled the Municipal Assembly of St. Louis. This charter superseded the former charter of the City and all amendments thereof, and was by the Constitution required to be in harmony with the laws of the State. This charter, like those previously noticed, confers upon the municipal assembly the sole power and authority to grant to persons or corporations the right to construct street railways in the city, by ordinances not

[1] Art. XII, sec. 20; *supra*, 62.

[2] St. Louis Railroad Co. *v.* South St. Louis Railroad Co., 72 Mo. 67. 1880.

inconsistent with any law of the State. Indeed the entire grant of legislative power is subject to these conditions. (Art. III, sec. 26.) Article X of this charter provides that: "The Municipal Assembly shall have power by ordinance to determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after completion," etc. The power here conferred is to be exercised, of course, by such ordinances as the Municipal Assembly is competent to pass: that is, ordinances not inconsistent with the laws of the State. Article X is but a detailed amplification of the power conferred by the 11th clause of section 26, article III, besides being somewhat legislative in its character. It follows from the foregoing views that the Municipal Assembly had no power to disregard the regulations prescribed in the Act of January 16th, 1860.

The act of 1860 was thus held to be an existing and unrepealed law, binding upon the city of St. Louis. But when precisely the same question was presented to the court some eight years later this early case was overruled.[1] Referring to argument there employed, the court said:

Tested by the rules of logic, this case is this: The question is was the Act of 1860 repealed by the adoption of the charter? The charter was required to be in harmony with and subject to the Constitution and laws of Missouri. The Act of 1860 is a law of the state of Missouri. Therefore the Act of 1860 was not repealed by the charter. This is reasoning in a circle, but it does not meet or decide the question presented.

Turn the proposition around and the other side of it is: In 1860, when the legislature alone had the power to legislate as to the streets of St. Louis, an act was passed prohibiting a street railroad from being constructed parallel to an existing street railroad on a street within three blocks of the existing road. In 1866 the General Assembly of Missouri amended the charter of St. Louis and gave it sole power and authority to grant the right to any person "to construct street railroads in any street of said city and to regulate and control the same and the use thereof." In 1875 the Constitution gave the city the power to adopt a charter which should supersede all prior charters. The charter so adopted gave the city the sole right to regulate the use of its streets, to grant the right to construct street railways and to regulate street car companies. The Constitution of 1875 expressly prohibited the General Assembly from granting the right to construct or operate or transfer a street railway in any city,

[1] State *ex inf.* Crow v. Lindell Ry. Co., 151 Mo. 162. 1899.

town or village of the State without its consent. The question therefore is, can the act of 1860 limiting the power of the city, stand at the same time and be made consistent with the Act of 1866 which conferred the sole power and authority upon the city, or with the charter which gave the city the sole power to regulate the use of its street and the power to grant the right to construct street railroads upon it, or with section 20 of Art. XII of the Constitution which prohibits the General Assembly from granting the right to construct, operate or transfer a street railway in a city without its consent? Or stated otherwise, can a prior act limiting a right, continue to exist, when the Constitution and subsequent acts vest the sole power in the city and prohibit the General Assembly from legislating upon the subject without the consent of the city? . . .

But it is unnecessary to further elaborate the discussion. It is demonstratively plain that the Act of 1860 is no longer an existing statute law, because it cannot stand with the Act of 1866 or with the provisions of the Constitution of 1875, and the ordinances of the city of St. Louis passed in disregard of it are not void as being inconsistent with it, for being itself inconsistent with subsequent acts and with the Constitution, it has ceased to exist, and hence those ordinances cannot conflict with what no longer exists. The case of St. Louis Railroad Co. *v.* South St. Louis Railroad Co., 72 Mo. 67, was erroneously decided and is therefore overruled.

One should not, of course, too greatly condemn the court for its "circular" reasoning in the earlier of these cases. Circular it unquestionably was; but if ever there were constitutional provisions which invited mental processes of the circular variety, they were these home rule provisions of the Missouri constitution of 1875.

Be that as it may, the later case settled the supremacy of charter provisions over previously enacted state laws on the subject of public utility control. It may be noted, however, that even as to this point the provisions of the freeholders' charter were apparently not quite equal to the task of standing alone. The declaration of the old legislative charter of 1866 upon this subject and another provision of the constitution (which did not relate exclusively to cities under freeholders' charters) were dragged in to give support to the proposition that the charter repealed the law.

Nor was it expressly or even impliedly declared that the control of public utilities was an affair of local rather than of state concern

— a matter in respect to which charter provisions need not be "consistent with" or "subject to" the laws of the state. This specific question of conflict the Missouri courts have not yet been called upon directly to answer; but as will be seen in a later connection,[1] there is strong likelihood that it would be resolved against rather than in favor of control by the locality.

It may be mentioned in conclusion that numerous provisions of state laws dealing with the subject of public utilities (some of which are applicable specifically to St. Louis and others to cities generally, and most of which antedate the freeholders' charter, though a few of them are of subsequent enactment) are still regarded as being applicable to that city.[2] Presumably these laws do not seriously conflict with the provisions of the charter. Otherwise contest would in all probability have arisen before this and their status would have been judically determined.

Does a State Law supersede a Charter Provision governing the Making of Street Improvements?

Immediately after the first freeholders' charter of Kansas City went into effect question arose as to whether the provisions of such charter relating to the assessment of damages and benefits for street improvements had superseded the provisions of a state law upon the same subject enacted in 1885 and made uniformly applicable to *all* cities. The law and the charter were in irreconcilable conflict. The opinion uttered by the court was in part as follows:[3]

> The first section of the enabling act of March 10, 1887, is but a repetition of said section 16, of the constitution, with some matters added, of no value to the present inquiry. The second section enacts: "After the expiration of said thirty days after the ratification and adoption of said charter, as aforesaid, such charter shall be, and constitute, the entire organic law of such city, and shall supersede all laws of this state then in force, in terms governing or appertaining to cities having one hundred thousand inhabitants, or more." The fiftieth section gives such cities

[1] *Infra*, 186–190.
[2] *Rev. Code of St. Louis*, 1907, pp. 213–219.
[3] State *ex rel.* Kansas City *v.* Field, 99 Mo. 352. 1889.

exclusive control of the streets, and the exclusive power to vacate streets and alleys.

. . . The proposition made for relator, that, when any such city has adopted a charter, it is out of, and beyond, all legislative influence, cannot be sustained. We held to the contrary in the case of Ewing *v.* Hoblitzelle, 85 Mo. 76, 77.

Subject to this superior power of the legislature, the constitution accords to any city having the requisite population the right to frame and adopt a charter for its own government, which will supply its peculiar wants. Charters thus adopted will, of necessity, be more or less at variance, and that they will be unlike, in many respects, is within the contemplation of the constitution. It is also within the fair contemplation of the constitution that a charter thus adopted may embrace the entire subject of municipal government, and be a complete and consistent whole. The enabling act of March 10, 1887, is in perfect accord with the spirit of the constitution, and it discloses a well-defined purpose to clear the legislative field, and pave the way for the adoption of a charter which will, of itself, present a complete system of local municipal government. It says the charter thus adopted shall be, and constitute, the entire organic law of such city. Stronger language could hardly have been selected to express the purpose and intention which we have said is disclosed by this act. . . .

This matter of assessing damages and benefits for grading and regrading streets naturally falls within the domain of municipal government. The act of 1885, as amended, is one of those laws which the enabling act declares shall be superseded by the adopted charter. When the present charter of Kansas City became a law, the eighth article suspended and took the place of the general law of 1885. That a general law relating to municipal affairs may be in this way, in effect, repealed, so far as the particular locality is concerned, is established by State *v.* Binder, 38 Mo. 451.

Our conclusion is, that the charter of Kansas City, and not the act of 1885, as amended, is the law by which damages and benefits arising from grading and regrading streets, in Kansas City, are to be assessed.

Reading this case superficially or looking only at the judgment reached, one might be inclined to set it down as holding that street improvements are a matter of local or municipal as distinguished from general or state concern and that laws governing such a matter are not the kind of "laws" which freeholders' charters must be "subject to." A close reading of the case discloses, however, that, whether or not this idea may have been in the minds of the judges, nothing of the sort was clearly declared. It

was "within the fair contemplation of the constitution" that a home rule charter might "embrace the entire subject of municipal government, and be a complete and consistent whole," and the so-termed enabling act was "in perfect accord with the spirit of the constitution." But apparently the supersedence of the law by the charter was referable to this enabling act rather than to the constitution. For it was the purpose of this act "to clear the legislative field" — presumably because the constitution had not done so — "and pave the way for the adoption of a charter" which would be "a complete system of local municipal government." It was "under" this act, and seemingly therefore not directly under the terms of the constitution, that "laws, though general they may be, which relate alone to the government of cities, must yield to the provisions of the adopted charter."

This is a fair example of the lack of interpretative clearness which the Missouri court has so frequently shown in construing the home rule provisions of the constitution. Obviously if the supremacy of the charter regulation was referable to the law rather than to the constitution, it follows that the scope of the city's independent powers under these constitutional provisions is as large or as small as the legislature may by law decree, and that whether or not the matter of street improvements "falls within the domain of municipal government" is a question of no pertinence whatever.

In the case of Murnane *v.* City of St. Louis,[1] involving practically the same question of conflict between a state law and a charter provision relating to street improvements,[2] it was again declared that the statute in question did "not bear upon any of the subjects which concern the relations of a city to the state or are authorized topics, under the constitution, for general legislation applicable to St. Louis" but touched upon a subject that "is a matter strictly of municipal regulation." This assertion, however, was wholly immaterial to the decision of the case, for the law was held void solely upon the ground that it was special legislation — a ruling which, as we have already had occasion to notice, was subsequently reversed.[3]

[1] 123 Mo. 479. 1894.

[2] In this case the charter antedated the law.

[3] *Supra*, 124.

In view of certain later decisions of the Missouri court in which the distinction between matters of general and matters of local concern has been applied with a fair degree of definiteness in determining what "laws" charter provisions are "subject to," there can perhaps be no question that should any further case upon this subject of street improvements arise, the supremacy of the charter would be sustained by direct reference to the constitutional grant of power as modified or explained by the judicial introduction and application of this distinction. The status of the law upon this specific subject has not, however, been unmistakably declared. In spite of the very elaborate provisions of the St. Louis charter of 1876 on the subject of street improvements,[1] the compiler and annotator of the city code of 1907 includes under the caption "state laws applicable to St. Louis" a statute of 1899 dealing with this matter.[2]

Does a State Law supersede a Charter Provision relating to such Matters as Parks, Boulevards, and Bridges?

In 1891 injunctive relief was sought in the case of the State *ex rel.* Wood, Attorney General *v.* Schweickardt [3] to restrain the city of St. Louis from carrying out an ordinance and contract leasing certain buildings in Forest Park and granting to the lessee the privilege of selling intoxicating liquors. Many points were raised to defeat the ordinance, it being contended, among other things, that it was in conflict with an act of the legislature approved March 29, 1875 — an act which antedated the charter. The court held that "if it be true that there is such conflict, then such statute must be regarded as abrogated under the express terms of section 20 of article 9 of the constitution, which declared that upon the adoption of such scheme, it 'shall become the organic law of the county and city and such charter the organic law of the city . . . and supersede the charter of St. Louis . . . and all special laws

[1] Art. III, sec. 26, ch. 2; Art. VI, secs. 1-27.
[2] *Rev. Code of St. Louis*, 1907, pp. 211-213.
[3] 109 Mo. 496. 1891.

relating to St. Louis county inconsistent with such scheme.'"[1] But whether such conflict existed was of no moment because of the terms of that statute, which conferred power to "regulate . . . all parks . . . belonging to the city."

In the course of the opinion it was declared as follows, although the precise pertinency of the declaration is not clear:

> And it must also be borne in mind when considering the point in hand and the force and effect of ordinance 16,002, that, in relation to the property in question and the discretionary control of the city over it, it must be regarded as a matter of purely local concern, as held and owned by the city not in its political or governmental capacity, but in a quasi-private capacity in which the municipal authorities act for the exclusive benefit of the corporation whose interests they represent. This position is abundantly sustained by authority as shown by briefs of counsel.

Very definite application was given to the view thus expressed in the important case of Kansas City *ex rel.* North Park District *v.* Scarritt,[2] decided in 1894. The legislature in 1893 passed "an act empowering every city in this state which is now or may hereafter be organized under and by virtue of the provisions of section 16, article 9 of the constitution of this state, to establish and maintain for such city a system of parks and boulevards, to be under the control and management of a board known as the board of park and boulevard commissioners, and defining the powers and duties of such commissioners."[3] This act was declared to be clearly in conflict with provisions of the Kansas City charter, as amended in 1892, on the subject of parks and boulevards. The opinion recited:

> The act now in dispute deals with subjects strictly within the domain of municipal government. State *ex rel. v.* Field (1889), 99 Mo. 356 (12 S. W. Rep. 802.) It does not purport to bear upon the relations of any locality or of its people to the state government.
>
> The act is in truth what it frankly professes to be, namely, an amendment to the charter of cities organized under the constitutional license above quoted.

[1] This ruling was wholly out of harmony with that laid down in St. Louis Railroad Co. *v.* South St. Louis Railroad Co., 72 Mo. 67 (1880) — a case which had not at this time been overruled. *Supra*, 150. This case was not, however, mentioned.

[2] 127 Mo. 642. 1894.

[3] Laws of Mo., 1893, p. 43.

Yet the language of the constitution on that point is, that a municipal charter, so obtained, may be amended by an action of the people of the city, and "not otherwise."

Surely we cannot write those words out of the organic law, whose authority it is our duty to assert.

It is quite true that there are also provisions requiring such charters to be in harmony with, and subject to, the constitution and laws of the state. Those provisions are general declarations, inserted out of abundant caution, and intended to expressly ordain what the courts would probably have held without them, namely, that valid laws, passed for the state at large, or otherwise conforming to the constitution, should apply to, and be fully operative within such cities.

But such general language cannot justly be considered to override and nullify so specific and clear a command, in the same document, in regard to the mode in which such charters may be amended.

When the constitution declares how such amendments may be made, and that they shall not be otherwise made, it certainly does not mean that the legislature may adopt a different mode for such amendment, by direct legislation operating only upon such charters. . . .

The provisions of the constitution that have been cited are not intended to interfere with the legitimate regulation, by general laws, of all those subjects which concern the relations of the state to the locality, or to prevent appropriate action by the lawmakers upon any of the topics regarding which the constitution sanctions legislation to give practical effect to its own commands, as explained in Kenefick *v.* St. Louis (1895), 127 Mo. 1 (29 S. W. Rep. 838). No such subjects or topics are in question here. The act under review relates solely to matters of internal municipal government. It seeks to amend the existing charter of Kansas City in a number of ways; and its last passages indicate plainly that such is its main design. It cannot be supported without nullifying the guaranty which the fundamental law gives in section 16, above quoted, against invasion of the right of local self-government in the internal affairs of such cities.

Upon a motion for a rehearing, asked upon the ground that the decision rendered was not in harmony with certain previous adjudications — as it certainly was not — the court attempted with indifferent success to vindicate its own consistency, admitting, however, that "remarks" in some of the cases may be found which go further than the judgments, and may not be entirely reconcilable with this last ruling.

It will be observed that in this North Park District case the

court had resort to the constitutional provisions governing the amending of freeholders' charters rather than to the requirement that they should be "subject to" the laws of the state. Instead of defining the laws which such charters must be "consistent with" and "subject to" — this being the clause that was invoked to sustain the statute — as being "laws" *on subjects of general or state concern*, it was in effect asserted that such charters "may be amended" by local action "and not otherwise" *as to matters of purely municipal concern*. The delimiting phrases are obviously identical in purport. The shift in the point of argumentative attack only illustrates the apparent affection of the Missouri court for "the mazes of adjudication" and the "labyrinth of ingenious and divergent reasons" which a few years later one of the members of the court referred to with so much despair.[1]

This apparent affection is far more strikingly illustrated by the incredibly strange opinion delivered in the case of Kansas City *v.* Bacon.[2] Precisely the same statute was under consideration as that reviewed in the North Park District case, the contention being made that it operated to void certain proceedings to condemn lands for park purposes, which proceedings the city had taken under an ordinance enacted pursuant to a charter amendment of 1895. It would certainly seem that the briefest kind of reference to the former case would have sufficed to settle the controversy in favor of the supremacy of the charter. But this case was not even mentioned! On the contrary, a statute the "main design" of which had been declared in the North Park District case to have been "to amend the existing charter of Kansas City" was now held to be "not mandatory but merely permissive or enabling in its provisions." The words of the act "nowhere require any such city to establish and maintain a park, but on their face disclaim any repugnancy or inconsistency with the charter rights of such cities, to acquire land for parks in pursuance of their right to amend their charters, which is a continuing power." Moreover, home rule charters "will of necessity be more or less at variance," and

[1] *Supra*, 126.
[2] 147 Mo. 259. 1898.

the power to frame a charter would be meaningless if "its provisions must all be *in hæc verba* with the provisions relating to the same subject in some other statute — relating to cities in this class." The conclusion was reached that there was "nothing in the charter of Kansas City upon the subject of the acquisition of parks that places it out of harmony with the constitution and laws of the state." Not a single word was said in support of the doctrine that parks are a matter of local concern and as such subject to control of charter provisions which the legislature is incompetent to amend.

It need only be remarked that where the court itself gives so little respect to its own previously uttered views, these views become scarcely worthy of restatement, to say nothing of deferential analysis. The North Park District case was not overruled. It was simply forgotten or ignored. Presumptively it still stands as law — if there is any clear standing law in Missouri upon this subject.

At the same term of court was decided the case of St. Louis *v.* Dorr [1] involving the validity of an ordinance prohibiting any business or avocation to be carried on along a certain street designated as a "boulevard." The ordinance was enacted in pursuance of "an act relating to boulevards in cities having a population of 300,000 inhabitants or more." [2] It was the opinion of a majority of the court that the charter of St. Louis contained no general or specific provision that authorized the enactment of such ordinance. Hence the act in question had to be regarded as an "amendment" of the charter — an amendment conferring power upon the legislative authorities of the city which the charter had not conferred. The act was held invalid, in the first place, because of its special character — a ruling which, as we have noted, was subsequently overturned.[3] In the second place, following the North Park District case,[4] the court held the act void as being an amendment

[1] 145 Mo. 466. 1898.

[2] Laws of Mo., 1891, p. 47.

[3] *Supra*, 124.

[4] And the reaffirmative decisions of Kansas City *v.* Ward, 134 Mo. 172 (1896); and Kansas City *v.* Marsh Oil Co., 140 Mo. 458 (1897); *infra*, 174.

to the charter concerning a local affair of the city.[1] It was declared that "section 25 does not refer to any distinction between local and other subjects of legislation; but sections 20 and 23 *indicate the distinction* quite clearly."[2] Parenthetically, it may be submitted that none of the sections of the constitution upon this subject indicate this distinction "quite clearly," except that the constitution was, without such judicial interpolation, highly contradictory and uncertain of meaning. But in plain point of fact the only thing that was "quite clear" was this contradiction and uncertainty, and the distinction in question which, as we have seen, had by no means been consistently applied in the cases, was referable wholly to the law-making competence of the courts — a competence which, it may be freely admitted, was in this instance forced of necessity upon the judiciary.

Referring to the constitutional pronouncement of section 25, to the effect that the legislature should "have the same power over the city and county of St. Louis that it has over other cities and counties of the state," and to the requirement of section 7, to the effect that the "organization and classification of cities" into not more than four classes should be provided "by general laws," the opinion recited:

> But the theory (advanced in this case) that the freeholders' charter of St. Louis may be amended by an act such as that before us, while the freeholders' charters of cities organized under section 16 may not be so amended, seems at variance with the terms of section 25 which is assigned as the basis of that theory. The charter of St. Louis is subject to the legislative power of the State to the same degree that other cities and counties are. But the degree to which the charters of other cities are subject to amendment by Acts of the General Assembly is limited and defined by section 7 of the same article, already discussed in a previous paragraph of this opinion.
>
> That section imposes positive restrictions on the power to deal at all with city charters, obtained since the Constitution of 1875 took effect.

[1] The contention was repudiated that the situation of Kansas City differed from that of St. Louis in that the charters of cities of more than 100,000 might be amended by local action "and not otherwise," whereas this phrase was omitted in the constitutional provision relating specifically to St. Louis.

[2] *Supra*, 118–119.

Those limitations are as applicable for the protection of the city of St. Louis against legislation upon its local affairs as to protect any other city against such legislation.

Legislation on local topics, properly comprehended in municipal charters, must be enacted in the manner defined by section 7, by general laws, the nature of which is indicated explicitly, viz.: "So that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." And the number of classes which the General Assembly may create for the organization of cities and towns is positively limited to four.

Those safeguards protect all city charters that have come into being under the Constitution of 1875.

All of this is so hopelessly muddled in its logic that it seems impossible to subject it to explanatory analysis. One of the main points registered in the case was that "so far as concerned the local affairs" of St. Louis, as of Kansas City, its charter "cannot be amended by an act of the legislature.' Yet in the face of this it is here asserted that "the charter of St. Louis is subject to the legislative power of the state to the same degree that other cities and counties are," and that that degree "is limited and defined" by the section of the constitution guaranteeing "general legislation" to each of not more than four classes of cities. Now obviously the power of the legislature over "other cities" of the state included the power to amend their charters (by general laws) as to "local" or any other "affairs." The truth of the matter seems to be that in this case the court had run headlong against the contradictions of the constitution on this subject, and certainly its lengthy disquisition, appealing with unfailing regularity to the clarity of the provisions, was utterly contradictory as to its several parts. It served, more than twenty years after the constitution was adopted, only to add chaos and confusion to confusion and chaos.

It has been noted that the doctrine of the Dorr case on the subject of the requirement of general legislation for St. Louis was subsequently overruled. It would seem also that its doctrine has been impliedly overruled as to the incompetence of the legislature to amend a freeholders' charter by granting a power as to a "local affair" which was not granted by the charter itself. In

the case of Haeussler *v.* St. Louis,[1] decided in 1907, question was raised as to the authority of the city to construct a bridge across the Mississippi River. The point was not specifically determined that this was a local affair, although it was referred to as "a public municipal purpose." The court found authority for the exercise of this power in the charter, but it located the principal source of such authority in state laws. It was declared without the slightest hesitation:

> This charter authority, in our judgment, is but cumulative authority, for if section 6350 (of the revised statutes) and the preceding three sections mean anything at all when supplemented by the Act of 1905, there is ample express authority in so far as the state can grant it. By this section 6350, it was not necessary to have express charter authority, but it is sufficient if the public municipal purpose is one authorized "by the general law of the state."

Of course it might have been declared that the construction of a bridge extending beyond the boundaries of a city — and especially when it reached into another state — was not a matter of strictly local or municipal concern. In this wise the opinion might have been made to harmonize with the second doctrine of the Dorr case. But the fact remains that no such declaration was made.

Such, then, are the views of the Missouri court as to the power of the legislature to supersede or supplement by law the provisions of a home rule charter governing matters pertaining to parks, boulevards, and bridges. It may be noted that in every case mentioned (except the bridge case, where the charter also covered the situation) resolve was entered against the power of the legislature, but on what theory this was done perhaps only the courts of that state are competent to explain.

Does a State Law supersede a Charter Provision governing the Removal of Municipal Officers?

The constitution of Missouri expressly provided that the legislature should, "in addition to other penalties, provide for the

[1] 205 Mo. 656. 1907.

removal from office of . . . city . . . officers on conviction of wilful, corrupt, or fraudulent violation or neglect of official duty."[1] This provision was effectuated by a statute enacted in 1877 conferring the power of removal upon the circuit court. The charter of St. Louis declared that "any elective city officer may be suspended by the mayor and removed by the council for cause; and any appointed officer may be removed by the mayor and council for cause." In 1893 application was made by the commissioner of public buildings of the city for a writ of prohibition to restrain the mayor from trying him on charges preferred by the president of the board of public improvements, on the ground that the charter provision enacted was in conflict with the state law noted.[2]

Relying upon a case [3] in which it had been held that the special provisions of a legislative charter on the subject of making removals from office were "unaffected by the act of 1877," the court declared that "that ruling cannot be otherwise regarded than as decisive of this case." Since the constitution expressly referred to "other penalties," and since this reference must have some meaning, it could as well apply to the provisions of a city charter creating penalties as "to those created by the general assembly." "Surely nothing could more conduce to the good government and welfare of the city, than that it should annex 'other penalties' (than those enacted by the general laws of the state) for the punishment of its own officers, than that incompetent and unworthy officers should be removed in a more summary way than that afforded by the method of procedure provided" in the general law.

Upon this theory — somewhat similar it wil be noted to that commonly applied in determining the order of superiority between police laws and police ordinances on the same subject [4] — it was held that the law in question was not in conflict with the charter provision regulating the making of removals. This rule was reaffirmed in the State *ex rel.* Heimburger *v.* Rolla Wells,[5] where

[1] Art. XIV, sec. 7.
[2] The State *ex rel.* Reid *v.* Walbridge, 119 Mo. 383. 1893.
[3] Manker *v.* Faulhaber, 94 Mo. 430. 1887.
[4] *Supra*, 138–141.
[5] 210 Mo. 601. 1907.

the proposition of law was in all respects identical with that presented in the case just mentioned. And although this proposition was again discussed at considerable length, nothing new in point of view was added to the opinion expressed in the earlier case. In neither case was it expressly declared that the regulation of removals was a matter of purely local concern. Nor was it intimated whether or not the charter would have superseded the law in case there had been absolute conflict between them.

Does a State Law supersede a Charter Provision regulating the Filing and the Prosecution of Damage, Tax, and Contract Claims Against the City Itself?

It is well known that municipal charters commonly contain certain provisions governing the rights of private persons who may lodge claims against the city for damages of various kinds, for tax rebates, and for breaches of contract. Of course it is obvious that in regulating such rights neither a legislative nor a home rule charter may impose restrictions that run counter to the formidable guarantees of due process of law and the inviolability of contract obligations.

The first freeholders' charter of St. Louis made provision that "whenever the city should be made liable to an action for damages" caused by the "wrongful acts" of "any person or corporation," the "injured party" should "join" such person or corporation in any suit that he might institute against the city; that "no judgment should be rendered against the city" unless also "against such other person or corporation"; and that the party should be "nonsuited" if he brought action under such circumstances against the city alone. A general law of the state declared that "every person who shall have a cause of action against several persons . . . may bring suit thereon jointly against all, or as many of the persons liable, as he may think proper." [1] The charter provision and the state law were manifestly in conflict. In the case of Badgley *v.* St. Louis [2] appeal was taken by the city

[1] Rev. Stats. of Mo., 1899, sec. 1995.

[2] 149 Mo. 122. 1898.

to the supreme court from a judgment awarding damages for injury resulting from a street obstruction caused by dirt piled by a private corporation, on the ground that the said corporation had not, as required by the charter, been "joined" in the suit.

In Wiggin *v.* St. Louis[1] it had been decided that the plaintiff was entitled to his judgment against the city notwithstanding the fact that the lower court had erroneously instructed the jury to find that the party sued jointly with the city was not liable — a decision which certainly rendered the charter provision of but little practical value. But the point of conflict was not clearly raised and passed upon in this case. In the Badgley case the court declared as follows:

> The Constitution confers upon the city of St. Louis power to adopt a charter "for the government of the city," but the section before us goes further. It undertakes to regulate the practice in the courts of the State in cases where said city is an ordinary litigant.
>
> Said charter must be "in harmony with the Constitution and laws of Missouri." This section repeals, however, *pro tanto*, the Code of Civil Procedure and substitutes one of its own. If the city of St. Louis can do this, it may likewise, in every case where said city is a party to a suit, supersede by charter provisions, the change of venue laws of the State, and those regulating the manner of summoning and impaneling juries. It may change the statute, in all such cases, as to the place of bringing suits, and the forum for the trial of the same, and it may also alter the form of pleadings therein. It has already attempted to direct the judgment that may be rendered and the manner of its enforcement. If this power exists, it may in fact amend any part of the Practice Act and form a Code to suit itself. We are not prepared to sanction such a construction of the power conferred by the Constitution upon our cities to frame charters for their own government. We think that the authority to make such changes in the Code as are now under consideration, is lodged by the organic law of Missouri in the General Assembly of the State, and not in any of its municipalities. If such legislation is desirable, it must emanate from the proper source.
>
> The procedure in suits of the character of this one is not a matter for municipal regulation. It does not "fall within the domain of municipal government." (State *ex rel. v.* Field, *supra.*)
>
> We are aware that the General Assembly has inserted clauses somewhat similar to this in charters granted by it, but the legislature has power to

[1] 135 Mo. 558. 1896.

change the Practice Act. The city has not. Therein lies the difference. It does not follow, by any means, that because the city is a party to an ordinary civil action, it may, under the power granted to provide municipal government, regulate the process and proceedings of the State courts in such cases.

We must, therefore, hold that the section of the charter relied upon by appellant forms no obstacle to plaintiff's recovery. The statutes must control, and the trial court committed no error in overruling the objection to the introduction of evidence, and in refusing the instruction asked by defendant.[1]

Here, then, was authority for the broad assertion that matters pertaining to damage suits against a city were matters of general or state concern which could not be regulated by a freeholders' charter in a manner contrary to the laws of the state. But in the case of Brunn and Donnell *v.* Kansas City,[2] decided ten years later, it was emphatically held — and with characteristic nonchalance toward the unguardedly expressed doctrine of the Badgley case — that matters pertaining to damage suits arising under condemnation proceedings were matters of strictly municipal concern. The controversy in this case arose over the fact that the charter of Kansas City provided that, pending an appeal by "any such party aggrieved by any verdict or judgment in a condemnation proceeding," no interest should "be allowed or collected on the judgment." [3] The state law, on the other hand, provided generally that interest should "be allowed on *all* money due upon *any* judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property." The opinion ran:

It is settled law that when special charter provisions relating to procedure in condemnation cases are not inimical to the general scope of the policy of our Constitution and laws, then such special provisions govern as against the provisions of general law — that is, such special provisions may be likened to exceptions read into or grafted on the general law. (See authorities, *supra.*) Again, it must be taken as the accepted doctrine

[1] [The legislature subsequently enacted the substance of the charter provision into a state law applicable to cities of over 150,000 inhabitants. Laws of Mo., 1901, p. 78.]

[2] 216 Mo. 108. 1908. [3] Charter of Kansas City, 1889, art. 10, sec. 18.

that powers granted, and charter provisions adopted pursuant, relating to the exercise of the right of eminent domain by a city of the class of Kansas City in establishing parks, boulevards and streets, pertain peculiarly to the domestic municipal affairs of such city and therefore come within the purview of its powers freed from interference by the Legislature, so long as such provisions do not contravene the general policy of our laws and Constitution. In fine, the constitutional idea was that charters under consideration should present a complete scheme of local self-government and that where their provisions conflict with the general statutes on a merely municipal regulation (such as condemnation proceedings are held to be) the charter provisions should control; and it has been held that the constitutional plan for amending charters (sec. 16, art. 9), which directs that they shall be amended by a vote of the people "and not otherwise" is mandatory and forbids the regulation and direction of purely municipal affairs by act of the legislature. (Kansas City *v.* Scarritt, 127 Mo., *supra.*)

In a somewhat pathetic effort to put strength and vitality in the weak-kneed and retrogressive opinion delivered in the already considered case of Kansas City *v.* Bacon,[1] the court went on to assert and explain in many words that such was the "undeniable doctrine" of this case. With due respect, however, this was palpably not the undeniable doctrine of the Bacon case, as we have already had occasion to note. Under the guise of giving "point to the discussion" of that case the court simply read into it a view which was nowhere expressed or even intimated in the opinion that was handed down. But this is merely to show unnecessary irritation over the court's vacillating pronouncements. The point of importance is that matters relating to a particular kind of damage suits — those arising out of condemnation proceedings — were here declared to be so strictly local in character that charter provisions upon the subject took precedence over a state law of the most general character — a law applicable to monetary judgments of any and every description.

In Barber Asphalt Paving Co. *v.* Ridge[2] the issue at bar was whether the city could by charter provision "deprive an abutting property owner of his right to plead a lawful defense to a suit to enforce the lien of a tax bill against his property because he had not filed a written statement of his defenses before the board of

[1] *Supra*, 159. [2] 169 Mo. 376.

public improvements within sixty days after said tax bill was issued." It was held that this was to deprive the owner of his property without due process of law — a ruling which had also been applied against a state law of similar purport.[1] This decision was reaffirmed in Barber Asphalt Paving Co. *v.* Munn,[2] and in Curtice *v.* Schmidt.[3] The point determined in these cases is of no great significance in this connection in view of its having been laid directly upon the guarantee of due process of law. Moreover, the fact that the city was a home rule city had no particular bearing upon the issue. The legislature could not have incorporated the provision in question into a legislative charter.

It must be remembered, of course, that the city or the purchaser of a tax bill is the plaintiff in such cases, the property owner being the defendant. There is certainly some distinction between a requirement that imposes upon a person "attacked" by the city itself the duty of presenting to an administrative authority his defenses within a limited time and a requirement that a person who himself initiates an action against a city shall be under certain time limit obligations. Thus the doctrine of the cases here noted could not be applied to defeat a charter provision demanding that a person asking damages as a result of some public improvement undertaken or as a result of injury due to negligence on the part of the city should file his complaint within so many days.[4] This refined, though doubtless supportable, distinction must be borne in mind.

The case of the State *ex rel.* Gavigan *v.* Dierkes [5] arose out of an action taken by one chamber only of the municipal assembly of St. Louis in appointing an investigatory committee with power to employ a paid clerk. The charter of the city [6] declared that "all contracts relating to city affairs shall be in writing, signed

[1] Spurlock *v.* Dougherty, 81 Mo. 171 (1883); Mason *v.* Crowder, 85 Mo. 526 (1885).

[2] 185 Mo. 552. 1904.

[3] 202 Mo. 703. 1906.

[4] On this point, see the apparently contrary view that was expressed by the California court, *infra*, 340–342.

[5] 214 Mo. 578. 1908.

[6] Art. 16, sec. 7.

and executed in the name of the city, by the officer authorized to make the same; and in cases not otherwise directed by law or ordinance, such contracts shall be made and entered into by the comptroller, and in no case by the assembly or any committee thereof." It was held, in the first place, that the relator in the case — the clerk who sued to recover the amount of his salary — was not an "officer" of the city because an "office" could be established only by ordinance passed by both chambers of the assembly. This position, therefore, if it had any legal standing at all rested only upon a contractual basis. But it was obvious that no contract had been entered into in the manner prescribed by the charter.

It would seem that this determination would have been fully sufficient to answer in the negative the contention that was made. But the court, in addition to considerable discussion of general principles underlying the "spirit and letter of our law," referred to a section of the revised statutes of the state which regulated in a general way the manner in which cities and other municipal corporations might enter into contracts and declared as follows:

> We think that inasmuch as relator was not a public official, but a private citizen, before there could be a valid and binding contract between him and the city, such contract must be one duly authorized by law and duly entered into in writing by the properly constituted authorities. In other words, the relator being a mere alleged contractor for services with the city, the provisions of section 6759, Revised Statutes, 1899, fully apply, as well as the provision of the city charter above quoted.

There was in fact here no question of conflict between the state law and the charter provision governing the making of municipal contracts. Nor did the court expressly declare that in case there had been such conflict the statute would have controlled. But if the regulation of the legal process of making contracts was a matter of local as distinguished from state concern, it is difficult to see why the state law was referred to at all (the charter provision having been ample to settle the controversy) or why it was declared that the provisions of such law "fully apply" as well as those of the charter.

From the adjudicated cases it is quite impossible to describe in general terms the state of the law in Missouri upon the subject of the relative rank of statutory and home rule charter provisions regulating the rights of persons in the prosecution of damage, tax, and contract claims against the city. The most that can be said is that the principles are not completely and clearly established.

As was said at the opening of our discussion of the conflicts that have arisen in Missouri between state laws and charter provisions, no very satisfactory conclusions as to the settled state of the law can be drawn from the adjudicated cases. Beyond question the framers of the constitution prepared for the courts a difficult task. In a general way it may be said (1) that the latter first applied the rule that any law of general applicableness to a class of cities, no matter what its subject might be, would supersede a contrary charter provision; (2) that they ultimately threw overboard this requirement of general applicableness so far as the two home rule cities of the state were concerned; and (3) that they at length read into the provision of the constitution the qualification that the laws to which charter provisions must be subject were laws dealing with subjects of general as distinguished from local concern. But the cases in which this latter distinction was applied stand side by side with earlier cases, never overruled, in which no such distinction was mentioned. Moreover, even subsequent to its first introduction this distinction has not been applied with complete consistency, while the pendulum of decision has swung without much regularity from liberality to narrowness of view. As a result of all this the law of home rule in Missouri is in a woeful state of uncertainty on many points.

CHAPTER VI

HOME RULE IN MISSOURI — THE SCOPE OF THE CITY'S POWERS IN FRAMING A CHARTER

WHOLLY apart from all consideration of the difficulties arising out of conflicts between state laws and charter provisions is the question of the powers which a city may confer upon its own government by its charter. The constitution grants the power to frame a "charter for its own government." [1] Obviously the city must *ab initio* decide for itself the scope of powers that may with "legal" propriety be included in a municipal charter. But it is easy to see that differences of opinion might arise over the question whether this or that power of government is or is not appropriate to a charter for the government of a city.

Whether a question of conflict or merely a question of power shall be raised in any controversy depends almost wholly upon whether the legislature has crossed or occupied a particular field by state law. If a contrary state law exists upon the subject in hand, the more natural question to be raised is one of conflict. In the absence of such law, however, if any dispute arises it is over the competence of the city to deal with the particular subject in any wise within the local charter. The existence or non-existence of state laws in conflict with charter provisions determines the nature of the contention that is made; and this accounts for the fact, which will be noted in the course of this study, that controversies over similar subjects have in the same state or in different states sometimes involved questions of conflict and at other times merely questions of power.

[1] *Supra*, 121. The St. Louis provision calls it "a charter for the government of the city."

May the City exercise the Taxing and Eminent Domain Powers?

It has already been pointed out that the rulings of the Missouri courts in cases involving conflicts between state laws and charter provisions on the subject of taxes and licenses were largely in favor of the supremacy of the former.[1] But manifestly the power to frame a charter would be less than nothing if the city could not, within the requirements of state laws, exercise any of the financial powers necessary to carry on the government. This patent fact was recognized by the court in the early case of the City of St. Louis *v.* Sternberg,[2] where the contention was made that the city could not levy a license tax upon lawyers because the taxing power had not been specifically conferred, reliance being placed upon the long-established rule that the grant to a municipal corporation of power to levy taxes is not to be implied. Answering this contention and referring to the home rule provisions of the constitution, the court declared:

> It is clear, we think, from these sections, that it was the intention of the framers of the constitution that the city of St. Louis might adopt as its organic law a charter containing any and all the provisions then in its charter, and such other provisions as would not be inconsistent with the constitution and laws of the state. . . .
>
> As neither state, county, nor municipal government can be maintained without revenue, and as revenue cannot be raised without the exercise of the taxing power in some form, it would follow as the logical result of defendant's theory that St. Louis would be practically left without any government. . . . It must be presumed that the framers of the constitution had in their minds the fact that it was wholly impossible to conduct a city government in a city like St. Louis without the power of taxation being vested in those charged with conducting such government. The right to adopt a charter necessarily implied the right to put in it such provisions as would enable the city to maintain its government. . . . Under the theory of defendant the city of St. Louis, after the adoption of the charter, would have a charter without its bestowing any powers, rights or privileges, a legislative assembly without power to pass laws or ordinances, a city with hundreds of thousands of inhabitants without any municipal government, charged with the payment of the park tax and the debt, both of the city and county of St. Louis, without authority to impose

[1] *Supra*, 133.

[2] 69 Mo. 289. 1879.

taxes to raise revenue to pay either the one or the other. We cannot give our assent to an interpretation of the sections of the constitution we have adverted to which would bring such results, nor do we believe them to be susceptible of such meaning. . . .

It matters not whether the ordinance assailed was passed as a police regulation or otherwise. The question is one of power, and whether the provision of the charter authorizing the passage of such an ordinance was in conflict with either the constitution or laws of the state. We think it does not conflict with either. Under the constitution the imposition of a license tax on lawyers has been held, as we have shown, to be a legitimate exercise of the taxing power on the part of the state, and the charter provision does not, therefore, conflict with it, nor does the mere fact that the General Assembly has not exercised such power by passing a general law requiring all lawyers to pay a license tax, and imposing a fine on every one practising as such without a license, create a conflict between the charter provision and the ordinance passed in virtue of it and any law of the state. If the General Assembly should pass a law declaring that no license should be required of lawyers by any municipal corporation in the state, then such conflict would exist between the charter provision and the law; and section 25, article 9, of the constitution would apply and the argument of defendant that the charter provision, not being in harmony with the law of the state, was, therefore, obnoxious to that section, would have force.

It will be noted that it was not declared in this case that a license tax on business was a municipal as distinguished from a state affair. Nor was the clear implication that a state law prohibiting the tax in question would operate to void the charter provision rested upon this distinction; for it will be recalled that such distinction was not introduced into the Missouri decisions on home rule questions until a much later date. It cannot be said, therefore, that the opinion uttered lends unmistakable support to the view that a freeholders' charter may contain provisions dealing with matters of state concern.

The doctrine of the Sternberg case was reaffirmed in City of St. Louis *v.* Bircher,[1] no additional point of importance being recorded.

In Kansas City *v.* Marsh Oil Co.,[2] the court was asked to rule that the city could not exercise the power of eminent domain because such power had not been conferred. The court answered that while

[1] 76 Mo. 431. 1882.

[2] 140 Mo. 458. 1897.

it was "not pretended that the power is inherent in a municipality created by the state," but is a power that must be "conferred," yet the power might be conferred as well by the constitution upon home rule cities as by the legislature upon legislative charter cities. The opinion asserted:

> The authorities cited by the learned counsel for defendant as to the necessity of a grant of power have no application to a city charter, which derives the power of condemnation of lands for public purposes directly from the organic law of the State in such unequivocal terms. It is not a matter of inference, but a direct grant of the necessary power. But that there might not be the semblance of a doubt of the power of the city to exercise eminent domain for such purposes the General Assembly of this State passed an enabling act which was approved March 10, 1887 (Laws of Mo., 1887, p. 42), by which cities of over one hundred thousand inhabitants were authorized to adopt charters, "for their own government," "in harmony with and subject to the Constitution and laws of this State." Section 52 of that act provides that it shall be lawful for any such city to acquire and hold by gift, devise, purchase or by the exercise of the power of eminent domain, lands for public use, etc.
>
> Upon legal principles it cannot be seen what efficacy there was in this legislative act. The power with its limitations had been previously conferred by the people of the State and it was not within the power of the legislature to curtail it. That the people of Missouri in their sovereign capacity and by their organic law, could delegate to the people of a municipality this power to frame a charter for its own local government, as to matters falling properly within municipal regulation, we have no doubt whatever. Such a right is entirely in accord with the genius of our institution, bringing the regulation and government of local affairs within the observation of those who are to be affected thereby, and at the same time preventing the officious and selfish intermeddling with the charters of our cities, without the knowledge of those whose rights are affected.

In marked contrast was this declaration as to the superfluousness of the "enabling act" upon this subject with the apparent reliance which, as we have seen,[1] the court put upon this act to sustain the provisions of the Kansas City charter in respect to the matter of street improvements where a question of conflict with statute law was raised. Here, it is true, was no case of conflict; nor was it expressly declared that a state law regulating the exer-

[1] *Supra*, 153–155.

cise of the power of eminent domain would not have superseded a contrary charter provision. But street improvements were not held to be inherently a matter of local concern, while eminent domain — a power closely related to street improvements — was here declared to be a matter "falling properly within municipal regulation." Taken as a whole the cases are certainly far from harmonious.

Attention should doubtless be directed to the fact that the above mentioned cases dealing with the financial competence of home rule cities involved only the exercise of powers customarily conferred upon cities. What might have been the attitude of the courts toward the validity of a charter provision establishing the single tax, or the principle of excess condemnation, or some other more unusual financial policy, it is impossible to say.

Has the City the Power to enact Police Ordinances?

The power to enact police ordinances is one of the time-honored functions of the city corporation. Attention has already been called to the fact that cases of conflict between police laws of the state and police ordinances of home rule cities have been determined in Missouri by the application of precisely the same general principle that is commonly applied in the settlement of those not infrequent conflicts that occur between such laws and the police ordinances enacted by a city under a legislative charter.[1] Indeed it would seem that of all the possible subjects of municipal control less difficulty should arise over the exercise of the police powers than over any other, for the manifest reason that a long-established precedent exists for the concurrent exercise of such powers by both the state and the city and there is a fairly established principle according to which conflicts of provision are adjusted.

The police power is usually regarded as "inherently" a state rather than a municipal power. The municipality enjoys only such parts of this power as are expressly or impliedly conferred.[2]

[1] *Supra*, 138–141.

[2] A few somewhat recent cases involving the exercise of specific powers by cities have been decided upon what appears to be the ground that these powers were

It would nevertheless have been grotesque had the courts declared that because of this fact a city framing a home rule charter might not provide for the exercise of police powers. Such a declaration has never been made by any court and has probably never been thought of by any one.

In addition to the question already discussed of conflicts between state laws and municipal ordinances of a police nature, attention may be directed to one or two other points that illustrate the similarity between home rule and legislative charter cities in respect to this matter. In the first place, although it might have been expected that cities endowed with the authority to frame their own charters would have conferred upon their primary legislative bodies power to enact by-laws or ordinances for the governance of the city in *general terms*, the fact is that boards of freeholders or charter conventions have seldom adopted any such policy. They have for the most part blindly — and it would seem somewhat stupidly — followed the old legislative practice of enumerating the powers of the council in great detail.[1] In this respect the charters of St. Louis and Kansas City were not exceptional. Now it cannot be too greatly emphasized that in seeking to determine the competence of one of these cities to enact a particular ordinance the courts have invariably examined the provisions of the charter with the end in view of ascertaining whether the power in question was conferred *by the charter*. In the absence of charter provision expressly or impliedly in point they have never held that the power was conferred directly by the home rule provisions of the constitution. In other words, the theory as to the powers of municipal legislative bodies under these state provisions embodying the "federal" idea as between the city and the state has not been the same as the theory concerning the powers of the state legislatures under the clause of the national constitution reserving "all other powers"

implied under a general police power enjoyed by cities even though no general grant of such power was made by the charter. This is very close to the assertion that the police power belongs "inherently" to every city whether granted or not.

[1] Certain exceptions may be noted, such, for example, as the Denver (Col.) charter of 1904, the Colorado Springs and Grand Junction (Col.) charters of 1909, the Spokane (Wash.) charter of 1911, and most of the Ohio charters of 1913–14 (*infra*, Ch. XVII).

to the states. Under this reserve clause the states adopt constitutions; but even if these constitutions do — as they frequently appear to do — expressly confer certain powers upon the legislature, the general rule applied is that the legislature enjoys any other power that is not expressly or impliedly denied. It would seem that a somewhat similar rule might have been applied to the legislative body of the home rule city. The city is endowed with power to frame "a charter for its own government," just as the state is empowered to frame a constitution for its own government, although no such phrase is used in the national constitution. Almost invariably the home rule charter declares that "the legislative power of the city shall be vested in" a council, or otherwise designated assembly, and proceeds to enumerate the powers which the council may exercise. It has been invariably held that the state legislature, under the grant of the "legislative power of the state," enjoys all powers not expressly or impliedly denied to it by the national and the state constitution — this competence being in effect derived, no matter how else it may appear, from the reserve clause of the federal constitution, which does not mention the state legislature but only the "states." By a parity of reasoning why might it not have been held that the legislative body of the city enjoys, under the grant of the "legislative power of the city" all powers not expressly or impliedly denied to it by (1) the national constitution, (2) the state constitution, and (3) such laws of the state as the constitution subjects it to the control of — this competence being derived from the constitutional clause conferring power to frame a charter for its own government, which clause does not mention the city legislature but only "cities?" It may be urged that a difference undermining the fitness of this comparison lies in the fact that state constitutions have not commonly enumerated the powers of state legislatures, while municipal charters have commonly detailed the powers of city councils. But it may be rejoined, first, that an important rule of law like this should have more substantial basis than the mere neglect of the framers of the constitution to make an enumeration if such was legally necessary; and second, that the difference noted is in any case only one

of degree; and third, that not all municipal charters, whether home rule [1] or legislative,[2] do in point of fact specify the powers of the council in detail. It may be that even as applied to state legislatures the rule here in question is open to debate as to its foundation in logical reasoning. But it would certainly seem to be very nearly as reasonable in one case as in the other.

The fact is, however, that no such rule has been applied by the courts anywhere.[3] On the contrary the well-known rule of somewhat strict construction of the terms of the charter has been applied to determine the powers of the legislative bodies of home rule cities. One or two illustrations will suffice. Thus it has been held that an ordinance prohibiting the sale of coal unless the load had been "weighed by a weigher approved by the mayor and authorized by law to weigh the same" was a valid exercise of the charter powers "to license, tax, and regulate retailers," "to regulate and establish standards of weights and measures to be used," and to provide "for the inspection and weighing or measuring of hay or stove coal, charcoal, firewood, and all other kinds of fuel." [4] So an ordinance "making it a misdemeanor for any person thereafter to erect, build or establish or maintain within the city limits of said city any dairy or cow stable without having first obtained permission" was validly enacted under the power "to prohibit . . . cow stables and dairies . . . within prescribed limits." [5] In the course of the opinion rendered in this case the somewhat startling declaration was made that "as the grant in the charter is express, we are relieved from any discussion to demonstrate that the dairy business is of a character that brings it within the police power of the state." Just why the expression of the charter should relieve the court of this necessity does not appear.

[1] *Supra*, 177, note 1.

[2] The legislative charter of cities of the first class in Kentucky (applicable only to Louisville) confers a general power upon the council without enumeration. This is certainly exceptional.

[3] For the view of the California courts on the police power conferred upon cities by express constitutional provision, see *infra*, 322–333.

[4] Sylvester Coal Company *v.* The City of St. Louis, 130 Mo. 323. 1895.

[5] City of St. Louis *v.* Fischer, 167 Mo. 654. 1901.

On the other hand, it has been held that an ordinance imposing a fine on real estate agents for failure, upon order, to remove or repair a building in an unsafe condition was void when the charter provided merely for "the licensing, taxing, and regulating the business of real estate agents" and empowered the municipal assembly to "take down and remove buildings, walls, or superstructures that are, or may become, dangerous, or require owners to remove or put them in a safe and secure condition, at their own expense." [1] The view of the court was that the charter conferred power on the assembly to require this duty of *owners* but not of *agents*.

These are nothing more than examples of the application to home rule charters of the familiar canons of construction that are applied to the case of municipal charters of the legislative variety. No element of difference is discernible. And precisely the same comment may be made in respect to the interpretation put upon so-called "general welfare" clauses of charters — clauses which, in addition to the detailed enumeration of powers, confer incidental and supplementary powers in *general* terms. The home rule charters of St. Louis and Kansas City have always contained such clauses. But these are clauses which are also found in many legislative charters and especially in those of modern origin.

In the case of St. Louis *v.* Schoenbusch[2] it was held that an ordinance prohibiting cruelty to animals could be sustained under the charter grant of power "to pass all such ordinances . . . as may be expedient in maintaining the peace, good government, health, and welfare of the city." These "general welfare clauses," said the court, "are not useless appendages to the charter powers of municipal corporations." So also the power to require by ordinance that the owners of lots should prevent the growing of weeds a foot high was gathered under this clause as well as under the charter authority "to declare, prevent, and abate nuisances" and "to secure the general health of the inhabitants by any means necessary." [3] On the other hand, the power to regulate telephone rates

[1] St. Louis *v.* Kaime & Bro. Real Estate Co., 180 Mo. 309. 1903.
[2] 95 Mo. 618. 1888. [3] City of St. Louis *v.* Galt, 179 Mo. 8. 1903.

could be sustained neither under the charter power to "license, tax, and regulate all occupations, professions, and trades not hereinbefore enumerated, of whatever name and character" (more especially since the power to fix rates for the carriage of persons and property, for gas, and for street railways was expressly conferred) nor under the general welfare clause.[1] The point to be noted in this connection is that the line of reasoning followed in these cases was in every respect identical with the reasoning employed by the Missouri court in construing similar clauses in legislative charters.[2]

Still another rule of construction may be noted in this connection as being applied to home rule charters in exactly the same manner as to legislative charters. This is the well-known rule which asserts the competence of the courts to declare void an ordinance which in the view of the courts is unreasonable. Thus in the case of St. Louis *v.* Heitzeberg Packing and Provision Co.[3] an ordinance declaring that the emission of "dense black" or "thick gray" smoke within the city limits was a nuisance was held invalid although the charter authorized the municipal assembly to "declare, prevent, and abate nuisances." The city was incompetent "to declare that a nuisance which was not so in fact" — a frequently uttered rule, which in spite of its disguise is obviously equivalent to the assertion that the city cannot make that a nuisance which the *courts* do not regard as such. Such an ordinance, "which makes no reasonable allowance for the regulation of this smoke, but essays in advance of any known device for preventing it to punish all who produce it in any degree whatever, is wholly unreasonable." The conclusion was reached that "while it is entirely competent for the city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health or annoying to the public at large, this ordinance must be held void because it exceeds the powers of the city under its charter to declare and

[1] The City of St. Louis *v.* The Bell Telephone Co., 96 Mo. 623 (1888); *infra*, 186.

[2] City of St. Louis *v.* Bentz, 11 Mo. 61 (1847); City of St. Louis *v.* Cafferata, 24 Mo. 94 (1856).

[3] 141 Mo. 375. 1897.

abate nuisances and is wholly unreasonable." [1] So also an ordinance imposing a fine upon "persons who shall lounge, stand, or loaf around or about or at street corners or other public places" was void because of its unreasonableness.[2]

On the whole it cannot be said that the Missouri courts have looked upon the exercise of police powers by home rule cities from any point of view that would not have been equally applicable to cities under legislative charters. No new or different rules of interpretation have been developed and applied.

Has the City Power to regulate Municipal Elections?

Attention has already been called to the Missouri cases involving questions of conflict between state laws and charter provisions dealing with the subject of elections.[3] It has been shown that while these cases are not wholly clear as to the status of the law, and while it has never been unmistakably declared that the regulation of strictly municipal elections is a matter of state concern, yet in practice such elections in St. Louis and Kansas City have been conducted largely under state laws.

On the other hand, in the fairly early case of the State *ex rel.* Attorney General *v.* Thomas [4] views were expressed which seem to indicate that, certainly apart from any question of conflict with state law, the regulation of municipal elections is an entirely proper subject for charter control. In this case the specific point as to the power of a home rule city to control such a matter in its charter

[1] A law subsequently enacted by the legislature upon this subject and made applicable to cities of more than 100,000 inhabitants was sustained on the ground that the legislature "in the exercise of the police power may declare that a nuisance which before was not a nuisance" at common law (although apparently the city could not do so), and on the further ground that the statute provided "that if there were no known practicable devices or appliances by which dense smoke so generated could be prevented," the owners and managers of buildings "should not be punished therefor." State *v.* Tower, 185 Mo. 79. 1904.

[2] St. Louis *v.* Gloner, 210 Mo. 502 (1907.) This ordinance was also declared to be an unwarrantable interference with the liberty guaranteed by the due process of law clause of the federal and the state constitutions.

[3] *Supra*, 141 ff.

[4] 102 Mo. 85. 1890.

was not raised. That power seemed to be conceded, the principal contention being that the charter did not confer the power to enact an ordinance providing for the holding of the special election which was had. Said the court:

> This contention, however, cannot stand in the face of the twenty-sixth section of article 13 of the charter, and the eighth clause thereof, providing that: "The mayor and assembly shall have power within the city, by ordinance not inconsistent with the constitution or any law of this state, or of this charter: . . . To regulate and provide for the election or appointment of city officers required by this charter, or authorized by ordinance, and provide for their suspension or removal," etc.
>
> The object of this charter provision is quite plain; it bestows, as its language imports, sufficient power upon the lawmaking authorities of the city to make all necessary rules or laws in regard to municipal elections, whether those elections be general or special; whether occurring before the expiration of any official term of office, and, therefore, *anticipatory* in their nature, or when occurring *after* some regular election has failed of its purpose by reason of one or more of the various vicissitudes incident to, and frequently attendant on, such events. In short, the authority, thus granted to the legislative department of the city, is as broad in the limited sphere of its operation, as is a similar power bestowed by the constitution of the United States upon Congress, "to regulate commerce with foreign nations." . . .
>
> So here, the authority thus delegated to the legislative branch of the city government, to pass all necessary ordinances in furtherance of the object mentioned, is *plenary* in its character; it is the power to prescribe rules by which city elections are to be governed; a power which recognizes only such limitations as are marked out by the constitution or laws of this state or by some other provision of the charter.

There was here not the slightest intimation that the regulation of municipal elections was a matter not properly governed by charter provisions. On the contrary, in general tenor at least, the opinion seemed to regard the charter provision in question as highly appropriate in character.

The Kansas City charter of 1889 contained an unusual provision levying a poll tax of two dollars and a half upon every male resident citizen over twenty-one years of age but exempting from the payment of this tax all those who cast votes at the general city election. The provision, therefore, by indirection estab-

lished the principle of compulsory voting. When hailed before the courts the provision was held void and the following interesting views were expressed: [1]

It may be conceded, so far as legislative power is concerned, that this provision of the city charter has equal authority, within the limits of Kansas City, over its citizens, as a like enactment of the legislature would have over the citizens of the state at large, and that it ought to be upheld unless in conflict with the constitution of the United States, or of this state. State *ex rel. v.* Field, 99 Mo. 352.

It may also be conceded that the legislative authority in this state has power to levy a capitation tax subject to the constitutional provision that the same shall be levied "for public purposes only" . . . and "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." . . .

The section in question is an apt illustration of the manner in which such a principle of selection may be used for the purpose of punishment, under the guise of a tax for "public purposes," for no one can read this charter provision as a whole without coming to the conclusion that its purpose is to impose a penalty upon the voters of Kansas City for not voting rather than for the purpose of raising revenue to maintain a necessary function of the city government. In fact the greater part of the argument of the learned counsel for the respondent is directed to the maintenance of the proposition that, to require a citizen to vote, under penalty, is a legitimate exercise of legislative authority in this state. . . .

The whole force of the argument in these interesting and instructive papers [cited by counsel in support of the principle of compulsory voting] is spent in the concession that by them the exercise of the elective franchise is established to be a duty, as well as a right or privilege — a concession which for the purpose of this case, may be made, and yet the main proposition remain unestablished, *i.e.*, that it is such a duty as may be enforced by compulsory legislation. . . .

That it is not within the power of any legislative authority, national or state, to compel the citizen to exercise this sovereign right, seems to have been the common understanding of our people from the beginning of our national existence, for, notwithstanding the diligent research of counsel for respondent, and our own investigations in that direction, no other legislative enactment of the character of the one in hand has been, nor do we believe can be, found. The municipality of Kansas City in this enactment seems to have been the pioneer and sole adventurer into this field of legislation in this country, since the Revolution. . . .

[1] Kansas City *v.* Whipple, 136 Mo. 475. 1896.

As no precedent for such legislation can be found in the history of the government, of course no adjudicated case can be found directly supporting it, but we are cited to a class of cases in which it is held that a citizen elected to a public office may be compelled to qualify therefor and enter upon the discharge of its duties; which, it is contended, does by way of analogy support it.

It is seen at once, however, that the analogy fails when we consider that the duty of a citizen elected by the sovereign will to an office created by the sovereign power, is the duty of a subject, while the duty in question here is the duty of the sovereign himself. Of like character with the former is also the duty of the citizen when he is called on to bear arms, serve on juries, etc. By no such duties as these can the duty of a citizen as an elector be measured. . . .

Before closing the opinion, however, it may be well to notice another point made by counsel for respondent, in which the discriminative character of this legislation, regarded as a statute imposing a tax, is sought to be avoided by comparing the provision made for the payment of the tax, by voting, to the exemption (sometimes provided, by laws which have been upheld) from a general poll tax, of those who perform public service in a voluntary fire department, or by working the public highways, etc.

But these are not strictly exemptions. Taxes may be levied in money or in services having a money value to the public, and he who pays in money does not necessarily have to pay more or less than he who pays in service, and *vice versa;* and it is upon this principle that these laws have been upheld. But who can estimate the money value to the public, of a vote? It is degrading to the franchise to associate it with such an idea. It is not service at all, but an act of sovereignty above money and above price. The ballot of the humblest voter in the land may mold the destiny of the nation for ages. Who can say it will be for weal or woe to the republic? Who that it is better that he should cast, or withhold, it? Who dares to put a price upon it? The judgment of the circuit court is reversed. All concur.

We are not here especially concerned with the degree of success which the court achieved in demonstrating that the charter provision in question imposed a tax that was in violation of the "public purpose" or the "uniformity" requirements of the state constitution, although it may be remarked in passing that these requirements appear to have been completely lost sight of in the discussion of certain abstractions and of the merits of a public policy of which the court obviously disapproved with much vehemence. The point of chief importance in connection with our study is the

opening concession that was made, to the effect that so far as any question of power was concerned, "this provision of the city charter has equal authority within the limits of Kansas City, over its citizens, as a like enactment of the legislature would have over the citizens of the state at large." In other words, there was no doubt as to the competence of the city (barring, of course, a conflicting state law) to regulate a matter like this — which may be said to have pertained jointly to the subjects of suffrage, elections, and taxation — unless some pertinent prohibition could be found in the state constitution.

While the cases are neither numerous nor very specifically in point — a fact due largely to the absence of charter provisions on the subject of elections [1] — it must be concluded that the Missouri court has given fair expression to the view that the control of matters pertaining to elections, at least in the absence of state law, is properly included within the scope of the city's power "to frame a charter for its own government."

Has the City Power to regulate Matters pertaining to Privately Owned Public Utilities?

It has been pointed out that the Missouri courts have never been called upon to determine any question of supremacy between a freeholders' charter provision and a state law enacted since 1875 on the subject of the control of public utilities; [2] and likewise that the power to regulate telephone rates could not be sustained under the general welfare clause of such a charter.[3] In the case involving this latter question,[4] decided in 1888, it was clearly indicated by implication that a home rule city might exercise this power provided the grant of authority was adequately made by its charter. "This power could be delegated to municipal corporations." "A telephone company," being in effect a monopoly, "must submit to such reasonable regulations as the municipal corporation *has power* to prescribe." "If the city has such power, it must be

[1] *Supra*, 145. [2] *Supra*, 152. 153. [3] *Supra*, 181.
[4] The City of St. Louis v. The Bell Telephone Co., 96 Mo. 623. 1888.

found in a reasonable and fair construction of its *charter*." But the provisions of the St. Louis charter were not sufficiently in point to warrant the deduction that the city was endowed with power to pass the regulatory ordinance in question.

In the light of the implication of this case, the ruling of the court in the case of the State *ex rel.* Garner *v.* Missouri & Kansas Telephone Co.[1] is somewhat disconcerting. In the so-termed "enabling act" of 1887 power had been "conferred" upon any city of over 100,000 inhabitants that might frame its own charter "to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city or by or under the state of Missouri, or any other authority." In the charter of Kansas City, under the allowance either of the constitution itself or of this provision of the enabling act, express power had been conferred upon the city council "to regulate the prices to be charged by telephone" and other public service corporations. Holding that the city had no power to regulate telephone rates, the views of the court were expressed as follows:

> If the city had power to enact the ordinance fixing the maximum rate for telephone service in question it is to be found in that clause of the Constitution, those sections of the statute and those charter provisions above quoted. In so far as the ordinance depends upon the charter there is no doubt of the authority; the charter expressly authorizes it. But whether the provision of the charter is backed by lawful authority, is the serious question in the case.
>
> It is not questioned that the State has power to keep telephone corporations in this State within reasonable bounds in respect of charges for their service, nor can it be questioned that the State may delegate that power to be exercised by a municipal corporation within its limits, but the question is, has the State delegated that authority to this city? . . .
>
> But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the State may exercise within the city limits, but only powers

[1] 189 Mo. 83. 1905.

incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the State may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, "may frame a charter for its own government," mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the State has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental regulation, which are foreign to the scope of municipal government. In none of the cases that have been before this court bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875, have we given to this constitutional provision any broader meaning than above indicated. (St. Louis *v.* Bell Tel. Co., 96 Mo. 623; State *ex rel. v.* Field, 99 Mo. 353; Kansas City *ex rel. v.* Scarritt, 127 Mo. 646; State *ex rel.* Subway Co. *v.* St. Louis, 145 Mo. 574; Kansas City *v.* Stegmiller, 151 Mo. 189; Young *v.* Kansas City, 152 Mo. 661.)

The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the State that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation, but it is not a power appertaining to the government of the city and does not follow as an incident to a grant of power to frame a charter for a city government. The authority of Kansas City to insert in its charter the power to regulate the price to be charged for telephone service within the city is not conferred by the constitutional provision above quoted.

Is it conferred by what is called the "Enabling Act" of 1887? . . .

In adopting these two sections 50 and 51, of the so-called Enabling Act, the Legislature had in view the necessity of power in the city to control its streets and other public places, and the power in the State to grant franchises to be exercised by the grantee in the streets and other public places of the city, and it was not difficult to foresee that a clash might occur between the city in its exclusive control of the street and the private corporation in the exercise of the franchise granted to the State. Therefore, after granting to the city, as it did in section 50, control of its streets, the thought occurred to the lawmakers that there were private

corporations organized and to be organized under the laws of this State with express authority to use the streets and other public highways in the exercise of their franchises, and in order to prevent any clash that might occur between the city in its control of the street and the private corporation in its use of the same, section 51 was added which gave the city power to regulate and control the private corporation in its use of the street. Under that power the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or do any thing within reason to render the use of the street by the private corporation as little of injury to the public as may be. But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city.

Following upon the heels of the earlier case upon this subject this was strange doctrine indeed. Moreover, even if it be granted that the city enjoyed, under the direct constitutional grant of authority to frame a charter for its own government, no power to regulate public utility rates, it is difficult to see how this power could have been conferred in general terms more expressly than in the act of 1887; and the court admitted that such power could be delegated to the city. Indeed it is impossible to escape the conclusion that the court here went far out of its way to impose an inhibition upon the competence of the city that was in plain fact wholly unwarranted by its own course of reasoning. In final analysis the opinion appears only to have declared that a city could not exercise this power under the direct constitutional grant of authority to frame a charter simply because it could not do so, and that the state law had not conferred this power simply because it had not done so. A more arbitrary pronouncement from the bench, with nothing but words gathered to its support, can scarcely be imagined. It may be worth while to remark that the legislature promptly met this decision by conferring the power here interdicted in terms of such explicit meaning that it would have required greater heroics than even the Missouri court was capable of to vitiate their substance.[1]

The above mentioned are the only cases from the Missouri jurisdiction that deal specifically with the question of the com-

[1] Laws of Mo., 1907, p. 119.

petence of a home rule city to control matters pertaining to public service corporations under the general grant of authority to frame a charter.[1] The Kansas City Telephone case, which expresses the last word upon the subject, must be taken to mean that the home rule city has no power to fix public utility rates in the absence of express statutory grant, this being a state affair. And this is but a specific application of the broad doctrine, which clearly lay at the bottom of the opinion rendered, that a city in framing a charter for its own government (wholly aside from any consideration of conflicts between state laws and charter provisions) may not exercise a function that is of general or state as distinguished from strictly local or municipal concern. Not only would the consistent and rigid application of such a doctrine render the grant of home rule powers a ludicrous farce, but it is also to be remarked that this is a doctrine which the Missouri court itself has in numerous cases expressly or impliedly repudiated.

To what Extent may the City exercise Control over its Own Streets?

No question has ever arisen in Missouri as to the power of a city, in the absence of a conflicting state law,[2] to provide in a freeholders' charter for the control of matters pertaining to street improvements. But one or two interesting cases have arisen involving a consideration of the extent of the city's power over its streets. Thus in the case of the State *ex rel.* Belt *v.* City of St. Louis [3] it was decided that the city had no authority to enact an ordinance directing the board of public improvements to enter into contract with a designated person for clearing the streets of waste paper and litter by providing at suitable places, without cost to the city, boxes for the collection of such rubbish and giving to the contractor, in lieu of other compensation, the exclusive right to use these boxes for advertising purposes. The theory of the court in this case seemed

[1] Albright *v.* Fisher, 164 Mo. 56 (1901), and State *ex rel.* Abel *v.* Gates, 190 Mo. 540 (1905), which involved questions relating to public utility control, were concerned almost wholly with the matter of the competence of the courts to control the proposed action of municipal legislative bodies by the grant of injunctive relief.

[2] *Supra*, 153-156.

[3] 161 Mo. 371. 1900.

to be that the city under the charter grant of power "to regulate the use of the streets" could not delegate "its control over the public streets, held by it in trust for the public, and create a monopoly in favor of one advertiser," such action being distinguished from the grant of power to public service corporations to make peculiar uses of the streets on the ground that the use of the streets in such instances was "public" use although "private gain" was the primary object of such corporations, whereas in this case the "pecuniary profit" arose "from a source wholly distinct from any public use." Of course this argument, in view of the fact that the public derived a definite benefit in the form of clean streets, was open to debate. But since the decision of the case did not turn upon any inherent difference between the competence of a home rule city in this regard and that of a city under legislative charter, it may be passed with this casual reference.

More directly in point was the case of Ford *v.* Kansas City.[1] The charter of the city authorized the council to impose upon property owners or upon the *occupiers* of premises the duty of keeping sidewalks *in repair* as well as free from snow and ice. Acting under this authority, the council enacted an ordinance imposing these duties upon occupiers as well as owners. The court declared in part:

> It may be conceded that the municipal corporation may impose upon lot owners the burden of the duty of keeping the walks in front of their premises in reasonably safe repair, and enforce the same by special tax bills, or penalties for failing to perform such duty; but we are unwilling to extend this power to a mere occupant of property to keep in repair the walks in front of the property occupied by him. This duty could only be enforced against a tenant by a judgment in the nature of a fine for failing to perform his duty; no tax bill could be issued against him, because he is not the owner of the property. The city has absolute control of its streets and sidewalks and, under the law, it must keep them in a reasonably safe condition, and this duty cannot be evaded, suspended, or shifted upon others, by any act of its own. (Welsh *v.* St. Louis, 73 Mo. 71; Russel *v.* Town of Columbia, 74 Mo. 480.)
>
> The keeping of sidewalks in safe repair, in a large and populous city means, in many instances, the doing of a large amount of substantial

[1] 181 Mo. 137. 1903.

work, and if cities can impose this burden and duty upon mere renters of property, we confess those living in such cities, who are so unfortunate as not to be able to own the property occupied by them, are at the mercy of charter framers.

It is unnecessary to express an opinion as to that part of the ordinance relating to the removal of snow and ice from the walks by the occupant, for that feature of the ordinance is not involved in this cause; but upon the question of imposing the duty of keeping the sidewalks in safe repair by the mere occupant, who is not the owner, we unhesitatingly say that the charter provision and ordinance predicated upon it, which authorizes the exercise of such power, is unconstitutional and void. We have searched in vain for authority which sanctions the exercise of any such power. We readily comprehend the reason for imposing the duty of street improvements and repair upon the property owners, for such burdens of taxation are repaid in the enhancement of the value of the property, but no such reason can be assigned as to the tenants occupying the property.

Aside from the difficulty of enforcing the ordinance in question, in view of the fact that the expense incurred by the city in repairing a sidewalk not kept in repair by the occupier could not be made a lien upon the property, and aside from the wisdom of the policy involved — with both of which facts the court should have obviously had no concern — it is somewhat difficult to follow the line of reasoning here employed. If the court had no hesitation in saying that the charter provision and the ordinance predicated upon it were "unconstitutional and void," this lack of hesitancy certainly could not be ascribed to the clearness with which their unconstitutionality was elucidated. No constitutional provision in point was named. The requirement might indeed have been regarded as a special assessment tax, the theory of which has been that it is paid for in accordance with the direct value of the special improvement to the property — improvement which redounds to the benefit of the owner rather than the occupier of premises. But everybody knows that the incidence of such assessments is largely borne by occupiers; and there is certainly no well-established rule of law in this country (doubtless because the policy has not frequently been adopted) to the effect that a special assessment may not be levied *directly* upon occupiers on the theory that it is they and not the owners who enjoy the measurable special

benefit accruing. It may be also that, owing to frequent changes in occupancy and the consequent failure of a tenant to "live out" the benefit of such a special assessment, the wisdom of the policy would be open to serious question. But this is beside the mark. The conclusion seems unescapable that the judgment of invalidity was reached not even by careful analysis of the economic principles of taxation involved but because the court disapproved of a policy which would place those "who are so unfortunate as not to be able to own the property occupied by them at the mercy of charter framers."

This case is chiefly of interest because it illustrates the vagaries of policy into which home rule cities may occasionally stray and the difficulty presented to the courts of determining whether the authority to inaugurate experimental policies is embraced within the power to frame a charter. After all it is worth remembering that even in a government as stable as ours the political heresies of to-day may be the accepted principles of to-morrow.

Has the City the Power to confer Jurisdiction upon a Court forming a Part of the State Judicial Organization?

It will be recalled that in a case involving the power of St. Louis to regulate, in a manner contrary to state law, certain matters pertaining to the rights of persons who might bring action for damages against the city, it was held that the regulation of "practice in the courts of the state in cases where said city is an ordinary litigant" does not "fall within the domain of municipal government." [1] This decision did not, however, clearly assert that the city was incompetent to control such a matter to the extent that it was not made subject to statutory control. Nor did it determine whether a city could or could not confer jurisdiction upon a state court in addition to the jurisdiction fixed by state law. The former point has never been raised in Missouri. But in the case of The Union Depot Railroad Co. *v.* The Southern Railway Co.[2] this latter ques-

[1] Badgley *v.* St. Louis, 149 Mo. 122 (1898); *supra*, 165.
[2] 105 Mo. 562. 1891.

tion was squarely presented. It was held that the charter of St. Louis conferred power upon the municipal assembly to regulate by ordinance the manner of adjusting the compensation of one railway to another when one should be authorized by ordinance to use the other's tracks. The assembly passed an ordinance conferring power upon the circuit court to review the findings of commissioners who should be appointed to make such an adjustment as this. The question was whether the city had the power to confer such jurisdiction. This answer was given:

> That objection is this, that the city had no power to confer appellate jurisdiction over the award of the commissioners upon the circuit court. Section 22, of article 6, of the constitution, cited in support of the proposition, provides that the circuit court shall have "such concurrent jurisdiction with, and appellate jurisdiction from, inferior tribunals and justices of the peace as is or may be provided by law." This section is not in the way of any law giving the circuit court jurisdiction over the award.
>
> The legislature may authorize a city to institute and prosecute suits in the circuit and other courts. It may even delegate to a city the power to establish municipal corporation courts. State *v.* Johnson, 17 Ark. 407. Indeed the charter of the city of St. Louis not only provides for two police justices, but the assembly is authorized to increase the number. The mere fact that the ordinance gives the circuit court power to review the award is no objection to it. Authorized ordinances, duly enacted, have the force and effect of laws.

Here certainly was no uncatholic view of the scope of powers embraced within the grant of authority to frame a charter. Although the constitution expressly declared that the circuit court should have such jurisdiction "as is or may be provided by *law*," the charter and ordinance were in effect declared to be laws within the meaning of this constitutional provision.[1] This doctrine as applied to sustain precisely this same provision of the charter was reaffirmed in Grand Ave. Railway Co. *v.* Citizens' Railway Co.[2] and in Grand Ave. Railway Co. *v.* Lindell Railway Co.,[3] where it was expressly declared that "the ordinance in question is a provision 'by law' in the meaning of the constitution."

[1] For views in other states on this point, see *infra*, 426, 473.

[2] 148 Mo. 665. 1898.

[3] 148 Mo. 637. 1898.

It is easy to see that the broad doctrine here involved is one which might give rise to some difficulty. Suppose, for example, that a home rule city should confer general jurisdiction for the enforcement of its police ordinances upon a court forming a part of the judicial organization of the state. It might well be that the court in question, organized under state law, would be utterly swamped with cases arising out of the jurisdiction so conferred, as well as wholly unfitted as to its organization for their proper disposition. However, the danger of such a situation is doubtless largely imaginary.

Has the City the Power to create Police Courts?

The constitution of Missouri declares that "the judicial power of the state . . . shall be vested in" a series of enumerated courts, among them being "municipal or corporation courts." [1] In the elaborate article dealing with the "judicial department" all of the several courts named are directly established with the sole exception of these "municipal or corporation" courts, and there is no express declaration as to what authority is empowered to establish the latter. In practice the legislature has created police courts for cities under legislative charters. In practice also St. Louis and Kansas City have provided for police courts by the terms of their freeholders' charters.[2] These courts are given jurisdiction over cases arising under the charter and ordinances of the city, and their relation with certain courts of the state judicial organization is determined to an extent at least.[3]

In the above-mentioned Union Depot Railway case[4] it was clearly intimated that the power to establish a police court was

[1] Art. VI, sec. 1.

[2] St. Louis charter of 1876, Art. IV, sec. 25–27; of 1914, Art. XII. Kansas City charter of 1889, Art. IV, secs. 15 ff.; of 1908, Art. IV, secs. 9, 10.

[3] The St. Louis charter of 1914, for example, creates appeal from the "City Courts" established to the St. Louis Court of Criminal Correction; and the Kansas City charter of 1908 confers concurrent jurisdiction in certain classes of cases upon the "Municipal Court" established and the Circuit Court of Jackson County.

[4] *Supra*, 193.

quite within the scope of the power of St. Louis. In the case of *Ex parte* Kiburg,[1] decided in the St. Louis court of appeals in 1881, this point was definitely before the court and it was there held that the "charter authority" in this regard "derives sanction" from the provision of the constitution vesting the judicial power of the state in "municipal or corporation courts" among other enumerated courts. Since cities were empowered to frame charters and since a part of the judicial power of the state was vested in municipal courts, which were not created by the constitution and were not specifically required to be created by the legislature, it was evidently the view of the court, although this was not declared in so many words, that such courts might with constitutional propriety be established through the medium of freeholders' charters.

In spite of the fact that both of the home rule cities of Missouri set up police courts under their charters, the state legislature enacted in 1903 a law creating juvenile courts in these cities.[2] Several constitutional objections were raised to this act in the case of *Ex parte* Loving,[3] but the contention seems not to have been pointedly made that under the judiciary article of the constitution, when considered in conjunction with the provisions conferring home rule powers, the legislature was powerless to create in St. Louis and Kansas City "municipal or corporation courts." It was urged, however, that the law was void as being in conflict with a controlling provision of the charter. On this point the court said briefly:

> It is also insisted that the provisions of this act are in conflict with certain provisions of the charter of Kansas City, in respect to the exercise of jurisdiction by the police judge, in pursuance of certain ordinances covering some of the matters that are included in this act. We will say, upon that proposition, that this being a general law, as applicable to the class of subjects treated of, the charter provisions would be inoperative. The provisions of the charter must be in harmony not only with the Constitution of the State, but as well, its general laws. This is clearly settled in the discussion of the cases of Kansas City *v.* Oil Co., 140 Mo. l. c. 469, and Kansas City *v.* Bacon, 147 Mo. 259.

[1] 10 Mo. App. 442 (1881). See also Kansas City *v.* Neal, 49 Mo. App. 72 (1892).

[2] Laws of Mo., 1903, p. 213. Amended so as to give Kansas City a somewhat differently constituted court, Laws of Mo., 1905, p. 56.

[3] 178 Mo. 194. 1903.

The conclusion must be reached from these few adjudicated cases that while the charter control over police courts has not given rise to much difficulty or controversy in Missouri, and while such control is, in the absence of state law, entirely within the competence of a home rule city, yet this is a subject upon which a state law will supersede a contrary charter provision.

Is the Power to frame a Charter a Continuing Right?

After the amendment of 1902 of the home rule provisions of the Missouri constitution applicable specifically to St. Louis, there could be no question as to the power of this city to frame and adopt a new charter at any time that it might elect to do so.[1] Upon this point, however, the provisions applicable to cities of more than 100,000 inhabitants were by no means convincing,[2] and in the case of Morrow *v.* Kansas City [3] the court was called upon to say whether Kansas City had exhausted its charter-making power by the adoption of a charter in 1889, or whether another board of freeholders might be elected, as was proposed in 1904, to draft a new charter. The opinion recited in part:

> Keeping in view then that the power to create a municipal corporation and to define its powers is a legislative function, and that prior to the Constitution of 1875 it was vested exclusively in the legislative branch of our State government by the general grant of legislative power, we can the more readily grasp the full meaning and scope of section 16 of article 9 of the Constitution of Missouri of 1875, which provides: "Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of thirteen freeholders, who shall have been for at least five years qualified voters of such city at any general or special election," etc. It is obvious that the power vested in the legislature to grant the charters of all cities was by this section of the Constitution modified, so that when any city of more than one hundred thousand inhabitants elected to avail itself of this grant and framed and adopted its own freeholders' charter, then the power of the legislature to govern the purely municipal affairs of such a city ceased, and by the grant the people of the State transferred this legislative power,

[1] *Supra*, 119. [2] *Supra*, 121. [3] 186 Mo. 675. 1904.

because the framing of a charter and adopting it is the exercise of legislative power, to the people of such city, but in so doing did not change the nature or extent of the power further than it was made a condition that the charter which it should frame and adopt should be consistent with and subject to the Constitution and laws of this State. In a word, the people of the State in their sovereign capacity delegated a legislative power, which theretofore had been vested in the legislature, to the city itself, and when the city availed itself of this privilege then it ceased to be in the power of the General Assembly to curtail the power thus vested in the city. (State *ex rel.* Kansas City *v.* Field, 99 Mo. 352; Kansas City *v.* Oil Company, 140 Mo. 466–7–471.)

At considerable length of discussion the court endeavored to distinguish the home rule provisions of the Missouri constitution from those of California, where the supreme court had reached an opposite conclusion upon this point.[1] In fact, however, the differences pointed to were of minor significance. It was simply that the California court applied to the constitution a rule of literal construction while the Missouri court considered the substance and purpose rather than the letter of the grant. The case is of no especial importance anyway except as it indicates the necessity of devoting great care to the phrasing of a constitutional provision conferring the charter-making power upon cities.

On the whole it may perhaps be said that in cases involving merely the question of whether this or that power is embraced within the scope of authority to frame and adopt a charter, the Missouri court has been more liberal than otherwise, although one or two cases furnish conspicuous exceptions. Wholly in the absence of any alleged conflict with state laws, the powers of taxation and of eminent domain and the competence to regulate municipal elections, to confer jurisdiction upon a state court, to create a police court, and to exercise the charter-making power continuously have been sustained. So far as the police power is concerned the home rule charter was viewed precisely as if it had been a charter of legislative origin. On somewhat unaccountable grounds the power to regulate public utility rates was denied. But it is especially

[1] Blanchard *v.* Hartwell, 131 Cal. 263 (1900); *infra*, 221. See also *infra*, 418.

noteworthy that the restricting hand of the court was laid upon every municipal action that was in any sense experimental in policy or outside of the usual and commonplace in the field of municipal activities. Thus was compulsory voting interdicted; as was also a scheme to secure street trash boxes in return for advertising privileges. So likewise was the city prohibited from requiring occupiers of premises to be responsible for repairs to sidewalks. In spite of the fact that in one or two cases the test applied to determine the competence of the city was whether the legislature could have conferred the disputed power in a legislative charter, this test was by no means consistently applied, as is evidenced by the ruling of the court in respect to the power of the city to regulate utility rates.

CHAPTER VII

HOME RULE IN CALIFORNIA — THE LEGAL NATURE OF A FREEHOLDERS' CHARTER

FOLLOWING the lead of Missouri the constitutional convention which met in California in the year 1879 likewise determined to liberate at least the metropolitan city of the State — San Francisco — from the thraldom of legislative "interference" in its affairs by conferring upon it the power to frame its own charter. The provisions of the Missouri constitution were before the members of the convention, and St. Louis had been operating under a freeholders' charter for more than two years. Sufficient time had not elapsed, however, for the California convention to have the benefit of much judicial determination of the complicated legal problems involved in the St. Louis experiment. Missouri could offer to California nothing except the uninterpreted phrases of her constitution. As might be expected under these circumstances the debates upon the floor of the California convention showed no great insight into the heart of the problem under consideration. Said Delegate Reynolds, speaking in support of the proposal:[1]

> Now, to illustrate the difficulties under which the city labors, I wish to call attention to the volume I hold in my hand. Here is a volume of fine print, three hundred and nineteen pages, that comprises the charter of the city of San Francisco, to-day. No man on earth knows what is in it, and they do not pay any attention to it either. They ride rough shod over it. Dozens of these acts have been passed in the interest of a single individual. Some contractor or some officer would want to get a supplementary act passed, and he would slide up to the legislature and get it through. Under this section a body of citizens selected for that purpose,

[1] *Debates and Proceedings of the California Constitutional Convention of 1879*, II, p. 1060.

will go to work decently, frame a charter, and submit it to the people. If they fail, try it again, and the amendments [will] be made in the same and no other way. The argument seems to be overwhelming in favor of adopting a regular systematic course, the same as in forming a constitution for the state. The argument that it is creating an *imperium in imperio*, that it is creating a free city, that it is running away from the state, has no force whatever. Of course, this charter must be subservient to the constitution and laws of the state; hence there can be no objection whatever to giving the city of San Francisco the authority to procure a charter for her own government.

In reply to this somewhat unilluminating explanation of the purport of the proposition Delegate Hale declared:[1]

This ninth section is very strong, and makes it easy for the city of San Francisco to set up an independent government; entirely independent of the authority of this state. . . . What is it we authorize? Why that the city of San Francisco may hold a constitutional convention — call it in her own way, hold it when she pleases, enact such a constitution as she pleases. How is it to become the organic law? Why, sir, by submitting it to the electors of the city of San Francisco. Is there any power in the state government, supposing that they should set up a government thus inconsistent with the state government, and which contravenes the policy of our laws, by which the state could prevent it? No, sir, there is no authority provided. It is to be submitted to the electors alone, and if by them satisfied, it becomes the organic law of the city of San Francisco. There is no power in the legislature; there is no power in the judiciary, nor in any of the departments of the state to interfere if we establish that system; and if they themselves become dissatisfied and wish to amend it, they have only to repeat the process, and call, independently of the authority of the state, another convention, and adopt these amendments and put them in force. They are required to keep one of these new constitutions on file in the office of the Secretary of State, and then all the courts, and all the departments of government are required to take notice and govern themselves accordingly.

This is the boldest kind of an attempt at secession. If this had been attempted down at the lower end of the state, it would not have looked so bad. But here in San Francisco . . . [it] seems to me to savor so strongly of imperialism that I cannot see how any gentleman on this floor can reconcile himself to advocate it. Why, how, for what reason, can it be argued that the [people of the] city of San Francisco shall not submit themselves

[1] *Debates and Proceedings of the California Constitutional Convention of 1879*, II, p. 1061.

to the laws of which they are a part, and whose government and duties they should share? . . .

In spite of the opposition thus eloquently voiced, the following provisions were incorporated into article XI of the constitution as it came from the hands of the convention:

Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws.

Sec. 7. City and county governments may be merged and consolidated into one municipal government, with one set of officers, and may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes. The provisions of this Constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or prohibited to cities, shall be applicable to such consolidated government.[1]

Sec. 8. Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of such

[1] [This section originally declared also that "In consolidated city and county governments of more than one hundred thousand population, there shall be two Boards of Supervisors or houses of legislation — one of which, to consist of twelve persons, shall be elected by general ticket from the city and county at large, and shall hold office for a term of four years, but shall be so classified that after the first election only six shall be elected every two years; the other, to consist of twelve persons, shall be elected every two years and shall hold office for the term of two years. Any vacancy occurring in the office of Supervisor, in either Board, shall be filled by the Mayor or other chief executive officer." This provision merely incorporated into the constitution certain features of the then existing government of the city and county of San Francisco — a consolidated government which had been established by law in 1856. San Francisco — the only consolidated city and county that there has ever been in California — did not have a freeholders' charter until January 1, 1900. This provision was repealed by an amendment adopted in November, 1894. It therefore never applied to any freeholders' charter in California, and it may in consequence be omitted from consideration.]

city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned one copy thereof to the Mayor, or other chief executive officer of such city, and the other to the recorder of deeds of the county. Such proposed charter shall then be published in two daily papers of general circulation in such city for at least twenty days, and within not less than thirty days after such publication it shall be submitted to the qualified electors of such city at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the Legislature for its approval or rejection as a whole, without power of alteration or amendment, and if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or if such city be consolidated with a county, then of such city and county, and shall become the organic law thereof, and supersede any existing charter and all amendments thereof, and all special laws inconsistent with such charter. A copy of such charter, certified by the Mayor, or chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the electors, and its ratification by them, shall be made in duplicate, and deposited, one in the office of the Secretary of State, the other, after being recorded in the office of recorder of deeds of the county, or city and county, among the archives of the city; all courts shall take judicial notice thereof. The charter so ratified may be amended at intervals of not less than two years, by proposals therefor submitted by legislative authority of the city, to the qualified voters thereof at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the Legislature as herein provided for the approval of the charter. In submitting any such charter, or amendment thereto, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

* * * * * * *

Sec. 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

Certain other sections of the same article limited the power of the legislature in regard to specific matters relating to the affairs of municipal corporations; but they are not material to the consideration of the powers of home rule as granted by the provisions above set forth.

It is to be noted that, while section six imposed important limitations upon the legislature with respect to *all* the cities of the state, and while section eleven conferred a general police power upon *all* cities, the power to frame a charter was granted originally only to cities of more than one hundred thousand population. The provision was, therefore, applicable only to San Francisco. This city, like St. Louis, made haste to avail itself of the privilege thus conferred. But its first attempt, in 1880, and its second attempt, in 1883, as likewise two attempts thereafter,[1] were without success, each proposed charter being rejected by the municipal electorate. In spite of this unfortunate experience of the metropolis of the state, agitation was begun soon after the adoption of the constitution for an extension of like authority to other cities; and as a result of this agitation section eight was in 1887 amended so as to confer the power to frame a charter upon any city containing a population of more than ten thousand inhabitants. At this time no very material changes were made in the phraseology of the original grant.

Immediate activity on the part of certain middle-sized cities of the state followed the adoption of this amendment. Los Angeles, like San Francisco, had her first attempt at charter-making defeated by her own electors; but early thereafter a second board of freeholders was elected, and the charter which they submitted was ratified by the people in October, 1888 and by the legislature in January, 1889.[2] In November, 1888 freeholders' charters were approved by the voters in Oakland and Stockton and were subsequently ratified by the legislature.[3] In March, 1889 San Diego adopted a charter which likewise received the stamp of legislative approval.[4] Here then were four cities, varying in population from fourteen to fifty thousand, which had within two years after the privilege had been extended to them availed themselves of the opportunity to frame a government according to their own ideas. It was inevitable that these charters should be attacked in the courts.

[1] *Infra*, 229.
[2] Stats. of Cal., 1889, pp. 513, 577.
[3] Stats. of Cal., 1889, p. 455.
[4] Stats. of Cal., 1889, p. 643.

The Form of Legislative Ratification of Charters and Amendments

It is to be noted that the provisions of the constitution regulating the procedure to be followed in the adoption of a freeholders' charter were fairly elaborate and complete in character.[1] The attack that was immediately made upon the first freeholders' charter of Los Angeles struck at what was doubtless the weakest point in the requirements of procedure that were laid down in the constitution. It was there provided that the charter should become the charter of the city "if approved by a majority vote of the members elected to each house" of the legislature. The charter of Los Angeles, the first charter presented to the legislature, was ratified by a joint resolution of the two houses without being submitted, as in the case of other legislation, to the governor. This raised the question whether the term "legislature" as used in this section included the governor. In the case of Brooks *v.* Fischer[2] the court declared upon this point:

> It does not follow that because in other parts of the constitution, as contended by counsel for the petitioner, the term "legislature," so far as it applies to the enactment of laws, includes the governor as a part of the law-making power, that is the effect of the language above quoted with reference to the adoption of city charters. The language itself clearly shows a different intention. It provides for the submission to the legislature which does not necessarily include the governor, and provides in express terms that the proposed charter shall become effective upon its being approved by the members of that body. It seems to us that the language is so plain and unequivocal that it cannot call for a construction by this court. It is enough that the constitution has so provided. This being the effect of the constitution it seems to us to be wholly immaterial whether the charter was approved by the legislature by a bill in the regular form or by way of a joint resolution.

This decision definitely settled the validity of legislative ratification without the participation of the governor. There seems to be little question that the court was entirely correct in the

[1] People *v.* Hoge, 55 Cal. 612 (1880); *infra*, 259.

[2] 79 Cal. 173 (1889). It was also contended in this case that some of the provisions of the charter were inconsistent with existing laws and that therefore the whole charter was void. But the court refused to sustain this contention. *Infra*, 239.

construction thus placed upon the literal wording of the constitution. But whether there was justification for holding that the legislature might ratify the charter by means of a joint resolution instead of conforming to all the other requirements of the constitution in respect to the enactment of a law by a bill *is* open to question. The point may seem to be trivial but it really proved to be of far-reaching importance; for a year after the decision of the Brooks case the court decided a most important case affecting the powers of cities under freeholders' charters — the case of the People *v.* Toal [1] — upon the express ground that the legislature in ratifying such a charter by joint resolution was *not* engaged in the enactment of a law.

Is a Home Rule Charter a Law?

The Toal case involved the legality of a police court established by the freeholders' charter of Los Angeles. It was held that the constitution provided for the establishment of inferior courts "by the legislature" and for the fixing of the jurisdiction of such courts "*by law*"; that it also provided elaborate procedure for the enactment of a *law* and the approval of the governor; that a freeholders' charter, being ratified by the legislature with much less formality than was required for the enactment of a law and without submission to the governor, was *not* established by law within the meaning of the constitution; and that an "inferior court" sought to be created by such a charter was in consequence a nullity. Said the court:

> A provision in a charter, adopted by mere resolution of approval and not by law, establishing inferior courts, and giving them jurisdiction, is clearly in conflict with the constitutional provisions prescribing the mode by which laws shall be enacted.

In order to test the soundness of the court's decision in this case it is necessary to consider several points of interest and importance. In the first place, the constitution expressly declared that a freeholders' charter when ratified by the legislature should

[1] 85 Cal. 333. 1890.

become the "organic law" of the city, thus employing the very term — "law" — which the court in effect declared such a charter not to be. In the second place, the constitution declared that this charter should "supersede any existing charter, and all amendments thereof, and all *laws* inconsistent with such charter." The case of Miner *v.* Justices' Court,[1] which eight years later reaffirmed the decision of the Toal case, emphasized perhaps more clearly than did the earlier case the somewhat astonishing proposition that a freeholders' charter which was apparently not a "law" within the meaning of the constitutional provision relating to courts, could nevertheless repeal a law. In the Miner case it was held that neither the provision of the legislative charter of 1878, by which two justices of the peace were established for the town of Berkeley, nor the provision of the freeholders' charter of 1895, by which a similar establishment was sought to be made, had any validity. It was contended there that if the provision of the freeholders' charter in this regard was void, then the provision of the old charter remained in force. But the court answered that the contrary of this contention was established because the constitution expressly declared that the freeholders' charter should "supersede any existing charter." This operated to repeal the old charter in toto. While, therefore, the provision of the old charter creating the two justices was abrogated by the ratification of the new, the provision of the new charter upon this subject was without force because the constitution required that inferior courts should be established only by law.

Identical in effect was the decision of *Ex parte* Sparks[2] handed down in the same year. In this case the contention that the freeholders' charter of Sacramento had merely *continued* the police court established by the old legislative charter was rejected. The court declared:

> The argument against the power to continue in existence an existing court, which would otherwise be abrogated by the adoption of the new charter, is stronger, if there is a difference, than any argument that can be made against the power to create a police court by the charter.

[1] 121 Cal. 264. 1898.

[2] 120 Cal. 395. 1898.

Upon the specific point that a freeholders' charter, which was in effect held to be not a law, could nevertheless repeal a law, it was said by Judge Temple:

> The old charter is not repealed because it is so enacted in the new charter, or because its provisions are inconsistent with those of the new charter. The new charter does not abrogate the old *ex proprio vigore*, but because the constitution declares that such consequence should follow.
>
> The reason of this is sufficiently obvious. It is not the passage of an ordinary law, but the establishment of a government. The new is to take the place of the old, however dissimilar, and although some parts of the old charter have no corresponding provisions in the new, there is no presumption that anything is continued, for the new scheme is deemed complete in itself and to provide all that is desired. That which is omitted is omitted because not desired.[1]

Although it is a well-known fact that municipal charters enacted by the legislature do not commonly repeal provisions of existing charters except by express declaration or because of obvious inconsistency and conflict of provision, it may well be that this was a correct interpretation of the language of the constitution. The effect of a freeholders' charter upon the charter that it replaced was, in other words, precisely the same as that of a new state constitution upon an old. The new blotted the old completely out of existence. But this construction of the terms of the constitution, far from sustaining the view that a freeholders' charter was not a law within the meaning of the entire constitution, would seem to have been an almost unanswerable argument to the contrary.

In the third place, as bearing upon the soundness of the doctrine laid down in the case of the People *v.* Toal and the subsequent reaffirmative cases mentioned, it is to be noted that the California court has in other cases expressed opinions that are not wholly in harmony with this doctrine. Thus in the case of the People *v.* Gunn,[2] decided at the same term of court as the Toal case, the charter of San Diego was attacked upon the ground that there had been in its adoption irregularities in the procedure required by the constitution. The lower court refused to admit evidence that

[1] For the view of Judge Temple as expressed in this case of the effect of the constitutional amendments of 1896, see *infra*, 212.

[2] 85 Cal. 238. 1890.

was offered to show the existence of these irregularities upon the ground that the act of the legislature in ratifying the charter was a "political" rather than a legislative act; that it was the business of the legislature to determine before it approved the charter whether the constitutional procedure had been complied with; and that in consequence the legislative ratification was a conclusive determination of the matter and binding upon the judiciary.[1] If the act of the legislature was not an act of lawmaking, and if the freeholders' charter was not enacted "by law," it would seem that this argument of the lower court was not without some force. But the supreme court wholly rejected this view, declaring that the legislature

> was not called upon or authorized by the constitution to adjudicate upon the question of whether the *lawmakers* — the municipal authorities and people of San Diego — had proceeded regularly in the framing and adoption or passage of the *law* or not. That was a judicial question.

Here then was an express declaration by the court to the effect that a freeholders' charter was a "law" of some species, if not within the requirements of the constitution in respect to the enactment of a law, and that the municipal authorities and the people of the city were the makers of that "law."

Again in the case of Frick *v.* Los Angeles,[2] where it was contended that the charter provisions regulating the manner in which the city might enter into contracts were subject to and controlled by the general laws of the state relating to contracts, the court said:

> As to the provision of section 1622 of the Civil Code, that all contracts may be oral except when required by statute to be in writing, if we conceded that it has relevancy to the controversy here, we are yet clearly of the opinion that the charter, to the extent of its purposes as a scheme of municipal government, is a "statute" within the meaning of that section; it is undoubtedly a law, though of local operation; the constitution declares it to be the organic law of the city (Const., Art. XI, sec. 8); it is of course a written law, and for many purposes the terms "statute" and "written law" are used indifferently.

[1] See also the opinion of Temple, J., in Fragley *v.* Phelan, 126 Cal. 383 (1899), *infra*, 265, where this view was again put forward, although it was not concurred in by any other judge.

[2] 115 Cal. 512. 1896.

It is to be remarked moreover that when a number of years afterward the court was called upon in numerous cases to determine what powers a city might "confer upon itself" in a freeholders' charter, the very liberal view was taken, as will be shown a little later on,[1] that such a charter might grant any power which in the absence of constitutional limitation the legislature might grant in a legislative charter. In assuming this attitude the court asserted more than once that such a charter "has the same effect as that of a law passed by bill." Thus in Sheehan *v.* Scott,[2] where the somewhat absurd proposition was put forward that a freeholders' charter could not lay down qualifications for municipal officers, the court said:

> The authority to provide a municipal government for a city is referable to the lawmaking power of the state, and the enactment of a charter for a municipality is a legislative act. . . . The people have . . . withdrawn from the senate and assembly the legislative authority of the state in reference to municipal government for cities, to the extent that neither of these bodies can exercise any legislative authority in the enactment of a charter for such a municipality until after its provisions have been formulated and approved by the city itself in the manner prescribed by section 8 aforesaid, and have limited their legislative authority to the mere approval or rejection of the charter so formulated. The authority thus withdrawn from the legislature and given to the city is none the less a part of the lawmaking power of the state because it is contained in the article upon "Cities, Counties, and Towns," rather than in the article upon the "Legislative Department," and the act of the city in formulating the charter and determining the provisions to be included therein has the same force and authority as would a charter with the same provisions enacted by a legislature that was not restrained by any constitutional limitations. Its adoption by the city and approval by the legislature in the manner prescribed by said section is the mode prescribed by the constitution for its enactment, and has the same effect as that of a law which is passed by bill, under the provisions of section 15 of Article IV. It must be held, therefore, that the provisions of the charter of San Francisco in reference to qualifications for eligibility to the office of tax collector have been established by the legislative authority of the state and are valid.

Again in *In re* Pfahler,[3] where the legality of the initiative and referendum provisions of the freeholders' charter of Los Angeles

[1] *Infra*, Ch. X. [2] 145 Cal. 684 (1905); *infra*, 364. [3] 150 Cal. 71. 1906.

was sustained,[1] the court assumed, although merely "for purposes of argument," that "the legislature, in approving by concurrent resolution a charter framed by any city," actually delegates legislative power to such city. It cannot be said that this was an unmistakable recognition of the fact that the ratifying act of the legislature was an act of law-giving. It was merely an assumption; but under any reasonable application of the doctrine of the Toal case it was an assumption which, being wholly contrary to the "law of the constitution" as interpreted by the court, should not have been indulged in.

It was in the case of Rothschild *v.* Bantel,[2] however, that the court gave voice to an opinion that appears to be most completely at variance with its other utterances upon this point. In an earlier case [3] it had been held that an express provision of the constitution [4] prohibited the deposit of municipal funds in any bank. In 1906 the constitution was amended so as to allow such deposits to be made "in such manner and under such conditions as may be provided by *law*." [5] It was contended that the limitation thus expressly imposed operated to prevent the determination by the provisions of a freeholders' charter of the manner in which and the conditions under which these deposits might be made, just as the requirement that inferior courts should be established by law had prevented their being established by such charters. This contention the court disposed of as follows:

> The words "in such manner and under such conditions as may be provided by law," following this provision, are simply a limitation upon the permission before given, the effect thereof being that such deposits may be made only in the manner and under the conditions provided by such laws as may properly be enacted in regard thereto. As to the state, any county, or any municipality organized under the general municipal corporation act, such laws providing for the deposit and the manner and conditions thereof, may undoubtedly be enacted by the legislature of the state. But when we come to the manner of the safekeeping of the moneys of a municipality having a freeholders' charter, "the organic law" of the

[1] *Infra*, 318.
[2] 152 Cal. 5. 1907.
[3] Yarnell *v.* City of Los Angeles, 87 Cal. 603. 1891.
[4] Art. XI, sec. 16. [5] Art. XI, sec. 16½.

city (Const., Art. XI, sec. 8), so far as it speaks upon the matter at all, is, subject to the constitution, the paramount law, and, except as provided in the constitution, nothing contrary thereto can be "provided by law." In such a case the charter provision is the "law" referred to in the constitutional provision. The provision is not that the deposit may be made in such manner and under such conditions as may be provided by the legislature, or by any particular kind of law, but is simply "as may be provided by law."

Now it is manifest from the above review of cases that in the decisions of the California court upon this point there is a distressing amount of inconsistency. It is difficult to understand how on the one hand a freeholders' charter is enacted "not by law," as was asserted in the Toal case, and yet on the other hand is the "organic law" of the city, repeals laws, is a "law" passed by the local authorities and people of the city, is a "statute" as referred to in a general law of the state, "has the same effect as a law which is passed by bill," may be assumed by reason of legislative ratification to be a delegation of power from the legislature, and is a "law" as that term was used in the amendment of 1906 relating to municipal deposits. It would appear at first view that the Toal case and the other cases affirming the doctrine there laid down have been so far modified by later decisions as to have been practically overruled; but such is evidently not the view of the California court. In most of the cases mentioned above in which opinions were expressed that seemed to be out of harmony with the doctrine of the Toal case, that important case was not even mentioned. Moreover, as late as 1908 the Toal case was cited with approval by the court and without any intimation that it had been modified in the slightest degree.[1] In the above-mentioned case of *Ex parte* Sparks, which was decided soon after the adoption in 1896 of certain constitutional amendments which greatly extended the scope of municipal home rule in California — amendments which are reserved for later discussion[2] — Judge Temple expressed the view that, while it had been decided that the legislature in ratifying a freeholders' charter was not engaged in law-making, this

[1] Fleming *v.* Hance, 153 Cal. 162 (1908); *infra*, 257, 372, 383.
[2] *Infra*, Chs. IX–XI.

question should in the light of these amendments be regarded as reopened and that such ratification should be declared to be "*a special mode for the enactment of a law by the legislature.*" But the other judges who concurred in the judgment that was rendered made a point of refusing to express any opinion on this subject upon the ground that it was unnecessary to the decision of the case at bar. Nor has the majority of the court, so far at least as their opinions disclose, ever expressed any intention of accepting this view.[1] Even in the Rothschild case, where the point to be determined was so very nearly identical with that which was determined in the Toal case, this earlier and leading case was not referred to; and the only effort to distinguish the two that can possibly be said to have been made was the attention that was called to the fact that the constitutional amendment in respect to municipal deposits did not say "as provided by the legislature" but simply "as provided by law." The constitutional provisions which were applied in the Toal case referred in one section to "such inferior courts as the *legislature* may establish," and in another section declared that "the *legislature* shall fix by law the jurisdiction" of such courts. It is manifest, however, that this point of distinction — if such the court without reference intended it to be — was somewhat hairsplitting in its nicety. For since a freeholders' charter was in the Rothschild case expressly declared to be a law, the jurisdiction of any inferior court for which it provided was certainly fixed by law; and since such a charter had no validity without action by the legislature, it certainly might have been held with reason that the *legislature* by its indispensable act of ratification "established" and "fixed" the jurisdiction of the inferior court for which the charter provided.[2]

[1] The opinion of Temple, J., in People *ex rel.* Lawlor *v.* Williamson, 135 Cal. 415 (1902), was founded upon this view and was concurred in by Henshaw, J., and Beatty, C. J. See *infra*, 287.

[2] The effect of the opinion to the contrary was to read into the constitutional provision the words "without other participation," so as to make the acts of establishing and fixing the jurisdiction of inferior courts acts of the legislature alone. With quite as much show of reason, it would seem, might it have been held that the constitution excluded the governor from participation in the *establishment* of inferior courts; for although the fixing of jurisdiction was required to be *by law*, the consti-

In the Toal case the court laid great emphasis upon the fact that a freeholders' charter was enacted "not by law" because in ratifying such a charter the legislature did not follow the procedure required for the enactment of a law and did not submit the charter, as required by the constitution for the enactment of a law, to an authority outside the legislature — to wit, the governor. In other words, except in the somewhat extraordinary instance of a vote overriding the governor's veto, the constitution made no provision for the enactment of *any* law without the participation of some authority in addition to the legislature as such. In the enactment of laws in general the legislature was only a participant, although it must be admitted that it was the principal participating authority.

By reference to another article of the constitution the court certainly might have found that a peculiar and exceptional provision was made for the enactment of certain municipal charters, which were referred to as laws and which repealed laws. In the enactment of these laws the legislature was also a participant, although not the chief participant. In their enactment the legislature occupied a position somewhat like that of the governor in the enactment of laws in general. Like the governor as to general laws, it could veto these peculiar laws, the only difference being that its veto was absolute instead of suspensive. The constitution had nothing to say as to the "informality" of the manner in

tution did not specifically require that the legislature should *establish* such courts *by law*. Now as every one knows, the legislature may act by other means than by law, and in some of the acts of the legislature the governor does not participate. If therefore the rule of strict construction had been applied with consistent rigidity to the provision relating to the establishment of inferior courts, it might have been held that the legislature could establish such courts by concurrent resolution without submission to the governor, upon the theory that when the constitution said the "legislature may establish" it meant to declare that this act of establishment should be by the legislature alone — without any other participating authority. Indeed argument of this kind would seem to be even stronger than that which was applied to the case of freeholders' charters for the reason that the constitution did not anywhere indicate, except by implication of a very general character, that the act of the legislature in establishing inferior courts should be regarded as a "law"; whereas the constitution expressly provided that a freeholders' charter should be the "organic law" of the city and should operate to repeal "laws." There is no question, however, that the courts would have regarded as absurd the contention that inferior courts could be established in this manner by the legislature alone.

which the legislature participated in the enactment of these laws, except that it did perhaps imply that they should not be submitted to the governor. Such other informality as obtained had been sanctioned merely by a judgment of the court. It was not established by any unavoidable terms of the constitution. In the enactment of laws in general as well as of this peculiar class of laws the legislature was, therefore, simply a participating authority, the difference being chiefly in the degree and the order of participation. It may be that it would have been strange to the ear had the constitution declared that the *governor* — a participant by reason of his limited veto power in the making of laws in general — should fix the jurisdiction of inferior courts *by law;* but if the constitution *had* made such declaration and had provided only *one* method for the enactment of laws and *one* means for the participation of the governor in such enactment, it is scarcely to be questioned that this declaration would in effect have been identical with that which was made — to wit, that the *legislature* should fix such jurisdiction *by law.*

By a parity of reasoning it may be argued that it was somewhat strange for the constitution to declare that the *legislature* — a participant by reason only of its absolute power of veto in the making of laws in the nature of freeholders' charters — should fix the jurisdiction of inferior courts *by law,* if it was intended that the laws establishing such jurisdiction might be of this peculiar class for which provision was made in the constitution. But since the constitution *did* make such declaration and provided a peculiar method for the enactment of laws of this class and a means for the participation of the legislature in such enactment, was the court justified in asserting that the jurisdiction of such courts as fixed in laws of this kind was not fixed by the *legislature* and was not fixed *by law?*

Moreover, even if the framers of the constitution fully *intended,* by the expression that was used, to permit the determination of this matter of jurisdiction by laws in the nature of freeholders' charters, there was considerable justification for the employment of the simple and comprehensive declaration to the effect that the "legislature shall fix by law." For it must be remembered that

this matter could not under any circumstances be determined exclusively by freeholders' charters, which could be adopted only by certain cities and which need not be adopted by any cities. To the extent, therefore, that the matter was not fixed by the legislature under laws of this peculiar class it was indispensable that it should be determined by the legislature under laws of the more usual character. What was more reasonable under these circumstances than the use of the broad declaration that was made — a declaration which could, without too violent twisting of terms, be construed to include laws of both classes?

The probable truth of the matter is, of course, that the provisions of the constitution in respect to courts were adopted without any consideration whatever of the provisions relating to freeholders' charters. Even so, it would certainly seem that there was no absolute contradiction of terms; and to assert that the constitution created the incongruous situation in which a freeholders' charter was a "law" that was enacted "not by law" seems to have been not only an unnecessary but also a wholly unwarranted equivocation. As Judge Beatty declared in his dissenting opinion in the Toal case, "to make the constitution consistent and harmonious as a whole, verbal discrepancies must be disregarded." There is no apparent reason why it might not have been held that the legislature, in giving its sanction without power of amendment to a freeholders' charter, was engaged in performing its constitutional function in the enactment of a particular kind of law, for the passage of which the constitution prescribed a procedure different from that prescribed for the enactment of all other laws; that such an enactment was in every possible respect a law within the meaning of the constitution; and that where the constitution ordained that the legislature should do this or that *by law*, that function the legislature fulfilled when it participated in the enactment of one of these peculiar laws. In other words it might have been held that the provisions of the constitution regulating the passage of laws *in general* did not in any wise affect the character of freeholders' charters as laws nor the nature of the legislative act of ratification as an act of law-making,

this rule being rested upon the well-known principle that the special and exceptional provision in a constitution, to the extent of the exception created, takes precedence over and controls any general provision with which it is in open conflict or slight disharmony.

It is of some interest to inquire what would have been the effect upon the right of home rule in California had the court applied this interpretation to the provisions of the constitution in question. In the first place, it would have been difficult for the courts to declare void the provisions of certain freeholders' charters that established police courts. As will be brought out a little later,[1] the California court has never adopted the view that a city in framing a charter "for its own government" was limited to providing for those matters which may be regarded as of "local" as distinguished from "state" concern. In the absence of conflicting state law[2] the court could not have declared, therefore, that police courts were a part of the judicial system of the state and as such were a matter of state concern and therefore *ultra vires* to the city which attempted to exercise the home rule powers conferred upon it by the constitution. It ought to be mentioned perhaps that provisions for police courts were the only provisions of freeholders' charters that were ever held void upon the ground that such a charter was not enacted by law. The practical effect of this doctrine, therefore, as a general doctrine of construction, was apparently not very far reaching.

In the second place, it is to be remarked that had the court declared a freeholders' charter to be a law enacted by the legislature under special procedure every such charter would have been in the nature of a "special law."[3] Now the relation between general and special laws is a matter of common knowledge. A special law, of course, with or without reference, supersedes a gen-

[1] *Infra*, Ch. X, *passim*.

[2] *Infra*, 241–245.

[3] Section 6 of Art. XI declared that municipal corporations should not be created by "special laws"; but the context shows clearly that the laws here referred to were laws enacted under the usual constitutional procedure. This provision need not, therefore, have been construed to mean that laws in the nature of freeholders' charters, enacted by the legislature under the exceptional procedure provided, were not valid "special laws."

eral law previously enacted; while a general law does not by implication usually repeal a special law previously enacted.[1] Would this have been the rule applied to determine the relation between general laws enacted by the legislature and the provisions of freeholders' charters in California? Apparently not; for the constitution expressly declared that such charters should "be subject to and controlled by general laws." Under any reasonable interpretation of this provision it could certainly have been held that a special law in the nature of a freeholders' charter did *not* supersede a general law previously enacted, even though the legislature had been a participant in the subsequent enactment of such special law. If the legislature desired to have such special law control, then the legislature should amend the general law so as to permit such a result. And it might have been held also that a general law did operate to control a previously enacted freeholders' charter in the nature of a special law, even though this special law was in no wise referred to in the general law. In other words, it might have been held that the express provision of the constitution referred to prevented the application of the ordinary rule of construction governing the relation between general and special laws so far as these latter consisted of freeholders' charters. Such an interpretation would have placed freeholders' charters in their relation to "general laws" exactly where they were in point of fact placed by the decisions of the courts; but it would have wholly obviated the necessity of asserting in effect that these charters were not laws enacted by the legislature within every requirement of the constitution. Of course, in any case, the real point of importance here would be the judicial definition of the term "general laws" — a subject which is discussed in the two succeeding chapters.

Actual Results of the Requirement of Legislative Ratification of Charters and Amendments

In the California convention of 1879 the provision which required that freeholders' charters should be ratified by the legisla-

[1] See People *v.* Hill, 125 Cal. 16. 1899.

ture without power of amendment was wrung from the advocates of home rule as a highly important concession to the principle of central control over cities. The legislature of California has never failed to ratify a charter or amendment submitted to it for approval, although in one or two instances a vigorous fight for rejection has been made. Indeed the joint resolutions by which these charters and amendments receive legislative sanction and are thus given validity early became in most instances little more than a formality.[1] This may have been due in part to a liberality of attitude assumed by the legislature toward the right of home rule that was created by the constitution. But it was also due in large part to the fact that the courts almost immediately declared in effect that this ratifying act of the legislature was not an act of law-making, and to the further fact that the legislature recognized the judicial branch of the government to be the proper authority for keeping these charters "within legitimate bounds" and determining their conformity to the general laws of the state. The legislative intention that this or that "general law" should supersede the provisions of municipal charters was clearly indicated from time to time; but this was a situation which was utterly unaffected by the fact that the legislature participated in the making of freeholders' charters. It resulted from the constitutional requirement that all charters should be "subject to and controlled by general laws" — a requirement which, as already indicated, would have subordinated charter provisions to the control of general laws with or without the scheme of legislative ratification. This scheme added nothing to, and took nothing from, the subordination thus provided for. It cannot be said, therefore, that the requirement of legislative approval in California accomplished much of what its advocates expected or its opponents feared. Its net result seems to have been the introduction of a degree of confusion and inconsistency in the views of the courts as to the nature of a freeholders' charter and the invalidation of certain charter provisions upon the highly questionable

[1] On this point, see the opinion expressed in Harrison *v.* Roberts, 145 Cal. 173. 1904.

ground that such charters were not laws enacted by the legislature within the requirements of the constitution.

Apart from the fact that certain important charter provisions have been held void upon the ground that a freeholders' charter was not enacted by law, the only justification for this somewhat extended discussion of the legal nature of such a charter under the California constitution has been to demonstrate that, far from accomplishing anything of substantial good in the cause of establishing a satisfactory relation in law between the city and the state, the requirement of submission to the legislature, which among home rule states is found only in California, has been a positive evil.

Judicial Control over Home Rule Procedure

It should be mentioned in concluding the discussion of this phase of the home rule provisions of the California constitution that, following the rule laid down in People *v.* Gunn,[1] the California court continued to assert that it was a prerogative of the judiciary to determine whether the constitutional requirements in respect to the framing and adoption of freeholders' charters and amendments have been satisfied in any particular instance. Thus in People *ex rel.* Hoffman *v.* Hecht[2] the court determined the question as to the qualifications of certain freeholders who were elected to draft a charter in San Francisco. Again in People *ex rel.* Miller *v.* Davie[3] the court construed the meaning of the term "special election" at which the constitution permitted charter amendments to be submitted. So also in the City of Santa Rosa *v.* Bower[4] it was held that a charter approved by a majority of those voting *on* the proposition but not by a majority of those voting *at* the general municipal election of April, 1902, when the charter was submitted, was void under the provisions of the constitution as they stood at that time,[5] even though the charter was subsequently duly ratified by the legislature.

[1] *Supra*, 208.
[2] 105 Cal. 621. 1895.
[3] 114 Cal. 363. 1896.
[4] 142 Cal. 299. 1904.
[5] Amended in this respect in November, 1902; *infra*, 224.

In 1900 it was decided in the important case of Blanchard *v.* Hartwell[1] that the power to frame a complete charter was not under the then existing provisions of the constitution a continuing power but was exhausted in being once exercised. This proposition was sustained upon the following line of argument:

Since a procedure for the amendment of such a charter is expressly provided, the presumption would be (independently of the declaration that all the provisions of the constitution are mandatory and prohibitory unless the contrary is expressly stated) that such mode is exclusive. Under such a constitution this seems indisputable. The one mode of amendment is commanded, and all others are prohibited.

But every feature of the prescribed mode indicates that it is exclusive. It can be amended only once in two years. This would be a vain restriction if, nevertheless, the charter can be amended by framing a new charter (as remarked at the argument) every sixty days. Here is a clear and positive constitutional policy calculated to insure some degree of permanency, and to prevent frequent changes. Such is the prescribed policy. People may differ as to its wisdom. It certainly is the law. In the second place, it prescribes a different notice from that required upon the adoption of the charter in the first instance, and provides that alternate propositions may be submitted for the choice of electors. These are both important matters, not only providing for greater deliberation, but enabling the electors to decide by direct vote between different proposed policies, thus bringing local self-government nearer to the individual voter. No one should be permitted to deprive the electors of this privilege by compelling them to vote upon a different proposition, to wit, whether they will adopt a new scheme as a whole or not. I regard the right to submit specific amendments as a matter of great importance; but whether important or not such is the constitutional scheme. In the third place, the amendment must be approved by a majority of three-fifths of the qualified electors;[2] a charter may be adopted by a majority vote of such electors. This is also a provision favoring permanence, and against changes made under temporary excitement. What a fatuous limitation or requirement this would be if the policy thus clearly indicated could be defeated by adopting a new charter once in sixty days by a mere majority vote.[3]

[1] 131 Cal. 263 (1900). For reference to this case by the Missouri court, see *supra*, 198.

[2] [This was altered by an amendment of 1902; *infra*, 224.]

[3] [Here followed a discussion of Reeves *v.* Anderson, 13 Wash. 17, *infra*, 413 ff., and an attempt to distinguish the provisions of the California and Washington constitutions upon this point.]

This was obviously a somewhat rigid interpretation of the provision of the constitution in question, though doubtless quite within its strict letter.

In the case of Harrison *v.* Roberts,[1] decided four years after the Blanchard case, question was raised as to the meaning of the provision that freeholders' charters might be "amended at intervals of not less than two years." On December 4, 1902 the people of San Francisco voted in favor of certain charter amendments which were subsequently ratified by the legislature. The "legislative authority" of the city — the board of supervisors — proposed certain other amendments to be voted on at the general election held on November 8, 1904; and the question as to whether this would be amending the charter in less than two years was brought before the court by an application for mandamus to compel the election commissioners and the registrar of voters of San Francisco to give these proposals place upon the ballot. This application was refused, the view being taken by the court that the period of two years which must elapse between the enactment of amendments was the period *between the ratifying elections*. The contention was rejected that the two years must fall between the dates at which amendments were ratified by the legislature. Such construction, said the court, would enable the people of a city to hold as many elections as they chose upon the subject of amendments and would require only that such amendments as were adopted by the people should wait until the date at which the legislature might formally ratify them; and this would fail to accomplish one apparent object of the provision, which was to "protect the municipality against the expense and disturbance of frequent elections." Likewise the contention was rejected that the provision necessitated that two years should follow the date on which the legislature might ratify an amendment or set of amendments before *any* steps should be taken toward the enactment of further amendments. It was pointed out that this would normally extend the period in question to four years, since the regular sessions of the legislature were in effect limited to sixty

[1] 145 Cal. 173. 1904.

days in every two years, and since the constitution required that proposals for charter amendments should be published sixty days in advance of the date of submission to the people. The court concluded that "the real essential to an amendment is, after all, the ratification by the people at an election;" and the rule asserted was in fact premised upon this view — a view which was manifestly in accord with the notion that the ratifying act of the legislature was not an act of law-making.

Shortly after the decision of the Harrison case the court refused in the case of Lubliner *v.* Alpers [1] to issue a mandamus to compel the board of supervisors of San Francisco to order a special election for the submission of certain charter amendments which had, under the authority of a constitutional amendment of 1902,[2] been proposed by a petition of voters. The board of supervisors was held to be "invested with full discretion to order a special election, or if they deem that course unadvisable, to wait until the next general election to submit the proposed amendments to a vote of the people." [3]

It was thus that the California courts in a considerable number of cases gave judicial interpretation to various phases of the procedure prescribed by the constitution for the framing, adopting, and amending of freeholders' charters. The number of such cases that arose, as well as the number of amendments that resulted from their adjudication, clearly demonstrates the necessity of wording a constitutional provision upon this subject with the utmost care and precision.

Constitutional Amendments of 1887, 1892, 1902, 1906, 1911, and 1914 in Respect to Home Rule Procedure

As a matter of fact section 8 of article XI of the California constitution as set forth above in its original form [4] has been amended on six different occasions since its adoption in 1879.

[1] 145 Cal. 291. 1904.

[2] *Infra*, 224.

[3] See also Apple *v.* Zemansky, 166 Cal. 83 (1913), involving an interpretation of the constitution in respect to the matter of the submission of alternative amendments.

[4] *Supra*, 202, 203.

It was rewritten in 1887 before any city had adopted a freeholders' charter. At this time the most important change that was made was that already referred to — the extension of the charter-making power to cities of more than 10,000 (instead of 100,000) inhabitants. By amendment in 1892 the following alterations were made: (1) the power was extended to cities of more than 3500 inhabitants; (2) express authority was given for the ratification or rejection of charters or amendments by "concurrent resolution" of the legislature; (3) charters were declared to supersede "all laws inconsistent" therewith instead of merely "all special laws"; and (4) the publication of proposed amendments was regulated more specifically.

In 1902 the requirement for the adoption of a charter was changed from a majority of those voting *at* an election to a majority of those voting *on* the proposition, and the requirement for the adoption of an amendment from a *three-fifths* majority of those voting *at* an election to a *majority* of those voting *on* the amendment.[1] The significance of these changes, especially where a city desired to vote upon a charter or amendment at a general election, is too obvious to necessitate comment. It was provided at the same time, also, that in addition to the method of initiation by the "legislative body of the city," an amendment or amendments might be initiated at any time by a petition of fifteen per centum of the voters, which amendments should thereupon be submitted to the voters for approval or rejection.[2]

In 1906 the provision was again amended by the insertion of a clause which made it clear that a city operating under a freeholders' charter might frame and adopt another such charter by precisely the same procedure by which it secured its existing charter — this change being made to overcome the effect of the court's decision in the above-mentioned case of Blanchard *v.* Hartwell.[3] At the same time the clause which required that the charter should

[1] *Supra*, 220.

[2] In Blanchard *v.* Hartwell, *supra*, 221, it was clearly indicated that not even the legislature was competent to vest the power of initiating amendments elsewhere than in the legislative body of the city.

[3] *Ibid.*

be "consistent with and subject to the constitution and laws of this state" was altered to require merely that the charter should be "consistent with and subject to the constitution." In the light, however, of certain other unaltered provisions of the article applying to cities it is not apparent, as we shall see, that this latter change was of any material consequence.

In 1911 the section in question was subjected to the following elaborate series of minor alterations:

(1) Permitting any city to establish its population as exceeding 3500 by taking its own census; (2) requiring a two-thirds vote of the local legislative body or a petition of fifteen per centum of the voters to initiate proceedings for electing a board of freeholders, and requiring the city clerk to verify petitions; (3) making candidates for freeholders subject to nomination only by petition; (4) extending the time for drafting the charter from 90 to 120 days; (5) reducing the period of publication of the charter from 20 to 10 days; (6) requiring the charter to be submitted to vote at a special or municipal election held between 20 and 40 days after publication; (7) allowing charter amendment elections to be held before the expiration of two full calendar years; (8) permitting charters or amendments to be submitted at special sessions of the legislature; (9) requiring petitions for charter amendments to be verified by the city clerk and submitted between 20 and 40 days after publication; (10) allowing special charter elections to be called by ordinance, which must establish election precincts, fix polling places, and name election officers; (11) allowing the establishment of the borough form of city government.

In 1914 this much remodeled section of the constitution was again subjected to repair, the most important alterations being: (1) that the legislative body of the city was given power to extend the time given the freeholders to prepare a charter from 120 days to 180 days; (2) that only a single publication in a newspaper should be necessary, provision being made, after the Oregon system, for the distribution of pamphlets to the electors; (3) that all petitions for the submission of any amendments to the charter must be filed with the legislative body of the municipality not

less than 60 days prior to the general election next preceding a general session of the legislature; (4) that elections for the adoption of charter amendments were limited to a period commencing six months next preceding a regular session of the legislature and ending with the final adjournment of that session; and (5) that no amendment could be submitted to the legislature except at a regular session.

Under this amendment of 1914 the provision of the California constitution is immeasurably and, it would seem, wholly unnecessarily detailed in character.[1]

[1] The provision reads:

"Any city or city and county containing a population of more than three thousand five hundred inhabitants, as ascertained by the last preceding census taken under the authority of the Congress of the United States or of the legislature of California, may form a charter for its own government, consistent with and subject to this constitution; and any city, or city and county having adopted a charter may adopt a new one. Any such charter shall be framed by a board of fifteen freeholders chosen by the electors of such city at any general or special election; but no person shall be eligible as a candidate for such board unless he shall have been, for the five years next preceding, an elector of said city. An election for choosing freeholders may be called by a two-thirds vote of the legislative body of such city, and, on presentation of a petition signed by not less than fifteen per cent of the registered electors of such city, the legislative body shall call such election at any time not less than thirty nor more than sixty days from the date of the filing of the petition. Any such petition shall be verified by the authority having charge of the registration records of such city or city and county and the expenses of such verification shall be provided by the legislative body thereof. Candidates for the office of freeholders shall be nominated either in such manner as may be provided for the nomination of officers of the municipal government or by petition, substantially in the same manner as may be provided by general laws for the nomination by petition of electors of candidates for public offices to be voted for at general elections. The board of freeholders shall, within one hundred and twenty days after the result of the election is declared, prepare and propose a charter for the government of such city; but the said period of one hundred and twenty days may with the consent of the legislative body of such city be extended by such board not exceeding a total of sixty days. The charter so prepared shall be signed by a majority of the board of freeholders and filed in the office of the clerk of the legislative body of said city. The legislative body of said city shall within fifteen days after such filing cause such charter to be published once in the official paper of said city (or in case there be no such paper, in a paper of general circulation); and shall cause copies of such charter to be printed in convenient pamphlet form, and shall, until the date fixed for the election upon such charter, advertise in one or more papers of general circulation published in said city a notice that such copies may be had upon application therefor. Such charter shall be submitted to the electors

of such city at a date to be fixed by the board of freeholders, before such filing and designated on such charter, either at a special election held not less than sixty days from the completion of the publication of such charter as above provided, or at the general election next following the expiration of said sixty days. If a majority of the qualified voters voting thereon at such general or special election shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be submitted to the legislature, if then in session, or at the next regular or special session of the legislature. The legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or amendment, and if approved by a majority of the members elected to each house it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith. One copy of the charter so ratified and approved shall be filed with the secretary of state, one with the recorder of the county in which such city is located, and one in the archives of the city; and thereafter the courts shall take judicial notice of the provisions of such charter. The charter of any city or city and county may be amended by proposal therefor submitted by the legislative body of the city on its own motion or on petition signed by fifteen per cent of the registered electors, or both. Such proposals shall be submitted to the electors only during the six months next preceding a regular session of the legislature or thereafter and before the final adjournment of that session and at either a special election called for that purpose or at any general or special election. Petitions for the submission of any amendment shall be filed with the legislative body of the city or city and county not less than sixty days prior to the general election next preceding a regular session of the legislature. The signatures on such petitions shall be verified by the authority having charge of the registration records of such city or city and county, and the expenses of such verification shall be provided by the legislative body thereof. If such petitions have a sufficient number of signatures the legislative body of the city or city and county shall so submit the amendment or amendments so proposed to the electors. Amendments proposed by the legislative body and amendments proposed by petition of the electors may be submitted at the same election. The amendments so submitted shall be advertised in the same manner as herein provided for the advertisement of a proposed charter, and the election thereon held at a date to be fixed by the legislative body of such city, not less than forty and not more than sixty days after the completion of the advertising in the official paper. If a majority of the qualified voters voting on any such amendment vote in favor thereof it shall be deemed ratified, and shall be submitted to the legislature at the regular session next following such election; and approved or rejected without power of alteration in the same manner as herein provided for the approval or rejection of a charter. In submitting any such charter or amendment separate propositions, whether alternative or conflicting, or one included within the other, may be submitted at the same time to be voted on by the electors separately, and, as between those so related, if more than one receive a majority of the votes, the proposition receiving the larger number of votes shall control as to all matters in conflict. It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. It shall be

competent in any charter to provide for the division of the city or city and county governed thereby into boroughs or districts, and to provide that each such borough or district may exercise such general or special municipal powers, and be administered in such manner, as may be provided for each such borough or district in the charter of the city or city and county.

"The percentages of the registered electors herein required for the election of freeholders or the submission of amendments to charters shall be calculated upon the total vote cast in the city or city and county at the last preceding general state election; and the qualified electors shall be those whose names appear upon the registration records of the same or preceding year. The election laws of such city or city and county shall, so far as applicable, govern all elections held under the authority of this section."

CHAPTER VIII

HOME RULE IN CALIFORNIA — CONFLICT BETWEEN STATE LAWS AND CHARTER PROVISIONS BEFORE 1896

It has been noted that the right to frame freeholders' charters was by an amendment of 1892 extended to practically all the cities of California — to any city having a population of more than three thousand five hundred inhabitants. Almost immediately certain smaller cities became active in the matter of framing charters. In 1893 the legislature approved home rule charters for the small cities of Grass Valley and Napa,[1] as well as for the more sizable city of Sacramento.[2] In the legislative session of 1895 charters were ratified for Berkeley and Eureka [3] and certain amendments to the Oakland charter of 1889 were also sanctioned.[4] San José was the only city that presented a charter at the session of 1897, which charter was promptly approved.[5] From this time on the number of charters and charter amendments that were offered for legislative ratification steadily increased from session to session of the legislature.

After repeated attempts to frame a charter acceptable to her voters,[6] San Francisco at length succeeded at an election held in May, 1898. This charter was ratified by the legislature the next year [7] and went into effect on January 1, 1900. At the same ses-

[1] Stats. of Cal., 1893, pp. 628, 641.
[2] *Ibid.*, p. 545.
[3] Stats. of Cal., 1895, pp. 409, 355.
[4] *Ibid.*, p. 353.
[5] Stats. of Cal., 1897, p. 592.
[6] Proposed charters were defeated at the polls of San Francisco in September, 1880; March, 1883; April, 1887; and November, 1896. For a brief discussion of these attempts at charter-making, see Oberholtzer, *The Referendum in America*, ed. of 1911, pp. 349–352.
[7] Stats. of Cal., 1899, p. 241.

sion of the legislature charters were approved for the little cities of Santa Barbara and Vallejo.[1] At the present time,[2] out of the fifty-two cities of California [3] having a population of more than thirty-five hundred inhabitants, thirty-three are operating under charters of their own making.[4] The city of Redlands, with a population of slightly over ten thousand inhabitants, is the largest city of the state operating under a legislative charter.

Aside from the problem considered in the previous chapter, which arose out of the judicial construction of the nature of a

[1] Stats. of Cal., 1899, pp. 448, 370.

[2] Down to 1915 but not including the charters that may have been ratified at the legislative session of 1915. [3] According to the federal census of 1910.

[4] The following is the list of home rule cities with the dates of their charters and amendments as ratified by the legislature; the page references are to the Statutes of corresponding years; charters or amendments which were defeated at the polls are not included:

Los Angeles, 1889 (p. 455), amended 1903 (p. 555), 1905 (p. 980), 1907 (p. 1160), 1909 (p. 1289), 1911 (p. 2051), 1913 (p. 1629); *Oakland*, 1889 (p. 513), amended 1895 (p. 353), 1907 (p. 1349), 1909 (p. 1320), second charter, 1911 (p. 1551); *San Diego*, 1889 (p. 643), amended 1901 (p. 879), 1905 (p. 901), 1909 (p. 1137), 1911 (p. 1856), 1913 (p. 1663); *Stockton*, 1889 (p. 577), amended 1905 (p. 832); *Sacramento*, 1893 (p. 545), amended 1905 (p. 924), 1911 (p. 1790); *Grass Valley*, 1893 (p. 628), amended 1909 (p. 1282); *Napa*, 1893 (p. 641), amended 1903 (p. 689); *Berkeley*, 1895 (p. 409), amended 1905 (p. 829), second charter, 1909 (p. 1208), amended 1913 (p. 1502); *Eureka*, 1895 (p. 355), amended 1907 (p. 1172), 1911 (p. 2036), 1913 (p. 1544); *San José*, 1897 (p. 592), amended 1901 (p. 952), 1903 (p. 684), 1907 (p. 1272); *San Francisco*, 1899 (p. 241), amended 1903 (p. 583), 1907 (ex. sess., pp. 10, 29), 1911 (pp. 1469, 1661), 1913 (pp. 1473, 1602); *Santa Barbara*, 1899 (p. 448), amended 1905 (p. 929), 1909 (p. 1149), 1911 (p. 1478); *Vallejo*, 1899 (p. 370), amended 1907 (p. 1245), second charter, 1911 (p. 1958), amended 1913 (p. 1693); *Fresno*, 1901 (p. 832), amended 1905 (p. 1026); *Pasadena*, 1901 (p. 884), amended 1905 (p. 1011), 1909 (p. 1198), 1913 (p. 1457); *Salinas City*, 1903 (p. 599), amended 1911 (p. 1739); *Santa Rosa*, 1903 (p. 702), second charter, 1905 (p. 867); *Watsonville*, 1903 (p. 647); *San Bernardino*, 1905 (p. 940), amended 1909 (p. 1166), 1913 (p. 1716); *Alameda*, 1907 (p. 1051), amended 1913 (pp. 1454, 1720); *Long Beach*, 1907 (p. 1176), amended 1913 (p. 1513); *Riverside*, 1907 (p. 1277); *Santa Cruz*, 1907 (p. 1105), second charter, 1911 (p. 1861); *Santa Monica*, 1907 (p. 1007); *Palo Alto*, 1909 (p. 1175), amended 1911 (p. 2040); *Richmond*, 1909 (p. 1262), amended 1913 (p. 1690); *Modesto*, 1911 (p. 1493); *Monterey*, 1911 (p. 1742); *Petaluma*, 1911 (p. 1799); *Pomona*, 1911 (p. 1913); *San Luis Obispo*, 1911 (p. 1698), amended 1913 (p. 1667); *San Raphael*, 1913 (p. 1549).

In 1913 home rule charters were also ratified for Los Angeles County (p. 1484) and San Bernardino County (p. 1652), this power having been conferred upon counties by a constitutional amendment adopted in November, 1912.

freeholders' charter, the real difficulties arising under the provisions of the California constitution of 1879 relating to cities may be considered as in the case of Missouri, under two heads: first, what relation of precedence was established between general laws of the state and provisions of freeholders' charters — that is, what was the character of those "general laws" which charter provisions were made "subject to and controlled by"; and second, what powers might a city exercise under the grant of the right to frame a charter "for its own government" wholly in the absence of any consideration of conflict between statutory and charter provisions.

The Contradictions of Section Six

It is to be noted that section six, as above quoted, required (1) that the legislature should "by general laws" provide for the government of cities and that cities should "become organized under such laws whenever a majority of the electors voting at a general election" should so determine; and (2) that *all* cities of the state, no matter when or how organized should "be subject to and controlled by general laws."

On the very face of things here was a contradiction of terms within a dozen lines of the constitution, unless, forsooth, "general laws" should be defined to have one meaning as used in the first sentence of the section and to have another meaning as used in the concluding sentence. For how could a city, no matter when or how organized, be at all times "subject to and controlled by general laws" and at the same time enjoy the right to determine for itself at a general election whether it would or would not organize under "general laws"?

Moreover, it is highly important to observe that the last sentence of this section made no distinction whatever between cities organized under freeholders' charters and cities organized under existing special legislative charters or under the general charter laws which the legislature was required by the new constitution to enact. It referred specifically to "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted

by authority of this constitution." This included, of course, every city of the state (those which should organize under freeholders' charters as well as others under special or general charter laws), and it was ordained that every such city should be "subject to and controlled by general laws." What did the framers of this provision mean by "general laws" as this term was so curiously and conflictingly employed?

It has already been remarked that the first freeholders' charter in California was that of Los Angeles which went into effect in 1889, ten years after the adoption of the constitution. Meantime the courts had been called upon to construe the meaning of the term "general laws" in a number of cases. And while these cases did not involve the question of freeholders' charters as such, it was manifest that the doctrines which they laid down would be equally applicable to such charters, since the section of the constitution under consideration made no exception in requiring such charters to be subject to and controlled by general laws. These cases were, therefore, of quite as much importance in determining the conditions of home rule that were established by the constitution as if they had arisen in some controversy involving a freeholders' charter.

The Doctrine that "General Laws" dealing with Specific Charter Subjects control Charter Provisions without Local Acceptance, Regardless of whether Such Laws relate to State or Municipal Affairs

At the time of the adoption of the constitution of 1879 the "city and county" of San Francisco was a single municipal corporation operating under a charter known as the "consolidation act" of 1856. In 1880 the legislature attempted to give this corporation a new government by enacting what was known at the time as the "McClure Charter." This charter was general in form but applied only to "merged cities and counties having more than one hundred thousand population" and therefore only to San Francisco. It was held in the case of Desmond *v.* Dunn[1]

[1] 55 Cal. 242. 1880.

that this law was not a "general law" within the meaning of the constitution. It is somewhat difficult, however, to fathom the reasoning of the court upon this point. It was declared that if this charter was a "general law" it could have no effect until it should be adopted by the voters; but in making this declaration the court ignored the requirement of the constitution to the effect that cities heretofore organized should "be subject to and controlled by general laws." The court also declared that a merged city and county government might "not be incorporated under general laws providing for the incorporation of *consolidated* city and county governments, for municipal purposes, but under general laws providing for the incorporation and organization of *all* corporations for municipal purposes." In other words, although the constitution recognized the right of the legislature to classify municipal corporations, it was at this early date apparently the view of the court that the legislature could not enact "general laws" for the several classes at different times, no very clear reasons being assigned in support of this view. Finally it was concluded that this was a class of municipal corporations which the legislature had no constitutional authority to create. This may or may not have been an arbitrary determination. Certainly it was no more arbitrary than the declarations of invalidity that have been made by the courts of certain other states in the matter of legislative classification of municipal corporations. On the whole it cannot be said that the California court made very substantial progress in this first case toward elucidating the highly uncertain meaning of the constitutional provision under review.

In 1881 the legislature enacted a law known as the Hartson Act which provided that all "county, city and county, and township" officers in the state should be elected in November of the even-numbered years beginning in 1882. Under the charter of San Francisco "city and county" officers were elected in the odd-numbered years, the next election being scheduled to take place in September, 1881. The attempt was first made to enjoin the election commissioners from holding this election; and although

the court, by a judgment concurred in by five out of its seven members, refused in the case of Wood *v.* Election Commissioners [1] to grant this injunction, the judges were unable to agree on the ground upon which the injunction was refused.

The real constitutional interpretation of the applicableness of the Hartson law to San Francisco arose a year later in the case of Staude *v.* Election Commissioners,[2] where the contention was made that this act, being a "general law" which the voters of San Francisco had not accepted, was not applicable to the corporation of the city and the county and did not repeal the provisions of its charter as contained in the consolidation act of 1856 as amended. In refuting this contention the court referred to the fact that while section six declared that cities should organize under general laws only upon a vote of the people, it also said that all cities should be subject to and controlled by general laws; and a distinction was drawn in the opinion between the "general laws" applicable only upon a referendum and the "general laws" which all the cities of the state were without acceptance subject to and controlled by. The opinion recited in part:

> Recognizing the fact that the city and county of San Francisco remains a subdivision of the state, the constitution has said, in effect, that it, as well as all other cities and towns heretofore or hereafter organized, shall be subject to and controlled by such general laws as the legislature shall enact *other than those for the incorporation, organization, and classification, in proportion to population, of cities and towns.*[3] We do not perceive the danger suggested by counsel for respondents, of the Consolidation Act being "eaten away" by such legislation. It cannot, as already observed, be supplanted by a general act of incorporation without the will of the people expressed at the polls, nor can it be affected by special legislation; and it is not probable that such *general* laws as the legislature may enact in conflict with its provisions will seriously affect it. But be that as it may, the constitution has expressly declared that it shall be subject to and controlled by such laws. Such a law, in our opinion, is the Hartson Act, which simply provides for a uniform system of elections for the elective county, city and county, and township officers in the state in the even-numbered years, commencing in the year 1882.

[1] 58 Cal. 561. 1881. [2] 61 Cal. 313. 1882.

[3] [The italics are interpolated.]

Here then was a fairly clear announcement of the attitude which the courts would assume upon the subject of the relation between general laws and charter provisions as established by the nebulous phraseology of the constitution. The term "general laws" as used in the first sentence of section six was held — as of necessity it had to be held if the section as a whole was to be given any intelligibility — to mean something different from the same term as used in the concluding sentence. The "general laws" which the city was to "become organized under" only upon a vote of the people were those that related to the "incorporation, organization, and classification" of cities. The "general laws" which the city was to be "subject to and controlled by" without local sanction were those which did not relate to such matters. The distinction was easily put into words; but the application of this distinction was obviously fraught with great difficulty. Take, for example, the statute that was here before the court. It regulated the time of the election of the corporate officers of the city and county of San Francisco. This is a matter which is almost invariably regulated by the law that provides for the "incorporation" and "organization" of a municipality. In this respect the charter of San Francisco was no exception. The law which in this case was sustained clearly operated to amend the charter of the city and county. Indeed in last analysis the opinion of the court seemed to be that while the legislature could not put into effect without the sanction of the local electorate a general law providing a comprehensive scheme of government, a complete charter, for cities or classes of cities, it could nevertheless put into effect a general law dealing with some specific phase of the local government.

Several points in connection with this leading case in California deserve to be noted in passing. In the first place, although the situation of San Francisco was peculiar in that it was a single corporation with both city and county officers, the constitution expressly declared that the provisions applicable to cities "so far as not inconsistent or prohibited to cities" should be applicable to consolidated city and county governments. The provision re-

quiring that cities should "be subject to and controlled by general laws" was therefore obviously applicable to the "merged" government of San Francisco. The law under review in the case applied not only to county and township officers but also specifically to "city and county" officers. The question presents itself whether, under the doctrine of Desmond *v.* Dunn,[1] this was not creating a class unwarranted by the constitution. This question was not discussed by the court. The point of importance is, however, that if this law regulating the time of election of the officers of city and county governments was valid, certainly also a "general law" regulating the time of election of city officers and thus amending the provisions of municipal charters throughout the state would have been valid.

In the second place, the opinion did not turn upon the view that the matter of elections is a matter of state as distinguished from local concern.[2] In other words the court did not say that the general laws which cities were to be "subject to and controlled by" were those laws that related to matters of *state* concern, and that the matter of elections fell within this category. Under the broad doctrine of the case a matter of the most "local" concern would be subject to and controlled by a general law upon the same subject, for "general" was not held to be used in contrast with "local." A general law was a law of general *application*.

In the third place, as has already been mentioned, this law would have applied to San Francisco with precisely the same force and effect if the city and county had at the time been operating under a freeholders' charter; for the constitution made no distinction whatever between freeholders' and legislative charters in the matter of their being "subject to and controlled by general laws." As presaging the authority of the legislature to alter and amend freeholders' charters by the enactment of general laws, this case was therefore of profound signification.

In the case of Thomason *v.* Ruggles[3] it was held by a majority of the court (under circumstances of legislation so complicated

[1] *Supra*, 232. [2] *Supra*, 141 ff.; *infra*, 259 ff.
[3] 69 Cal. 465 (1886); *infra*, 276.

that they need not be detailed, the court itself being unable to reach any majority agreement upon all of the points at issue) that a "general law" regulating the matter of street improvements for all cities applied to San Francisco and operated to modify its charter provisions. It was, however, at its next term that the court, considering in the important case of Thomason *v.* Ashworth [1] the applicability to San Francisco of a "general" street improvement law, rendered an opinion that could be easily analyzed and understood. In doing so the absurdity of the interpretation which in the Staude case was put upon the phrase "general laws" as employed in the constitutional provisions relating to cities was fully demonstrated.

In 1883 the legislature of California enacted a general municipal charter law or code which in accordance with the terms of the constitution classified the cities of the state upon the basis of population, and provided that any city might organize with the form of government applicable to its class upon an affirmative vote of its inhabitants. San Francisco did not accept this act. It remained under its old special charter — the consolidation act of 1856 as amended by special laws up to 1879 and by the Hartson Act of 1881. In 1885 the legislature enacted the so-called Vrooman Act which regulated the matter of assessments for street improvements. This street law was made applicable to "all cities" of the state but it was clearly also in the nature of an amendment to the general municipal law of 1883, which contained elaborate provisions in respect to the matter of street improvements, and which was *not* applicable to San Francisco. The court held nevertheless, following the doctrine of the Staude case, that this law, relating to a *specific* matter which was universally a part of the laws providing for the "incorporation" and "organization" of cities, operated to supersede the provisions of the old charter of San Francisco upon the same subject. To this curious ruling Judge McKinstry registered a powerful and convincing dissent. He pointed out that it was indeed a strange situation

[1] 73 Cal. 73 (1887); reaffirmed in Hellman *v.* Shoulters, 114 Cal. 136 at p. 147 (1896).

that while the general municipal law of 1883 could not be made operative in San Francisco without the assent of the voters, yet this law "amending and revising the general law became at once binding upon the city and citizens." This decision was rendered just at the time when the right to frame freeholders' charters was being extended in California to all cities of more than ten thousand inhabitants. It was doubtless this fact which led the learned dissenting judge to declare:

> Observe how carefully the constitution has guarded against legislative interference with any charter which shall be adopted in the manner provided in section 8. Such a charter (which by section 6 will undoubtedly "be subject to and controlled by general laws" — whatever the phrase may mean) can only be amended "at intervals of not less than two years;" each amendment must be submitted to the electors, and must be ratified "by at least three-fifths of the qualified voters." To become operative, it must then be approved by a majority of all the members of the legislature "elected to each house."
>
> Verily, if a new charter, which may be adopted for San Francisco, can be amended out of existence by statutes passed in the legislature by a majority composed in no part of members representing San Francisco, — as it may be if the present charter can be so amended, — the laborious efforts of the constitution-makers to prohibit amendments, except with the consent of three-fifths of the qualified electors of the city have been of little avail. With all respect, such a result seems to me *reductio ad absurdum*.

In his opinion the general laws which the constitution declared that cities should "be subject to and controlled by" were laws that were "general" in the sense that they did not regulate "local" affairs. And as examples of such laws he cited "laws relating to the organization of the superior courts, laws defining crimes and civil rights, regulating the mode of contracting," and "perhaps all laws which confer rights or impose duties upon all the people, or it may be a portion of the people of the state, but which are not local in that they apply only to the people within particular places less than the whole state."[1] As has already been said, this was an interpretation of the term "general laws" as used in the

[1] See similar dissenting opinion of Fox, J., in *Ex Parte* Ah You, 82 Cal. 339 (1890).

concluding sentence of section six which the California court never came to accept.

In Brooks *v.* Fischer,[1] a case already mentioned in another connection, the court was called upon for the first time to construe the term "general laws" as applied specifically to the case of a freeholders' charter. But the request was presented in the form of a general and vague contention that some of the provisions of the Los Angeles charter of 1889 were in conflict with "general laws" of the state and that in consequence the entire charter was a nullity. As might have been expected, the court answered:

> It may be that certain of its [the charter's] provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws, but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force.

As has already been mentioned,[2] the California constitution of 1879 contained a provision which in effect prohibited the deposit of public funds in any bank. In spite of this fact and of the fact that laws had been enacted to effectuate this provision, section forty-four of the freeholders' charter of Los Angeles authorized the treasurer of the city to make such deposits of the public moneys of the city. The case of Yarnell *v.* The City of Los Angeles[3] arose out of a taxpayers' action seeking to enjoin the treasurer from exercising the authority thus conferred by the charter. In granting the relief sought the court, having sustained the contention that the charter provision was in violation of the constitution, went on to show also that the charter provision was in conflict with the general laws of the state. The opinion did not turn upon the view that the control of municipal moneys was a matter of state concern, and nothing new was added to general rules of interpretation that had been laid down in the cases mentioned above.

[1] 79 Cal. 173 (1889); *supra*, 205.
[2] *Supra*, 211.
[3] 87 Cal. 603. 1891.

A slight variation, however, was disclosed in the case of the People *ex rel.* Willis *v.* Howard,[1] decided in 1892. In 1878 a public library was organized in the city of Los Angeles under the authority of a special statute enacted in 1874. In 1880 the legislature passed a general law enabling any city to establish a library and providing an organization for its management and control. In her freeholders' charter of 1889 Los Angeles made provision for the administration of the city library, and a contest as to authority arose between certain library trustees who were elected under the general law of 1880 and the trustees who in accordance with the charter provision were appointed by the city council. Said the court:

> The relators insist that, the act of 1880 being a general law, its provisions apply to all libraries existing in cities as public libraries, and that trustees elected under the act of 1880 have the legal right to manage and control all public libraries in such cities, and that therefore they have the legal right to the control of the Los Angeles public library. The defendants contend that the act of 1880 applies solely to libraries established under its provisions, and not to those existing prior to 1880, and established prior to that time under special laws and charters.
>
> At the time this library was established as a public library, there was no constitutional inhibition of the enactment of local or special laws for such purposes.
>
> The provisions of the present constitution making cities and charter cities subject to general laws do not apply to this case; for it is manifest that they can be subject only to such general laws as by their terms or by necessary implication are made to apply to cities, or generally throughout the state. So, also, it is clear that public libraries in cities are not necessarily subject to a general law which by its own terms does not apply to all libraries generally, but only to a particular class of libraries.

The decision of the court in this case must not be construed as one of special liberality. It is difficult to see how a contrary decision could have been given. The general law of 1880 was merely permissive. Los Angeles had never availed itself of this law because prior to its enactment the city had already established a public library under a valid special law. Under the constitution the only possible ground upon which the provisions of the free-

[1] 94 Cal. 73. 1892.

holders' charter respecting the management of the library could have been held inoperative was that such provisions were subject to and controlled by some general law. But how could such provision have been held to be controlled by a law which by its very terms had no application whatever until the city had voluntarily acted under it? Had the city actually established a library under the general law of 1880, there might have been some foundation for the contention that this law operated to "control" the charter provisions subsequently adopted. As the circumstances stood, however, the contention was very nearly ridiculous. It is important to note, however, that the decision of this case did not rest upon the notion that a library was a matter of local concern.[1]

The Doctrine as to the Control of "General Laws" over Charter Provisions considered in its Relation to the Subject of Police Courts

The doctrine of the court as laid down in the Staude case and the case of Thomason *v.* Ashworth received additional application in the case of the People *ex rel.* Daniels *v.* Henshaw,[2] where it was held that an act of the legislature passed in 1885 "to provide police courts in cities having thirty thousand and under one hundred thousand inhabitants" operated to supersede the provisions on this same subject contained in the legislative charter of Oakland, which dated back to 1866. In 1889 a freeholders' charter became effective in Oakland. This charter made provisions for a police court; and one Ah You was convicted before the court thus established. He applied for a writ of habeas corpus on the ground that the court had no legal existence because the charter provision which attempted to give it validity was void as being

[1] See also Kennedy *v.* Board of Education, 82 Cal. 483 (1890), where it was held that a general law of the state which provided that a teacher "when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct" was a law which governed the action of the board of education of San Francisco, anything in its charter — the old consolidation act — to the contrary notwithstanding. This case was not decided upon the ground that education was a matter of "general" as distinguished from "local" concern.

[2] 76 Cal. 436. 1888.

in conflict with an existing general law of the state — the above-mentioned law of 1885. The court sustained this contention.[1] Referring to the case of the People *ex rel.* Daniels *v.* Henshaw, it was declared:

> *If that case was correctly decided, — if the old charter was superseded by the law of 1885, —* there can be no question that the freeholders' charter adopted is also subject to the same act. . . .
>
> The freeholders' charter of Oakland was "framed and adopted by authority of this constitution" (Art. 11, sec. 8, as amended in 1887), and is not only "subject to and controlled by general laws," according to the express terms of section 6 of article 11, but was also required by the section (8), in pursuance of which it was framed, to be "consistent with and subject to the constitution *and laws* of this state."
>
> There is, therefore, no escape from the conclusion that if the old charter was superseded by the act of 1885, the new charter is subject to and controlled by it, and the police court which the freeholders' charter attempted to establish must be held to have no legal existence unless we are prepared to squarely overrule the decision in People *v.* Henshaw.

It will be observed that the argument here employed by the court was wholly different from that advanced in the case of the People *v.* Toal [2] to support the judgment of invalidity passed upon the provisions of the freeholders' charter of Los Angeles establishing a police court. The two cases were decided in the same year. The charter provisions under review related to the same subject-matter. Why then this difference? In view of this very pertinent question it may not be amiss briefly to review at this point the entire curious line of California decisions upon the subject of municipal charters and police courts — a subject which appears to have given both the courts and the cities an endless amount of trouble.

As far back as 1884 was decided the case of *In re* Carrillo.[3] It was there held that a provision of the legislative charter of San José, dating from 1874, had been amended by a general law of 1880 establishing a police court in every city of the state. It appears, however, that San José, never having regarded the law

[1] *Ex parte* Ah You, 82 Cal. 339. 1890.

[2] *Supra*, 206.

[3] 66 Cal. 3. 1884.

as applicable, had not elected the police judge required by the law. It was held, therefore, the theory not being clear, that "the charter of the city as to the judicial power of the city remained in full force," and that Carrillo was properly convicted before the police court established under the old legislative charter. It seems self-evident that such a conclusion was reached in this case on the "practical" ground that the city would otherwise have had no legally established police court at all.

In the above-mentioned case of the People *v.* Henshaw[1] it was determined in 1888 that the provisions of the legislative charter of Oakland on the subject of police courts had been superseded by the law of 1885 establishing police courts for cities of from thirty to one hundred thousand inhabitants, these cities being Oakland and Los Angeles.

In 1890 it was decided in the Ah You case[2] that this law also "controlled" the provisions in respect to this matter that were incorporated into the freeholders' charter of Oakland adopted in 1889. In other words, the police court that existed in the city, being established by the law, remained unaltered when the home rule charter went into operation. Since this law was a "general law" it was not "superseded" by the freeholders' charter along with the old legislative charter.

Los Angeles, however, had never paid any attention to the law of 1885 which provided a police court for itself and Oakland, nor to the decision of the Carrillo and more especially the Henshaw case. For five years after the passage of the act of 1885 the police court in this city as established under the existing legislative charter had continued in operation just as if the general law in question had never gone upon the statute books. Under these circumstances it would have been manifestly embarrassing to have contended in the Toal case[3] that the Los Angeles charter of 1889 was "controlled by" the law of 1885 when in plain fact the legislative charter had in practice never been "controlled by" such law. The constitution made no distinction between new freeholders' charters and old legislative charters in this regard. Of

[1] *Supra*, 241. [2] *Supra*, 241, 242. [3] *Supra*, 206.

course the curious rule laid down in the Carrillo case, where it was in effect held that an old charter provision although controlled by a subsequently enacted law was still in force because the city had failed to obey the law, might have been applied. But it is possible that the court was willing, if not anxious, to forget this rule. At any rate, in the Toal case the unfortunate device was hit upon of declaring the charter provisions inoperative upon the ground that they created an "inferior court" which was not established "by law." [1] Following this decision a police court was set up in Los Angeles as prescribed by the law of 1885.[2]

The doctrine of the Toal case was reaffirmed and extended in *Ex parte* Sparks [3] and in Miner *v.* Justices' Court,[4] where the police courts established by provisions of freeholders' charters in Sacramento and Berkeley were declared to be invalid. This doctrine was relied upon doubtless for the same reasons that prompted its original pronouncement — namely, that no police court established under general law had been in operation in these cities, and it would be difficult to hold that a general law which had not in practice "controlled" the old legislative charters nevertheless did "control" the new freeholders' charters.

This explanation of the strangely shifting views of the California court upon this subject may not be wholly correct; but it is not easy to see what other explanation could be offered. No intimation whatever of such a "practical" explanation is to be found in the opinions expressed. The Ah You case and the Toal case which, upon wholly different grounds, held the police courts of Oakland and Los Angeles to be invalid were decided at the same term of court. Neither case was mentioned in the opinion delivered in the other. Yet the general law of 1885 which was held to "control" the Oakland charter was equally applicable to Los Angeles. The only possible explanation is that some practical reason existed for the failure of the court to decide the two cases upon precisely the same grounds. The reason here offered appears to have at least a plausible foundation.

[1] *Supra*, 206 ff.
[2] *In re* Mitchell, 120 Cal. 384. 1898.
[3] 120 Cal. 395 (1898); *supra*, 207.
[4] 121 Cal. 264 (1898); *supra*, 207.

But apart from the fact that the court allowed itself to drift into this unconscionable muddle of doctrines — a fact in itself of no mean significance as bearing upon the difficulty of phrasing a constitutional provision conferring home rule powers — the most important point to be noted is that in declaring a charter provision dealing with police courts to be "subject to" and "controlled by" a general law, the court did not rest upon the view that such a matter was of state as distinguished from local concern. The law took precedence simply because it was general in application and not because it was general as to its subject.

The Doctrine as to the Control of "General Laws" applied Specifically to the Case of Freeholders' Charters

As has already been said, Brooks *v.* Fischer[1] was the first case in which the California court was called upon to declare — what was manifestly the situation created by the terms of the constitution — that a freeholders' charter was on precisely the same footing in its subordinate relation to the "general laws" of the state as a legislative charter that antedated the adoption of the constitution. After 1889, the year in which freeholders' charters first became effective in certain cities of California, the cases that came before the court requiring the determination of the relation between "general laws" and charter provisions were concerned interchangeably with freeholders' charters and legislative charters that still remained in force. But since the principles laid down were applicable alike to both classes of charters, no distinction need be made upon this ground, although in fact most of the cases to which reference is made below concerned the application of the rule of control by general laws to instances of freeholders' charters.

In the People *ex rel.* Johnson *v.* Bagley[2] the court was asked to declare that the city of Stockton, which in 1884 had voluntarily organized under the general municipal corporation act of the previous year and in which a freeholders' charter had become effective in March, 1889, was in spite of the adoption of such

[1] *Supra*, 205, 239. [2] 85 Cal. 343. 1890.

charter still subject to the control of that provision of the general act which regulated the number of councilmen. The court held, as might have been expected, that the municipal corporation act ceased to be applicable to the city of Stockton upon the ratification of the freeholders' charter. This decision was based upon the fact that this general act was merely permissive, whereas the general laws which all charters were subject to and controlled by were mandatory in character. It was also pointed out by the court that to sustain the contention prayed for would be in effect to preclude any city which had by a vote of its people organized under the general municipal corporation act from ever enjoying the right to frame its own charter, because it was obvious that a freeholders' charter which remained subject to and controlled by all the provisions of the general charter law would be merely a "delusion." The very fact that such a contention as was here raised could be seriously urged upon the court was somewhat eloquent of the curious uncertainty of the rule of construction which had been applied to the term "general laws" as employed in the constitutional provision under review.

The municipal authorities of Los Angeles who were chosen under the freeholders' charter of 1889 were not slow to give some heed to the restricted view which the supreme court of the state had taken of the rights of cities under the constitution. Thus the charter framed by the city contained ample provisions for the opening, closing, and widening of streets. But shortly after its ratification by the legislature a general law regulating this matter for all cities of the state had been enacted. The street commissioner of Los Angeles immediately ignored the charter provisions and proceeded to act under this statute. In Davies *v.* The City of Los Angeles [1] the court held that he acted with commendable propriety, since "all charters framed and adopted under the constitution" were "subject to and controlled by general laws."

To the same effect was the decision of the court in the case of Kennedy *v.* Miller,[2] which held that the provisions of the freeholders' charter of San Diego regulating the matter of school funds

[1] 86 Cal. 37. 1890. [2] 97 Cal. 429 (1893); *infra*, 295.

were inoperative as being in conflict with the general laws of the state upon this subject. In this case attention was called to the fact that the constitution made education a matter of state care and supervision; but this fact was apparently, in the view of the court, merely an incident. The decision really rested upon the existence of a conflict between the charter requirements and a state law of general application.

Shortly after the charter of San Diego went into effect a portion of the city known as Coronado Beach was separated from the city, action having been taken under a general law of the state entitled "an act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom." The description of the boundaries of the municipality as set forth in the charter naturally included this territory; and the action taken under the general law naturally amended the charter provisions in this respect. The court held in the case of the People *ex rel.* Connolly *v.* City of Coronado [1] that the law in question applied to cities under freeholders' charters, and that by the proceedings had under the law the territory was validly separated.

It will be observed that the question here involved differs somewhat from that involved in the annexation of territory.[2] The division of a municipality into two separate corporations may, not without considerable force of logic, be regarded as a matter of strictly local concern, although the annexation of territory might not be so regarded. However, under the rule applied by the California courts prior to 1896 it was of no importance whether a law of general applicability did or did not deal with a subject of local or municipal concern.

In the case of the People *ex rel.* Wood *v.* Sands [3] the court sustained the right of the board of supervisors of Alameda *county* to fill a vacancy in the office of a justice of the peace elected for the *city* of Oakland, on the ground that a general law of the state vested such power in the county board. This was not, however, a clear case in which a law of the state was held to control a provision of a freeholders' charter; for while the charter contained a

[1] 100 Cal. 571. 1893. [2] *Supra*, 146; *infra*, 269. [3] 102 Cal. 12. 1894.

provision conferring upon the mayor power to fill vacancies in general, the court construed this provision to refer to offices created by the charter. The office of justice of the peace was not one of these.

In Miller *v.* Curry [1] it was held that a general law enacted in 1895 regulating the fees of county, township, and other officers applied to the clerk of the city and county of San Francisco and operated to supersede the provisions on the same subject that were contained in the charter of the consolidated corporation. In this case the court, at the instance of counsel, gave a somewhat new turn to the discussion. It had been so often held that a general law controlled a conflicting provision of a municipal charter that little attention was given to this point. The broader doctrine was here urged upon the court that a general law does not necessarily repeal a special law dealing with the same subject. As applied to the special legislative charter of San Franciso this doctrine was rejected by the court.

In the same year there was decided by the court the somewhat astounding case of Kahn *v.* Sutro,[2] in which the doctrine of the supremacy of general laws of the state over provisions of municipal charters was carried to the utmost extreme. It will be recalled that in the case of Staude *v.* Election Commissioners [3] it had been held that a law fixing the time of the election of "city and county" officers superseded the contrary provisions of the legislative charter of San Francisco. San Francisco was the only municipality of the state which had "city and county" officers; and the law specifically included such officers within the scope of its application.

In 1893 the legislature passed a law known as the "county government act," which among other things extended the term of certain enumerated county officers from two to four years. The act expressly referred only to "county" officers, no mention being made of "city and county" officers. The question arose whether the act applied to any officers in the city and county of San Francisco. Referring to certain cases previously adjudicated

[1] 113 Cal. 644. 1896. [2] 114 Cal. 316. 1896. [3] *Supra*, 234.

— most of which have been discussed above — the court declared that it might "be regarded as settled by the decisions of this court that the city and county of San Francisco is a municipal corporation, and in matters of government is to be regarded as a city." *But*, said the court, "the officers elected by voters, to the extent that they exercise only such powers as are given by laws relating merely to counties, and do not derive any of their authority from the charter, are to be regarded as county officers, as distinguished from city officers." The conclusion was reached that San Francisco was not "a city and county" but "both a city and a county" — the repetition of the article being all significant. "It must follow from this that some of its officers are city officers and others are county officers." The court thereupon made an elaborate examination of the officers named in the county government act as compared with those named in the charter, or consolidation act, inquiring minutely into their functions and the sources of their authority. Upon the basis of this examination it was held that while the mayor, the attorney and counsellor, the superintendent of streets, highways, and squares, and the school directors were "city officers" (these not being named in the county government act at all); and while the treasurer, tax collector, and surveyor must also be classed as "city officers" (because although these were named in the county government act they were also given functions by the charter); yet the district attorney, sheriff, clerk, recorder, coroner, and public administrator were "county officers" (because although named in the charter their functions were determined primarily by state laws). The term and the time of election of these latter officers were, therefore, controlled by the county government act. From this decision two judges dissented.

In view of all the circumstances the opinion handed down in this case is certainly open to grave criticism. In the law under review the legislature, fully cognizant of the peculiar situation in San Francisco, had omitted all reference to "city and county" officers. The constitution expressly recognized that a merged city and county was "one municipal government, with one set of of-

ficers."[1] The decision of the court in effect declared that in such corporations there were *two* sets of officers, the same being "county officers" and "city officers." It seems clear, as was pointed out by Judge Temple in his dissenting opinion, that the constitution recognized, as the legislature had also recognized in many laws, that a consolidated government resulted in the establishment of a distinct class of officers not one of whom was either a "city officer" or a "county officer" but who were all "city and county officers." Had the decision turned upon a matter of function or of policy laid down by state law which some officer of the city and county corporation had refused to be guided by, the judgment which the court reached might easily have been justified, although it would doubtless have been rested upon different grounds. But in any candid view the conclusion is almost irresistible that the court here held certain provisions of the charter of San Francisco to be superseded by a general law which might easily have been regarded as inapplicable, and which it was by no means clear that the legislature had intended to make applicable to that municipality.

From the above review of the cases construing the provisions of the constitution which subordinated municipal charters, whether framed by a board of freeholders or not, to the control of "general laws" enacted by the legislature, the conclusion seems justified that the supreme court of California took an extremely narrow and not wholly logical view of the rights of cities as determined by the somewhat confusing terms of the constitution. The practical result of the application of this view was that while the legislature could not enact a comprehensive scheme of government for cities or classes of cities in the state which would become effective without local acceptance, yet the legislature could by the enactment of general laws applicable to all cities or classes of cities control without such acceptance any phase or aspect of local government that it desired to control. Nor must it be thought that the extent of this legislative domination was actually measured by the specific cases adjudicated before the highest court of the state. The gen-

[1] Sec. 7 of Art. XI; *supra*, 202.

eral doctrine laid down by that court was applied in numerous cases that were not appealed from the lower courts and was deferred to by the cities of the state not only as a limitation upon their freedom in the framing of freeholders' charters but also as a guide for their officials, who in some instances accepted without controversy before the courts the provisions of general laws which under this doctrine clearly superseded charter provisions.[1] Indeed it would be quite impossible to measure the full effect of the doctrine.

On the whole it must be said that the interpretation of the California court was far less liberal than that which was ultimately applied by the Missouri court. It is true that constitutional provisions in the two states were somewhat different; but neither can be said to have been more contradictory or confusing than the other. Out of the chaos of the Missouri provision the court, in spite of many circumlocutions, did in the final round-up redeem a considerable measure of the home rule right. On the other hand, had the constitution of California not been amended, there is no reason to suspect that the California court would have imposed any obstacle to the unlimited amendment of freeholders' charters by legislative acts, many of which were "general" in little more than form.

[1] As an instance in which the city even accepted a law that was unconstitutional see City of Los Angeles v. Teed, 112 Cal. 319. 1896.

CHAPTER IX

HOME RULE IN CALIFORNIA — CONFLICT BETWEEN STATE LAWS AND CHARTER PROVISIONS AFTER 1896

No sooner was the potential effect of the doctrine of the supremacy of general laws over freeholders' charters apparent than agitation arose in California for changing the terms of the constitution to which this doctrine owed its origin. In 1896 a highly significant phrase was inserted in the constitutional provision which required that all charters should be "subject to and controlled by general laws." This phrase was "except in municipal affairs." After its insertion the last clause of section six[1] read as follows:

> Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to and controlled by general laws.

The adoption of this amendment was a somewhat heroic attempt to put a stop to legislative interference with the local affairs of cities through the medium of "general laws" by giving to that term the restricted definition which the courts had refused to give. But in making this heroic attempt the framers of the amendment created a new complication which the courts had to overcome by simply ignoring the literal wording of the provision. It will be noted that the "cities and towns" and the "charters" which were made subject to and controlled by general laws "except in municipal affairs" included *all* the municipal corporations of the state. Now there were in California at the time of the adoption of this amendment, as there still are, certain small

[1] *Supra*, 202.

cities organized under the general municipal code. This code of course consists in large part, if not entirely, of provisions dealing with municipal affairs. Under a literal interpretation of the amendment the legislature would have been prevented from altering this code in any respect, because, as to municipal affairs, *every* city of the state was exempted from the control of general laws.

In the case of *Ex parte* Jackson [1] it was held that the power to levy license taxes was a municipal affair,[2] but the court said that the right of the legislature to regulate this power for cities operating under the "municipal corporation act" was "from the very nature of things" unquestionable. It was pointed out that the first clause of section six expressly conferred upon the legislature authority to "alter, amend, and repeal" those general laws "for the incorporation, organization, and classification" of cities which became effective only upon acceptance by the voters. Such a law was the general "municipal corporation act." It followed, therefore, that the act of 1901 restricting the licensing power of counties, cities, and towns was a general law applicable to cities under the municipal corporation act even though the act in question related to a municipal affair.[3] In other words, just as before 1896 the confusing use of the term "general laws" in the original provision was resolved by the courts in favor of the power of the legislature and against the rights of cities, so also after 1896 was the conflict of provisions that resulted from a delimitation of the term as employed in one of its connections resolved in like favor. It must be admitted, however, that there was larger justification for the latter construction than for the former. The point is of no importance in connection with the problem of home rule in California, since it concerned only cities operating under the general municipal code. It simply demonstrates the carelessness with which the original confusing phraseology of the constitution was amended.

[1] 143 Cal. 564. 1904. [2] *Infra*, 280.

[3] This doctrine was also laid down as dictum in *Ex parte* Helm, 143 Cal. 553 (1904), and *Ex parte* Lemon, *ibid.*, 558.

Cities under Special Legislative Charters exempted from the Control of General Laws relating to "Municipal Affairs"

The "municipal affairs" amendment received its first judicial interpretation in the case of Morton *v.* Broderick.[1] This case arose out of an application for mandamus to compel the auditor of San Francisco to enter upon the assessment roll taxes which had been fixed by an order of the board of supervisors. It was contended by the auditor that this order was void upon the ground, among other things, that it lacked the signature of the mayor and that a general act of the legislature passed in 1897 required "ordinances and resolutions passed by the city council, or other legislative body of any municipality, to be presented to the mayor, or other chief executive officer of such municipality, for his approval." To this contention the court gave answer as follows:

> The act of 1897 unquestionably deals with a municipal affair, the mode and manner of the passage of ordinances and resolutions provided for in the charter. Under this constitutional amendment [of 1896], such acts now apply only to cities and to their charters which have organized under the general scheme embraced in the municipal corporation act. (Stats. 1883, p. 93.) San Francisco is not one of such cities, and the act of 1897 has, therefore, no application to it.

At this time San Francisco was still operating under the old consolidation act of 1856. It was clear, therefore, as indeed under former adjudications there could be little question, that the exemption of cities from the operation of general laws relating to municipal affairs applied to cities under early legislative charters as well as to cities under freeholders' charters. Although after 1896 the cities of California were rapidly taking advantage of the home rule powers conferred by the constitution, certain of the cases discussed below are concerned with the relations between special legislative charters and general laws. The principles involved are in no wise different from those that would have been applied had the charters been of the home rule variety.

With the end in view of making comparisons a matter of no

[1] 118 Cal. 474. 1897.

great difficulty, the California cases, like the Missouri cases, are discussed under appropriate group headings. It will be observed, however, in the course of what follows, that owing to the unusual complications of the California home rule provisions it is sometimes necessary to explain certain points that are only collaterally related to the concrete question, "what is a municipal affair?" It will be observed also that question as to the applicableness of a general law of the state has occasionally been raised even in the total absence of any conflicting charter provision, this being due to the fact that the constitution excepted not only "charters," but also "cities," from the control of general laws relating to municipal affairs. A literal reading of this broad declaration would evidently exempt a city from such control even where a charter was silent upon this or that subject of municipal concern.

Is the Control of the Police a Municipal Affair?

In the case of Popper *v.* Broderick [1] the court held void an act of the legislature passed in 1897 which raised the salaries of policemen and firemen in cities of the first class — this class embracing only the city of San Francisco. Relying upon Kahn *v.* Sutro [2] the court declared that policemen and firemen had in that case been classed as "city officers" and that the amendment must have been adopted with the definition of municipal affairs as laid down in that case in view. "We are of the opinion," said Judge Van Dyke, "that the pay of firemen and policemen clearly falls within the term 'municipal affairs.'" It is to be remarked that the court might easily have relied upon cases in a number of jurisdictions which have, in construing constitutional provisions of various import relating to cities and especially the home rule provisions of the Missouri constitution,[3] laid down the rule that the control of police is a matter of general or state concern rather than a local or municipal affair.[4]

[1] 123 Cal. 456. 1899.

[2] 114 Cal. 316 (1896); *supra*, 248.

[3] *Supra*, 133, 142.

[4] As being more or less in point see Mayor etc. of Baltimore *v.* State, 15 Md. 376 (1859); People *ex rel.* Drake *v.* Mahaney, 13 Mich. 481 (1865), as qualified and explained in People *ex rel.* Le Roy *v.* Hurlbut, 24 Mich. 44 (1871); State *ex rel.* At-

But these cases were neither discussed nor cited in the opinion. Upon the basis of a former decision of its own the court elected to give broad scope to the definition of the term municipal affairs.

Is the Exercise of the Police Power a Municipal Affair?

Attention will be directed in the next chapter to the unusual provision of the California constitution on the subject of the police power and to the construction which the courts have placed upon this provision. At this point we are concerned only with the order of precedence as between state laws and charter provisions enacted in pursuance of the police power as affected by the "municipal affairs" amendment of the constitution.

In the early case of *Ex Parte* Hong Shen,[1] decided before the amendment of 1896, the court avoided determining whether a police ordinance of San Francisco regulating the sale of opium was controlled by a general law of the state upon the same subject by finding that no actual conflict existed between the two.

In the case of *In re* Hoffman,[2] decided after the amendment, a somewhat similar question was presented for consideration. An ordinance of Los Angeles fixed the standard of milk that might be sold in the city. The legislature had by general law fixed a different and lower standard. And although the court held that the municipal ordinance was not in conflict with the law, since it merely added to the standard fixed by the state, it was nevertheless expressly declared that "undoubtedly if such a conflict exists, the ordinance must give way to the paramount law of the state." This was obviously dictum; but it must be taken as expressing the view that a city under a freeholders' charter might not exercise

torney General *v.* Covington, 29 Oh. St. 102 (1876); State *ex rel.* Holt *v.* Denny, 118 Ind. 449 (1888); State *ex rel.* Atwood *v.* Hunter, 38 Kas. 578 (1888); Commonwealth *v.* Plaisted, 148 Mass. 375 (1888); Burch *v.* Hardwicke, 30 Gratt. (Va.) 24 (1878); State *ex rel.* Attorney General *v.* Moores, 55 Neb. 480 (1898), overruled but not as to this point by Redell *v.* Moores, 63 Neb. 219 (1901); Newport *v.* Horton, 22 R. I. 196 (1900). But see also People *ex rel.* Wood *v.* Draper, 15 N. Y. 532 (1857); *supra*, 36.

[1] 98 Cal. 681. 1893.

[2] 155 Cal. 114. 1909.

its police power in such a manner as to contravene a policy established by the state in its exercise of a similar power. This was merely to declare the usual rule applied in cases of conflict between state police laws and municipal police ordinances touching the same subject. It was to say that home rule cities stood in the same relation to such laws as cities under legislative charters, which cities with practical universality exercise concurrent police powers with the state.[1]

Is the Regulation of Matters pertaining to Prosecutions for the Violation of Municipal Charters and Ordinances a Municipal Affair?

In Fleming *v.* Hance,[2] a case which will be noticed again at a later point in our discussion,[3] one of the questions considered was whether the regulation of matters pertaining to prosecutions for violations of municipal ordinances was or was not a municipal affair. Although the consideration given to this question may perhaps be regarded as having been somewhat collateral to the principal points decided by the case, the views expressed by the court upon this matter are nevertheless of considerable importance.

It will be recalled that in the case of the People *v.* Toal[4] it was held that the original provisions of the freeholders' charter of Los Angeles establishing a police court were inoperative. Following this decision the legislature in 1901 enacted a law creating a police court for cities of "class one and a half," which class embraced only Los Angeles, and providing for the office of prosecuting attorney. In 1907 this act was amended so as to increase the number of such attorneys from two to four and to raise their salaries. The contention was made that the act of 1901 as amended in 1907 was void because it attempted *after* 1896 to regulate a municipal affair. This contention, however, was premised not so much upon the view that a police court was *inherently* a municipal affair as

[1] *Supra*, 138 ff. See also *infra*, 294, in respect to the relation between state laws and municipal ordinances regulating matters pertaining to public health.

[2] 153 Cal. 162. 1908. [3] *Infra*, 383. [4] *Supra*, 206.

upon the ground that the matter of police courts had been transformed into a municipal affair by reason of another specific amendment adopted in 1896 to which attention will be directed a little later.[1]

In addition to this contention it was urged against the amending statute of 1907 that in any event prosecuting attorneys were not a "part" of police courts and that the regulation of matters pertaining to such officers was certainly a municipal affair. The court sustained the proposition that prosecuting attorneys were not a part of the police court. The state law required these attorneys to attend all sessions of the police court and to conduct all misdemeanor and felony prosecutions arising under state laws, but they were under no obligation to conduct prosecutions arising under the municipal charter and ordinances except "when requested by the city attorney." It was held that the prosecution for offenses against the state laws was a state and not a municipal duty. As to the other class of prosecutions, the court declared:

> The qualified duty of prosecuting for violations of the charter or city ordinances imposed upon the prosecuting attorneys by the act in question presents a different question. It may well be said that prosecutions of this character, *i.e.*, for offenses which are punishable solely by reason of the organic act or the legislative action of the city itself, may properly be regarded as included within the functions of the city. But the city has, in its charter, assumed and provided for this duty. By section 49 of the Los Angeles charter (Stats. 1889, p. 472), it is made "the duty of the city attorney to prosecute in behalf of the people all criminal cases arising upon violations of the provisions of this charter and city ordinances." If the prosecution of such offenses is a part of the duty of the city, — in other words, if it is a "municipal affair," this provision of the charter must control as against an act of the legislature, by reason of the constitutional amendment exempting charters from legislative control in municipal affairs. (Const., Art. XI, sec. 6.) The two provisions, that of the charter and that of the statute, are necessarily inconsistent and cannot both be operative. If the city attorney is to prosecute *all* cases of this character, none can remain which are to be conducted by the prosecuting attorneys.[2]

[1] *Infra*, Ch. XI.

[2] The real constitutional point at issue here was as to the competence of the legislature to compel a city to incur a debt for a state purpose — a question that arose out of the construction of Art. XI, sec. 12 of the constitution. See *supra*, 52. It

The opinion thus expressed necessitates little comment. It manifestly sustains the notion that the regulation of all matters pertaining to prosecutions for offenses committed in violation of a freeholders' charter or ordinances is a municipal affair.

Are Matters pertaining to the Election of City Officers Municipal Affairs?

In the very first case decided under the home rule provisions of the California constitution of 1879 — the case of the People *v.* Hoge[1] — the contention was made that the board of election commissioners of San Francisco, established under the consolidation act of 1856, had no authority to call the election of a board of freeholders to frame a charter. It was urged that legislation was necessary before such an election could be called. Denying this contention, the court declared:

> It is argued in the first place that the power to call the election resided in the Board of Supervisors, and the point is also taken, that action on the part of the Legislature was essential to enforce and give effect to the provision of the Constitution. The first point has already been disposed of and the second is not, in our opinion, well taken. Legislative action was not necessary to enable the inhabitants of the City and County of San Francisco to act, under sec. 8, Art. XI, of the Constitution, in the matter of framing a charter. The Constitution nowhere provides either expressly or by implication for such legislative interference, and the construction placed upon the provision of the Constitution under discussion might result in entirely defeating its operation. If this ground can be sustained, it would result that hostile action, or even non-action on the part of the Legislature, would prevent the inhabitants of the city from exercising a power expressly given to them in clear and unmistakable language by the Constitution. It was manifestly the intention of secs. 8, 13, and 14, Art. XI, as well as of sec. 25, Art. IV, of the Constitution, to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature.

was held, relying upon Conlin *v.* Board of Supervisors, 114 Cal., 404 (1896), a case which as to its pertinent parts appears to have been not very directly in point, that the legislature had no such power. The part of the opinion quoted above was read in support of the view that the prosecuting attorneys could not perform any municipal function and hence their salaries could not be made a charge upon the municipal treasury.

[1] 55 Cal. 612. 1880.

Here then at an early date was a very broad assertion of the competence of a city to proceed to the election of a board of freeholders without waiting for the legislature to fix any of the details for the conduct of such election. Indeed it was clearly intimated that the legislature enjoyed no power whatever to regulate these details. As an abstract proposition this liberality of view toward the constitutional grant of the power of home rule was doubtless to be commended. It is evident, however, that the court did not take into consideration the possible difficulties to which it might give rise.

The constitution declared that the "city" might exercise this power "by causing a board of fifteen freeholders . . . to be elected . . . at a general or special election." This was obviously somewhat vague and indefinite. A "city" can act only through officers who find the source of their definite authorities in the charter or law. It is conceivable, of course, that under the terms of this or that city charter power over the initiation and conduct of all elections might be conferred in such general terms that there would be no question as to the competence of some particular agency of the city government to control the election of freeholders. But it is also conceivable that the terms of the charter may be such as to create grave doubts in respect to this matter. Suppose, for example, that the charter merely conferred upon a municipal board of election commissioners to conduct *charter* elections and no others. In such a case, by what power to initiate an election of freeholders belong to the board or to the city council? Who would determine whether freeholders should be elected at a general or a special election? And even if it be granted that under these circumstances the council, as the primary legislative organ of the city, was on "general principles" the proper agency of the city in this matter,[1] would it be held that, having

[1] On this point see the declaration that was made *arguendo* in Blanchard *v.* Hartwell, 131 Cal. 263 (1901); *supra*, 221. It was there said: "The constitution provides that the city shall cause the election to be held. The city can only act through its legislature." This was obviously in contradiction of the rule laid down in the Hoge case, where action by the election commissioners in calling an election of freeholders was sustained. Likewise it is absurd to declare broadly that a city, which in fact acts through numerous agencies, "can only act through its legislature."

decided, let us say, to hold a special election, this council could, without any direct grant of authority either from the legislature or the people of the city, establish a complete election machinery for the purpose? Could it prescribe the form of ballots to be used, determining, for instance, whether party designations should or should not be recognized? Could it provide for nominations in any manner that it chose — by convention, by direct primary, or by petition? Could it introduce a system of preferential voting or proportional representation? Could it prescribe a special scheme for the registration of voters?

If such questions, and many others of similar character that might be put, were answered in the affirmative, it is certainly plain that the council would be vested with very large powers in the premises under a rather remote implication from the constitutional authority conferred upon the "city" to "cause" an election. The truth of the matter is that, taken in conjunction with the highly various provisions that were doubtless to be found in the several municipal charters of the state on the subject of elections, this constitutional right of the city to cause an election to be held was patently vague and uncertain. It might easily be that without supplementary legislation a particular city would find itself powerless to exercise the right conferred or confronted with numerous doubts as to the location and the scope of its competence.

The possible difficulties that inhered in the doctrine and implications of the Hoge case were only aggravated by the adoption of the "municipal affairs" amendment. Prior to that amendment the legislature might certainly have enacted "general" laws on the subject of elections (if necessary without specific reference to the election of freeholders) which would have so amended existing legislative charters as to make the "causing" of an election everywhere possible. But if municipal elections generally and the elections of boards of freeholders in particular were municipal affairs the legislature under a literal interpretation of the constitution was after 1896 powerless to enact a law upon this subject which "cities" would be subject to and controlled by.

This whole complicated problem was presented to the court for solution in the case of Fragley *v.* Phelan.[1] In this case all of the members of the court concurred in the judgment that was rendered — a judgment that refused the application for a writ of injunction to restrain the election commissioners of San Francisco from incurring expenditures for conducting in November, 1899, the election which was destined to effectuate at length the first freeholders' charter of the metropolitan city of the state. But since the judges arrived at the judgment by wholly different courses of reasoning it is necessary to detail here the somewhat complicated statutory situation that was involved.

A special act of March, 1878, regulated the matter of elections in the "city and county" of San Francisco. In 1889 the legislature passed certain general laws regulating the matter of elections in all cities and counties. These laws, which all charter provisions were at that date "subject to and controlled by," naturally had operation in San Francisco. In 1897 there was enacted a general "charter election law," which regulated the conduct of elections in cities at which boards of freeholders might be chosen as well as elections at which charters or amendments might be submitted for popular acceptance or refusal.

It was contended by the taxpayer, Fragley, who brought this action, that the election of the board which drafted the charter of San Francisco was conducted under this law of 1897, and that such election was in consequence void because the law in question was a general law regulating a municipal affair. Answering this contention in the negative, Judge Garoutte, with whom two other judges concurred, emphatically held that the law of 1897 was not a law which regulated a municipal affair. He said:

> Municipal affairs, as those words are used in the organic law, refer to the internal business affairs of a municipality. . . . There is no sound reason why freeholders' charters should not be framed and ratified under general laws. There are a multitude of sound reasons to be urged why the conduct and procedure of elections for the election of freeholders and ratification of charters should be held under general laws. . . .

[1] 126 Cal. 383 (1899); *supra*, 209.

> The city and county of San Francisco is a municipality. The municipal affairs of this municipality are a multitude, covering its business transactions. These business matters are the municipal affairs of the present municipality, but the drafting and ratification of a new charter is not one of its business matters. . . . A municipal affair pertains to something which may be done by the municipality. The creation of a new charter is a matter not placed in the hands of the municipality, but in the hands of the inhabitants thereof with the consent of the state. . . .
>
> Viewing the question from another angle, it seems that the creation of a charter is not essentially and alone a municipal affair. It is a state affair, and that fact is recognized in unmistakable terms by the state when the constitution demands that the state legislature approve the instrument by a majority vote; and until such approval it has no life.

Judge Harrison, with whom also two other judges concurred, held that under the special act of 1878 and the general laws of 1889 the election commissioners had the power to do all the things which they purported to do under the act of 1897 and that it was in consequence unnecessary to consider whether the latter statute, enacted since the "municipal affairs" amendment, was or was not valid legislation. Since, however, as we shall see a little later,[1] it had not been decided that the amendment in question was not retrospective in operation — for if it was retrospective it would operate to suspend the application of previously enacted general laws relating to municipal affairs — it was necessary for him either to declare that the amendment was not retrospective or to decide the question whether the general election laws of 1889 were applicable to elections in San Francisco. Determination of the first point he avoided; and upon the latter he equivocated. He said:

> The municipal affairs of any individual municipal corporation are, therefore, such affairs only as that municipality has the power to engage in or perform, and the municipal affairs of one city may vary greatly from those of any other city — and this, too, whether the charter of the city has been conferred upon it by the legislature or has been framed by a board of freeholders of its own choice, and afterward adopted by its citizens and approved by the legislature. In either case, the municipality can exercise only the powers found in its charter A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision

[1] *Infra*, 271 ff.

relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the legislature. If in framing its charter, its board of freeholders should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city. It is not within the constitutional power of the legislature, by approving a freeholders' charter which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter. If, by adopting a charter which failed to give it power to act upon affairs which are properly municipal, a city could be freed from any legislative control in reference to those affairs, either by itself or by the legislature, that city would become a veritable Alsatia. . . .

It may be conceded that each of the elections herein considered, as well as the creation or consolidation of the precincts at which the elections were held, is a "municipal affair," but, as since the amendment to the Political Code of 1889 there has been no provision in the charter of San Francisco relating to the creation and consolidation of election precincts, the city was subject to and controlled by the general laws existing in reference thereto.

In other words, it was the view of this learned judge and his concurring colleagues that the term "municipal affairs" varied in its content according to whether this or that affair was or was not regulated by a particular charter. If regulated by charter, it was beyond the power of the legislature to control by general law. If not so regulated, it was within such legislative power. This may have been an intelligent determination of what the constitution *should* have declared; but it will be recalled that the provision in question *did* in fact ordain that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." It was, therefore, not only "charters" but also "cities" which were to be exempt from the control of general laws in municipal affairs. San Francisco was certainly a city "heretofore organized." As such the provision asserted that it was "subject to and controlled by general laws, *except* in municipal affairs." In the view expressed by Judge Harrison the election in question was conceded to be a

municipal affair. It is not easy to see, therefore, why San Francisco was subject to control in this affair by a general law, even though its charter failed to regulate the affair. It may be argued that unless a majority of the court had been prepared to accept the view of Judge Garoutte and his concurring associates — which was certainly under the circumstances the more logical view to have taken — San Francisco, because of the silence of its charter in respect to the conduct of elections, would have been without any available means of securing a freeholders' charter. This may have been true. But if so, the fault lay in the peculiarly unhappy phraseology of the constitution as amended in 1896. It could not be laid at the door of the court.

Judge Temple, who was unsupported by any of his colleagues, seems to have appreciated the absurdity of declaring, in the face of the two categories clearly sought to be created by the amendment, that an affair became municipal simply because of its regulation by charter provision. "The word 'affairs,'" he said, "would include all possible laws. Municipal means pertaining to a municipality. It is not permitted to construe unambiguous language." And he added that "if the legislature may still control such charters by general laws in regard to matters not expressly provided for, a wide margin of uncertainty is still left and a charter by such laws may yet be made." He reached his conclusion against the granting of the injunction sought upon the view that it was the business of the legislature, since "the whole proceeding was governmental and political," to determine at the time when it approved the charter whether the elections had been properly held. As we have previously had occasion to note, this view, early urged upon the court, had been categorically rejected;[1] and from its original attitude upon this point a majority of the court has never swerved.

The decision of the Fragley case left the law as to whether the election of a board of freeholders is or is not a municipal affair in a state of uncertainty which has never been resolved. While this case involved the question of the validity of a state law gov-

[1] *Supra*, 209.

erning the election of freeholders as applied to a city then operating under a special legislative charter, yet owing to the peculiar wording of the constitution by which *all* cities, whether home rule or otherwise, were exempted from the control of general laws dealing with municipal affairs, the question presented in the case would have differed in no wise had it arisen in respect to a city then operating under a freeholders' charter. This fact is of especial significance in connection with the subject of the election of freeholders. Naturally a legislative charter antedating the adoption of the constitution of 1879 would contain no reference to such elections. If the control of the elections was a municipal affair which could not be regulated by general law, it might well happen, as has already been remarked, that a city under such a charter would find itself forever debarred from proceeding to frame a charter, its existing charter being insufficient and the legislature being powerless to come to its assistance. Not so, however, with a city which was operating under a charter of its own making and desired to frame a new charter. For there would be nothing to prevent such a city from incorporating into its first freeholders' charter and in every successive charter provisions regulating the manner in which future boards of freeholders might be elected, in much the same way that a state constitution commonly provides the means by which a subsequent constitution may be initiated. Indeed there would be every reason why the charter should make such provision, for if it failed to do so and if a state law could not apply, the city in adopting the charter would be stupidly closing the door upon its own competence to frame complete charters for the future. This could not be done with respect to the power to make amendments, for the power of the city in this regard was regulated in sufficient detail by the constitution; but it could easily be accomplished either by accidental or designed omission with respect to the power of complete revision through the medium of a new board of freeholders.

In plain point of fact an examination of the home rule charters of California discloses that they do not contain provisions governing the future election of boards of freeholders. It has evidently

been concluded, therefore, that the Fragley case, in judgment if not in opinion, settled the question of the supremacy of the state law upon this subject and overturned the broad doctrine announced in the case of the People *v.* Hoge. In practice the elections of boards of freeholders by the cities of the state have been conducted under the provisions of the general law. However, under the constitutional provision as amended in 1911 and 1914 the modes of initiating an election of freeholders are specified and the competence of cities to regulate by their charters the method of nominating candidates for freeholders is expressly recognized.[1]

The question as to the order of supremacy between state laws and charter provisions regulating the matter of elections provided for under the *terms* of a freeholders' charter has never been directly raised in California;[2] but such a question was raised collaterally in Socialist Party *v.* Uhl,[3] a case decided as recently as the year 1909. In 1908 a constitutional amendment was adopted which imposed upon the legislature the duty of enacting a primary election law.[4] It was contended by the Socialist Party that the law which was enacted was void on the ground, among other things, that it was specifically made not to apply "to the nomination of officers of municipalities whose charters provide a system of nominating candidates for such offices," whereas they regarded the constitutional amendment as requiring that the primary law should apply to *all* elections. Declaring that there was no virtue in this contention, the court said:

> There is nothing in the constitutional provision making any primary law enacted thereunder applicable in charter elections. The law enacted under the constitutional provision stands, as far as municipalities are concerned, the same as any other general law which, under the constitution (Art. XI, sec. 6), is not binding upon a municipality as to matters which are strictly municipal affairs. That the election of municipal officers is strictly a municipal affair goes without question. It is held in People *v.* Hill, 125 Cal. 16, that city charters prevail over the general law as far as

[1] *Supra*, 226–228.

[2] Certain cases involving election laws were decided before the municipal affairs amendment, as we have seen. *Supra*, 233, 248.

[3] 155 Cal. 776. 1909.

[4] Art. II, sec. 2½.

regulating the method in which a charter election shall be conducted.[1] If section 2½ referred to a charter election as being within the scope of any legislation required to be enacted under it, there would be no room for discussion of this point. All the constitutional provision requires, however, is the passage of a general law relating to primary elections. As far as municipal elections are concerned, being municipal affairs, it cannot control them. Under these views the exception of municipalities did not render the act unconstitutional for want of general application to all elections.

There was obviously no uncertainty in the mind of the court as to the propriety of regarding matters relating to the election of municipal officers as municipal affairs. It may be said in this connection that there has probably never been a freeholders' charter in California that has attempted to cover in full all matters respecting the conduct of municipal elections. As every one knows, the detailed provisions respecting the conduct of elections commonly bulk somewhat large upon the statute books of the several states. It would be wholly unnecessary for every charter to contain elaborate provisions in regard to the physical character of polling booths, the manner of voting, the duties of election officers, the rights of challenge, the canvassing of returns, and innumerable other particulars that are ordinarily regulated in great detail by law. The usual practice in freeholders' charters has been to cover the matter of elections to whatever extent has been desired and then by a blanket clause to adopt the provisions of the

[1] [This statement of the doctrine of People *v.* Hill is wholly misleading. The case did not raise any question as to whether elections under a charter were or were not a municipal affair. The whole question decided was as to whether the section of a legislative charter of Salinas City enacted in 1876 which adopted the general election law "as far as practicable" but which created specific exceptions to such law as to certain matters was controlled by this general law as to these exceptions. It was expressly declared: "The decisions rendered in Staude *v.* Election Commissioners, 61 Cal. 313; Thomason *v.* Ashworth, 73 Cal. 73; People *v.* Henshaw, 76 Cal. 436, and other cases cited, have no bearing whatever upon this matter. In these cases the statutes expressed a design to control and repeal the special laws, and the only questions considered were as to the power of the legislature to pass such laws — not as to the construction of the statutes. Here it is the charter which makes the general law applicable so far as it is so, for in form and words the general law excludes the idea that it has any application to the charter election." The contention that was made in the case was in fact quite absurd.]

general law as to all other matters.[1] As will be seen in a later connection,[2] certain powers over election officers were specifically conferred upon home rule cities by another amendment adopted in 1896. But the powers of regulation thus *expressly* conferred were not very extensive when viewed in comparison with the sum total of regulations that are commonly prescribed for the conduct of elections.

Is the Annexation of Territory a Municipal Affair?

In the People *ex rel.* Cuff *v.* City of Oakland[3] the city had in annexing certain territory taken action under a general state law. This law empowered the city council to rearrange the wards of the city so as to make provision for the annexed area. The freeholders' charter, however, provided for the redistricting of the city into wards only once in every ten years. It was claimed that this was a municipal affair which could not be controlled by general laws. Said the court:

[1] The following examples, selected at random, may be noted:

"All provisions of the general laws of this state, including penal laws, respecting elections, not inconsistent with the provisions of chapter II hereof, shall be applicable to all elections held in the City and County of San Francisco. All provisions of the general laws of this state respecting the registration of voters shall be applicable to such registration in the City and County. The Board of Election Commissioners must provide for precinct registration, so far as it can do so under the constitution and laws of the state." 1900 Charter of San Francisco, as amended to 1911, art. XI, ch. I, sec. 5.

"All elections shall, except as herein otherwise provided, be conducted and held in accordance with the provisions of the laws of the state for the holding of general elections in effect at the time." 1889 Charter of Los Angeles, Amendment of 1909, sec. 202.

"The provisions of the general law of the state governing municipal elections, where the same are held separate from state elections, are hereby adopted as the law governing city elections." 1901 Charter of Pasadena, art. 19, sec. 3.

"The provisions of the state law relating to the qualifications of electors, the manner of voting, the duties of election officers, the canvassing of returns, and all other particulars in respect to the management of elections, so far as they may be applicable, shall govern all municipal elections, provided that the Council shall meet as a canvassing board and duly canvass the election returns within four days after any municipal election." 1909 Charter of Berkeley, Art. III, sec. 6, cl. 1.

[2] *Infra*, 371.

[3] 123 Cal. 598. 1899.

It [the statute in question] permits territory not within the city limits or under its control to become annexed to and incorporated into the city by the mutual action of the city and the inhabitants of such territory — a thing that could not be accomplished through any provision of the charter of the city of Oakland, or otherwise than under the statutory authority given by said act; and therefore such relation as said act has to "municipal affairs" is not within the constitutional exception. It does not compel action contrary to the provisions of the city charter, but authorizes action at the pleasure of the city, which could not otherwise be taken. As the legislature alone has the power to authorize such annexation, it must have the power to prescribe the terms, conditions, and mode of annexation, and especially to provide that the inhabitants of the annexed territory shall not be deprived of any constitutional right.

The rule here laid down was again applied in the case of the People *ex rel.* Peck *v.* City of Los Angeles,[1] where it was held that a state law, which required but a single publication of an election notice on a question of annexing territory, controlled a charter provision that required publication of such notice for ten days. "Annexation of territory to a municipality" was "not in any view a municipal affair." "It could not be accomplished under any provision of the charter of Los Angeles, but solely under the general law."

In these cases the point was also disposed of that the law permitted the city to amend its charter in a manner not prescribed by the constitution. It will be recalled that a similar contention was sustained by the supreme court of Missouri.[2] Not so in California. The probable view of the court, although it was not very clearly set forth, was that while the city in attempting to amend its charter was manifestly bound by the requirements of the constitution, which requirements the legislature could not alter, yet a general law on any subject of *state* concern could amend a contrary charter provision. The statute governing the procedure for annexation was such a law. It is true that it was permissive merely and provided for the initiation and effectuation of the annexation by local action. A *general* law on the subject would of practical necessity be of such a character. Not only the voters of the city but also

[1] 154 Cal. 220. 1908. [2] *Supra*, 147.

certain voters outside the city participated in this local action. The charter, therefore, was not amended by the city alone. It was in fact amended by a law that did not relate to a municipal affair, which law became applicable only upon a contingency in which the city was a participant but not the only participant.

Whether a law which provided that a city might annex territory solely by its own action — that is, without the consent of the people annexed — would or would not be valid does not appear. Such a law might obviously confer power upon a city to amend its charter in a manner contrary to the requirements of the constitution. It would seem that in order to avoid the complicated questions that have arisen it would be the part of wisdom for the legislature to provide, in any statute regulating the procedure for the annexation of territory to cities under freeholders' charters, that action by the city should be taken in the manner required by the constitution for the making of charter amendments. For it is apparent that there is here much room for legal quibbles as well as for honest differences of opinion.

Is the Regulation of Matters pertaining to Street Improvements a Municipal Affair?

In the year 1900 opinion was rendered in the important case of Byrne *v.* Drain.[1] This case arose out of an action to restrain the superintendent of streets of Los Angeles from selling certain property of the plaintiff's to satisfy an assessment levied in the matter of opening a street.

It will be recalled that in Davies *v.* Los Angeles[2] it was held that the municipal authorities acted properly in proceeding to make a street opening under the provisions of a general law of the state enacted in 1889 instead of under the provisions regulating this matter which were contained in the freeholders' charter that was approved by the legislature a few weeks before the passage of the general law. The proceedings under which Byrne's property was sought to be sold were had under this same general law. They

[1] 127 Cal. 663. 1900.

[2] 86 Cal. 37 (1890); *supra*, 246.

were begun in September, 1898, and therefore after the adoption of the "municipal affairs" amendment of 1896. The contention was made that this amendment operated to repeal the applicability of the general law and to reinstate the provisions of the charter, and that the proceedings had under the general law were in consequence void. This contention the court sustained. It was held that the charter provisions on this subject were valid from January 31, 1889 (the date of the legislative ratification of the charter), to March 6, 1889 (the date of the passage of the general law); that this law did not *repeal* the provisions of the charter but that such provisions merely became "subject to and controlled by" such law as long as it remained in force — in other words, were "suspended." The question was clearly presented and unequivocally decided by the court — a question which had been either dodged or overlooked by certain members of the court in the Fragley case [1] — that the amendment of 1896 was retrospective as well as prospective in its effect, and that it operated to lift the "control" of any general law relating to municipal affairs by which the force of any charter provision had been "suspended."

The charter of Los Angeles, ratified in 1889, contained provisions not only for opening, closing, and widening streets but also for making other street improvements. These latter provisions had, however, never been acted upon by the municipal authorities, who had deferred to the opinion of the court in the case of Thomason *v.* Ashworth,[2] where, as we have seen, it was held that the Vrooman Act of 1885 *regulating the matter of assessments for street improvements* in "all cities" of the state operated to supersede the provisions upon this subject contained in any municipal charter. After the decision of Byrne *v.* Drain it is not surprising that the municipal authorities of Los Angeles proceeded to ignore this general act and to make assessments for street improvements under the long dormant provisions of the freeholders' charter, upon the belief that the "municipal affairs" amendment of 1896 had operated to relieve the charter from control by the general law. But this belief was rudely shattered by the court in the case of Banaz *v.* Smith,[3] where

[1] *Supra*, 262 ff. [2] 73 Cal. 73 (1887); *supra*, 237. [3] 133 Cal. 102. 1901.

it was held that the Vrooman Act was still effective in Los Angeles. Said the court:

> If [the provisions of the charter were] void from the beginning, the amendment to section 6 of article XI of the constitution did not give life to such provisions. That would give the amendment the effect of enacting laws, instead of merely authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people, in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it, unless it is expressly so provided.
>
> Byrne *v.* Drain, 127 Cal. 663, was a case where the charter provisions, when adopted, were perfectly valid and immediately went into operation. Subsequently, a general law was passed which was inconsistent with some provisions found in the charter. As to that the constitution provided that all such charters shall be subject to and controlled by general laws. It was, in effect, held that the mere fact that the charter provision *was to be subject to* and *controlled* by general laws implied a continued existence, and that when the general law was repealed the charter was in force and uncontrolled by the superior law. Here, the charter provisions being void, there was nothing held under control which could be restored to free operation.

This opinion was reaffirmed in the case of the German Savings and Loan Society *v.* Ramish.[1] The net result of the refined distinction that was drawn between the Byrne case and the Banaz case was that the declaration by the court as to the retrospective character of the municipal affairs amendment was robbed of much of its force. The amendment operated to revive only those provisions of municipal charters which had *once* been effective and which, although still "on paper," had ceased to be effective by reason of the *subsequent* enactment of a controlling general law. It did not give life to provisions which from the beginning had been ineffective because of the existence of controlling general laws *previously* enacted.

The argument advanced by the court in support of the distinction here made was of course patently defective. In the Banaz case it was asserted that charter provisions which never had any force were "void from the beginning." But it is perfectly manifest

[1] 138 Cal. 120 (1902) at p. 131. See also Carter *v.* Superior Court, 138 Cal. 150 (1902), where the point was touched upon but passed over as being unnecessary to the decision of the case.

that such provisions were no more *void* than were provisions which, having once been operative, became inoperative because of the later enactment of a controlling general law. In each case the clause of the constitution which caused the supersedure of the general law was that which declared that all charters should be "subject to and controlled by general laws." In the Byrne case it was held that this clause did not mean that the conflicting charter provisions were *repealed* and thus made *void* but merely that such provisions were suspended. In the Banaz case it was in effect held that this same clause rendered utterly *void* any charter provision which from the beginning was found to be in conflict with a general law of the state. How could it be asserted in one case that "subject to and controlled by" did not mean "to repeal, extinguish, and do away with" but "implied a continued existence" in a state of suspended effectiveness, while in the other case the same words were construed to render charter provisions not merely ineffective but wholly void? Why in the latter case was it not held that the charter provisions in question, which were merely "subject to and controlled by" the general laws in existence at the time of the enactment of the charter, were fully in existence but were "suspended" from the beginning? Indeed was there any element of logic or consistency in the contrary holding of the court?

It is impossible to say whether the court, in drawing the superfinical distinction that was made, was or was not hastening to destroy in part the force of the decision in the Byrne case — a decision which may perhaps have been made without full appreciation of its far-reaching effect. Even as the law stood after the distinction was drawn it would seem that the amendment of 1896 operated not only to revive the provisions of freeholders' charters which had been suspended by general laws enacted *after* these charters went into effect but also to relieve such cities as were still under special legislative charters antedating the adoption of the constitution of 1879 from the control of any and every general law which was applicable in character, which had been enacted since 1879, and which regulated a municipal affair. For it will be recalled that cities under special legislative charters were, in respect to their being "subject

to and controlled by general laws," placed by the constitution in precisely the same category as cities under freeholders' charters. In the same way also they enjoyed the benefit of the "municipal affairs" amendment. Under the doctrine of the Byrne case, therefore, the general laws which since 1879 had superseded provisions of their special charters had merely "suspended" such provisions — which provisions, "when adopted, were perfectly valid" — and since the effect of the amendment was to repeal the controlling force of these general laws, the formerly valid provisions of these special legislative charters must have been "restored to free operation." Although this seems to have been without question the law of California as it stood according to the doctrine of the Byrne case, it is not believed that in practice the cities operating under special legislative charters changed their governments to conform to this interpretation; and it does not appear that the question in its application to such cities was ever brought before the courts.

It will be noted that in the above discussion of the retrospective or prospective operation of the municipal affairs amendment, nothing has been said about the "inherent" nature of the control over street improvements — whether such control was or was not a municipal affair. As a matter of fact the court in the Byrne case found no difficulty whatever with this point. "That the matter of opening the streets of a municipality is a municipal affair," the opinion recited, "is not disputable under the authorities." It may be remarked parenthetically, however, that the authorities cited by the court in this connection were not specifically in point at all.[1]

[1] Reference was made to Sinton *v.* Ashbury, 41 Cal. 525 (1871), a case which decided that an appropriation made for a street improvement "was for a municipal" and not "for a purely private purpose." The case really involved the doctrine of no taxation for a private purpose, the term "municipal" being employed as synonymous with "public." The case of People *ex rel.* Bryant *v.* Holladay, 93 Cal. 241 (1892), far from supporting the doctrine in question, might have been cited in opposition; for it was expressly declared that "a municipal corporation is for many purposes but a department of the state organized for the more convenient administration of certain powers belonging to the state, . . . and such corporations, in their management and control over streets and squares . . . exercise a part of the sovereignty of the state." In other words, in such a function a city merely acts

It is a well-known rule laid down in many branches of the law of municipal corporations that the streets of a city are to be regarded merely as a part of the highways of the state, and that in consequence the city, in exercising control over its streets, acts merely as the agent of the state. This is a rule which is certainly open to serious criticism;[1] but it is on that account none the less a widely accepted rule. Nowhere has it been more broadly and emphatically stated than by the supreme court of California. As late as 1886 that court, in a case[2] which did not concern the exercise of home rule powers, declared:

> All public streets, alleys, and roads in the state are public highways for the use of the people of the state. The state in its sovereign capacity has the original right to control them for the public use. The state for this purpose has the right to grade and repair. The highways within and through a city are constructed by the state itself, which has full power to provide all proper regulations of police to govern the action of persons using them, and to make from time to time such alterations in these ways as the proper authorities shall deem proper. (Cooley, Const. Lim. sec. 588). This applies equally to the streets and alleys of a city or village as to county roads. A municipality has no control over a highway unless the right of control has been vested by the state in the municipality.
>
> For convenience, this power of the state is frequently vested in the municipality; but unless so vested, it remains in the state; when so vested, the municipality acts as the agent of the state.

The opinion thus spoken was not adverted to in the Byrne and the Banaz cases. It is nevertheless quite impossible to reconcile the easy assertion "that the matter of opening the streets of a municipality is a municipal affair" with the equally easy declaration that control over the streets is, "for convenience" merely, "frequently vested in the municipality;" but that "unless so vested, it remains in the state," and "when so vested, the municipality acts as the agent of the state."

as an agency of the state. Hellman v. Shoulters, 114 Cal. 136 (1896), the only other case cited by the court, while it concerned the validity of a law governing the matter of street improvements, does not appear to have touched even by indirection upon the point in support of which it was cited as an "authority."

[1] Goodnow, *Municipal Home Rule*, pp. 144–149, 228.

[2] Thomason v. Ruggles, 69 Cal. 465. 1886.

Is the Control over the Sources of Municipal Revenue a Municipal Affair?

The freeholders' charter of Los Angeles conferred power upon the city council to impose license taxes for revenue purposes. In 1901 the legislature added a new section to the Political Code which provided that the "boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns thereon, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, *and not otherwise*, have power to license all and every kind of business not prohibited by law." This general law attempted to limit the power of all municipalities in the state to imposing license taxes solely for purposes of regulation and to prohibit such taxes for revenue. In the case of *Ex parte* Braun [1] the question was raised whether this law related to a municipal affair and was as such inapplicable to Los Angeles. In upholding the contention that it was such a law, the court, speaking through Judge Angellotti, said:

> The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature. There is no enactment of the legislature purporting to vest such authority in such cities. It was held by this court in Security Savings Bank, etc. Co. *v.* Hinton, 97 Cal. 214,[2] where the question was directly involved that the authority given by the Constitution to certain cities to frame and adopt "a charter for its own government," which "shall become the organic law thereof" is comprehensive enough to authorize a provision such as that contained in the charter of the city of Los Angeles providing for taxation for municipal purposes. . . . There was at the time of the adoption of the charter no general law of the state prohibiting the imposition of a license tax for revenue, and the same constitutional authority that sanctioned the provision for a property tax authorized the provisions for the revenue license. . . . Those provisions when legally incorporated in the charter constituted a grant from the state of the power to impose a license tax for revenue purposes. This power, being so granted by the state to the municipality for municipal purposes, became a "municipal affair" of the city of Los Angeles within the meaning of those words as used in the Constitution, and the legislature was without authority to withdraw or modify such power. . . .

[1] 141 Cal. 204. 1903.

[2] [*Infra*, 340.]

> Our conclusions are, therefore, that the power to collect a license tax for revenue purposes was actually conferred upon the city of Los Angeles for municipal purposes by the charter framed for its government . . . and that such power is a "municipal affair" within the meaning of those words as used in section 6 of article XI of the constitution, and cannot be withdrawn or abrogated by the legislature. Section 3366 of the Political Code is therefore inapplicable to that city.

Here was no picayune view of the meaning of the term "municipal affairs." It may be freely admitted that the power of taxation is a power essential to the very existence of modern municipal corporations and that in consequence the exercise of such power is manifestly a municipal affair. But it is equally manifest that the revenue policy and system of the state as such *might* be seriously interfered with if such power were vested in its various subdivisions without restriction. Suppose, for example, that in this case the state had decided that it would be wise to leave the property tax wholly to the local subdivisions of the state and that it would establish a uniform system of license taxes on business as one of the sources of central revenue. This policy the state might have been effectually prevented from carrying out because of the existence in a single city of the state of high license taxes of this character — prevented not because of lack of legal power to levy additional license taxes but because of the knowledge that such a policy of taxation would in this particular city be unreasonably onerous. In other words, considering the limited sources of public revenues, it is perfectly obvious that in theory as well as in constant practice the sources of central state revenue are and ought to be determined with large reference to the established sources of local revenue. Complete power over state and local revenue policies cannot be vested respectively in central and local governments without some risk, for the reason that they bear so intimate a relation one to the other that in many aspects of the matter they may be said to constitute a single and indivisible policy. In this view, then, the question of what sources of revenue shall be available to the municipalities of a state is clearly a state rather than a municipal affair. And there is no doubt that had the California court, resting upon some

such argument as this, chosen to assert that the general law limiting the power of all the local subdivisions of the state in the matter of imposing license taxes on business was not a law relating to municipal affairs but a law regulating a state affair, there would have been many who would have found the argument of the court convincing. The truth of the matter is that the "affair" in question was *both* a municipal and a state affair; and in plain point of fact it was impossible for anybody to put it exclusively in either the one or the other category. Yet the provision of the constitution which had to be construed and applied distinctly implied that all general laws could be separated in these two classes. It was this which led Judge McFarland, who concurred in the judgment rendered in the case, to assert with some asperity and irritation:

> The section of the constitution in question uses the loose, indefinable, wild words municipal affairs, and imposes upon the court the almost impossible duty of saying what they mean. This court has not undertaken, and probably will not undertake to give a general definition of the words so as to bring all further cases within the two categories of what is and what is not a "municipal affair." A few cases involving the question have arisen and in each of such cases the court has merely determined, as it was compelled to determine, whether the thing there involved was or was not within the indeterminate constitutional words, and no doubt in the future each case involving the question will be decided on its own facts without an attempt at generalization.

In other words, here was a general phrase of somewhat vague import which was so difficult to apply in certain instances that its construction and application did not turn upon a question of law or of fact or of mixed fact and law but merely upon a matter of individual opinion. In this respect it was not unlike certain other vague and general phrases of our constitutional law, such for example as the guarantee of due process of law. And just as the United States Supreme Court has consistently refused to give any general concrete definition of the phrase "due process of law," so in the opinion of Judge McFarland it would be necessary for the California court by a gradual and cumulative process to erect a definition of the "wild" phrase "municipal affairs" only to the extent

that it became obligatory to decide in particular cases that this or that law fell within or without the category created by this term of the constitution.

In the cases of *Ex parte* Helm [1] and *Ex parte* Lemon [2] the doctrine of *Ex parte* Braun was reaffirmed as applied to cities still operating under special legislative charters that antedated 1879. Such cities were in respect to their exemption from the operation of general laws relating to "municipal affairs" on the same footing with cities under freeholders' charters; and the law limiting the power of cities in the matter of license taxes had in consequence no application to them. But in *Ex parte* Jackson [3] it was held, as we have already had occasion to note, that this law did apply to cities which had organized under the general municipal corporation act of 1883.

While the decision of these cases apparently gave a very wide latitude to cities under freeholders' charters in the matter of choosing the sources of local revenues, it should be recorded that the cities of California, like most other cities of the country, have in practice raised the major portion of their revenue from the general property tax. In 1910 an amendment to the constitution was adopted which purported to separate the sources of state and local revenues.[4] To this end the amendment in question withdrew from all cities and counties of the state the right to levy taxes on certain classes of corporations (chiefly public service corporations, whether local or extra-local as to operation, and banking and insurance corporations), reserving the power to tax such corporations exclusively to the state. The general property tax was left to the local corporations except that it could be employed by the state if the "exclusive" source of revenue proved insufficient.[5] By

[1] 143 Cal. 553. 1904.
[2] 143 Cal. 558. 1904.
[3] 143 Cal. 564 (1904); *supra*, 253.
[4] Art. XIII, sec. 14.
[5] In the first year of the operation of the amendment the state levied an *ad valorem* tax only for purposes of the Panama-Pacific Exposition. There is no guarantee, however, that the direct property tax may not ultimately constitute a more or less permanent part of the central fiscal policy as the expenses of the state government increase. There is certainly nothing in the amendment of 1910 to prevent such a result.

this amendment exceedingly important limitations were imposed upon the power of home rule cities to govern the sources of their revenues.

Upon the assumption that the amendment of 1910 had accomplished a complete separation of the sources of state and local revenues — which it obviously had not — an amendment was proposed for adoption in November, 1914, which was put before the people of the state under the vote-catching slogan of "home rule in taxation." Briefly put, this amendment empowered cities or other political divisions of the state to adopt upon a referendum vote any system of raising revenue that they desired, provided that no encroachment was made upon the sources of revenue set aside exclusively to the state. Unquestionably the proposal was fostered by the advocates of the so-called single tax. It was defeated at the polls. Presumably the necessity for such an amendment lay in the broad declaration of the constitution to the effect that "all property in the state . . . shall be taxed in proportion to its value" and in the definition of the term "property" to include most varieties of personalty as well as realty.[1] This provision did not refer specifically to municipal taxation, but since the large withdrawal of the state under the amendment of 1910 from the field of the general property tax, it manifestly related more particularly to municipal and county taxation than to state taxation. Even so, the proposed amendment of 1914 did not repeal this original declaration of the constitution and under the liberal doctrine of the court in the above-mentioned Braun and reaffirmative cases, it is not plain to see the ground upon which the court might declare void an experiment in the single tax plan should some city, abandoning the general property tax, attempt to introduce the single tax or some other revenue-producing experiment.

Another amendment rejected by the voters of California in November, 1914, was one which gave constitutional sanction to the principle of the excess condemnation of land for public improvements. Again it is difficult to see why such an amendment is necessary so far as home rule cities are concerned. The constitution con-

[1] Art. XII, sec. 1, as amended in 1894.

tains no expressly prohibitive provision of a pertinent character.[1] From the constitutional point of view the vital questions in the establishment of such a practice are whether the excess property condemned is or is not for a public purpose and whether the special assessments levied to defray the cost of such excess condemnation are or are not taxes levied for a public purpose.[2] These are questions which have not yet been definitely settled in our law. The first is undoubtedly a federal question arising under the guarantee of due process of law, and the second certainly involves a general doctrine of our law. But these questions have no special relation to the competence of home rule cities. They could certainly be settled quite as easily under the provisions of a freeholders' charter as under a state law or the sanction of a state constitutional provision.

It should be mentioned in concluding this discussion of the financial competence of home rule cities in California that, unlike many constitutions,[3] the fundamental law of that state does not impose either an absolute debt or tax limit upon municipal corporations but merely requires a referendum upon a proposition to incur a debt in excess of annual income.[4] Debt or tax limitations are sometimes imposed by the provisions of freeholders' charters (such for instance as the "dollar tax limit" provision of the San Francisco charter,[5] or the $5,000,000 debt limit of the Los Angeles charter [6]), but no case has ever arisen involving the question as to whether the imposition of such a limitation by state law would or would not be a municipal affair.

Is the Regulation of Matters pertaining to Bond Issues a Municipal Affair?

A somewhat curious case involving the rights of cities after 1896 was that of Fritz *v.* San Francisco.[7] In 1889 the legislature had

[1] See the somewhat usual clause of the declaration of rights on the subject of taking private property for a public purpose, Art. I, sec. 14.

[2] McBain, "Taxation for a Private Purpose," in *Political Science Quarterly*, 29: 201, n. 2. [3] *Supra*, 54. [4] Art. XI, sec. 18.

[5] San Francisco charter of 1900, Art. III, ch. 2, sec. 11.

[6] Los Angeles charter of 1889, Art. XII, sec. 223, as amended in 1903.

[7] 132 Cal. 373. 1901.

enacted a general law known as the Park and Boulevard Act, which regulated the matter of bond issues for certain public improvements. Under this act the people of San Francisco in December, 1899, voted affirmatively upon the matter of a certain bond issue. On January 1, 1900, and therefore before the bonds in question had been actually issued, the freeholders' charter went into operation. This charter provided a different scheme for issuing bonds for such purposes. The court held that the bonds that had been voted could not issue at all.

The first strange aspect of the opinion handed down was that the municipal affairs amendment was not mentioned at all. It was not specifically declared that the Park and Boulevard Act was a general law relating to municipal affairs and as such could not control the provisions of the charter which conflicted with it. On the contrary the clause relied upon to sustain the supersedure of the charter provisions was that which declared that a freeholders' charter should supersede "all laws inconsistent with such charter." In the constitutional provision as originally phrased this clause had read "all *special* laws inconsistent with such charter." In 1892 at the time when the right to frame charters by amendment was extended to cities of three thousand five hundred inhabitants the word "special" was omitted from this clause.[1] This fact was apparently unnoticed by the courts until the decision (nine years later and five years after the "municipal affairs" amendment) of the case here under review; but meantime, as we have seen,[2] the court went on after 1892 deciding cases in which general laws were held, under the provisions of section six of article eleven, to supersede the provisions of freeholders' charters and did not refer to the fact that, under section eight of that article as amended in 1892, a charter of this kind was declared to supersede "all laws inconsistent with such charter." It was passing strange, therefore, that the court should at so late a date have discovered the existence of this provision and should have ignored the "municipal affairs" amendment, although in consideration of the actual existence of this amendment, upon which reliance might easily

[1] *Supra*, 224. [2] *Supra*, 246, 256, 269, 271.

have been placed, the point is perhaps more singular than important.

The second suprising aspect of the opinion in this case is that the court apparently held the Park and Boulevard Act of 1889 to have been properly applicable and controlling in San Francisco at the time when the vote was taken in December, 1899. Under the doctrine of the Byrne case, as has already been indicated, it is difficult to see why the amendment of 1896 had not lifted the force of this general law relating to a municipal affair and restored the provisions upon this subject of the special legislative charter of San Francisco — the old consolidation act — thus rendering the entire proceedings under the general law void in the same way that the proceedings under the street opening act in Los Angeles instead of under the charter provisions were rendered void. The absolute identity of the legal situations, however, does not appear to have occurred to the court; for the argument advanced against the validity of bond issue was that it was only upon the effectuation of the charter that the general law ceased to have any application. The issue of bonds could not, therefore, be completed under the terms of the act. On the other hand, they could not be issued under the terms of the charter, for the only bonds which the charter contemplated as being issued under its terms were those which had been voted for in accordance with the provisions of the charter. In other words, the completion of *valid* proceedings which had been partially completed had been effectually estopped by the adoption of the charter.

In Brookes *v.* City of Oakland[1] bonds for sewer construction had been issued under an act in 1911, the general law of the state governing the issue of such bonds having been adopted by the freeholders' charter. The act itself, and therefore the bonds issued in pursuance thereof, was held void in this case on the ground that it deprived the persons assessed of property without due process of law. It was also contended that the rate of interest allowed by the act was in conflict with the provisions of the charter, which limited the rate to be paid on municipal bonds to five per cent.

[1] 160 Cal. 423. 1911.

The court, however, avoided the decision of the question of conflict by pointing out that the bonds referred to in the charter were bonds of the city as such, while the bonds issued under the act in question were those of the "sewer districts" provided for in the act. While the fundamental question that is of significance to our study was thus avoided and left unsettled, it is nevertheless easy to see how such a question of conflict might have been somewhat difficult to determine.

As a matter of fact, it appears that no California case has ever as yet directly decided whether the regulation of the details of the issuance of municipal bonds is or is not a municipal affair. This is undoubtedly due in large part to the fact that most freeholders' charters have adopted the provisions of the general law upon this subject.[1] A number of cases have been decided by the courts involving the validity of such laws,[2] but there has naturally been no occasion for discussing whether the regulation of matters pertaining to bond issues was or was not a municipal affair. Among the freeholders' charters of the state that of San Francisco seems to be somewhat unique in respect to the extent of its provisions upon this subject [3] and its failure to adopt the state law. Without passing upon the point specifically, the above-mentioned case of Fritz *v.* San Francisco certainly indicated strongly that the subject of these charter provisions would be regarded as a municipal affair that could not be controlled by state law. It ought to be mentioned again perhaps in conclusion that the constitution itself imposes certain restrictions upon the cities of California in the matter of incurring bonded indebtedness.[4]

[1] See, for example, Oakland charter of 1910, Art. IX, sec. 49, sub-sec. 14; Stockton charter of 1911, Art. VIII, sec. 70, sub-sec. 9; Alameda charter of 1906, Art. V, sec. 11, San Diego charter of 1889, Art. VI, ch. 2, sec. 12; Los Angeles charter of 1889, Art. XXII, sec. 223 (as amended in 1903); Berkeley charter of 1909, Art. IX, sec. 47, sub-sec. 8; Pasadena charter of 1905, Art. XII, sec. 21.

[2] City of Oakland *v.* Thompson, 151 Cal. 572 (1907); City of San Diego *v.* Potter, 153 Cal. 288 (1908); Haughawout *v.* Percival, 161 Cal. 491 (1911); Perry *v.* City of Los Angeles, 157 Cal. 146 (1909).

[3] San Francisco charter of 1900 as amended down to 1911, Art. XII, secs. 5, 10 ff.; Art. XVI, sec. 29.

[4] Art. XI, sec. 18, as amended in 1900 and 1906.

Is the Control of Matters relating to the Public Health a Municipal Affair?

In 1902 the court was called upon to consider a somewhat difficult situation growing out of the establishment of a board of health under the terms of the freeholders' charter of San Francisco which went into effect in 1900. In 1870 the legislature had created a board of health for the consolidated city and county with a membership consisting of the mayor and four physicians appointed by the governor. Although the jurisdiction of this board extended slightly beyond the boundaries of the city and county, it was the only department in the city which had control over matters relating to the public health and was in fact, so far as its functions were concerned, a municipal board of health. Before the adoption of the constitution of 1879 the provisions of law by which this board was established were incorporated into the Political Code of the state as a part of the general laws of the state relating to public health. In 1899 some question arose over the provision of the code regulating the term of office of the members of this board appointed by the governor, and the court held that both under the constitution of 1849 and the constitution of 1879, the members of the board were "officers" within the meaning of that term as used in the provision of the constitution which made four years the maximum term which could be established for *state* officers.[1] A year later the court declared void a police ordinance of the board of supervisors of San Francisco which regulated the making of interments in cemeteries on the ground that such ordinance was in conflict with a provision of the general law by which the board of health was established. The opinion delivered in this case recited as follows:[2]

[1] People *ex rel.* Davidson *v.* Perry, 79 Cal. 105 (1889). Said the court: "Unlike the commissioners of the funded debt, who in People *v.* Middleton, 28 Cal. 604, were held not to be officers within the meaning of the section referred to, the members of this board exercise important police powers *pertaining to the administration of the state government*, and are officers according to the strictest definition of the term as employed in section 7 of article XI of the constitution of 1849, and in section 16 of article XX of the constitution of 1879."

[2] *Ex parte* Keeney, 84 Cal. 304. 1890.

It is very clear that by this article the legislature has undertaken, as a part of the provisions of the general law "relating to the public health," and *through a local department of the state government*,[1] to wit, a board of health for the city and county of San Francisco, all the members of which, except the mayor of the city and county, are appointed by the governor, to manage and control certain — we do not say all, but certain — of the sanitary regulations of the city and county and contiguous harbor of San Francisco, and by section 3025 has particularly undertaken to manage and control the conditions and terms upon which permits for the interment of human bodies within said city and county may be issued, and by whom.

Although strictly speaking neither one of these cases was concerned with any construction of the home rule provisions of the California constitution, the tenor of the opinions, if not indeed the express language that was employed, clearly indicated that the court regarded the matter of local health regulation to be a peculiarly appropriate subject for *state* control.

Shortly after the freeholders' charter of San Francisco went into effect a proceeding in the nature of a quo warranto was instituted by the health officer of the state-appointed board against the locally appointed board to try the legality of the existence of the latter body as established by the charter. In the resulting case of the People *ex rel.* Lawlor *v.* Williamson [2] all of the judges of the court concurred in the judgment sustaining the validity of the existence of the charter board; but four separate opinions were handed down, and upon no one of these did a majority of the court agree. In the opinion spoken by Judge Temple two other judges concurred. Referring to the duties imposed upon the charter board, he said:

It is evident that the powers conferred upon and duties required of this board are strictly municipal in their character. All that is required of the board is peculiarly for the inhabitants of the city, and not directly for the benefit of some one else. As to some of the functions of the board, a charter which did not in some way provide for them . . . would be intolerable. It may be safely said that no such charter exists and that all that is here provided for is usually provided or permitted in the charters of large cities.

The board with its functions, being in its nature an "affair" appropriate for a municipality, and being actually contained in the charter, is a "mu-

[1] [The italics are interpolated.]

[2] 135 Cal. 415. 1902.

nicipal affair," within the meaning heretofore given to the phrase "municipal affairs." The suggestion that an "affair" already existing under the laws of the state, and for the people generally, including the inhabitants of the city cannot be made a municipal "affair" does not seem to me to merit discussion. The charter supersedes all laws inconsistent therewith. I do not wish to intimate a doubt as to the entire validity of the charter provision on this subject; but for the purposes of this case it is not necessary to decide whether some of its provisions are not void because inconsistent with the code provisions. If there is anything which the charter board can lawfully do, the city may maintain it [*i.e.* the board] . . . .

The charter is itself a law of the state. It matters not for this purpose whether it is a statute passed by the legislature or by a board of freeholders with a referendum to the people of the city. We must presume, if these provisions are valid, that in creating the charter and making it a law, the people have adopted a means, in their judgment, likely to protect the people of the state from such dangers. . . .

It may be true that the freeholder charter scheme confers greater influence in legislative matters upon the inhabitants of the favored cities than is enjoyed by the people who do not reside in such cities. The inhabitants of the favored cities may participate in making laws for others which have no operation at all as to them, while the outsider, after the charter has once been made, has no voice in making such laws for those within the city, even when he is vitally and directly interested in them. But if this be an inequality, the people have themselves created it, and if a remedy is needed, they can provide it. . . .

As I have said, we have in this case nothing to do with the former board. We are neither required nor authorized to determine in this case whether such board still continues in existence, or if it does exist, what powers and functions are left to it The charter board certainly has some powers which the charter confers upon it, and if to any extent the code sections creating the former board are inconsistent with the valid grant of power conferred by the charter, to that extent they are superseded by the charter.

Said Judge Van Dyke, in whose opinion no other member of the court concurred:

The provisions of the freeholders' charter upon the subject of public health concerns [*sic*] "municipal affairs." . . . It is quite true that the preservation of the health concerns the whole state as well as the city. In such matters it may be found necessary for the state by general laws operating outside as well as in cities, to provide against the spread of contagious diseases and like matters. The state board of health [for San Francisco] has jurisdiction coextensive with the bay and harbor of San

Francisco, and the quarantine grounds for the same are located at Sausalito, in Marin county [outside of the city and county corporation].

I see no reason, therefore, why the charter provisions are not valid, and if there be any laws inconsistent therewith, they are by the plain terms of the constitution, to that extent superseded.

Said Judge McFarland, who likewise spoke for himself alone:

I concur in the judgment of affirmance on the ground that it does not appear that the charter board is an illegal body or is wrongfully usurping powers. *It may do many things not inconsistent with the powers granted* by the state to the old board. But, in my opinion, public health is a matter in which the whole people of the state are concerned . . . and, in my opinion, whenever the provisions of a municipality, by charter or otherwise, conflict with laws of the legislature upon that subject, the former must yield, because "in conflict with general laws." The public health is not a "municipal affair" in the sense of excluding the jurisdiction of the state over the subject. But there is a wide scope for municipal action on this subject not inconsistent with general laws.

The opinion of Judge Harrison, in which one other judge concurred, ran in part as follows:

The supervision and control of the sanitary condition of a city, and provision for the health of its inhabitants, are, as is shown in the opinion of Mr. Justice Temple, eminently a "municipal affair"; and the establishment of a board of health which shall have the management and control of that "affair" is an appropriate provision of a municipal charter. To the extent that the provisions of the charter upon this subject are within this "municipal affair," to that extent the board of health created by the charter is not an illegal body. Whether any of the provisions of the charter upon this subject are inconsistent with the general laws of the state, and whether there are provisions in the general laws which are not covered by the provisions of the charter, is not involved in this case.

Neither are we now called upon to define the respective authority of the board of health created by the charter and of that authorized by the Political Code. So long as the functions to be exercised by the respective boards are not identical, there can be no inconsistency in permitting each to perform the functions prescribed for it; but to the extent that the functions prescribed for the one authorized by the Political Code are of a municipal character, these provisions have been superseded by the charter.

The opinions handed down in this case have been presented here at some length not only because of the intrinsic importance of

the broad question before the court but also because of the great contrariety of view to which expression was given. One or two points of interest may be noted.

In the first place, the proposition that the regulation of matters relating to the public health in a city was a "municipal affair" was agreed to by all except one judge — McFarland — who took the view that while such a matter was in all of its aspects a "state affair," yet the charter board of San Francisco was not an illegal body because the case did not show that this board was performing any function that was inconsistent with state law, and there was certainly room for the control by the "municipal" board of matters not regulated by state law. In other words, it was his opinion that a local board might be created to control a "state affair" to the extent that the field of regulation was not occupied by the state itself.

The other judges differed somewhat in their views as to the extent to which the regulation of public health was a "municipal affair." While they were all careful to declare that the case did not necessitate the determination of the point at which the control of public health ceased to be a "municipal" and became a "state" affair, it was manifest that Judge Temple, who spoke for himself and two of his colleagues, regarded public health as a municipal affair to just such extent as the city, acting of course within its territorial jurisdiction, chose to subject it to its own control. Recognizing that the regulation of such matters might affect the "outsider," who might be "vitally and directly interested in them," he in effect declared that the constitution permitted cities to control this "municipal affair" even though the effect of such control extended beyond the municipal boundaries, and that if the people were dissatisfied with such a result they should avail themselves of the remedy of amending the constitution. This opinion was premised upon the view that a freeholders' charter was in every possible respect a "law" of the state.

On the other hand it was evidently the opinion of Judge Van Dyke that in the matter of public health it was possible to make some kind of division of authority between the city and the state upon the

basis of whether or not a particular matter of control affected persons outside the city; and as evidencing the possibility of this division of jurisdictions between the two boards in question he laid emphasis upon the fact that the "state" board had *some* jurisdiction beyond the territory of the municipal corporation proper. Of somewhat the same purport was the view of Judge Harrison, with whom Judge Garoutte concurred. Taking advantage of the bare necessities of the issue at bar and of the fact that the powers of the two boards were not in *all* respects identical, he straddled the question of a division of jurisdiction as squarely as possible, for in effect he declared that public health was a "municipal affair" to the extent that it was "municipal" and that to this same extent were the provisions of the charter controlling.

In the second place, it is well-nigh impossible to escape the conclusion that the court welcomed the opportunity to limit itself to the decision of the one direct issue involved in the case as it was presented. This issue was solely as to whether the charter board was a legally established body. All of the judges agreed in sustaining its legality, at least for *some* purposes, although, as has been said, they were obviously not of a mind as to *what* purposes. As a result of the character of the action that was brought the question involved was in point of fact not a question of the relation between a charter provision and a conflicting general law of the state. It was rather a question of whether *power* to regulate some matters relating to public health might be conferred by a freeholders' charter.[1] Had the case been of another character, involving, let us say, the legality of some action of the charter board under the contention that the provision of the charter was in conflict with the law creating the state-appointed board, the question as to the extent to which public health was a "municipal affair" would have been squarely presented. It was the character of the cause — a proceeding in the nature of a quo warranto — that

[1] This whole question of the powers which may be exercised under a freeholders' charter where no question of conflict between charter provision and state law is involved is considered in the next chapter. The case of the People *v.* Williamson is discussed at this point because it trenched so nearly upon the question of such conflict.

enabled the court to avoid the determination of this difficult but highly important question. For this avoidance the court cannot of course be criticized, but neither must the fact be ignored that although the provisions of the charter and the provisions of the law were not precisely identical as to phraseology and as to the powers conferred upon the boards which they respectively established, nevertheless each of these boards was in effect a health board for San Francisco, with most of the powers commonly conferred upon such an administrative authority.[1] The California court was never compelled to settle any controversy between these two boards. Following the decision of the Williamson case it appears that the state-appointed board voluntarily ceased to exist, although it is obvious that neither the judgment rendered nor the opinions expressed in that case actually necessitated such a result.

Another case which involved the validity of provisions relating to public health in the charter of San Francisco and in which the court was able to avoid the necessity of determining whether the general law superseded a conflicting charter provision was that of the Odd Fellows Cemetery Association *v.* San Francisco.[2] This case arose out of a contest concerning the validity of an ordinance of the city prohibiting the burial of the dead anywhere within the city and county of San Francisco. It was contended, among other things,[3] that the authority conferred by the charter in this regard and the ordinance enacted under such authority were void as being in conflict with a general law of the state which forbade the burial of a body in the city and county "except in some cemetery already existing under the laws of the state or thereafter established by

[1] In the case of People *v.* Perry, *supra*, 286, the court in describing the functions of the state-appointed board said: "The authority conferred upon the board embraces the power to appoint a subordinate executive officer, *to exercise a general supervision over all matters appertaining to the sanitary condition of the city*, to control the landing of passengers and freight, *to seclude persons affected with contagious diseases, control burials, and abate nuisances.*" It would be difficult in general terms to describe more accurately the duties of the usual municipal board of health.

[2] 140 Cal. 226 (1903); reaffirmed in Laurel Hill Cemetery *v.* City and County of San Francisco, 152 Cal. 464 (1907).

[3] On the question of the police power as decided by this case see *infra*, 328.

the board of supervisors" of the corporation. Replying to this contention the court said:

> This is a negative provision, and does not by inference confer the right to bury in the excepted cemeteries. That right was preëxisting, but was subject to be taken away by police regulations, and remained subject to that condition after the enactment of section 297 [of the Penal Code] to the same extent as before. So far as the ordinance forbids burials outside of those cemeteries, it is in strict accord with section 297; and so far as it forbids burials within these cemeteries, it is not in conflict, for that section gives no right to do that and makes no provision relating thereto. It may be that the law supersedes the ordinance, so far as the territory embraced is the same in both, and that the ordinance is to that extent inoperative. If so, the only result will be that for the offense of burial in any place other than an established cemetery, the prosecution and punishment must be under state law, and for a burial within such cemeteries, it must be under the ordinance which as to such territory is in force and effect. The slight difference in the punishment provided is, in view of this result, immaterial.

Here was indeed a guarded admission that the state law to the extent that it had occupied the field of regulation of burials was paramount to municipal regulations upon the same subject; but the court went no further than to declare that "*it may be*" that the law supersedes the ordinance to this extent. Had the ordinance permitted burials in other than established cemeteries, it would have been in direct conflict with the state law and a positive determination of the point would have been material and important. For the issue of this case it was, as the court declared, immaterial.

It cannot be said, then, that the cases in the California books give us a very definite idea as to the relation of supersedence between state laws and charter provisions regulating matters pertaining to the control of public health. So far as such control extended merely to the enactment of a health law under the exercise of the police power presumably such a law, as was intimated in the Odd Fellows Cemetery case, would control a conflicting charter provision or an ordinance enacted pursuant to such a provision, under the general rule applicable alike to legislative and freeholders' charters.[1] But so far as such control extended to matters con-

[1] *Supra*, 256.

cerning the organization, operation, and methods of the health department, the status of the law has not yet been determined. In practice such matters are regulated largely, if not entirely, by the cities themselves.

It must not be supposed, however, that the situation in California in respect to control over matters pertaining to public health has been resolved without some manœuvring on the part of cities to avoid conflicts with state laws. In respect to this the president of the San Francisco board of health has written as follows:[1]

On more than one occasion where there was a possibility of a clash between the general law and the ordinances of the city and county, the supervisors have taken the law as a whole and enacted it as an ordinance. The most notable illustration was in the case of the Tenement House Act. Any possible conflict was avoided by incorporating the act as a whole in the building ordinance of the city and county of San Francisco.

Sometimes the state board[2] and the city board in their several jurisdictions approach very closely, as, for instance, in the care of the insane; but hitherto there has been no trouble since we provide the hospital, the attendants, matrons, etc., and the state simply provides the commissioners of lunacy.

I do not know that the direct question has ever been litigated "Where does the power of the city end and where does the power of the state supervene in matters which might be properly the subject of control by either"; but the general tendency has been to allow the city to handle all those matters of which it has taken control hitherto. . . .

By an indirect method we control all the dairies that ship milk into San Francisco. The board of heath has the right to issue permits to shippers of milk and when we find a foul dairy outside the city and county limits we take up the permit.

The whole question is not by any means free from doubt and our habit seems to have been to follow the line of least resistance by not interfering with one another but to jog along, the city doing its work along the same lines as the state and affording mutual support in the enforcement of the law.

[1] Personal letter to the author from Mr. Arthur H. Barendt, May 27, 1915.

[2] [This reference is to the board which has jurisdiction over the entire state and not to the state-appointed board which was involved in the Williamson case.]

Is the Control of Public Education a Municipal Affair?

It will be recalled that long before the passage of the "municipal affairs" amendment it had been decided in Kennedy *v.* Miller,[1] as might indeed have been expected, that municipal charters were subject to and controlled by general laws relating to the matter of public education. In this case there appears to have been no reason why the court should have gone beyond the simple declaration that there was clear conflict between the general law regulating the control of school funds and the provisions of the freeholders' charter of San Diego upon this subject. Under the rule applied before the amendment of 1896 a law of general application regulating *any* affair, "municipal" or otherwise, operated to subject to its control any provision of a municipal charter that conflicted with it. And although the judgment of the court in the case seems to have been reached almost wholly upon this basis, yet the opinion rendered did in point of fact cover a much wider range of discussion than was necessary. It is important to be analyzed in some detail at this point not only because of its description of the peculiar system of educational control established in California by constitutional, statutory, and charter provisions but also because of the views which were expressed as to the primary responsibility of the state rather than its local subdivisions for the maintenance and control of this function.

Referring to the provisions of the constitution rel..ting to education, the view was expressed by the court that article IX of that instrument — which article it may be remarked parenthetically was not altered in 1896 — "makes education and the management and control of the public schools a matter of *state* care and supervision." The legislature, among other things, was in this article directed to provide for "a system of common schools." The court declared that "the term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means

[1] 97 Cal. 429 (1893); *supra*, 246. See also Kennedy *v.* Board of Education, 82 Cal. 483 (1890).

one system which shall be applicable to all the common schools within the state."

Referring to the manner in which this obligation had been performed by the legislature, the opinion declared:

In pursuance of this direction, the legislature has enacted chapter III of title III, part III, of the Political Code, wherein the system outlined in the constitution has been amplified, and provision made for the organization of school districts, and the election of officers thereof, as well as of the officers authorized by the constitution, defining their powers and duties, and also providing for the proper application of the revenue from the state school fund, and for the raising of additional money by taxation for the support of the common schools.

Section 1576 of the Political Code declares that "each county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district." By virtue of this legislative authority, each school district becomes a public corporation (Estate of Bulmer, 59 Cal. 131; Hughes *v.* Ewing, 93 Cal. 414), and its functions and powers as such corporation are those which are given to it by the act under which it is created. . . .

Section 1616 of the Political Code declares that "boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided;" and in the Municipal Government Act provision has been made for boards of education in cities that may be organized under that act. By the expression, "the laws governing such cities," is meant the charter of the city, or the power under which the city acts and exercises its authority, whether such power be such as was originally conferred by special charter prior to the adoption of the present constitution, or such as has been conferred by the general law providing for the organization of cities and accepted by the city; or such as is embraced in a charter framed by freeholders of its own selection, and ratified by the legislature.

The reasons for this somewhat complicated system of educational control are historical. At the time when the constitution of 1879 was adopted and when these general provisions of law were enacted pursuant to its mandate, every city of the state was operating under a special legislative charter that made provision for a department of education. The legislature evidently did not deem it advisable to wipe this organization entirely out of existence. Instead of doing so it simply introduced certain important elements of uni-

formity. Among these elements was that which provided for the incorporation of the inhabitants of every city into a school district separated in its corporate capacity from the city as such. But the general law *adopted* as the governing body of every such city school corporation the board of education that was, or should be, created by its charter. And it was further provided that the powers and duties of such boards, as set forth in municipal charters, should remain unaltered *except* as otherwise provided in the general law applicable to all school districts whether urban or rural. It was manifest, therefore, that the *law* contemplated that *some* matters relating to the management of schools should be determined by the provisions of city charters. Acting in accordance with this contemplation, the legislature provided for boards of education in the general municipal government act of 1883 — an act which classified the cities of the state and established forms of government for the several classes which might be accepted by any city upon a referendum vote. In view of the policy thus pursued by the legislature in the matter of setting up a system of common schools, as commanded by the constitution, it could not have been held that cities drafting freeholders' charters were powerless to enact *any* provisions relating to public education, although it may have been that their powers in this regard were in fact referable to the law (which adopted charter provisions subject to important qualifications) rather than to the constitution which conferred the charter-making power.

In the opinion handed down in the case under review the court was at pains to assert that neither the provision of law which incorporated school districts nor that which adopted, under limitations, municipal charter requirements relating to the powers and duties of boards of education operated to relieve such requirements from complete subordination to every provision of the general law. On the first point it was declared:

> The legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has by virtue of the Political Code. The city is a

corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized; and even though the charter may purport to define the powers and duties of its municipal officers in reference to the public schools in the same language as has the legislature in the Political Code, yet these powers and duties are referable to the legislative authority, and not to the charter.

On the second point the opinion recited:

The powers and duties of the board of education in a city cannot trench upon the system that the legislature has provided for the entire state, since the charter is limited in its operation by any general law that may be passed by the legislature, and, in addition thereto, such powers and duties are, by the terms of the section in which they are authorized to be given, limited by the provisions of the Political Code.

In the same year in which decision was made in the Kennedy case an interesting opinion bearing upon the functional character of education was rendered in the case of *In re* Wetmore.[1] Although it was not manifest that the precise point at issue in this case was one of conflict between state law and charter provision, the views expressed by the court were nevertheless of significance when considered in connection with the cases that arose after the introduction into the constitution of the famous excepting phrase. The case is therefore worthy of some careful study.

In February, 1889 the freeholders' charter of Oakland was approved by the legislature. Its provisions touching upon the question that was presented to the court in the Wetmore case were by no means clear; for while the charter vested in the board of education — a board provided by the charter and, as we have seen above, recognized by the Political Code of the state — authority "to build schoolhouses" upon plans approved by the board, it expressly denied to the board the power to contract debts beyond current annual income and vested in the city council the power to submit to the voters the question of incurring a debt for the construction of any permanent municipal building "the cost of

[1] 99 Cal. 146. 1893.

which in addition to other expenditures of the city will exceed the income and revenues provided in any one year." The council was required to proceed in such matter "as provided in section 18 of article XI of the constitution of this state and *general law.*"

In the Political Code it was provided generally that *county* boards of supervisors, upon certification from any *district* board of education (and this included such a board as that created by the Oakland charter) to the effect that the voters had approved, as required by law, a bond issue for school building construction, should issue bonds in the name of such district.

In March, 1889 the legislature, without repealing these provisions of the Code, enacted a law authorizing cities *as such* to issue bonds for the construction of school buildings. In 1891 Oakland, acting under this law, which was apparently adopted by one section of its charter, issued bonds for this purpose. It was contended that the city had no authority to issue such bonds "for the reason that the management of its schools is vested in a board of education, and that any bonds to be issued for school purposes must be authorized by that body." It was not, however, clearly disclosed in the case whether the contention was based upon the view that the *charter* vested this authority in the board, or upon the view that the charter provision, which apparently conferred authority to issue such bonds upon the city council, was void as being in conflict with the *Political Code.* Indeed, as already mentioned, the precise ground of contention was somewhat vague. But in respect to the character of education as a *municipal* function the opinion declared in part as follows:

> That the education of the youth is properly included within the functions of a municipal government cannot be denied. A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the constitution has imposed upon itself. . . . The legislature has made provision in the Political Code for a system of public schools throughout the state, and in the Municipal Government Act, which was enacted

in 1883, providing for the organization of municipal corporations, it has included a school department for the first five of the several classes of municipal corporations therein provided for. In each of the freeholders' charters that has been approved by it an educational department has been established and provision made for education and for the exercise of municipal functions in reference thereto. As school-houses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government as does the erection of a hospital for its indigent poor, or buildings for its fire engines; and the school-houses when so erected are as fully municipal buildings as are its engine-houses and hospital buildings. (Danielly *v.* Cabaniss, 52 Ga. 222; Horton *v.* Mobile School Commissioners, 43 Ala. 598.)

In 1903, ten years after the decision of Kennedy *v.* Miller and the Wetmore case, there was decided by the supreme court of California the first of a series of important cases dealing specifically with the question as to whether public education was or was not a municipal affair within the meaning of the amendment of 1896. Under authority of an act of 1891 the Santa Barbara School District, a corporation created by general law and covering practically the same geographical jurisdiction as the city proper, established a high school. In 1899 the district made a contract with one Hancock, the appellant in the case of Hancock *v.* The Board of Education,[1] to be principal of the said school for one year beginning in September, 1899. In January, 1900 a freeholders' charter, which provided for a board of education, went into effect in the city.[2] The charter declared that the new board should succeed to "all the property, rights, and obligations of the school trustees of the Santa Barbara School District heretofore existing."

[1] 140 Cal. 554. 1903.

[2] It ought to be mentioned in this connection, perhaps, although the matter was not referred to in the opinion, that a specific amendment — to be referred to at a later point in our discussion (*infra*, Ch. XI) — which was adopted also in 1896, expressly conferred upon cities framing freeholders' charters the power to provide "for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, and the number which shall constitute any one of such boards." There could be no question, therefore, of the authority of Santa Barbara to regulate in its charter at least these enumerated matters respecting education.

Once in existence, however, the charter board refused to recognize the contract of employment entered into by the old board with the high school principal; and the latter brought action against the school district (which still retained its corporate character) for the recovery of his salary. The chief point of contest that was made seems to have been that the action should have been brought against the city as such instead of against the school district. The court decided against this contention, and in doing so voice was given to an opinion which is of importance because, while in general accord with the opinion in Kennedy *v.* Miller, it appears to be almost wholly irreconcilable with the views upon this subject which were expressed in the Wetmore case, as well as in another important case decided at the next term of court. The opinion recited:

Every city constitutes a separate school district, including such outlying territory as may be legally attached to it. (Pol. Code, sec. 1576.) The Santa Barbara School District was formed under the state law, and as there is nothing in the record to show that it has ever been changed, dissolved, or discontinued, it must be presumed that it still exists. A city charter adopted under the provisions of the constitution has no effect whatever upon the existence or legal character of a school district formed under the general law. *The school system is a matter of general concern, and not a municipal affair.*[1] (Kennedy *v.* Miller, 97 Cal. 434.) The function of the city under the charter is simply to furnish the officers who compose the governing body of the district, and when the new charter was adopted the former board of school trustees was superseded as the governing body by the city board of education.[2] There was no change whatever in the existence of the district, but simply a change in the officers who governed it. The code provides that the trustees of every school district may sue and be sued (Pol. Code, sec. 1575), and that the trustees are liable in their official capacity for judgments for salaries against the district. (Pol. Code, sec. 1623.) Although the present governing body is called a board of education, yet it is in fact a board of trustees, and the term "board of education" is simply another name for trustees. These sections, authorizing the trustees to sue and be sued, make the board responsible for judgments, and *must be construed to apply to and include city boards of education*, as well as the boards of country school districts. (Kennedy *v.* Miller, 97 Cal. 434; Board of Education *v.* Board of Trustees, 129 Cal. 606.) It

[1] [The italics are interpolated.]

[2] [*Supra*, 300, n. 2.]

follows that an action can be maintained against the board of education whenever there is a cause of action against it in existence, and that the city board of education, as the successor of the former board of the Santa Barbara School District, is bound by the obligations of the former board, and may be sued thereon. The substitution of the board of education for the school board had no greater effect upon the obligations of the district than would the coming in of a new school board upon the expiration of the terms of the old members.

It is to be noted that in this opinion it was emphatically declared that "the school system is . . . not a municipal affair."

A year after the decision of the Hancock case opinion was handed down in the case of Law *v.* San Francisco.[1] This case arose out of a taxpayer's action brought to restrain the city of San Francisco from issuing, in accordance with the procedure required by its charter, bonds "for the erection of new school-houses, for improvements to existing school-houses, for the acquisition of land for those purposes, and of additional land for playgrounds of established schools." Without reference to the Hancock case, but with great reliance upon the earlier Wetmore case, it was specifically held by the court that these enumerated objects were "municipal affairs." "It follows, therefore," the opinion declared, "that the city authorities were justified in calling for a bonded indebtedness for the indicated purposes, and that the charter provisions in this regard supersede the requirements of the General Improvement Act of 1901 (Stats. 1901, p. 27), should conflict be found to exist between the two."

There was here no possibility of misconstruing the view of the court. The procedure for the issue of bonds had been taken under charter requirement, not in accordance with the provisions of general law. The validity of the issue was called into question and was sustained on the ground that the issuance of bonds for school purposes was a municipal affair. It was not even necessary to inquire specifically whether there was or was not conflict between the charter provisions and the general law upon the subject; for if conflict existed, the charter provisions superseded and were therefore in any case unimpeachable.

[1] 144 Cal. 384. 1904.

The issuance of bonds for school construction purposes may doubtless be regarded as an indispensable part of the function of furnishing educational facilities in urban communities. There was in the constitution of California no provision which could be interpreted to confer this power specifically and directly upon cities framing freeholders' charters. The authority of the city to regulate this matter in a manner contrary to state law could be sustained only upon the ground that public education — or at least the financing of public education — was within the meaning of the constitutional amendment of 1896 a municipal rather than a state affair. And such it obviously was, in the opinion of the court as handed down in this case.

In spite of the article of the constitution which in Kennedy *v.* Miller [1] the court had declared made education a matter of "*state* care and supervision," the doctrine of the Law case might, not without much justification, have been taken to mean that in the *latest* view of the court the control of public education in cities was a municipal affair upon which the legislature in conformity with the amendment of 1896 might not enact any general law that would control the provisions of a municipal charter. This doctrine, however, in its full significance, received a rude setback in the case of Los Angeles City School District *v.* Longden.[2] The School District of Los Angeles, as in every other city of the state, owed its origin to provisions of the Political Code. The freeholders' charter of Los Angeles recognized the existence of this corporation but expressly denied to the board of education which it established as the governing body of the district, and expressly conferred upon the city council, the power to take steps for the issuance of bonds for school purposes. This was a power which the board of every district corporation enjoyed under the Code. Here was then an unmistakable case of conflict between state law and charter provision. The board of education, acting under authority conferred by law upon the district corporation, took all the steps necessary for a bond issue up to the point where the county supervisors, according to the terms of the law, were re-

[1] *Supra*, 295.

[2] 148 Cal. 380. 1905.

quired to issue bonds upon certification of the board. The board of supervisors refused to act, and the board of education applied for a mandamus to compel the issue. The refusal of the supervisors rested on the ground that the municipal charter prohibited the board of education from taking these initiatory steps and that, under the doctrine of the Law case, the charter provisions superseded the general law regulating this municipal affair. Referring to the Law case and to the earlier case of *In re* Wetmore, the court said:

It may thus be taken as decided and settled that a city, as such, may bond itself for public-school purposes, and that this power extends to all cases when the object is in furtherance, and not in derogation of or in conflict with the general school system established by the state. For in this connection it must be remembered, as was said in Hancock *v.* Board of Education, 140 Cal. 554, that a school system of the state is a matter of general concern and not a municipal affair. It may be well to dwell upon this distinction with more particularity, and in so doing to point out the well-recognized and oft-repeated difference between the acts of the city as a city and the acts of the school district which may comprise the same territory. They are essentially the acts of two different corporate entities — the powers of the city being drawn from its charter, the powers of the school board being derived from the provisions of the Political Code; the bonds which the city issues being municipal bonds of that city, and the power to issue them being derived from the charter taken with the general laws, while the bonds of the school district are in name and in fact school-district bonds, the right and power to issue them being derived from the Political Code. What, therefore, the Wetmore case and the Law case decided was that the erection of school-houses within the corporate limits of a municipality was justly to be regarded as a municipal affair, and that the city, therefore, as such could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows, therefore, that the declaration of this court that the issuing of bonds for the building of school-houses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity — the school district — may under the general school system of the state, do the same thing for the same purpose.

Moreover it should be finally emphasized that the power of a municipality in this regard can only run current with, and never counter to, the general laws of the state touching the common-school system. To such general laws, if conflict arises, all municipal laws must be subservient.

The opinion thus uttered took most of the vitality out of the decision of the Law case, so far as that case was an apparent authority for the assertion that education was a municipal affair and that charter provisions upon this subject superseded the general laws of the state. Indeed, in spite of the fact that the court attempted to reconcile the two cases, it is not at all clear but that the later case completely overruled the earlier. It was not as though the Law case had concerned only a question of the *power* of the city as such to issue bonds for school purposes. Had this been the only question involved it might have been held that the case went no further than to assert that the city might, as long as its action did not run counter to the laws of the state, exercise this power *in addition to and in furtherance of* a similar power vested in another authority by the state. But it was evidently contended in that case that, even though the bond issue was valid in every other respect, it was nevertheless void because in the issue of the bonds in question the city had proceeded under its charter provisions instead of under the general law of the state governing procedure in such matters. The court did not hold that the law in question did not purport to regulate a bond issue of this kind or that the procedure required by the law and that required by the charter were practically identical. On the contrary it was specifically declared that the "charter provisions in this regard supersede the requirements" of the general law, "should conflict be found to exist between them."

The later case, which returned to the view expressed in the Hancock case, must of course be taken as defining the status of the law upon this subject. But even in the opinion rendered in the Los Angeles case it is somewhat difficult to reconcile the statement to the effect that the "school system of the state" — including naturally the erection of school buildings without which no school system would be possible — "is a matter of general concern and not a municipal affair" with the assertion in the same opinion that the "erection of school-houses . . . was justly to be regarded as a municipal affair." The constitution clearly implied that "affairs" were municipal or not municipal — that all affairs that

were subject to control by law could be separated into one or the other of these categories. It would have conduced to clearness had the court declared, as Judge McFarland declared in respect to matters relating to the public health,[1] that public education was in *all* of its aspects, *including* the erection of school buildings, a state and not a municipal affair; that while the legislature was in effect prohibited from passing laws relating to municipal affairs (except for cities under the general municipal corporation act), cities were not prohibited from regulating state affairs within their jurisdiction except in so far as their regulations collided with some general law, in which event the charter provision became "subject to and controlled by" the general law;[2] and that in consequence a city as such might under charter allowance issue bonds for the erection of school buildings — a state affair — as long as in the exercise of such power it conformed to any and all general laws of the state that were pertinent. This was in effect the purport of the decision, no matter how earnestly the court attempted to square its conflicting utterances upon the subject.

Moreover, this was certainly more nearly in harmony with the spirit and letter of the provisions contained in the article of the constitution relating to education, to which provisions the court apparently gave little if any consideration in these cases. The opinions that were handed down seemed to turn solely upon the construction of the "municipal affairs" amendment without reference to any other constitutional provisions.

Finally it is to be remarked that there was presented in the case of the Pasadena School District *v.* Pasadena [3] a somewhat unique aspect of the complicated problem in respect to the control of public education in California. The building code of the city, enacted under authority of the freeholders' charter, was elaborate in character. Among other things it contained the usual requirements that plans for the construction of a building should be submitted to the building inspector for approval. The charter had not changed the governing body of the school district, created by

[1] *Supra*, 289.

[2] 166 Cal. 7. 1913.

[3] On this point see the following chapter.

general law, and had made no attempt to regulate its powers and duties. The school trustees of the district were proceeding to the erection of a $400,000 school-house without submitting their plans to the municipal authorities as required by ordinance enacted in pursuance of the charter. The city sought to restrain them. The court said:

It is not claimed that there is any general law conferring police power upon the trustees of school districts except as it is insisted that these provisions of the Political Code have that effect. Nor as to these code provisions is it claimed that they expressly give any power to such trustees or enjoin on them the duty of adopting sanitary or building regulations or regulations in the nature of provisions for the public health, comfort, and safety in the construction of school buildings. It is insisted only that under the general power to control school affairs and the particular authority to plan and erect school buildings there is impliedly conferred full police power as to all matters pertaining to the erection of such buildings.

We cannot agree with this view of appellant. School districts are quasi municipal corporations of the most limited power known to the law. Their trustees have special powers and cannot exceed the limit. . . . Power in the school trustees to determine for themselves all matters concerning the school structures to be erected to the exclusion of the right of the municipality to impose police regulations cannot be implied from a grant solely of power to control the school affairs of the district and plan and build school-houses. The constitutional right of the municipality to reasonable police regulations within its territorial limits, while it may be controlled by a general law, still such law must be, as is said in *Ex parte* Campbell, 74 Cal. 20 (5 Am. St. Rep. 418; 15 Pac. 318, 321), a positive and general law upon that subject. The power conferred on the trustees of the school district to erect school-houses is to be taken only as a grant of power to effectually carry out the purpose of their creation. As a public agency of the state the trustees would have no such power unless it was specifically granted. As granted it is no different as a power from what is possessed by other corporations as far as controlling corporate property and the right to erect structures thereon is concerned, nor different from the right which the owners of land have to control it and erect buildings upon it. The erection of school buildings necessitates the making of plans therefor just the same as it is necessary for private corporations or individuals to prepare them. These latter when their structures are to be erected in the city must prepare their plans therefor according to the building regulations thereof and submit them for inspection to the municipality so that the regulations which the city imposes may be con-

formed to. And as we do not think the provisions of the school law invoked by appellant constitute a general law relieving it from compliance with the building regulations of the city of Pasadena, it was required to submit itself to and be governed by them.

So much for the view of the court upon the somewhat unusual question involved in this case.

It is manifest that from the decisions of the California court upon this subject it is impossible to draw any very satisfactory conclusions. The complicated combination of control over matters pertaining to education by state law and charter provision has gone on for many years with the occasional judicial controversies noted. It is doubtless in practice and in fact no more complicated a scheme of control than that which prevails in many a state in which there can be no constitutional question about the supremacy of state control. But to those who have affection for the accuracy and definiteness of legal principles it must appear that the law is in a woeful state of unsatisfaction; and it must appear also that should home rule cities attempt to overstep at numerous possible points the line of conventional and customary control, the courts would be compelled to take a more definite and understandable position.

It may be remarked in conclusion that certain specified powers over matters pertaining to education have been conferred upon the cities of California under freeholders' charters; but these will be discussed in a later and what seems to be a more appropriate connection.[1]

Is the Control of Privately Owned Public Utilities a Municipal Affair?

In 1901 the city of Pasadena became organized under a freeholders' charter. This charter apparently vested in the legislative authorities of the city full control over its streets and highways including the right to determine what portions thereof should be occupied by telegraph and telephone poles and wires.[2]

[1] *Infra*, 371.

[2] On this point see *infra*, 345 ff.

In 1905 the legislature reënacted a section of the Civil Code which declared that "telegraph and telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, . . . and may erect poles, posts, piers, or abutments for supporting the insulators, wires, or other necessary fixtures of their lines, in such manner and at such points as not to incommode the public uses of the road or highway." Subsequent to the reënactment of this section an ordinance was passed in Pasadena which made it unlawful to erect or maintain telegraph or telephone poles in the streets for use in "doing local or intrastate business without a franchise or privilege therefor from the city." In the case of the Sunset Telephone & Telegraph Co. *v.* Pasadena [1] the question was raised whether or not the regulation of telegraph and telephone poles in a city under a freeholders' charter was a municipal affair and as such not "subject to and controlled by" a general law of the state upon the subject. After a somewhat lengthy disquisition upon certain matters unrelated to the point that is of interest in this connection, the court declared as follows:

> Are the matters referred to "municipal affairs" within the meaning of those words as they are used in section 6 of article XI of the constitution? There has been much discussion in our decisions as to what matters are embraced in this term, and it has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term "municipal affairs" and its scope. But we can see very little reason in the argument that the question whether and to what extent the streets of a municipality shall be subjected to such secondary uses as the maintenance therein of telegraph and telephone wires, the primary purpose for which highways are established being the convenience of public travel, and such secondary uses permanently excluding the public from using for such purpose the portions occupied for such uses, is not a municipal affair. If the provisions of not only the many freeholders' charters of this state but also those of the General Municipal Corporation Act and other statutes are to be given any effect in the consideration of this question, they demonstrate the existence of practically a universal idea that such matters are principally of local concern, and should be within the exclusive control of the municipality. Even in the case of the ordinary commercial railroad, we find legislative recognition of the fact that the question, whether such a railroad should be allowed to occupy for its tracks any street, alley or highway

[1] 161 Cal. 265. 1911.

within a municipality, is one of such concern to such municipality that its consent should be a prerequisite. . . . As said by learned counsel for the defendants, "the legislature has consistently recognized and treated the control of municipal streets by municipalities as a local or municipal affair as distinguished from a state affair." It is unquestioned that the opening, widening, and vacating the streets of a municipality is purely a municipal affair. (See Byrne *v.* Drain, 127 Cal. 663, 667.) It would seem to be equally true that the question to what extent and upon what terms the primary use of these streets, which are constructed and maintained by the people of the city for use in common by the public for purposes of travel, shall be subject to secondary uses completely excluding any use at all by the traveling public of the portions devoted to such secondary use, is also a municipal affair, within the meaning of our constitutional provision. . . .

In the face of the long usage in such matters, by virtue of which this power has so frequently been regarded as one appropriate for a municipality to possess, it would be difficult to find warrant for the conclusion that, although such power is in terms conferred by a charter, it is nevertheless not a municipal affair within the meaning of the constitution. That any citizen in the state may be interested in the maintenance and operation of a telephone system in the city of Pasadena, to the extent that he may desire "the quick and ready communication afforded by the telephone" with some resident thereof, is doubtless true, but we do not see that this affects the question whether the extent to which portions of the streets of Pasadena may be exclusively occupied by telegraph and telephone companies is a municipal affair. It may, however, be suggested that no persons can be more interested in having the quickest and most efficient method of communication available between Pasadena and the rest of the state than the people of Pasadena themselves, and it is not likely that any municipality will insist upon such arbitrary and unreasonable conditions in the matter of the use of its streets, as will result in cutting it off from such method of communication.

The matters referred to being "municipal affairs" within the meaning of our constitutional provision, the charter provisions vesting control in the city of Pasadena are not subject to general laws, and the reënactment of section 536 of the Civil Code in 1905, by which certain rights in the public highways were granted to telephone companies, conferred no right upon the plaintiff so far as the streets of Pasadena were concerned.

It will be observed that the "matters" that were here held to be municipal affairs were the conditions under which a public service corporation might make peculiar uses of the public streets. The city demanded a local franchise where the state law apparently

conferred a right without such franchise. The court did not discuss the nature or extent of the franchise required by the city. It may have been a simple grant regulating the manner in which the streets might be occupied or an elaborate contract containing detailed provisions in respect to rates, service, compensation to the city, and the conduct of the business of the corporation. Whether it was the one or the other does not appear. But it would seem that under the unguarded doctrine of the case the right of the city to exercise control over public utility corporations in a manner contrary to the requirements of state laws was fairly implied.

The Los Angeles charter of 1889 contained few provisions on the subject of public utility control [1] until an amendment of 1905 [2] enumerated certain provisions that every franchise must contain. An amendment of 1911 created a public utilities commission endowed with elaborate powers of supervision.[3] In the City of Los Angeles *v.* Davidson [4] question was raised as to whether a street railway franchise "struck off, sold, and awarded" to a person by the council was or was not void under the provisions of a state law of 1901, as amended in 1903, which required that franchises should be granted only "by ordinance." The city charter provided that ordinances should be approved by the mayor (which was not done in this instance) and the court declared that "the amendment of 1901 by the act of 1903 must be construed in connection with the provisions of the charter;" and so construed it was held that "the franchise here in question should finally pass from the sovereign to the individual only by an ordinance approved by the mayor."

Again in the case of the Los Angeles Railway Co. *v.* Los Angeles,[5] a state law [6] was construed and applied to determine the question whether a franchise granted by the city had been forfeited by reason of the failure of the company to complete the work of construction within the time prescribed in the franchise contract.

[1] In the original charter, see Art. III, sec. 31.
[2] Art. I, sec. 25, as amended in 1911, secs. 40, 41.
[3] Art. XV.
[4] 150 Cal. 59. 1906.
[5] 152 Cal. 242. 1907.
[6] Civil Code, sec. 502.

It may not be inappropriate to call attention once more to the curious fact that the constitution (article eleven, section six) very clearly declared that not only the "charters thereof" but also "cities and towns heretofore or hereafter organized" should be "subject to and controlled by general laws *except* in municipal affairs." Los Angeles was certainly a city heretofore as well as hereafter organized. Its freeholders' charter had not expressly adopted the state laws relating to public utilities. And in consequence this question may not unreasonably be asked: If the regulation of public service corporations was a municipal affair, of what pertinence were the state laws upon this subject, since they could not subject the city of Los Angeles to their control? In other words, should it not have been declared that the state laws had no applicableness and that the city itself was culpably negligent in having failed to provide for the regulation of utilities through the medium of its own charter in view of the fact that such regulation was a municipal affair? This would seem to have been the logical and reasonable interpretation of the constitutional provision under review. But it is an interpretation which appears to have occurred neither to the court nor to counsel, so far at least as the record of these cases discloses.

More than this, however, in the course of the opinion handed down in the case last mentioned, the court made one declaration which completely unsettled the whole question of the relation between state laws and charter provisions relating to the matter of public utility control. It was expressly declared that "the city in granting a street railway franchise is but an agency of the state, and if there were conflict between the ordinance containing the grant and the general laws of the state, the *latter would govern.*" This declaration was doubtless not essential to the decision of the case since it was found that the ordinance was in complete compliance with the requirements of the law. But it raises the whole question as to whether the control of public utilities is a state or a municipal affair; and it appears to say that this is a state affair. This is apparently in absolute conflict with the decision of the Sunset Telephone & Telegraph case, unless it was intended by that

case merely to assert that the control over the uses of streets by a public service corporation was a municipal affair. In view of the fact, however, that the control of the uses of streets cannot possibly be separated from the *general* control over utilities (seeing that one of the primary reasons for such general control arises out of the peculiar uses that are made of the public highways), it is manifest that this is an infinitesimal line of distinction.

The pronouncement of the court in the Los Angeles Railway case is the last word in California upon this subject of conflict between state laws and charter provisions. In the absence of more specific determination it may perhaps be taken to mean that the state legislature might, if it chose, occupy the entire field of governmental regulation and control over municipal public utilities (except as to the fixing of rates for certain utilities [1] and except as to the matter of municipal ownership [2]), and that some of the provisions relating to such utilities which are in fact found in the charters of numerous California cities are of legal validity simply and solely because the legislature in its grace has not seen fit to preëmpt the field of possible control.

Is the Regulation of Matters pertaining to the Removal of City Officers a Municipal Affair?

In 1897 application was made to the supreme court of California for a writ of prohibition directing the board of trustees of the City of Sacramento not to place upon trial before them the superintendent of streets upon charges of incompetency, neglect of duty, and violation of charter provisions prohibiting a city official from being interested in municipal contracts. The freeholders' charter of the city authorized such an administrative trial and provided that an official found to be interested in municipal contracts should forfeit his office and be forever disquailfied from holding any position in the city service.

In the case of Croly *v.* City of Sacramento [3] it was contended, among other things, that the charter provision authorizing such

[1] *Infra*, 345 ff. [2] *Infra*, 355 ff. [3] 119 Cal. 229. 1897.

trial was void because the Penal Code of the state provided for the trial of civil officials for the offenses in question. The latter point, however, which clearly raised the question of conflict between state law and charter provisions was not clearly discussed by the court in the opinion that was rendered. The argument turned rather upon a consideration, without regard to any question of conflicting state law, of whether the city enjoyed the power under a freeholders' charter of providing for the removal and punishment of officers found guilty of the enumerated offenses. It is probable, in any case, that the municipal affairs amendment would not have been applicable, since the laws in question antedated the charter of Sacramento.

In Coffey *v.* Superior Court[1] there was involved the question of the authority of a state tribunal to try the chief of police of Sacramento who had been indicted by the grand jury "for wilful and corrupt misconduct in office" based upon his failure to suppress gambling. A provision in the Penal Code of the state conferred jurisdiction upon the superior courts to entertain proceedings for the removal of municipal officers. The freeholders' charter of the city contained different provisions upon this subject. It was contended that the charter requirement superseded that of the Code and that the removal of municipal officers was a municipal affair that could not be controlled by general laws. It was held, however, that the charter did not purport to confer *exclusive* jurisdiction upon the municipal authority vested with the power to make removals. "It is not at all unusual," said the court, "for different tribunals to have concurrent jurisdiction over the same subject-matter, the same parties, and be empowered to grant the same relief, and, in our judgment, that is the condition here." There was in consequence no inconsistency between the provisions of the charter and those of the law. It was asserted, nevertheless, in this connection that "the provisions of the Penal Code constitute a general law applicable to all municipal corporations, whether created by freeholders' charter, existing under special charter granted prior to the adoption of the present constitution,

[1] 147 Cal. 525. 1905.

or organized under the general municipal act." Whether the court intended by this to declare that any and every provision of the Penal Code was applicable to all cities regardless of any conflict it is difficult to say. The point was in fact directly and intentionally left unsettled, for the opinion recited:

> Whether the removal of the petitioner is or is not a "municipal affair" has been largely discussed by counsel on both sides, but we do not perceive that the solution of that question is germane to the case. The general law which confers jurisdiction on the superior court to entertain proceedings for the removal of municipal officers does not thereby render the charter provision conferring similar jurisdiction on the board of trustees "subject to and controlled by" the general law. To be "subject to" is "to become subservient to" or "subordinate to," and to control is defined as "to exercise a directing, restraining, or governing influence over; to direct, to counteract, to regulate." (Century Dictionary.)
>
> The general law does not have this effect. That law, conceding that the removal of municipal officers is purely a "municipal affair," does not assume to subordinate or make subservient the jurisdiction conferred on the trustees by the charter to remove delinquent officers, or to control, govern, direct, or regulate it. The jurisdiction under the charter is exercised untrammeled, unrestrained, and uncontrolled by the fact that jurisdiction on the subject is also conferred on the superior court under the general law. The jurisdiction of both is consistent and concurrent.

It was not, therefore, specifically declared that the removal of municipal officers was a municipal affair which would not be subject to general law in the event that actual conflict had existed between the law and the charter.

Of somewhat the same purport was the case of McKannay *v.* Horton,[1] which involved the validity of the removal of Eugene E. Schmitz from the office of mayor of San Francisco after the notorious Reuff-Schmitz scandal of 1906–07. Although convicted of a felony, the crime of extortion, Schmitz still attempted to exercise the powers of his office from the county jail in which he was imprisoned. Both the charter and the Political Code provided that such an office became vacant upon the conviction of its incumbent of a felony. The court held that the conviction of Schmitz had operated to vacate the office of mayor; but it was

[1] 151 Cal. 711. 1907.

not indicated whether this resulted from the provision of the charter or that of the law.[1]

In 1906 — and therefore after the development of the circumstances that gave rise to the Coffey and the McKannay cases — a constitutional amendment was adopted which added a proviso to section sixteen of article twenty, a section that related generally to terms of office. This proviso declared:

> That in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control.

In Craig *v.* Superior Court[2] application was made for a writ of prohibition directing the lower court not to proceed to the trial of a captain of police of the city of Stockton upon an accusation presented by a grand jury under provisions of the Penal Code relating to the removal of municipal and other officers for misconduct in office. The court granted the writ prayed for and in doing so expressed the following opinion:

> There can be no serious question that the object of this constitutional provision was to make it clear that provisions of a freeholders' charter should control in the matter of the dismissal of any officer or employee of a municipality, and it was very properly recognized in the opinion of the learned district court in this proceeding that such provisions "would not control" if such officer or employee can be removed by the superior court under the sections of the Penal Code heretofore referred to, where the charter provisions contemplate that the whole matter of removals shall

[1] Angellotti, J., in whose opinion two other judges concurred, added to what was said in the opinion sanctioned by the majority: "I deem it proper to add that I am satisfied that the effect of the *charter* provision . . . was to create a vacancy in the office. . . . There can be of course no question as to the power of the people of the city and county of San Francisco to make such provision in their charter as to purely municipal offices. As is shown in the opinion of the chief justice, the provision for the ouster of the incumbent in the contingency named is in no degree by way of punishment for any offense alleged to have been committed by him, but is solely for the purpose of securing an efficient, orderly, and decent discharge of the office, which doubtless it was deemed could not be had during the incumbency of one under a verdict of conviction of felony."

[2] 157 Cal. 481. 1910.

be in the hands of the appropriate municipal authority. The question is then whether the charter provisions of the city of Stockton do so contemplate.

Having examined these charter provisions the court found that, unlike the provisions of the Sacramento charter under review in the Coffey case, they did contemplate exclusiveness in respect to the manner in which removals might be made.[1]

Several conclusions may be drawn from the above review of cases upon this subject. In the first place, prior to the constitutional amendment of 1906 the court never had occasion to declare whether the regulation of matters pertaining to the removal of municipal officers was or was not a municipal affair within the meaning of the amendment of 1896. This resulted from the fact that in the cases that arose there was, in the opinion of the court, no actual conflict between state law and charter provision. In the second place, it would seem that by its literal terms the amendment of 1906 would render state laws inapplicable only when there were charter provisions upon this subject. In the absence of such provisions the state law would apply;[2] but this is a rule which, as we have seen, has in effect been held to be governing as to municipal affairs even in the absence of any specific constitutional provision. Moreover, the examination which the court made in the Craig case to ascertain whether the charter provisions contemplated *exclusive* control in the matter should doubtless be taken to mean that this element of exclusiveness must be found to exist before it could be held that the state law did not have even concurrent applicableness. In other words, had the Coffey case been decided after the amendment of 1906 the decision would have been the same, because in the opinion of the court the provisions of the charter in question did not contemplate exclusiveness. Whether or not this was a justifiable interpretation to put upon the amendment is an open question. The amendment declared that the charter provisions with reference to dismissal "shall control." It did not declare that such provisions *if exclusive* shall control;

[1] See also Dinan v. Superior Court, 6 Cal. App. 217. 1907.

[2] *Supra*, 316.

nor yet that such provisions, no matter what their contemplation, shall control *exclusively*. But when it is considered that the amendment was in all probability prompted by the decision of the court in the Coffey case, it is perhaps not unreasonable to believe that those who drafted it intended to provide that where a municipal charter contained provisions regulating the matter of the removal of corporate officers, removals might be made only under such provisions and not at all under state law, even though the latter could be construed merely to run current with the charter requirements.

In the third place, it is important to note that neither the amendment of 1906 nor the Craig case decided under it is authority for the view that municipal officers were rendered immune from trial by the courts of the state for any and all offenses for which punishment was provided in the Penal Code. Certain sections of that code provided for the trial of officials which, upon conviction, could result *only* in an order of removal from office and not in a sentence imposing fine, imprisonment, or other punishment. These were the sections which might be superseded by the provisions of freeholders' charters. Where other punishment was provided the general law unquestionably remained applicable. Moreover, it is highly questionable, as will be noted later,[1] whether a freeholders' charter *could* provide any punishment for official misconduct or negligence beyond removal from office.

Is the Manner in which the "Legislative Power" of a City shall be exercised a Municipal Affair?

In the case of *In re* Pfahler,[2] already mentioned above, where question was raised as to the validity of the initiative and referendum provisions of the freeholders' charter of Los Angeles, one of the contentions asserted was that these provisions were in conflict with the general laws of the state. On this point the court declared:

"It is earnestly urged that the initiative provision of the charter is inconsistent with the form of municipal government prescribed by title

[1] *Infra*, 365. [2] 150 Cal. 71 (1906); *supra*, 210.

III of part IV of the Political Code (sec. 4354 *et seq.*). These sections constituted part of the original code, and provided a general form of government for cities. By section 4355, the legislative power of the city is vested in a common council. It is said that this is a general law with which the provisions of freeholders' charters must be consistent. As to municipal affairs, it is sufficient if the provisions of a charter are consistent with the constitution. As we have shown the method of exercising the legislative power of a municipality is a municipal affair."

It seems unnecessary to comment upon this expression of opinion, for the contrary contention urged by counsel was manifestly absurd.

The "Municipal Affairs" Amendment as reamended in 1914

At the general election held in November, 1914 an amendment was adopted which rewrote section six of article eleven as follows:

Corporations for municipal purposes shall not be created by special laws; but the legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed; and the legislature may, by general laws, provide for the performance by county officers of certain of the municipal functions of cities and towns so incorporated, whenever a majority of the electors of any such city or town voting at a general or special election shall so determine. Cities and towns heretofore organized or incorporated may become organized under the general laws passed for that purpose, whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith. Cities and towns hereafter organized under charters framed and adopted by authority of this constitution are hereby empowered, and cities and towns heretofore organized by authority of this constitution may amend their charters in the manner authorized by this constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. Cities and towns heretofore or hereafter organized by authority of this constitution may, by charter provision or amendment, provide for the performance by county officers of certain of their municipal functions, whenever the discharge of such municipal functions by county officers is authorized by general laws or by the provisions of a county charter framed and adopted by authority of this constitution.

Apart from the clauses of this amendment which deal with the subject of city-county relations,[1] it is not easy to comprehend the motives which prompted the rephrasing of this section. It had in effect been held, as we have seen,[2] that as the provision stood, a general law even though it related to a municipal affair would apply to a city operating under a freeholders' charter whenever that charter was silent in respect to the subject of the law. This rule, it is true, was obviously not derived from a literal construction of the provision which declared that "cities," as well as "charters," should in municipal affairs be exempt from the control of general laws. It was nevertheless a rule and a very useful rule. It was what the constitution should have declared. But be that as it may, the cities of the state were certainly enjoying the benefit of the rule in question, for general laws were in practice applied in home rule cities in a considerable number of instances in which charters failed to cover this or that subject.

Now note the wording of the new pronouncement: "Cities . . . are hereby empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, subject *only* to the restrictions and limitations provided in their several charters, and *in respect to other matters* [only?] they shall be subject to and controlled by general laws." Does this mean that cities shall hereafter not be subject to general laws when their charters are silent or incomplete as to a particular municipal affair? If so, many cities of the state will be immediately compelled to supplement their existing charters by amendments. If not, it is not easy to see how the new phraseology changes the law at all; for cities already enjoyed, under the authority to frame charters for their own government, the power to "make and enforce all laws and regulations in respect to municipal affairs." The specific reference to the power to "amend their charters" indicates perhaps that it was in the minds of those who drafted the provision that it would give rise to the necessity for amendments; but whether or not this provision means that cities will no longer, even if their charters be silent upon this or that municipal affair, be subject to

[1] *Infra*, 386, 393, 394. [2] *Supra*, 252, 253, 264, 284, 312.

general laws upon the subject is a question for the courts to decide. Certainly no additional power was by this change conferred upon the city, for under the old wording any city could occupy the entire field of municipal affairs to whatever extent it chose. By the old wording of the section all "cities" and all "charters" were exempted from the control of state laws in municipal affairs. Under the new wording it is not clear whether it is "cities" that are "subject only to the restrictions" of "their several charters," or whether it is "laws and regulations in respect to municipal affairs" that are "subject only" to such restrictions. If the latter meaning prevails then the provision is much narrower as to the exemption of cities than formerly, for there are many charter provisions which might not be included in the category of "laws and regulations." However, here again is a problem for the courts.

Indeed, from whatever angle the amendment of 1914 be viewed, it would seem that its net result was to supply new and wholly unnecessary agony for the courts and possibly also to furnish a whip to compel every city of the state to live up to the utmost limit of its charter-making powers.

CHAPTER X

HOME RULE IN CALIFORNIA — THE POWERS OF THE CITY

REGARDLESS of any question of conflict between state laws and the provisions of freeholders' charters, what is the limit to the powers which a city may draw unto itself under the authority granted to frame a charter for its "own government"?

Is the Exercise of the Police Power included in the Grant of Power to frame a Charter?

Reference has been made in a preceding chapter[1] to the fact that it has been intimated by the California courts that the relation between state laws enacted under the police power and the police ordinances of home rule cities is precisely the same as the usual relation existing between state laws of this character and municipal ordinances passed by a city operating under a legislative charter. If there is absolute conflict between the two the state law controls; but there is nothing to prevent the usual concurrent regulation of the same subjects by statutes and ordinances.

It would have been too absurd for imagining had the California courts declared that the power to frame a charter for the city's own government did not include the power to enact police ordinances. A city not endowed with such power would surely be a strange anomaly. Nobody has ever thought to make such a contention before the courts either in California or in any other state that has conferred home rule powers upon cities. Whether or not the framers of the constitution of 1879 thought that some question

[1] *Supra*, 256, 292.

might be raised in regard to this matter does not appear; but assuredly all uncertainty was dissolved by the incorporation of a provision which declared as follows:[1]

> Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

What did this declaration as written into the fundamental law mean? It did not refer specifically to cities under freeholders' charters, San Francisco being the only city within the immediate contemplation of those who in drafting the constitution originally restricted the exercise of home rule powers to cities of more than 100,000 inhabitants. All other cities, and San Francisco as well, if it failed to adopt a charter of its own, were under charters which, while granting police powers, made a specific enumeration of such powers. Did the provision mean that these cities were at one stroke of the constitutional pen emancipated from this enumeration of powers, that they might thereafter, regardless of charter specifications, exercise any power that might be gathered under the expansive wings of the term "police"? And did it mean that any city framing its own charter was absolved from the necessity — indeed was pointed to the folly — of enumerating the police powers which its legislative body might exercise? In other words, could the legislative body of any city, home rule or otherwise, look to this broad grant of authority to enact police ordinances and ignore the restrictive enumeration of the local charter? It is interesting to review the decisions of the California court upon this subject.

In the early case of *Ex parte* Casinello[2] the court held it to be very clear that authority to pass an ordinance prohibiting the deposit of rubbish in the streets was vested in the board of supervisors of San Francisco by its charter; "but if there were any room for doubt, the clause in the constitution (section 11 of article XI) is too plain to admit of more than one construction." By this clause "we have authority clearly and expressly conferred

[1] Art. XI, sec. 11.

[2] 62 Cal. 538. 1881.

by the organic law of the state, and that it is wisely conferred will admit of no doubt." Here then was a clear intimation that if the charter were found lacking, the general grant of the constitution supplied all deficiencies.

Again in the early case of *In re* Stuart [1] it was held not only that power to enact a liquor license ordinance was conferred by the charter of San Francisco but also that "ample authority to enact this order is found in the eleventh section of Article XI of the constitution." Did this imply that the constitution conferred "ample authority" *directly*, even if the charter did not; or was the court here merely accumulating authorities?

Following the decision of these cases the supreme court of California sustained numerous police ordinances of cities either by joint reference to the charter and to the constitutional provision under review or by sole reference to the constitutional grant of power.[2] As an instance of a case in which decision was reached by reference only to the constitutional provision, it being claimed the city had no power to enact the ordinance in question under the terms of its charter, the following expression of opinion as delivered in the case of *Ex parte* Campbell [3] may be noted:

> Prior to the adoption of the constitution of 1879, the local authorities possessed only such powers as were expressly or by necessary implication conferred upon them by their charters. It is now provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Const., Art. XI, sec. 11) Under this provision, every county, city, town, or township may adopt and enforce such constitutional police regulations as are not in conflict with general laws. It

[1] 61 Cal. 374. 1882.

[2] *Ex parte* Moynier, 65 Cal. 33 (1884); *Ex parte* Wolters, 65 Cal. 269 (1884); *Ex parte* Mount, 66 Cal. 448 (1885); *Ex parte* White, 67 Cal. 102 (1885), In the Matter of Yick Wo, 68 Cal 294 (1885); *In re* Guerrero, 69 Cal. 88 (1886); *In re* Hang Kie, 69 Cal. 149 (1886); *Ex parte* McNally, 73 Cal. 632 (1887); *Ex parte* Campbell, 74 Cal. 20 (1887); *Ex parte* Cheney, 90 Cal. 617 (1891), *Ex parte* Tuttle, 91 Cal. 589 (1891); *Ex parte* Sing Lee, 96 Cal. 354 (1892); *Ex parte* Hayes, 98 Cal. 555 (1893); *Ex parte* Lacey, 108 Cal. 326 (1895); *Ex parte* McClain, 134 Cal. 110 (1901), Dobbins *v.* City of Los Angeles, 139 Cal 179 (1903); *In re* Smith, 143 Cal. 368 (1904); *In re* Zhizhuzza, 147 Cal. 328 (1905).

[3] 74 Cal. 20. 1887.

has the same power over its own local police and sanitary affairs as were formerly granted by the legislature, and unless the exercise thereof will conflict with the operation of general laws, it may make and enforce the same through its local government.

It is true that in the case of *Ex parte* Lorenzen,[1] decided in 1900, the court, as apparent justification for applying the well-known rule of reasonableness to the case of a municipal police ordinance that was ultimately sustained, made the broad declaration that the section of the constitution in question was "not to be construed as enlarging the powers which municipalities theretofore enjoyed." It was "merely an express grant of a power which formerly they possessed by implication." In the face of the considerable number of cases in which the courts sustained police ordinances by direct reference to the constitution where the charter lacked in comprehensiveness of grant, this assertion was wholly out of harmony with the general doctrine elsewhere applied, unless, indeed, it may be said that California courts had "theretofore" been far more liberal in construing the implied powers of cities than have the courts of other states. This does not appear to have been a fact; and the declaration of the Lorenzen case, which in effect held that the constitutional provision upon this subject was entirely useless, must be regarded as a slip of utterance. At any rate, it seems never to have been reiterated.

Emboldened by the fact that the courts had in the main expressed very liberal views concerning the scope of the powers conferred by section eleven, San Francisco, having been frustrated at the polls in its several attempts to secure an entirely new charter, determined in 1889 to try out the possibilities of this section. If the provision in question authorized cities to exercise police powers not expressly or impliedly conferred by their charters, why could they not also exercise police powers in *violation* of such charters? If, in other words, the time-honored canons of charter construction, as laid down in the oft-quoted words of Judge Dillon, were by this provision abrogated so far as police powers were concerned, why could not the city go one step further and rely upon

[1] 128 Cal. 431. 1900.

the direct constitutional grant for authority to ignore its charter entirely in the exercise of "local, police, sanitary, and other regulations"?

Acting upon this theory of its competence the board of supervisors enacted an ordinance which reorganized the fire department of the city in a manner that differed from that prescribed by the charter. Answering the contention that this ordinance ought to be sustained under the general and direct grant of power contained in section eleven, the court declared in the case of the People *ex rel.* Wilshire *v.* Newman:[1]

> This delegation of power to make police regulations is authority to make only such regulations as are usual and necessary in the government of municipalities under their respective charters. . . . The provision of the constitution referred to was not intended to clothe the board of supervisors with the power to annul a constitutional part of the charter itself, or to overthrow one of the municipal departments. The power conferred by it is not vested in any particular branch of the municipal government, but in the whole municipality. The government of the city and county of San Francisco is distributed into different departments. The board of supervisors represents one of these departments and the board of fire commissioners represents another department. The board of supervisors has no more authority to reorganize the board of fire commissioners than the latter has to reorganize the board of supervisors. The same power that established one board established the other, and one is just as essential and important a part of the municipal government as the other. The regulations provided for by section 11 of Article XI are such as are in accordance with the fundamental organic law. This must be so; otherwise the board of supervisors could completely revolutionize the entire city government under a grant of power to make "such local, police, sanitary, and other regulations as are not in conflict with general laws," — in effect, make a municipal charter by ordinance, and change the same as often as it desired.

It will be observed that the court intimated at the outset of the remarks above quoted that it was doubtful whether the ordinance under review was among the "usual and necessary" police regulations of a municipality. But unless greater weight is to be attached to this part of the opinion than seems justified when the

[1] 96 Cal. 605. 1892.

opinion as a whole is read, it is impossible to reconcile this case with that of Foster *v.* Board of Police Commissioners [1] decided two years later.

The legislature in 1878 enacted a law governing the issuance of liquor licenses in San Francisco. This law was patently a part of the charter of the "city and county." In 1893 the city passed an ordinance on this subject which was in clear conflict with the law in question. It was contended that under the doctrine of the Newman case the city was powerless to enact a police ordinance that violated a provision of its charter. The court answered:

> It may be conceded that the constitution of 1879 did not repeal the act of 1878, but the act in question was purely local, applicable only to the city and county of San Francisco, and was upon a subject included within section 11 of Article XI of the constitution. . . .
>
> The power to legislate upon such subjects, thus given to the city, necessarily includes the power to amend an existing regulation upon the same subject; and this authority expressly given in the constitution obviates all necessity of any authority being given upon the same subject in the charter.

It seems almost unnecessary to point out that the argument here advanced by the court could have been applied with equal force in the Newman case. The provision of the charter which was violated by the ordinance reorganizing the fire department was also "purely local, applicable only to the city and county of San Francisco." And while it may have been true — and certainly was true under the doctrine of numerous adjudications of the court — that "the authority expressly given in the constitution obviates the necessity of any authority being given upon the same subject in the charter," this was a point that had no bearing upon the issue at bar. Whether the necessity was obviated or not, the charter did in fact contain a provision regulating the issuance of liquor licenses just as it contained a provision organizing the fire department. In the one case, however, the ordinance was void because it annulled "a constituent part of the charter itself," while in the other case it was valid even though it did annul a charter regulation.

[1] 102 Cal 483. 1894.

In fundamental principle there was obviously no distinction between the two cases. Such difference as existed was a matter purely of the degree to which the charter provisions were sought to be overridden.

Moreover, it is worthy of note in passing that the point which was emphasized in the Newman case to the effect that section eleven of the constitution did not confer police powers upon the municipal council or any other "branch" of the government but upon the "whole municipality," was a point which, however well taken under the terms of the provision, could have been raised to defeat the logic of the entire series of decisions which sustained the doctrine that since the constitution conferred the police power directly, no specific charter grant was necessary. A city can act only through the duly constituted branches of its government. There is usually a primary "legislative" branch. In all of the decisions in which this doctrine was applied the court clearly assumed that this legislative branch was the city. Yet every one knows that in many cities even the so-called legislative functions of the corporation are divided. Thus a health board may be given exclusive charter authority to enact health ordinances. These are certainly police regulations. By what reasoning, therefore, did the court justify its assumption that the city council or other primary legislative body was the "city" within the meaning of the constitutional provision that conferred upon *cities* the power to make and enforce regulations? [1]

In Odd Fellows Cemetery Association *v.* San Francisco,[2] a case already mentioned in another connection, the inconsistency of the views which had been expressed upon this subject were evidently brought to the attention of the court. For in that case, in discussing the source of the city's power to enact a police ordinance prohibiting any further burials in the city, the court said:

> The ordinance in question was manifestly passed in the exercise of the police power given to the city and county by the Constitution. Article XI (sec. 11) provides that "any county, city, town, or township may

[1] For the opinion of the Ohio supreme court on this point, see *infra*, Ch. XVII.

[2] 140 Cal. 226 (1903); *supra*, 292

make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The city charter provides (subdivision 1, sec. 1, chap. 2, Art. II) that "The board of supervisors shall have power: 1. To ordain, make, and enforce within the limits of the city and county all necessary local, police, sanitary, and other laws and regulations." The insertion of the word "necessary" in the grant of power contained in the charter does not limit or restrict the power given to the city by the constitution. The city charter in municipal affairs is paramount to general laws, but it cannot be superior to the constitution itself, and nothing contained in such charter can in any way affect a grant of power conferred by the constitution. All the legislative power of the city is by the charter vested in the board of supervisors. (Art. II, chap. 1, sec. 1.) By virtue of this clause, the constitutional grant of the police powers of the state to the city goes directly to and rests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state, subject only to the control of general laws.

Here then was an apparent restatement of the doctrine of the Foster case to the effect that a charter provision on the subject of the police power could not affect the general grant of such power made by the constitution. But in the same breath it was asserted that the reason why the constitutional grant to the city went directly to the board of supervisors — a governmental branch of the city — was because the *charter* conferred all the legislative power of the city upon the board. In other words, it was the charter which must designate the organ of government that might exercise the power given to the city by the constitution; but nothing contained in this same charter could "in any way affect" the grant of power. If this be logic it is assuredly refined to the last degree.

This Odd Fellows Cemetery case was discussed *arguendo* in the case of *In re* Pfahler,[1] where one of the contentions made against the validity of the initiative and referendum provision of the Los Angeles charter was that the court had declared that the direct grant of police powers by the constitution could not be affected by a charter provision. The court attempted, with small success, to clear up the nebulous reasoning of the Odd Fellows Cemetery

[1] 150 Cal 71 (1906), *supra*, 210, 318

case. But it was declared — and this was obviously true and was all that was necessary to the decision of this point in the Pfahler case — that that case was direct "authority upon the proposition that the legislative power of a city operating under a freeholders' charter is just where it is placed by the charter."

In John Rapp & Son *v.* Kiel[1] it was held that an ordinance of San Francisco imposing a license tax "for the purpose of regulation" on persons selling liquors "in quantities of more than one quart" was void as being in conflict with a charter provision conferring power to levy such taxes only on persons selling "in less quantity than one quart." The opinion rendered in this case was devoted chiefly to showing that in the California decisions no difference had been made between a "license tax" for revenue and a "license fee or charge" for regulation. But upon the point that the charter provision could not affect the power of the legislative body of the city to exercise the direct constitutional grant of the police power, the court said:

> It cannot now be doubted that the legislative body of a city having a freeholders' charter may be limited by charter provision in the exercise of the police power conferred upon the city by the constitution of the state. In this connection, it is only necessary to refer to the opinion in the case of *In re* Pfahler, 150 Cal. 71, 81, which we think answers every point made in this behalf by learned counsel for appellants. (See also People *ex rel.* Wilshire *v.* Newman, 96 Cal. 605.)

No mention was made of the wholly contrary decision of the Foster case, which concerned an ordinance and charter provision of almost identically the same character, nor of the apparent restatement of the doctrine of that case in the Odd Fellows Cemetery case.

In the same year in which the liberal opinion of the Foster case was handed down an extremely narrow decision was rendered in the case of Von Schmidt *v.* Widber,[2] where it was held that San Francisco had no charter authority to purchase property for a small-pox hospital and that such authority was not conferred by section eleven. "The 'regulations' which the board of supervisors" were

[1] 159 Cal. 702. 1911.

[2] 105 Cal. 151. 1894.

"thus authorized to make" were "rules of conduct to be observed by citizens" and could not "by any construction of language be held to include the purchase of real estate." Nor could "the power to make such purchase be implied from the authority to make regulations"

In view of the long-established fact that the only satisfactory method of "regulating" the "conduct of citizens" suffering from highly contagious diseases is the method of complete segregation from other municipal inhabitants under rigid quarantine, and in view of the further fact that such segregation imports the absolute necessity of having a hospital for its accomplishment, it would seem that the view taken by the court was open to the accusation of being a superficial quibble Presumably an ordinance imposing quarantine regulations upon the patient in his place of abode would have been sustained in the absence of charter competence under the direct constitutional grant, but an ordinance on the same subject which adopted a different means of quarantine was void because it involved the necessity of a purchase of property

The narrowness of view assumed in the Von Schmidt case may also be contrasted with the opinion expressed in the case of Scott *v* Boyle, where it was held that an ordinance providing for the appointment of sealers of weights and measures was "clearly valid as an exercise of that police power conferred on municipalities and counties by section eleven"[1] Why, however, by a parity of reasoning, might it not have been declared that the power to make and

[1] 164 Cal 321 (1912) Art XI sec 14 of the constitution prohibited the legislature from creating offices in any city for the inspection, measurement, or graduation of any merchandise etc but conferred power on cities to appoint such officers 'when authorized by general law A statute of 1911 authorized all counties and cities to appoint sealers of weights and measures The court held that this act could be sustained under section fourteen but if not then the ordinance for appointment could be upheld under section eleven

By an amendment to section fourteen adopted in 1911 the prohibition upon the legislature against the establishment of a state system of inspection was removed It was contended but denied by the court that this amendment repealed the statute of 1911 There is no statute providing such state system and we are therefore not called upon to determine what effect such statute might have upon a previously established local system"

enforce "regulations" could not "by any construction of language be held to include" the creation of offices?

Finally, as a late instance showing that the California court has not departed from its original view that this clause of the constitution conferred powers *in addition to* the powers conferred by either a legislative or a freeholders' charter, may be cited the case of *In re* Montgomery.[1] This case sustained a "zoning" ordinance of Los Angeles, which declared the entire city with the exception of seven designated "industrial districts" to be a "residential district" and prohibited the carrying on of certain kinds of business in this residential district, including among others the business of conducting a lumber yard. The charter of the city authorized such an ordinance, but in its enumeration of the kinds of business that might be excluded lumber yards were not named. The court held that the power to exclude lumber yards by the ordinance was referable to the constitution and not to the charter. It need not fall "merely because the city has specific authority under its charter to suppress certain kinds of business."

In spite of the elements of inconsistency that pervade some of the California cases upon this subject, it may doubtless be concluded that the following points are at least fairly established:

(1) That the direct grant of police powers to cities by section eleven of article eleven of the constitution operates to confer powers in addition to those enumerated in legislative or freeholders' charters. The corollary of this is that a charter enumeration of police powers is wholly superfluous — a corollary to which the home rule cities of the state have in practice given little heed.[2]

(2) That it is the local charter which must determine the specific organ or organs of government that may exercise these additional powers since the constitution confers them upon the "city" as such. (This point has been ignored in most of the cases.)

(3) That the city may not, in exercising powers referable to this constitutional grant, violate any provision of its charter. (One or two cases which have never been expressly overruled, support the

[1] 163 Cal. 457 (1912). The same ordinance was upheld against different contentions in *Ex parte* Quong Wo, 161 Cal 220 (1911). [2] *Supra*, 177.

contrary rule. Whether a city may by its charter wholly prohibit the exercise of the police power in this or that direction has not been determined.)

(4) That this power may extend only to the making of "regulations"; but what constitutes a regulation appears to vary with the temper and "point of view" of the court.

Has a City the Power to provide for the Separation or Annexation of Territory?

It will be recalled that in People *ex rel.* Connolly *v.* City of Coronado[1] it was held, under the general doctrine which was applied before 1896 in determining the supremacy of state laws over charter provisions, that a portion of the territory of San Diego was validly separated from the city under a general statute even though this action did operate to amend the freeholders' charter. It was unnecessary to decide at that time whether matters pertaining to the separation of territory were or were not municipal affairs.

People *ex rel.* Adams *v.* City of Oakland,[2] decided two years before the Coronado case, involved, in the view of the court at least, no question of conflict between state law and charter provision. In October, 1888 an election was held under the allowance of state law which ratified the annexation of certain territory to Oakland. A month later the voters of the city accepted a charter which had been drafted the previous spring. In its description of the boundaries of the city this charter naturally did not include the territory that was annexed subsequent to its drafting. The charter did not become a valid legal instrument until it was ratified by the legislature in February, 1889. The question was whether the charter, drafted before but legalized after the annexation, operated to separate the territory which was certainly validly included within the city from October, 1888 (the date of the annexation election), to February, 1889 (the date of the legislative approval of the charter). The court held that the description of the boundaries of a city is an essential part of its charter; that in this

[1] 100 Cal 571 (1893), *supra* 247 [2] 92 Cal 611. 1891.

instance the charter description did not include the territory annexed in October; and that in consequence this territory must be regarded as having been separated by the enactment of the charter.

This conclusion is manifestly open to some criticism. Under the doctrine of the Coronado case, decided later, territory could be validly separated under a general law even though the effect of such action was to amend the charter. Under the doctrine of the Oakland case the charter could separate territory from the city even though the effect of such action was to nullify an action taken under the general law. Here was no understandable logic. Charters were subject to and controlled by all laws of general application, regardless at this time of whether they related to matters of state or of municipal concern. Such a law was the statute regulating the separation and annexation of territory. How then could it be held that a freeholders' charter was subject to and controlled by a subsequent but not a previous action taken under such law? [1]

No case involving the separation of territory appears to have been adjudicated since the adoption of the municipal affairs amendment, the reason being doubtless that the separation of territory from a city is not a very common occurrence.[2] Neither of the above mentioned cases called for any discussion of whether an affair like this was of state or of local concern. As the rule still stands it must be said to hold that under the authority to frame a charter for its own government a city has the power to lop off territory from its existing jurisdiction. The improbability that such action would be a matter of common happening renders the inquiry as to what would in certain possible circumstances be the legal status of the territory thus thrown out of the city's doors a matter more of speculative interest than of practical importance.

It has already been noted [3] that in the cases involving conflicts between state laws and charter provisions on the subject of the annexation of territory, the California court more than once

[1] It may be noted that there was here no question of the charter's repealing the law, but merely of its nullification of an action taken under the law.

[2] Even the question of separation in the Oakland case, as is obvious, arose through no intention.

[3] *Supra*, 289 ff.

expressed the opinion that even in the absence of a controlling state law a freeholders' charter could not regulate this matter. Such expressions must doubtless be regarded as dicta in those cases, since a state law did in fact exist. In the case of the People *ex rel.* Scholler *v.* City of Long Beach[1] this point was, however, definitely decided without much if any reference to the general law. The city had attempted to annex certain territory, proceeding under the general law; but it was held that the election which was had upon the question of annexation was void because of illegal voting. Before this judgment had been rendered by the lower court the city framed a home rule charter and included in the description of its boundaries the territory which was thought to have been annexed. It was contended that the charter accomplished the annexation. The court held that the constitution gave the city power to frame a charter for its own government and not for the government of people outside the city. The subject of annexation could not be controlled at all by the charter. This was an unmistakable application of the rule to the effect that over this particular "state" affair freeholders' charters could exert no control whatever — not even if the state laws were silent in respect to the matter.

Has a City the Power to acquire Property for and to operate a Waterworks outside the City?

Somewhat related to the question of the authority of a city to exercise exterritorial jurisdiction in the annexation of territory is the question of the city's competence to acquire property for and to operate a public utility beyond its limits. This question has been raised in at least one case in California — the case of Fellows *v.* City of Los Angeles.[2] The issue actually involved in this case was whether the city, having purchased from a private company an existing waterworks situated beyond the boundaries of the city, could discontinue the operation of the plant and the furnishing of water to persons who were non-residents of the city

[1] 155 Cal 604 1909. [2] 151 Cal. 52. 1907.

but who had been accustomed to being supplied with water by the company. The charter of the city expressly conferred "power to acquire water and water rights within or without the city for the use of its inhabitants." Speaking to this provision of the charter, the court declared that "the acquirement of this water plant and the operation of the system, if necessary, were not beyond the power of the city, and for the purposes of this decision, we must presume that the necessity existed." It was held, nevertheless, that the city could not discontinue the operation of the plant and thus discommode non-residents who had been receiving service therefrom. Apparently it did not occur to the court that this was recognizing the right of the city to frame a charter for its own government which would have exterritorial operation. The power of the city in this regard was not even discussed.

In this case no question of the exercise of the power of eminent domain was raised, for the city had acquired the plant in question by purchase. There is no reason to presume, however, that the court would have held the city incompetent to exercise such power where it was essential to such an undertaking as the construction of a waterworks. Indeed it is perfectly clear that this power may be completely dissociated from the exercise of general governmental powers, since it is a power that is frequently conferred upon private persons and corporations. There appears to be no inherent reason why the city might not exercise this specific authority beyond its territorial jurisdiction somewhat in the same capacity as a private person. In plain point of fact the cities of California under freeholders' charters have in more than one instance exercised this power beyond their territorial limits, although apparent sanction for such action is found in the general laws of the state.[1]

By an amendment of 1911, as we shall see,[2] express power was conferred upon the cities of California to furnish public utility services to persons outside the municipal boundaries. But in the light of the decision of the Fellows case it is impossible to understand why such a specific grant of power was necessary.

[1] City of Santa Cruz v Enright, 95 Cal. 105 (1892) For views of the Washington court, see *infra*, 429 ff.

[2] *Infra*, 360.

Has the City the Power to exercise Complete Control over Street Improvements and Other Public Works?

It will be recalled that the supreme court of California has unequivocally declared that the regulation of matters pertaining to street improvements is a municipal affair and as such is not subject to the control of general laws.[1] Whether a city may under the authority to frame a charter for its own government include provisions relating to street improvements has never been seriously questioned; but there are a few cases in the books which touch upon certain phases of the city's powers in this regard.

Thus in the case of Gassner *v.* McCarthy[2] it was held, by a somewhat strict construction of the charter of San Francisco, that although the city was empowered "to construct or permit the construction of tunnels under such rules and regulations as the board may prescribe," yet the city was not empowered by its charter to create a special assessment district for such purpose and to impose the burden of expense upon adjacent property owners. In this decision there was no intimation whatever that the city, through the medium of its charter, could not exercise complete control in regard to such a matter as this. The decision of the case turned merely upon the fact that the charter had not conferred upon the board of supervisors power to construct tunnels in the particular manner that had been attempted.

Following the decision of this case the charter of San Francisco was amended in 1911 so as to confer the power which the court had held to be lacking. Among other provisions in respect to this matter the legislative body of the city was empowered to enact an ordinance providing the procedure that should be followed in assessing the cost of a tunnel improvement upon property owners. It was contended in the case of Mardis *v.* McCarthy[3] that this provision constituted "an unauthorized delegation of legislative power by the legislature of the state," the theory apparently being that the city in framing a charter took the place of the legislature of the state, and that if the legislature could not delegate

[1] *Supra*, 275. [2] 160 Cal. 82. 1911. [3] 162 Cal. 94 1912.

the authority to provide a method of procedure by which assessments should be made, neither could the city exercise such power of delegation. On this somewhat hair-splitting point the court declared:

> That the procedure for constructing tunnels, or making other street improvements, is so far a matter of local concern as to be properly included within the scope of a municipal charter is not questioned by the appellant. (See Byrne *v.* Drain, 127 Cal. 663.) And if the charter may define such procedure directly, we see no reason why it may not confer upon the legislative body of the municipality (in this instance, the board of supervisors) power to enact a mode of procedure by ordinance. The provisions of the ordinance adopted pursuant to the authorization of the charter have the same sanction and the same effect that they would have had if incorporated in the charter itself.

Two cases have come before the California courts involving, collaterally at least, the question as to whether the determination of the manner in which public works shall be constructed — whether, for example, by contract or by the direct employment of labor — is or is not a matter that may be controlled by the provisions of the freeholders' charter. In the case of Perry *v.* Los Angeles[1] bonds for certain public works had been issued under the terms of an act of the legislature, the charter of the city having adopted the general laws of the state governing such bond issues. This act, however, specifically provided "that nothing herein contained shall be construed as prohibiting the municipality itself from constructing or completing such works or improvement, and employing the labor necessary therefor." The charter of Los Angeles contained nothing that expressly authorized the construction of public works by the employment of laborers under direct city management. Also it contained nothing to prohibit construction in this manner. It was contended under these circumstances that the city lacked authority to undertake construction by the direct method.

There was manifestly in this case no question of conflict between state law and charter provision and there was no question as to whether this was or was not a municipal affair. The issue

[1] 157 Cal. 146 1909.

was merely a question of the power of the city, and the court held, as might have been expected, that since the city was, under the general law which its charter voluntarily adopted, not prohibited from "employing the labor necessary," there certainly could be no objection to the city's using the method of direct construction.

In the case of Clouse *v.* San Diego[1] the city had, under the requirements of general law specifically adopted by the charter, issued bonds for certain street improvements. The general law in question expressly provided that the work paid for out of the proceeds of such an issue of bonds should be let by contract. The city charter was silent as to the manner in which the work should be undertaken. The city claimed, however, that while the *method* of securing money for this purpose was by the charter made subject to the control of the law, yet the *power* to issue the bonds in question was conferred by the charter and not by the law and that the *manner* of doing the work was a municipal affair which was not subject to control by general law. The court answered this contention as follows:

> Whether we regard the authority to raise the fund as being derived from the charter which has adopted the method of the Vrooman Act, or from that general statute itself, the fact remains that no scheme of expenditure has been provided in the charter for the payment of this money, and we are convinced that the statute of 1901 must be followed and the work must be done according to contract as therein commanded. While the city does confer certain powers upon the common council in the matter of laying and repairing streets and the like, no rules are made by the charter for the payment of the money used in such improvement.

The cases here noted as to the power of a city in framing a charter for its own government to regulate matters relating to street improvements and other public works are not of importance as settling the point that provisions in respect to this matter may properly be included in such a charter, for the reason that no contention to the contrary has ever been made. Taken as a whole, however, they indicate clearly that such matters are entirely within the scope of the city's powers.

[1] 159 Cal. 434. 1911.

Is the Power to levy Taxes included in the Power to frame a Charter?

The question of the competence of the city which frames its own charter to exercise the power of taxation has been raised in only a single case in California and it is probable that such an absurd question would not have been raised at all had it not been for a specific provision of the constitution which referred to the delegation of the power of taxation to municipal corporations "by general laws." In the case of Security Savings Bank etc. Co. *v.* Hinton[1] the court sustained the right of a home rule city to exercise such power by the following line of reasoning:

> This argument is based upon section 12 of article XI of the constitution, which is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, *but may, by general laws*, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."
>
> But the authority given by the constitution to frame and adopt "a charter for its own government," which "shall become the organic law thereof," is comprehensive enough to authorize a provision such as that contained in the charter of the City of Los Angeles providing for taxation for municipal purposes. . . .
>
> It is undoubtedly true that the legislative branch of the government has the exclusive power of taxation, except so far as that power is restrained by the constitution, or delegated by the legislature or the constitution to local municipalities. But by section 12 of article XI, above quoted, the legislature is *prohibited* from imposing taxes upon counties, cities, towns, or other municipal corporations for municipal purposes. It must therefore follow that in authorizing freeholders' charters, which the legislature cannot change or amend, the power of taxation being essential to municipal existence, that power is necessarily implied.

Has the City the Power to regulate the Filing and Prosecution of Tax or Damage Claims against the City Itself?

In the case of the Farmers and Merchants Bank *v.* Los Angeles[2] the provisions of the freeholders' charter which required that no

[1] 97 Cal. 214 (1893), see also *supra*, 173. [2] 151 Cal. 655. 1907.

suit should be brought upon any claim against the city until such claim had been presented to and demand made of the city council were sustained. It was held that one who had paid taxes under protest could not sue the city to recover unless he had satisfied this charter requirement. The point seems not to have been specifically raised that the imposition of such a requirement was beyond the power of the city. The main contention was that the charter had adopted a general law upon this subject which allowed suit to be brought without the presentation of any claim. This contention the court rejected.

Again in the case of Crim *v.* City and County of San Francisco[1] a provision of the city charter was applied which required that all claims for damages should be presented within six months after the occurrence under which the said damages were claimed. It was held that the provision in question acted as an estoppel to an action for damages where no claim had been presented. The point as to the power of the city to impose such a requirement was neither raised nor discussed.

In the case of Sala *v.* City of Pasadena[2] the contention seems to have been specifically made that a provision of the charter of Pasadena which limited the time in which a property owner might make claim for damages resulting from a street improvement was beyond the competence of a city framing a freeholders' charter as well as beyond the competence of the state itself. This contention was rested upon the guarantee that private property should not be taken or damaged without just compensation. Judgment was reached in the case upon the ground that the provision of the city charter was not sufficiently explicit in regard to this matter, since it did not clearly indicate that the failure of the property owner to make his claim would be tantamount to a waiver of his right to compensation. As to the power of the city to incorporate in the charter for its own government an adequate provision upon this subject, the following opinion was expressed:

> It is not questioned that the changing of street grades is essentially a municipal affair, and the provisions of the charter that are set forth above

[1] 152 Cal. 279. 1907. [2] 162 Cal. 714. 1912.

undoubtedly establish the procedure for changing grades of streets in the city of Pasadena. . . .

It is well settled that the state legislature in the matter of public improvements concerning which *they* are authorized to legislate, may require the property owner to assert his claim for compensation for the taking of his property or injury thereto before the commencement of the improvement, upon measurable notice of the proposed taking or injury, may prescribe in what manner and within what time he shall do this, and further provide that this failure to assert a claim within the prescribed time shall operate as a waiver of all claims and constitute a bar to any subsequent action looking either to a prevention of the work or the making of compensation. It is further settled that the notice in such case need not be personal, but may be constructive, as by advertising or posting. It is sufficient that the notice provided is such as may reasonably be held to afford adequate opportunity for knowledge of the designed improvement by the property owner who exercises reasonable care in the matter of his property. . . .

Undoubtedly, similar provision may be made in a freeholders' charter.

It will be observed that in these cases involving charter provisions regulating the manner in which claims against the city should be filed and prosecuted, no conflict between state law and charter provision was urged and, except in the case last mentioned, the question as to the competence of the city was not clearly an issue at bar. It is perfectly evident that in the first case, where there was involved the matter of a claim for taxes, the constitutional guarantee of due process of law might have been set up with more propriety than in the last case, where the claim was one based upon injury resulting from a street improvement. In the case of the tax claim the city was the plaintiff, the aggressor against the property owner, and under the doctrine of the Missouri court[1] distinction might have been drawn between a time limitation imposed upon a person asserting such a claim and the imposition of a time limit upon a person who himself initiated an action against the city for damages resulting from injury to himself or his property for which the city might be held liable. The fact is, however, that no such distinction was made or even referred to by the California court in this tax claim case.

[1] *Supra*, 168, 169.

The conclusion must be reached that, at least from the few cases of record, the California courts have been exceedingly liberal in their attitude toward the authority of a home rule city to incorporate in its own charter provisions regulating the rights of private persons to present claims against the municipal corporation.

Has the City the Power to regulate Matters pertaining to Public Health?

Attention has already been called to the only important California case, People *ex rel.* Lawlor *v.* Williamson,[1] which has turned upon the question of the authority of a city to regulate in a charter for its own government matters relating to public health. This case, it will be recalled, really concerned only a question of the power of the city, for it was a proceeding in the nature of a *quo warranto* to test the legality of a board of health created by the first freeholders' charter of San Francisco. It was pointed out when this case was under detailed discussion that the judges of the supreme court were unanimously of the opinion that the power to control matters pertaining to the public health was properly embraced within the scope of authority to frame a charter for the government of a city, although the members of the court were not agreed as to whether the control of public health was or was not a municipal affair. As the case stands upon the books, it being the sole expression of the law upon this subject, it seems fairly reasonable to conclude that a city framing a freeholders' charter is competent to regulate matters pertaining to the public health whether such matters are or are not to be regarded as municipal affairs. In other words, even though health be regarded as a state affair the city is competent to subject it to regulation under the terms of its charter, at least to the extent that it has not been subjected to the control of state law. Certainly this was the opinion of some of the judges in the Williamson case and it seems to be as fair a statement of the existing law as it is possible under the circumstances to make.

[1] 135 Cal 415 (1902); *supra*, 287.

Has the City the Power to regulate Matters pertaining to Public Education to the Extent that such Matters are not controlled by State Law?

We have already noted the uncertain state of the law in California upon the subject of the relation of superiority and inferiority as between state laws and charter provisions relating to the matter of education.[1] The case of Barthel *v.* Board of Education [2] involved the question of the power of a city to control a matter relating to education where there was no provision of the general law regulating the matter at issue. It was there held [3] that a public school teacher who had "a city certificate" as required by general law was protected by this law in the matter of removal from office, but that if he had no such certificate the provisions of the charter in respect to removal applied since the general law was silent. "It is not," said the court, "and cannot be claimed that the election and dismissal of teachers in the public schools is a municipal affair, which may be, by a freeholders' charter, regulated in a manner in conflict with that provided by general law." In other words, it was clearly the doctrine of this case that in the absence of statutory requirement a matter pertaining to public education, which was emphatically declared to be of state concern, might nevertheless be regulated by the provisions of a freeholders' charter.

In the case of Bannerman *v.* Boyle,[4] however, the court appears to have been somewhat less certain upon this point. The case arose out of a contest over a removal made by the mayor of San Francisco of a member of the board of education. It was held by the court that the act of removal was void because it had not been performed in compliance with the requirements of the city charter. At the conclusion of the opinion rendered the court declared:

> We have also assumed that it was competent for the charter of San Francisco to provide for the removal of a member of the board of educa-

[1] *Supra*, 295–308

[2] 153 Cal. 376 1908.

[3] Citing Kennedy *v.* Miller, *supra*, 295, and Mitchell *v.* Board of Education, 137 Cal. 372 (1902) This latter case contained a dictum that was somewhat in point, but the pertinent parts of the opinion are of no avail in connection with our study here.

[4] 160 Cal. 197. 1911.

tion, although he may be, in law, an officer of the state, administering a branch of the state school system, and the constitution (Art. XI, sec. 8½), it is claimed, does not expressly allow the city charter to do more than fix his term of office and the time and mode of appointment or election.[1] We find it unnecessary to decide either of these propositions, and we express no opinion concerning them.

It cannot be said that the court here repudiated the doctrine of the Barthel case. It merely refused to express any opinion concerning the competence of the city in this regard. The conclusion seems justified, therefore, that under the power to frame a charter for its own government a city may, under the California adjudications, control a matter pertaining to public education which is not controlled by state law. It may be remarked, however, that in point of fact matters relating to education are in California so fully regulated by state law that the opportunity for the city to enter the field of control is practically negligible.

Has the City the Power to control privately owned Public Utilities?

As the California constitution of 1879 came from the convention that drafted it every city of the state, home rule or otherwise, was specifically required to fix annually the rates to be charged by persons or corporations supplying water to the city and its inhabitants;[2] and it was elsewhere expressly provided as follows:[3]

In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.

[1] [As to the constitutional provision here referred to, see *infra*, 371.]

[2] Art. XIV, sec. 1.

[3] Art. XI, sec. 19.

It is to be observed that by this provision potential competition in the utilities of water and light was definitely established. Legal monopoly could exist only in case the city itself preëmpted the field. The conditions named were: (1) that the privilege of using the streets should be "under the direction of the superintendent of streets or other officer in control thereof"; (2) that it should be "under such regulations as the municipality may prescribe for damages and indemnity for damages" (presumably to abutting owners); and (3) that the city should have the power to fix rates. It would seem that there could be no question whatever concerning the power of a city under a freeholders' charter to regulate these specific utilities as to these designated matters. It is certain that all cities of the state did, as they were compelled to do, regulate water rates; and it is also certain that many cities provided in their charters for the regulation of gas and electric rates.[1] But strange to relate, one of the most serious complaints that was made in 1911, when an amendment to this section was proposed and adopted, was that a city "had no power to prescribe the manner of tearing up its streets, how long they should be torn up, or when they should be put down and repaired."[2] This was certainly most astounding. The constitution expressly recognized that the use of the streets should be under the direction of the officer in control of streets. What possible directions could such officer give if the city itself, or he as its representative, could not regulate just such matters as these? No case of supreme court record in the state ever held that the city lacked these powers; and the conclusion seems unescapable that if San Francisco — the city expressly referred to — failed to control the tearing up of its streets by utility corporations, the municipal authorities were culpably derelict in their duty in not fighting the question of their power into the highest court of the state, where it is unbelievable that the competence of the city in this regard would have

[1] "No question arises over the right, duty, and power of the city council" to regulate electric light rates. *Ex parte* Goodrich, 160 Cal. 410 (1911). This case concerned only the broad question as to when rates were confiscatory.

[2] Remarks of State Senator Reed in *Transactions of the Commonwealth Club of California*, VI, pp. 288 ff.

been denied. The United States Supreme Court, construing this section of the California constitution in a connection to be referred to below, said: "It is at once apparent that . . . the power of the city to supervise the execution of the work" of laying gas mains "was expressly secured by the constitutional provision."[1] Such was manifestly the unmistakable implication, if not the direct declaration, of the clause in question.

Several matters, however, in connection with the power of home rule cities over privately owned utilities were left wholly unsettled by this provision of the constitution. Could the city impose upon water and lighting companies other conditions than the three enumerated in the constitution? Could it, for example, require extensions and improvements of service, prescribe a system of accounts, control the issue of corporate securities? And to what extent, if any, could the city regulate and control the purveyors of other public services than those specifically mentioned in the constitution, such, for example, as street railway companies, telephone companies, and power and heating companies (at least where the latter were furnishing services not in connection with the supplying of light)? These questions may be considered briefly.

As to the first of them, it may be remarked that the city evidently could not impose conditions that would in effect deny to persons or corporations seeking to use the streets for the supply of water or light a privilege that was expressly granted by the constitution. Apparently, therefore, the city was powerless to require that such persons or corporations enter into a franchise contract with the city; for this would obviously, if it were a contract at all, involve the right of the city to refuse consent — a consent which was plainly not contemplated by the constitution.[2]

[1] Russell *v.* Sebastian, 233 U. S. 195. 1913.

[2] On the point that the direct grant made by the constitution did not require action by either the legislature or the city, see People *v.* Stephens, 62 Cal. 209 (1882); Pereria *v.* Wallace, 129 Cal. 397 (1900); *In re* Johnston, 137 Cal. 115 (1902); Denninger *v.* Recorder's Court, 145 Cal. 629 (1904); Stockton Gas & Electric Co. *v.* San Joaquin County, 148 Cal. 313 (1905); South Pasadena *v.* Pasadena Land & Water Co., 152 Cal. 579 (1908).

Moreover, apparently the city could not deny to these persons or corporations the right to use even streets that were already being adequately supplied with one of these utilities. Potential competition was the very essence of the provision; and the extent to which a street could be occupied by rival companies was doubtless limited only by the physical capacity of the street to hold the necessary mains, pipes, and conduits.[1]

It was asserted broadly in 1911, when this section of the constitution was made the subject of amendment, that the cities of California were powerless to compel expenditures to improve service, or to force extensions of service, or to regulate the issue of securities, or to control the keeping of accounts.[2] This lack of powers, if such it was, could certainly not be predicated upon judicial declaration, for the competence of the city in these respects appears never to have been brought before the courts for determination. The probable truth of the matter is that no city of California ever attempted to control the issue of stocks and bonds by a utility corporation or to impose a system of accounts upon it. Whether or not the city under a freeholders' charter might have exercised such power is purely a matter of speculation. It is probably true also that many improvements and extensions of service have been compelled by various cities. In a dictum of the United States Supreme Court touching upon this point, it was declared that "it would not be said that either a water company or a gas company

[1] It has been asserted that certain points in the streets of San Francisco are already so crowded with the distributing systems of public utility corporations that a new pipe line could not be introduced. It would seem, however, that under the apparent power of the city to direct the *manner* in which the streets might be used such a situation might be rectified or at least might have been prevented.

[2] "When it comes to regulating the capitalization of a corporation or in any way controlling its stock or bond issues or its expenditures required to improve the service, why, our powers as municipal officers are very deficient. We cannot compel a water company, for instance, to extend its mains, no matter how deficient a given part of a city may be in water supply or fire protection; we cannot compel a gas company to extend its mains to supply any particular portion of the city. We can, perhaps, when they have once extended their services compel them to maintain and to supply a certain quantity and quality of service." Remarks of Mr. Mason in *Transactions of the Commonwealth Club of California*, VI, p. 370.

establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community." The duty to serve and the right to serve, said the court, "were correlative."[1] Under this view it would seem that if the cities of California failed to require that improvements and extensions of service be made by the persons and corporations that occupied their streets for the supplying of water and artificial light, that failure must be ascribed to their voluntary inactivity and not to the law governing their legal competence.

There seems to have been likewise a distressing amount of uncertainty concerning the power of cities to regulate and control the public service corporations not specifically mentioned in the constitution. It passes comprehension, for example, how it could be seriously asserted that "by virtue of the powers granted in this section . . . the telephone company, and now a heat and power company, have dug up the public thoroughfares of San Francisco when and where they pleased, and have repaired them when and how they pleased."[2] It may well have been that the companies in question had in fact committed the outrages alleged; but they certainly did not do so under the authority of the constitutional provision referred to. This provision made no allusion whatever to companies of this character. In fact the constitution was wholly silent as to any utilities save water and artificial light.

In our discussion of the relation between state laws and charter provisions under the municipal affairs amendment, attention was called to the case of the Sunset Telephone & Telegraph Co. *v.* Pasadena.[3] There it was held that an ordinance enacted pursuant to the authority of a freeholders' charter which made it unlawful to erect or maintain telegraph or telephone poles for use in local or intrastate business without a "franchise or privilege" from the city was an ordinance governing a municipal affair which was not subject to the control of a conflicting state law. Certainly this

[1] Russell *v.* Sebastian, 233 U. S. 195. 1913.
[2] *Transactions of the Commonwealth Club of California*, VI, p. 390.
[3] 161 Cal. 265 (1911); *supra*, 309.

case, although it involved a question of conflict rather than of power, may be said to support the doctrine that a home rule city has *some* power to control those public service corporations that were not specified in the constitution. It has the power to require a local franchise, which power, as we have seen, it does not have over companies supplying water and artificial light.

But a franchise is an exceedingly variable thing. It may impose almost negligible restrictions upon the person or corporation accepting it, or it may contain, in view of the fact that it is a contract voluntarily entered into, the most elaborate stipulations for public regulation and control. The character of the franchise required of the Sunset Telephone Company was not disclosed or discussed; but the competence of the city to demand a franchise as a prerequisite for the peculiar use of its streets by such a utility corporation — control over its streets being a municipal affair — was unqualifiedly sustained. It would seem, therefore, that the right of the city to impose any conditions that it chose was unmistakably recognized. In other words, the authority of the city to exercise through the medium of a freeholders' charter complete control over every phase of a public utility business (barring water and lighting companies) is clearly supportable under the broad doctrine laid down in that case.

In point of fact it is doubtful whether any city of California has attempted to exercise the full limit of its possible powers in this direction. In practice, however, the charters of certain cities have conferred upon some organ of the local government power to regulate the rates for *all* public utility services.[1] In practice, also, the charters of certain cities assumed to regulate a few other matters connected with the control of public utilities. For example, the charter of San Francisco regulates in considerable detail the manner in which franchises may be granted and prescribes the fundamental provisions of all franchises.[2] The charter of Los Angeles,

[1] See, for example, Oakland charter of 1910, sec. 146; amendments of 1905 and of 1911 to Los Angeles charter of 1889, Art. I, secs. 25, 40, 41, and Art. XV; San Francisco charter of 1900 as amended to 1911, Art. II, ch. 2, secs. 4–7.

[2] Charter of 1900 as amended to 1911, Art. II, ch. 2, secs. 5, 6, 7; Art. III, ch. 2, secs. 7a, 7b, 7c.

by an amendment of 1911 creating a board of public utilities endowed with large powers to regulate and control all utility corporations after the manner of certain state commissions, has gone farther in this direction than that of any other city of the state. The competence of the city to establish such extensive control has not been questioned before the courts.

It must be admitted that the constitution of 1879 limited the power of cities over utility corporations to the extent that a corporation desiring to supply water or artificial light could not be absolutely prevented from using the streets and could not be compelled to operate under a local franchise. With the primary end in view of abolishing this situation the clause of section nineteen dealing with this subject was amended in 1911 so as to read as follows:

> Persons or corporations may establish and operate works for supplying the inhabitants with such services [light, water, power, heat, transportation, telephone service, or other means of communication] upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.

The phrasing of this provision was not free from ambiguity. Did it mean that municipal corporations were from this time on empowered to impose upon persons or corporations *already* supplying water or artificial light such conditions and such regulations as it might deem expedient? Could the city thereafter require such persons and corporations to purchase a franchise; and could they be forbidden to extend their services? Or did it mean that complete control of this character could be exercised only over persons and corporations which might *in the future* seek to establish and operate these works? There can be little question that those who originated and promoted this amendment thought that its effect would be "to restore to the cities of California the control of their public streets, which was taken away from them by the constitution of 1879, in section 19 of Article XI."[1] And this was likewise the view of the supreme court of the state expressed in

[1] *Transactions of the Commonwealth Club of California*, VI, p. 390.

the case of the Matter of Russell.[1] The following facts were involved in that case.

Acting under the assumption that complete power to control had been vested in the city by the amendment, Los Angeles promptly enacted an ordinance forbidding any person to lay or maintain pipes or conduits in any street without having obtained a grant from the city in accordance with the terms of its charter, and declaring it to be unlawful for any person to make excavations in the streets for any purpose without written permission from the board of public works. The charter of the city as amended in 1905 and in the spring of 1911 contained somewhat elaborate provisions concerning the procedure for granting and the content of all franchises. The obvious intent of these ordinances was to apply these charter provisions to *existing* lighting companies (the city owned its waterworks) at least as to future extensions of service. The Economic Gas Company, whose agent, Russell, was arrested for violating the ordinance prohibiting excavations, claimed apparently that the amendment of 1911 did not confer upon cities additional powers over water and lighting companies already in operation, and that if it did it impaired the obligation of such companies' contracts with the state, invading property rights which had become vested under the former provisions of the constitution. The court held that as to privately operated utilities of the kinds enumerated, the "design" of the amendment "was to place them all in control of the municipality;" and that following out this design, "the provision expressly limits the preëxisting powers and rights available to private corporations and natural persons." They were permitted henceforth "to engage in such enterprises" only "upon such conditions and under such regulations as the municipality may prescribe." It was further decided that the grant under the former constitutional provision of the privilege of using the streets took effect only by acceptance; that, since no written acceptance was necessary, the only effectual manifestation of acceptance was the act of taking possession of the streets; and that in consequence the vested

[1] 163 Cal. 668. 1912.

rights of the company extended only to its rights in the streets already occupied. On this ground the ordinances prohibiting the laying of pipes in new streets were sustained.

The decision of the California court upon this latter point was reversed by the Supreme Court of the United States in the case of Russell *v.* Sebastian.[1] It was there held that the grant of privilege under the old provision, "resulting from an acceptance of the State's offer," was "not a revocable license but constituted a contract, and vested in the accepting individual or corporation a property right, protected by the federal constitution." And it was further held that this property right, when once accepted by any construction of plant and occupancy of the streets, was the "right to lay pipes" and was not limited to the right to use pipes already laid. To hold otherwise would be "to assume, despite the explicit statement of the constitutional provision, that the investment in extensive plants — in the construction of reservoirs, and in the building of manufacturing works — was invited without any assurance that the laying of the distributing system could be completed, or that it could even be extended far enough to afford any chance of profit."

There can be little question that this interpretation by the highest court of the land of the nature of the grant made by the old provision of the constitution was sound. From the viewpoint of the public the weakness of the situation lay in the foolish policy deliberately established by that provision — a policy which the Supreme Court referred to as a "unique plan" for creating "the competition that was *then* thought to be desirable." The point of importance, however, is that under this decision control over the streets of the cities of California, so far as they are used by water and lighting companies, was not "restored" at all by the amendment of 1911. The city cannot require a local franchise of persons or corporations that had established plants and distributing systems for the supply of these utilities prior to October, 1911, whether such franchise appertained to streets already occupied or to streets to be occupied at any future time. Such persons

[1] 233 U. S. 195. 1913.

and corporations enjoy a perpetual franchise referable to the old constitutional provision. The extent of local control is precisely what it was prior to the adoption of the amendment. That extent has been discussed in some detail above.

Doubtless the city's power to impose "conditions" and "regulations" upon persons and corporations that may in the future seek to enter the field is plenary, extending even to the institution of a policy of legalized monopoly in those cases where two companies are not already in the field. But the practical effect of the decision just mentioned may be in some instances to create actual monopolies in the hands of the companies enjoying perpetual rights — monopolies which could be broken only by the cities themselves entering into competition. For it may well be that new corporations will hesitate to enter the field of competition (under limited franchises adequately protecting the public) against established corporations having perpetual franchises and being subject to a degree of public control that has never been fully and definitely determined. As we shall see, however, the city has within its grasp one important weapon, the weapon of municipal ownership in competition with privately owned enterprises. This weapon can be used either as a threat to compel acquiescence in all reasonable demands made upon water and lighting companies, or as a means of actually inaugurating a ruinous competition supported by the fact that the municipal corporation would not of necessity be dependent upon accruing profits.

In concluding this subject mention must be made of another amendment that was adopted in 1911.[1] This amendment conferred upon the state railroad commission plenary powers over all public utility corporations of the state. Provision was made, however, by which every city of the state might upon a referendum elect to retain control of its own utilities or, having voted to vest such control in the railroad commission, might subsequently rescind this action by another referendum. The powers which a municipality might thus decide to retain or to concede were "such powers of control over any public utility" as were "vested in any

[1] Art. XII, secs. 2, 3.

city." This vague phrase did not, of course, define in any wise the powers which in point of fact are so vested in any city. As we have seen, the extent of these powers is to a degree at least uncertain and varies with the kind of utility concerned. Within three years after the adoption of this amendment six of the smaller home rule cities [1] of the state, as well as a number of minor cities without freeholders' charters, had voted to turn over to the state commission control over their local utilities.[2]

Has the City the Power to own and operate Public Utilities?

Under an amendment to the charter of San Francisco adopted in 1907, broad powers of public utility ownership were conferred upon the city by itself.[3] "The city and county shall have power to acquire, construct, or complete *any* public utility . . . and may operate, maintain, sell, or lease the same." So ran the amendment. In December, 1909 the voters approved two issues of bonds for the construction of street railways by the city, and a taxpayers' action was instituted in the case of Platt *v.* San Francisco [4] to prevent these issues on the ground that the power to frame a charter did not include the power to own and operate utilities. Thus spoke the court:

> We do not understand that it is seriously claimed that the state may not invest its municipalities with the power to acquire and operate any such necessary public utility as is generally owned and operated in a city by what is ordinarily known as a public service corporation, such as waterworks, gas or electric light works, street railways, etc. . . .
>
> Of course, a grant by the state of such powers is essential to its exercise by a municipality, municipalities being confined to the exercise of such powers as are expressly or by necessary implication conferred by the state. The question presented here is whether under the provisions of our constitution, such power in regard to public utilities can be granted or conferred by the state by provisions contained in a freeholders' charter framed by the municipality itself under section 8 of Article XI of the constitution and approved by the legislature of the state by concurrent resolution. . . .

[1] Monterey, Palo Alto, Pomona, Salinas City, San José, and Santa Monica.
[2] *National Muncipal Review*, 4: 114. [3] Art. XII. [4] 158 Cal. 74. 1910.

But it seems clear to us, that, under our system, the power can be so conferred or granted, and that action by the state legislature other than its action in approving the charter by concurrent resolution is in no wise essential.

It cannot be questioned, in view of our decisions, that, as to all matters properly embraced therein, the provisions of a freeholders' charter so framed and approved have the same force and effect as they would have if contained in a special charter enacted as an ordinary law by a legislature not restrained in any manner by constitutional limitations. The section of the constitution thus referred to provides a special mode for the enactment of the "organic law" of such of the cities having the requisite population as desire to take advantage of its provisions. . . .

The only question, then, appears to be whether such provisions as are here involved may be properly included in a freeholders' charter, or to state it in another way, is it within the scope of such a charter to define the powers that shall be exercised by a municipality? It is only by finding some limitation in our constitution as to freeholders' charters that distinguishes them from ordinary municipal charters that any but an affirmative answer can be given to this question. . . . There is no distinction material to the question we are considering between the charters we have referred to [special legislative charters still in existence and charters created by the general municipal corporation act] and the freeholders' charters provided for by section 8 of Article XI of the constitution. The whole purpose of the scheme of such freeholders' charters originally was to enable any city having more than a certain number of inhabitants, originally 100,000, to adopt, subject to the approval of the legislature in lieu of the charter provided by the general municipal corporation act or the old special legislative charter, such a charter, to use the language of the learned trial judge, as the people thereof "deemed appropriate and adequate to its situation and condition and the full and proper administration of all its affairs." The charter so adopted was to be "the charter of such city," and "the organic law thereof." There never could have been any suspicion in the minds of the framers of this section or in the minds of the people adopting it that the charter thus provided for should not be as comprehensive in its scope as the ordinary legislative charter. That such charter should define the powers which the city should have, and that the adoption and approval of the charter in the manner provided should confer the powers (provided, of course, no law of the state prohibited the conferring of such powers) just as in the case of the ordinary legislative charter, was so obviously intended that it should not be necessary to discuss the matter at all.

Learned counsel for the plaintiff seek to find a limitation on the scope of such freeholders' charter in the use of the words "for its own govern-

ment," in the permissive provision of section 8 of Article XI. "Any city . . . may frame a charter for its own government," etc. The theory appears to be that the word "government" was used with reference to the recognized distinction between governmental and proprietary powers of a municipality, with the design to strictly limit the powers that could be conferred by such a charter to the exercise of purely public and governmental functions. . . . This division of "municipal functions" exists for certain purposes, among which is the purpose just stated of making municipalities liable to private action in certain cases (see 1 Dillon on Municipal Corporations, sec. 67; concurring opinion of Justice Shaw in Davoust *v.* City of Alameda, 149 Cal. 69) but it affords no warrant whatever for the narrow and unusual meaning sought by learned counsel to be attributed to the word "government" as used in section 8 of Article XI of the constitution. "Government" is defined as being the "exercise of authority in the administration of the affairs of a state, community or society" (Century Dictionary), "the act of governing, or the state of being governed, especially the authoritative administration of the affairs of a state, or other community" (Standard Dictionary). These definitions include every function which may lawfully be allotted to a municipality to perform. No other meaning can reasonably be attributed to the word "government" as used in the section under consideration. To hold otherwise would be to defeat in a most material part the manifest purpose of the whole scheme of freeholders' charters which we have hereinbefore described.

This opinion calls for some comment. It did not decide whether the question of municipal ownership was a municipal or a state affair. It did not intimate whether a state law upon this subject would control a charter provision. It simply laid down the broad doctrine that in the absence of a governing state law a freeholders' charter might contain any grant of power that a legislative charter might contain. In other words, it was clearly implied that a charter provision, even though it related to a matter of state concern, could not be impeached upon the ground that the authority to frame a charter did not include the power to incorporate the provision. This being the case, it was only when the contention could be made that the provision was in conflict with a state law that it became necessary to inquire into the *inherent nature* of the subject of the provision. The answer to any question that concerned solely the *power* of a city in framing its charter

could always be found in the answer to another question: could the legislature have incorporated the provision in a legislative charter?

It will be noted that this last question is by no means identical with the question as to the competence of the legislature to delegate legislative power. Municipal charters commonly do entail a delegation of legislative power and such delegation has universally been sustained upon historical and traditional grounds. But many provisions of city charters involve no delegation of legislative power at all. They are themselves the concrete expression of such power directly exercised. They are simply laws. And whatever the legislature may enact into law it may enact into a municipal charter. There is no reason why such matters as the recording of deeds and mortgages, or the probation of wills and the administration of estates, or the control of domestic relations, or the definition and punishment of crimes, or the organization and procedure of courts forming a part of the judicial organization of the state, might not be regulated in cities by charter laws. And occasionally municipal charters of legislative origin have in fact contained provisions that trench upon such fields of general legislation. If, then, a freeholders' charter may include any provision that a legislative charter might embrace (barring, of course, all consideration of possible conflicts with state laws on a subject of state concern), it is manifest that the scope of subjects that may be dealt with in such a charter is limited not by any vague notion of the courts as to the appropriate sphere of municipal activity but only by the existing body of state laws upon subjects of state as distinguished from local concern. If, for example, the state legislature had enacted no laws concerning combinations in restraint of trade or workmen's compensation or minimum wages, such matters could be made the subject of charter control. If this be the law in California, it is certain that the home rule cities of that state have not as yet lived up to the full measure of their constitutional powers.

Moreover, it is certain that the courts of California have not always applied this test to the ascertainment of the city's scope of

powers. Otherwise most if not all of the topics considered in this chapter would furnish no material for discussion. As we have seen, it has been clearly intimated, if not directly held, that certain specific matters such as education and perhaps also health, which are to be regarded as matters primarily of state concern, may be regulated by freeholders' charters where no question of conflict with state laws is involved. But this holding has not been predicated upon the broad doctrine indicated in the Platt case, nor indeed upon any plainly expressed doctrine. On the other hand, it has been held that the annexation of territory may not be so regulated. Now provisions for the annexation of territory are very commonly included in legislative charters, yet here is a subject which the courts have not hesitated to exclude from freeholders' charters. Such exclusion is rested upon entirely reasonable grounds; but the point is that it is wholly at variance with the unqualified doctrine of the Platt case.

There is no intention here to register any criticism against the judgment of the court as to the competence of a home rule city to make provision in its charter for the public ownership of utilities. The criticism is directed merely at the exceedingly latitudinarian doctrine upon which that judgment was rested. The somewhat uncertain distinction between municipal and non-municipal affairs was not of the court's making. It was written expressly into the fundamental law of the state. This being so, it would seem that the court might with more propriety, and certainly with more safety, have held that the right to frame a charter for its own government included (1) the power to regulate all "municipal affairs" as that term might be judicially defined, and (2) the power to regulate (in the absence of regulation by state law) those affairs which, although regarded in many branches of the law of municipal corporations as of state concern, are nevertheless commonly and doubtless appropriately regulated by charter laws. Under such ruling the power to make provision in a freeholders' charter for municipal ownership of utilities could have been easily sustained either as a strictly municipal affair or as a state affair commonly and appropriately controlled by municipal charters.

In October, 1911 there was adopted in California the constitutional amendment already referred to, which specifically conferred upon cities the power to impose the "conditions" and "regulations" under which *all* local utilities might be established and operated, whereas prior to that time "any individual or any company" enjoyed "the privilege of using the public streets" for the purpose of supplying at least the utilities of water and artificial light, subject only to the "direction" of the city as to the use of the streets and its power to regulate rates. There was also incorporated into this amendment the following provision:[1]

> Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction, or by the purchase of existing works, including their franchises, or both. . . . A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance.

It is difficult to understand the motives which prompted the framing of this provision. The Platt case had established that any city under a home rule charter could provide for the ownership of a public utility. In the case of Fellows *v.* City of Los Angeles[2] the competence of the city to supply a public utility service to persons outside its boundaries had been not only sustained but also, in the peculiar circumstances of that case, positively compelled. It was simply a fact that numerous cities of the state had owned waterworks and lighting plants for many years antecedent to the adoption of this amendment. It was explained by the author of the amendment, State Senator Reed, that the necessity arose from the fact that whenever any city attempted to construct a utility plant that would compete with an existing plant privately owned, the point was made that the corporation owning such plant was being deprived of its property without due

[1] Art XI, sec. 19.

[2] *Supra*, 335.

process of law.[1] Surely the senator's notion that the people of California could, by an amendment to their own constitution, draw the fangs of a guarantee of the national constitution was somewhat fantastic.[2]

In the case of the Matter of Russell [3] the supreme court of California, commenting on the municipal ownership features of the 1911 amendment, said that "at the time this amendment was adopted municipal corporations, *unless specially authorized by charter*, were without power to make or operate the several public utilities mentioned." But "there had apparently arisen a general opinion among the people that municipal ownership and operation of such utilities was [*sic*] desirable." The effect of the amendment was plain. It "makes to all municipal corporations a direct grant of power to make and operate public works of the kinds enumerated."

This analysis by the court of the intent of this part of the amendment was doubtless dictum, for, as has been seen, the case at bar involved no question of municipal ownership but merely of the municipal regulation of a privately owned utility. It is nevertheless interesting and illuminating. In the light of its holding in the Platt case the court was evidently seeking some justification for an amendment which, so far as it conferred the power to own utilities, merely wrote in express terms what the court had declared to be the already existing law of the constitution without such terms. Naturally the unique object aimed at by the author of the amendment did not occur to the court. It would have occurred to no one who knew even a smattering of the principles of our constitutional law. The court concluded that this amendment must have added *something* to the law as it stood

[1] *Transactions of the Commonwealth Club of California*, VI, p. 397.

[2] It may be remarked that in the case of Madera Waterworks v. Madera, 228 U. S. 454 (1913), it was held by the U. S. Supreme Court that a public service corporation in California was not deprived of property without due process of law by a city's entry into competition with it. This ruling might well have been expected from previous decisions of the court. See Knoxville Water Co. v. Knoxville, 200 U. S. 22 (1905); Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453 (1905)

[3] 163 Cal. 668 (1912); *supra*, 352.

under the Platt case. What it added was this — that a city might own and operate public utilities *without* the authorization of its charter. This was not declared in so many words but it was unmistakably implied by the language used.

It will be observed that by this implication the court has opened the door for the entrance of the same difficulties that have arisen out of the direct constitutional grant of the police power.[1] The power to "establish and operate" public utilities is conferred upon "any municipal corporation." For this purpose, if no charter provision is necessary, who is the municipal corporation? Can the council "establish and operate"? Can the council create a department of the government and empower this department to "establish and operate"? Can a charter provision "affect" this direct grant of power? (It was held that such a provision could not "affect" the direct grant of the police power.) May the charter prohibit the organ of the government which may ultimately be held to be the municipal corporation for this purpose from establishing and operating all utilities or any particular utility? These are some of the questions which the California courts may be called upon to answer if the clear implication of the Russell case is not retracted. On the whole it would probably be safer for the court to declare at its next opportunity that the municipal ownership provision of the 1911 amendment added nothing whatever to the law as it stood under the cases adjudicated prior to its adoption and that it was, therefore, utterly superfluous.

Two other cases should be mentioned briefly in conclusion. In Clark *v.* Los Angeles [2] it was held that the city was competent to supply electricity for motive power as well as for light and heat. This case did not in fact turn upon any construction of home rule powers. It was contended that the furnishing of electric current for such a purpose was a "private business." Why the city could not engage in a private business was not clearly asserted. The court merely argued that the business in question was "a public service" in which cities may engage. Presumably the rule of law that justified the argument at all, although it was not specifically

[1] *Supra*, 322 ff.

[2] 160 Cal. 30. 1911.

mentioned, was the rule that taxes may not be imposed for a private purpose. If this be so, it is manifest that the question would have arisen under a legislative as well as a freeholders' charter. The case may, therefore, be set aside as offering no point of interest in connection with our study.

In the case of Egan *v.* San Francisco[1] the court decided that the city could not, under charter authority to acquire land for a civic center and to authorize the erection by a private company of "an opera house, museum, or other structure," enter into a contract with the Musical Association of San Francisco by which the association was to construct a magnificent opera house upon ground furnished by the city. While the city was to retain the naked legal title to the property, the "beneficial attributes of ownership" were to pass to the association in the form of practically complete control in perpetuity. The precise ground upon which the power of the city to enter into this contract was negatived is not wholly free from uncertainty;[2] but whatever it may have been it did not rest upon the fact that the charter of the city was a freeholders' charter. Moreover, it was clearly intimated that, had it been necessary to decide the point, the court would have declared the ownership and operation of an opera house to be a function appropriately undertaken by a city. Of course, from most if not all

[1] 165 Cal. 576. 1913.

[2] The rule of no taxation for a private purpose was not mentioned, although this would doubtless have been the most apt rule to apply had it not been the view of the court that "generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legislative domain of public purposes." One of the principal ideas of the court seems to have been that public ownership and control was essential where a public purpose existed — an idea which, it may be remarked, was generally repudiated by all of the numerous cases sustaining railway aid legislation and specifically by some of them. See, for example, Olcott *v.* The Supervisors, 16 Wall. 678 (1872), where the point is directly discussed and dismissed. Another somewhat related notion of the court was expressed in the following declaration: "In so far as the proposed use is public, these powers necessarily devolve upon some officer or board of the municipality, and, under the well-settled rule, powers of this character cannot be delegated." This "well-settled rule" was obviously not the rule concerning the delegation of legislative powers; but "well-settled" is a term which has not infrequently been used by courts to conjure conviction out of doubt and uncertainty.

points of view, an opera house cannot be regarded as a public utility; but since in one state at least an enterprise of this character has been crowded under the term utility,[1] it seems proper that this case should be adverted to in this connection.

Has a City the Power to impose Qualifications for Municipal Office and to regulate the Removal of Municipal Officers?

In the case of Sheehan *v.* Scott[2] the somewhat absurd contention was made that it was beyond the power of the city of San Francisco to impose in its freeholders' charter the qualifications for the office of tax collector. The case is of interest and importance chiefly because of the broad ground upon which the competence of the city was upheld. The opinion recited:

> The authority to provide a municipal government for a city is referable to the lawmaking power of the state, and the enactment of a charter for a municipality is a legislative act. . . . The people have . . . withdrawn from the senate and assembly the legislative authority of the state in reference to municipal government for cities, to the extent that neither of these bodies can exercise any legislative authority in the enactment of a charter for such a municipality until after its provisions have been formulated and approved by the city itself in the manner prescribed by section 8 aforesaid, and have limited their legislative authority to the mere approval or rejection of the charter so formulated. The authority thus withdrawn from the legislature and given to the city is none the less a part of the lawmaking power of the state because it is contained in the article upon "Cities, Counties, and Towns," rather than in the article upon the "Legislative Department," and the act of the city in formulating the charter and determining the provisions to be included therein has the same force and authority as would a charter with the same provisions enacted by a legislature that was not restrained by any constitutional limitations. Its adoption by the city and approval by the legislature in the manner prescribed by said section is the mode prescribed by the constitution for its enactment and has the same effect as that of a law which is passed by bill, under the provisions of section 15 of Article IV. It must be held, therefore, that the provisions of the charter of San Francisco in reference to qualifications for eligibility to the office of tax collector have been established by the legislative authority of the state and are valid.

[1] *Infra*, 567.

[2] 145 Cal. 684 (1905); *supra*, 210.

Here again, it will be observed, was the scope of the powers embraced within the constitutional grant of authority to frame a charter for the city's government determined by applying the test of whether the legislature could have exercised the power in dispute through the medium of a legislative charter. The danger that inheres in such a liberal test has already been pointed out and need not be repeated. Neither need it be noticed that the court might easily have been contented with the assertion that the regulation of the qualifications for municipal offices was a matter strictly within the domain of municipal affairs.

Attention has been called to the fact that in the case of Croly *v.* City of Sacramento[1] there was clearly involved a question of conflict between a charter provision and a state law relating to the matter of the making of removals from office, but that the court nevertheless decided the case largely, if not wholly, upon a consideration of the power of the city to incorporate the provisions in question into its charter. The charter declared that for certain specified causes a city officer might be removed and "be found disqualified for holding any position in the service of the city." As to the power of the city to control the matter of removals from office, the court declared without hesitation:

> It cannot be questioned that the appointment of a superintendent of streets is a matter purely municipal, and which [*sic*] may properly be left to the municipality to be exercised in the manner provided in its charter, and it would seem to follow as a logical sequence that the power to remove an officer so appointed is equally a matter of purely municipal concern.

On the point concerning the competence of the city to impose a sentence of disqualification from holding office the court refused for the following reasons to be committed:

> Returning from these general considerations to the charter provision before us, it is to be observed that it provides two separate and distinct penalties for official delinquency and misconduct; the one removal from office, the other a perpetual disqualification from holding any other position in the service of the municipality. The foregoing citations and quotations sufficiently indicate that both of these penalties are recognized

[1] 119 Cal. 229 (1897); *supra*, 313.

as incidents to the corporate existence of municipalities. We are not, however, called upon to decide in this proceeding whether the second penalty is one which may properly be imposed under the charter, or, in other words, whether the penalty of perpetual disqualification and the consequent deprivation of an important right of amotion is but the exercise of a police power necessary to the welfare of a city. So much of the charter provision, therefore, is unquestionably valid. The decision upon this point is determinative of this appeal, for the suit is in prohibition to restrain the board of trustees from acting upon the theory that the law as a whole is invalid and unconstitutional. We need not attempt to anticipate the board's decision, and it is sufficient to say that, if it should render a judgment of perpetual disqualification against the plaintiff in this proceeding, it will be time enough then and thereafter to pass upon that question.

It need only be remarked that, although the court was manifestly justified in refusing to decide a point that was not directly at issue in the case at bar, yet the studious care with which this question was propped open for the future seems scarcely justified if the doctrine that a freeholders' charter may contain any provision that a legislative charter might embrace was a doctrine to be consistently applied. There could be no question that, barring some constitutional limitation in point, the legislature might have incorporated such a provision in a charter of its own framing. Why then this cautious utterance? This case only presents additional proof of the truth of the observation already made; to wit, that this doctrine has not been applied by the California court with anything like uniform consistency.

Again in the case of Coffey *v.* Superior Court,[1] while the court refused to determine whether the regulation of the manner of making removals from office was or was not a municipal affair that could not be subjected to the control of a general law, it was nevertheless in no wise intimated that this matter was not within the competence of a city to regulate by charter provision in the absence of a governing law. The point was simply not discussed.

So in McKannay *v.* Horton[2] the court avoided determination of the question whether the office of mayor of San Francisco had become vacant by operation of the law or the charter, which were in accord

[1] 147 Cal. 525 (1905); *supra*, 314. [2] 151 Cal. 711 (1907); *supra*, 315.

upon the subject; but three out of seven judges, in a separate concurring opinion, made a point of declaring that there could be "no question as to the power of the people of the city and county of San Francisco to make such provisions in their charter as to purely municipal offices."

On the whole it must be concluded that the power of the city in framing its own charter to incorporate provisions regulating the making of removals from office was clearly recognized in California even before the adoption of the amendment of 1906 [1] which expressly declared that the provisions of charters should control state laws upon this subject.

Has the City Power to incorporate in its Charter a Provision for Direct Legislation?

It seems almost absurd to propound the question as to the competence of the home rule city to provide for the enactment of municipal ordinances by a scheme of initiative and referendum. Reference has been made to the case of In re Pfahler,[2] where the contention was refuted by the court that the provision for such a scheme in the charter of Los Angeles was in conflict with state law. No further reference to this case would be necessary except for a single passage in the opinion which serves to illustrate once more the very unguarded rule that has been laid down in a few cases as determining the competence of the city that frames its own charter. Having established the point that the legislature might have provided the initiative and referendum in a charter of its own making, the court declared without qualification:

> If the legislature in providing by general statute for the organization and government of municipalities, can grant such power to the people thereof, there can, of course, be no question that such power may be vested in the people of a city, ratified by the electors thereof, and approved by the legislature, under section eight of Article XI of the constitution.

The possibilities of danger that inhere in this unrestricted rule and the fact that it has not been consistently applied by the California courts have already been sufficiently commented upon.

[1] Art. XX, sec. 16; *supra*, 316.

[2] 150 Cal. 71 (1906); *supra*, 318.

The Effect of the Amendment of 1914 upon the Powers of Cities

It will be recalled that the amendment of 1914 to section six of article eleven of the constitution of California declared that cities were expressly "empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters, they shall be subject to and controlled by general laws." [1] At the time this amendment was adopted no alteration was made in section eight of the same article which conferred power upon cities to "frame charters for their own government." Had these two provisions stood side by side in the original constitution of 1879 it is quite possible that the courts would have declared that the city in framing its own charter could embody provisions relating only to *strictly* municipal affairs; for while the old phraseology of the now famous section six declared that "cities" and "charters" should be subject to and controlled by general laws except in municipal affairs, and while, as we have seen, this was in effect interpreted to mean only that the *charters* should be subject to such control, thereby permitting state laws to be applied whenever charter provisions were silent upon this or that municipal affair, the new wording omits the word "charters" and deals only with "cities" which are empowered to control municipal affairs but are "in respect to other matters" emphatically declared to be subject to state laws. In the face of this declaration it would be difficult for the courts to hold without a wrench upon the plain meaning of terms that it is only "charters" that are subject to such control. Indeed the clause clearly implies, to the extent that it has *any* clarity of meaning, that all "affairs" are either municipal or not municipal, and that the city is empowered to regulate one of these categories but is not empowered to regulate the other in any respect, such affairs being subject to state regulation if they are to be regulated at all.

Now as we have seen, the California court under the former wording of the constitutional provisions in question has held that

[1] *Supra*, 319.

a city may regulate, through the medium of a self-made charter, certain state affairs to the extent that such affairs are not regulated in a contrary manner by state laws; and in several cases the broad rule has been propounded that a freeholders' charter may (barring all question of conflict) deal with any subject that a legislative charter might embrace. This view has been highly advantageous to the cause of genuine self-government, but it is a view which can be sustained only with some difficulty under the latest revision of the constitutional phraseology. There would be considerable measure of justification if the supreme court of the state should administer a well-deserved rebuke to the ever busy tinkerers with the fundamental law upon this subject by completely abandoning this view and accepting the constitutional pronouncement in all of its naked literalness. It is not probable, however, that such a policy will be adopted. The framers of the amendment certainly did not intend to narrow the existing scope of home rule powers, and the court will doubtless with great patience attempt to read more or less intelligibility into what they have written.

CHAPTER XI

HOME RULE IN CALIFORNIA — CERTAIN SPECIFIC RIGHTS CONFERRED IN ADDITION TO THE GENERAL GRANT OF POWER TO FRAME A CHARTER

SEVERAL of the provisions of the California constitution of 1879 which related to specified powers of cities have already been mentioned in appropriate connections. Thus reference has been made to special constitutional provisions touching upon the financial powers of cities,[1] the exercise of the police power,[2] the control of public utilities,[3] and the regulation of removals from office.[4] There remains to be discussed a section of the constitution which was adopted in 1896 at the same time that the "municipal affairs" amendment was ratified.[5] This section read as follows:

It shall be competent, in all charters framed under the authority given by section eight of article eleven of this Constitution to provide, in addition to those provisions allowable by this Constitution and by the laws of the State, as follows:

1. For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the compensation of said judges and of their clerks and attachés.

2. For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, and the number which shall constitute any one of such boards.

[1] Such as the provision relating to the deposit of municipal funds in banks (Art. XI, sec. 16½; *supra*, 211); the requirement of a referendum on incurring debts (Art. XI, sec. 18; *supra*, 282); the amendment of 1910 for a separation of state and local sources of revenue (Art. XIII, sec. 14; *supra*, 280).

[2] Art. XI, sec. 11; *supra*, 323.

[3] Art. XI, sec. 19; *supra*, 345, 351, 360; Art. XII, secs. 2, 3; *supra*, 354.

[4] Art. XX, sec. 16; *supra*, 316.

[5] Art. XI, sec. 8½.

3. For the manner in which, the times at which, and the terms for which the members of the boards of police commissioners shall be elected or appointed; and for the constitution, regulation, compensation, and government of such boards and of the municipal police force.

4. For the manner in which, the times at which, and the terms for which the members of all boards of election shall be elected or appointed, and for the constitution, regulation, compensation, and government of such boards, and of their clerks and attachés; and for all expenses incident to the holding of any election.

Where a city and county government has been merged or consolidated into one municipal government, it shall also be competent in any charter framed under said section eight of said article eleven, to provide for the manner in which, the times at which, and the terms for which, the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have, and for the compensation payable to each of such deputies.

In the light of our previous study it is manifest that the writing of certain clauses of this amendment was directly prompted by cases which had been adjudicated prior to 1896 and by the assumption or fear that the specific powers here conferred would not be regarded by the courts as falling in the general category of municipal affairs. The object of the clause relating to police courts was to overcome the decisions of the court in the series of cases upon this subject which we have noted [1] and especially perhaps the decision of People *v.* Toal. The clause relating to education was doubtless written because in the case of Kennedy *v.* Miller [2] the court had, though apparently without necessity, strongly intimated that the entire control of education was a matter of state concern. No case had been decided involving police departments; but at the time of this amendment the police department of San Francisco was under the control of a state-appointed commission,[3] and those who drafted this section evidently looked forward to the possibility of the contention being made that the city could not abolish this commission through the medium of a freeholders' charter. Although the case of Staude *v.* Election Commissioners [4] had not been decided on the ground that the regulation of municipal

[1] *Supra*, 241–245.
[2] Established in 1883.
[3] *Supra*, 246, 295, 303.
[4] *Supra*, 234, 248.

elections was a state affair, this point being unnecessary before 1896, yet the opinion contained certain expressions that apparently raised doubts as to what might be the holding of the court upon this point; and the insertion of the clause upon this subject was probably inspired by these doubts. Kahn *v.* Sutro,[1] the election case in which the court elaborately divided the several officers of the consolidated government of San Francisco into "city officers" and "county officers," had probably not been decided when this section was drafted, although it had doubtless reached the supreme court. It is certainly possible that the point which it raised led to the writing of the last paragraph of the section, applicable only to consolidated cities and counties.

It was in this wise, at any rate, that the people of California sought to confirm to their home rule cities certain specific powers which might otherwise have been excluded by the courts from the category of municipal affairs.

Were the Provisions of Section 8½ retrospective?

The case of *Ex parte* Sparks,[2] already discussed above,[3] was decided after this amendment went into effect; but it involved the validity of a police court established by a charter which was ratified before the adoption of the amendment. One of the contentions made in that case was that section 8½ operated to give validity to the provisions of the charter upon this subject even though they had been invalid prior to its adoption. But like the ruling laid down in the Banaz case[4] in respect to the retroactive effect of the "municipal affairs" amendment, it was held that the power conferred upon cities in the matter of police courts was prospective only and did not give life to charter provisions that were void from the beginning.[5] This interpretation of the language that was employed was certainly not unreasonable.[6]

[1] *Supra*, 248. [2] 120 Cal. 395. 1898. [3] *Supra*, 207. [4] *Supra*, 272.

[5] Reaffirmed in Fleming *v.* Hance, 153 Cal. 162 (1908); *supra*, 257; *infra*, 383.

[6] It is to be remarked that this ruling as applied to section 8½ stood upon a wholly different footing from the doctrine of the Banaz case, which, as has been noted (*supra*, 273), was without doubt open to question in the light of the decision of the

What Powers might the City exercise over the Jurisdiction of Police Courts?

In the year 1900 there was decided the first of a series of interesting cases involving the question of the relation between charter provisions governing the jurisdiction of police courts and state laws fixing the jurisdiction of general courts. This was the case of *Ex Parte* Dolan.[1] The freeholders' charter of Santa Barbara (1900) established a police court and conferred upon it "*exclusive* jurisdiction" over certain offenses — among others the misdemeanor committed by Dolan, the petitioner in the case for a writ of habeas corpus. Dolan was convicted before a township justice of the peace and his contention was that this justice was, by reason of the charter provision, incompetent to try and convict him. Upon this point, the view of the court is clearly set forth in the following excerpt:

By virtue of section 8½, article XI, of the constitution, it is competent for a freeholders' charter to provide "for the constitution, regulation, government, and jurisdiction of police courts." And it was under the authority found in this provision of the constitution that the police court of the city of Santa Barbara was created by its charter and jurisdiction given it as heretofore stated. We attach no importance to the adjective "exclusive" preceding the word "jurisdiction" found in the charter provision. The constitutional provision furnishes the measure of the power given to the framers of the charter, and unless authority is granted by that instrument to declare that exclusive jurisdiction in the class of cases here involved may be given to police courts, the word has no place in the charter. We must take the constitutional provision as it stands, and by that provision it is only said the jurisdiction of the police court may be fixed by charter. Under the power given by the constitutional provision

Byrne case. The language of the two amendments was quite dissimilar. Under section 6, municipal charters were not to be "*subject to and controlled by general laws*" in "municipal affairs." It would not have been unreasonable to hold that this amendment operated to relieve all existing charter provisions from the "control" of general laws relating to municipal affairs. But section 8½ merely declared that "it shall be competent" for freeholders' charters to provide for certain things. There was nothing whatever to indicate that the amendment had any retrospective operation.

[1] 128 Cal. 460. 1900.

the charter may fix the jurisdiction of the police courts, but no authority is conferred upon the charter by the constitutional provision whereby it may oust any other court of jurisdiction it already had.

It may be stated that in criminal cases the jurisdiction of justices' courts is not fixed by the constitution, but is a matter left solely to the legislature. We then have a direct grant of jurisdiction to justices' courts by the legislature in cases of simple misdemeanor such as that here involved. We also have, by virtue of the constitutional provision heretofore quoted, a direct grant through the medium of the freeholders' charter to police courts of the same character of criminal jurisdiction as that granted by the legislature to justices' courts. In other words, we have the same character of criminal jurisdiction vested in a police court and a justice's court, and we see no reason, upon any principle of statutory construction, why the latter grant of jurisdiction to the police court should result in a repeal of the general law vesting the same jurisdiction in the justice's court.

Although it was not specifically so declared, here was an unmistakable instance of conflict between state law and charter provision. The law conferred jurisdiction over the offense in question upon justices of the peace. The charter conferred *exclusive* jurisdiction over the same offense upon the police court. Applying a rule of strict construction to the grant of power over police courts, the court simply read the word "exclusive" out of the charter and sustained the validity of state law.

The case of Elder *v.* McDougald,[1] decided five years after the Dolan case, involved a question which was similar in one aspect to that which was raised in the Dolan case. The freeholders' charter of San Francisco provided for the appointment of two regular stenographers for the police court with annual salaries. The general laws of California imposed certain duties upon the judges of municipal police courts, especially duties as committing magistrates in the conduct of preliminary hearings in felony cases. In connection with these duties such judges were authorized to appoint stenographers to make reports of these hearings, and the cities of the state were ordered to compensate these stenographers. A police judge of San Francisco made an appointment of this character, as authorized by law, and his appointee sought a writ of

[1] 145 Cal. 740. 1905.

mandamus to compel the treasurer of the city to pay him his compensation. The court sustained the treasurer in his refusal to do so. The opinion recited:

> While it is contended in this appeal that it was not competent under this constitutional grant of power for the charter framers to invest such police courts with jurisdiction to enforce the general laws of the state to the extent of holding preliminary examinations, we do not feel called on to determine that question. It is not at all involved in the present inquiry.

After discussing a number of hair-splitting points that were raised, the principal contention at issue was disposed of as follows:

> We are of the opinion, therefore, that, under section 8½ of article XI of the constitution, it was competent for the framers of the charter of the city and county of San Francisco to provide for the appointment and compensation of the attachés of the judges of the police court authorized to be created thereunder, and that stenographic reporters come within the category of attachés; and that it is of no moment that in conducting preliminary examinations the judge of said court acquires jurisdiction to do so as a magistrate under general law. The purpose was to authorize them to provide for the appointment and compensation of all attachés to the *judges* of such court, no matter whether such attachés were necessary to a proper discharge of the duties of said judges under the provisions of the charter or under the requirements of the general law; the charter provision operated upon them as to their attachés by virtue of their existence as judges of the police court, created under the charter. . . .
>
> The provisions of the charter in that respect superseded section 869 of the Penal Code as far as it empowered a police magistrate of a city to appoint a reporter for a preliminary examination being held by him and to fix his compensation, because under section 8 of the constitution it is declared that the provisions of a charter authorized by that constitution shall supersede all laws inconsistent with it.

The opportunity which the court embraced in this case to avoid all determination of whether a freeholders' charter could invest a police court, over which it was given such large control by the constitutional amendment under consideration, with jurisdiction as to the enforcement of state laws was not open to the court in Robert *v.* Police Court of San Francisco.[1] The amendment specifically declared, without qualification or reservation, that such

[1] 148 Cal. 131. 1905.

charters might make provision for the "jurisdiction" of police courts. The framers of the charter of San Francisco, acting up to the letter of this grant of power, provided that the police court of the city and county should have "concurrent jurisdiction with the superior court" over misdemeanor cases arising under the general laws of the state. In declaring this to be beyond the power of a freeholders' charter the court fell back upon another provision of the constitution, which declared that the "superior court shall have original jurisdiction in . . . cases of misdemeanor not otherwise provided for."[1] Reading into this provision of the constitution the important word "exclusive" — a word by which the court had in the Dolan case expressly declined to qualify the term "jurisdiction" as used in the clause of section 8½ relating to police courts — the court declared that, since the superior court "must possess original jurisdiction in the absence of any transfer of jurisdiction to an inferior court, and loses its jurisdiction entirely by the transfer, it is clear that it cannot have concurrent jurisdiction with any other court in any case of misdemeanor.[2] Hence it follows . . . that the attempt of the freeholders' charter to confer concurrent jurisdiction is one to which legal effect cannot be given."

There seems to be little question that the construction placed by the court upon the clause of the constitution relating to the jurisdiction of the superior courts was somewhat highly strained. The vesting of concurrent jurisdiction in two or more courts is a fairly common practice of our law-makers.[3] There was nothing in the provision of the constitution referred to which specifically or by clear implication prohibited such a disposition of the juris-

[1] Art VI, sec 5

[2] The case of Green v Superior Court of San Francisco, 78 Cal 556 (1889), was cited in support of this construction It had been held in this case that where the legislature had by amendment of the 'consolidation act" vested in the San Francisco police court jurisdiction over misdemeanors, such jurisdiction passed entirely from the superior court The case did not clearly hold that the legislature *could* not have made the jurisdiction concurrent but rather that it *had* not done so

[3] For the recognition of this fact by the California court see Coffey v Superior Court, 147 Cal 525 *supra* 314 The Coffey case and the Robert case were decided at the same term of court

diction as to misdemeanor cases. The logic of the court would perhaps have been easier to follow had it been frankly declared that the jurisdiction which might be regulated by a freeholders' charter was jurisdiction as to the enforcement of municipal ordinances and charter provisions. It is true that the constitution placed no limit upon the "jurisdiction" which a freeholders' charter might "provide for." But it might have been argued with some force that the framers of the amendment could not have intended to vest in the several municipalities of the state the authority to regulate the jurisdiction of local courts to the extent of determining their power to hear causes arising under state laws. This was precisely the view of two members of the court (Beatty, C. J., and Henshaw, J.) who concurred in the judgment of invalidity on the added ground that "the jurisdiction of offenses defined by state law must be regulated by general state law," that "such regulations cannot be altered or qualified by any provision of a freeholders' charter," and that "the trial and punishment of offenses defined by the laws of the state is not a municipal affair."

It is to be remarked that in neither the Dolan, the Elder, nor the Robert case was the question specifically involved as to whether a freeholders' charter in making provision for the jurisdiction of police courts might *prohibit* the exercise by such courts of any jurisdiction in the matter of enforcing state laws. In the Dolan case the charter expressly conferred power over an offense arising under state law. In the Elder case the charter did not attempt to prohibit police judges from acting as committing magistrates; and although it was declared in the course of the opinion that the amendment conferring upon cities certain powers in respect to their police courts "had in view also the fact that (especially in a merged and consolidated municipal government, like that of the city and county of San Francisco) a large jurisdiction might be exercised by the judges of such courts under the general law," this expression of opinion was not pertinent to the decision of the issue at bar. In the Robert case there was no question whatever of an attempted exclusion by charter provision of jurisdiction

conferred by state law. The fact is that the California court has never been called upon to rule specifically upon this point. It would seem, however, that it would not be an unreasonable interpretation of the amendment of 1896 to hold that while a city might not under a freeholders' charter confer jurisdiction upon its police court as to the enforcement of state laws, neither might the state confer such jurisdiction against a mandate to the contrary in the municipal charter. In other words, it might be held that the city's power as to jurisdiction was absolute so long as no attempt was made to withdraw any portion of the jurisdiction of those courts which constitute the regular judicial system of the state.

In Graham v. Fresno [1] the provision of the amendment relating to police courts was again brought up for construction. The freeholders' charter of Fresno established a police court in 1901. Section 103 of the Code of Civil Procedure provided that in every city or town of the third or fourth class there should be a justice of the peace. The charter conferred upon the police court jurisdiction over violations of municipal ordinances and also "concurrent jurisdiction with township justices' courts in all matters wherein said justices' courts may have jurisdiction." The code provided that a justice of the peace in a city of the designated classes should have civil and criminal jurisdiction "as justices of the peace of townships" and also over violations of municipal ordinances. It was further provided that he should be paid $1500 out of the salary fund of the city or town and should be furnished with a suitable office by the municipality. Graham was elected "city justice of the city of Fresno" at the general election held on November 6, 1906. He applied for a mandamus to compel the municipal authorities to furnish him with a suitable office.

The only point directly involved in the case was whether the city could be compelled to furnish an office for the justice of the peace. Before the adoption of the amendment of 1896 there is no question that mandamus would have issued to compel the city

[1] 151 Cal. 465. 1907.

in this regard.[1] As to the effect which that amendment had upon the situation the court said:

We cannot find in subdivision 1 of section 8½ any intention to interfere with the power of the legislature in the matter of provision for justices of the peace for cities and towns. That subdivision is limited in terms to "police courts," and there is no mention whatever therein of justices of the peace or justices' courts. The term "police court" ordinarily refers to an inferior municipal court with a limited jurisdiction in criminal cases only, a court with the power to try certain misdemeanor cases arising from the violation of state law or municipal ordinance, and with the power to conduct preliminary examinations in cases of felony and certain misdemeanors, and to hold defendants to answer for trial for same, and does not include the justices' courts established by our law. The term should probably also be construed to include such inferior courts as may properly be held to be purely municipal, though given by the state certain jurisdiction in state as distinguished from municipal matters, courts coming within the class specified in the constitution as "such inferior courts as the legislature may establish in any incorporated city or town or city and county," such as a city recorder's court or a mayor's court. (See *Ex parte* Soto, 88 Cal. 624, 626.) But the city justice of the peace provided for by section 103 of the Code of Civil Procedure does not come within this category. (People *v.* Sands, 102 Cal. 12; People *v.* Cobb, 133 Cal. 74.) Justices of the peace are part of the constitutional judicial system of the state, having concurrent jurisdiction with superior courts in certain matters expressly given by the constitution (article VI, sec. 11), and also having such jurisdiction in civil and criminal cases as is given by the general laws of the state to all justices of the peace. In this regard there is no distinction whatever between township and city justices. (See cases last cited.) A city justice is simply a part of the general state system, elected by a certain subdivision thereof. It is immaterial in this connection that the legislature has attempted to confer upon city justices an additional jurisdiction in matters peculiar to the city, such as cases arising under violations of municipal ordinances, etc.

It does not follow, however, that the provisions of section 103 of the Code of Civil Procedure, as to the payment of the salary of such a city justice from the municipal treasury and the furnishing to him of an office by the municipality will be held valid as to a city having a police court established under a valid charter provision. . . . The city justice of the

[1] Bishop *v.* Council of Oakland, 58 Cal. 572 (1881); Jenks *v.* Council of Oakland, 58 Cal. 576 (1881); Coggins *v.* City of Sacramento, 59 Cal. 599 (1881); People *ex rel.* Wood *v.* Sands, 102 Cal. 12 (1894); People *ex rel.* Richardson *v.* Cobb, 133 Cal. 74 (1901).

peace established by the legislature has always been given, in addition to the ordinary jurisdiction of a justice's court, the power and jurisdiction of an ordinary police court of a city, the expense of the maintenance of which has always been considered a proper charge upon the city, and his office thus partook of the character of both a county and township and a city office.

The effect of subdivision 1 of section 8½ of article XI was to make the matter of such police courts purely a municipal affair as to any freeholders' charter city which subsequently made appropriate provision in its charter for such court. . . .

For a city maintaining a police court under valid provisions in that behalf in its freeholders' charter, the legislature therefore no longer has the power to provide such a court. While it still has the power to provide a justice's court for any such city as a part of the general state system of justices' courts, it no longer has the power to make such a court also a police court, maintainable at the expense of the city. This would be, in effect, the same thing as providing a separate police court for the city, to be maintained at the expense of the city. . . . As to such cities, the city justice of the peace provided by section 103 of the Code of Civil Procedure must be held to be the same in all respects as a township justice, simply a county or township officer performing no municipal function whatever.

The legislature is not empowered to direct the appropriation of municipal funds for the payment of the salary or office expenses of one who is simply a county or township officer. Municipal funds can be appropriated under our system only for municipal purposes. (Conlin *v.* Board of Supervisors, 114 Cal. 404.) The only ground upon which the decisions heretofore cited upholding the provision for the payment of salary and office expenses of city justices by municipalities can be sustained is that such justices, under the law then in force, in addition to being justices of the peace with the same jurisdiction as township justices, were also city police judges, performing municipal functions. (See People *v.* Sands, 102 Cal. 12; People *v.* Cobb, 133 Cal. 74.) As we have seen, such is no longer the situation in a city having a police court established under the valid provisions therefor in its freeholders' charter.

Two points of considerable importance may be noted in connection with the opinion handed down in this case. In the first place, the court made no mention of the fact that the charter of Fresno had vested in the municipal police court "concurrent jurisdiction with township justices' courts in *all* matters wherein said justices' courts may have jurisdiction." Whether it was competent in a

freeholders' charter to make such an investiture of jurisdiction was not involved in the case. The decision, therefore, added nothing to, and took nothing from, the rule laid down in the Robert case as to the incompetence of the makers of a freeholders' charter to vest a charter police court with jurisdiction concurrent with that of the "*superior*" courts of the state.

In the second place, the opinion apparently did determine, if the common definition of words is to be given to the language employed, that the legislature had no power to vest in any other court concurrent jurisdiction with a police court established by a freeholders' charter over violations of municipal ordinances and similar municipal matters. It is true that Judge Shaw, who read a concurring opinion, made it clear that he did not regard the opinion as sustaining the view that "when a freeholders' charter has created a police court, and vested in it jurisdiction over offenses against city ordinances and suits to collect city license taxes, or any other jurisdiction that could be vested in such police court, such provisions of the charter would have the effect of preventing the legislature from vesting the same jurisdiction in a justice's court created by general laws, . . . or that such charter provisions would at all affect the jurisdiction of any such justice's court, whether theretofore or thereafter established." With due respect, however, it is difficult to see how the opinion of the majority could be regarded as sustaining any other view than this which the learned judge repudiated. It was expressly declared that the legislature "no longer has the power to make such a court a police court;" and that the city justice of the peace under the circumstances indicated was "simply a county or township officer *performing no municipal function whatever.*" It would be difficult to find words which would assert more directly and more conclusively the incompetence of the legislature to trench in any respect upon the jurisdiction of a police court established by a freeholders' charter to the extent that such jurisdiction related only to violations of municipal ordinances and like matters

Briefly reviewed, the argument of the court seems to have been as follows: The legislature might not direct the expenditure of

municipal funds for other than a municipal purpose.[1] It could not, therefore, direct a city to make expenditures for a justice of the peace unless such justice served a municipal purpose. To vest in such a justice jurisdiction over violations of municipal ordinances and other strictly municipal matters (and thus permit him to perform municipal functions for which the city might be required to make expenditures) would be in effect to require the city to maintain two police courts where one such court was established under the provisions of a freeholders' charter. The amendment of 1896 made it competent for such a charter to establish a police court and determine many important matters in connection therewith. This amendment could not have contemplated that a court so established would be merely an unnecessary additional local court. In consequence the establishment of such a court operated to deprive the justice's court, created by general law, of jurisdiction as to municipal matters and thus to render it a court with jurisdiction only as to the enforcement of state laws. As such the financial burden of maintaining the court could not be saddled upon the city, because the court performed no municipal function.

This was obviously the line of reasoning developed in the opinion of the majority of the court, Judge Shaw's view to the contrary notwithstanding. And its effect was to declare, by a somewhat circuitous process, that when the amendment of 1896 vested in the city adopting a freeholders' charter the authority to determine the jurisdiction of a police court established therein the jurisdiction so determined was, so far at least as it related to municipal matters, *exclusive* in its nature. But the case did not, as has already been pointed out, determine that a freeholders' charter might prohibit the police court established by its terms from exercising any jurisdiction as to the enforcement of state laws where such jurisdiction was conferred by these laws. This point was not an issue of the case.

[1] The case cited by the court in support of this doctrine was Conlin *v.* Board of Supervisors of San Francisco, 114 Cal. 404 (1896); *supra*, 258, note 2. For the constitutional provision in question see *supra*, 52.

It will be recalled that in People *v.* Toal [1] it was held that the original provisions of the freeholders' charter of Los Angeles establishing a police court were inoperative. Following this decision the legislature in 1901 enacted a law creating a police court for cities of "class one and a half," which embraced only Los Angeles, and providing for the office of prosecuting attorney and assistant prosecuting attorney. In 1907 this act was amended increasing the number of such attorneys from two to four and raising their salaries. It was contended in Fleming *v.* Hance [2] — a case already mentioned in another connection — that this act was void, first on the ground that under the amendments of 1896 the clause of section 8½ relating to police courts made such courts a "municipal affair" within the meaning of that phrase as introduced into section 6, and that in consequence cities under freeholders' charters were no longer "subject to and controlled by" general laws upon this subject; and second, on the ground that prosecuting attorneys were not a part of such courts but were officers performing municipal functions and as such not subject to control by general laws. This second contention, as we have seen, was sustained by the court. The first contention was answered as follows:

> The grant contained in section 8½ is permissive merely. Where a freeholders' charter has, pursuant to the authorization of that section, created a police court, the power of the legislature to create, within the city, another court maintainable at the expense of the city, is, as is held in Graham *v.* Mayor etc. of Fresno, 151 Cal. 465, at an end. But where, as is the case here, the city has not taken advantage of the permission extended by section 8½ to include in its charter a valid provision for the organization of a police court, the legislature still has, under section 1 of article VI, of the constitution, power to create police or other "inferior courts" in any incorporated city or town. In cities which have not assumed control of the subject matter of such courts, the scope of legislative control remains, notwithstanding the adoption of section 8½, as broad as it was before. Nor is the legislative power as to such cities limited by the constitutional amendment of 1896 to section 6 of article XI, exempting charter cities from legislative interference in "municipal affairs." The theory of the Graham case is that where a city, pursuant to section 8½, does provide in its charter for a police court, the subject matter of such

[1] *Supra*, 206. [2] 153 Cal. 162 (1908); *supra*, 257.

provision becomes a municipal affair. But it has never been held, and there is not room for holding, that the mere adoption of section 8½ makes the creation and organization of police courts a municipal affair as to a city governed by a freeholders' charter where such charter has not dealt with the subject of police courts. In the absence of charter provision, the legislature retains the power originally vested in it with reference to inferior courts throughout the state.

It is not easy to comprehend why the California court on this occasion, as well as in certain of its other decisions,[1] apparently went out of its way to add to the vagueness of the meaning of the term "municipal affairs." As has already been noted, the constitution clearly implied that all affairs that might be subject to governmental regulation were either municipal or non-municipal. Whether an affair fell in one or the other category did not depend upon whether the legislature or the city had taken any particular action. In the view of the constitution its classification as one or the other kind of affair was purely a matter of fact, although, as has already been remarked and as the opinions of the courts fully demonstrate, in last analysis such classification is less a matter of fact than of individual opinion. In spite of the very evident implication of the constitution the court in the opinion just quoted came forward with the somewhat astounding assertion that the subject-matter of police courts is a "municipal affair" when the city has acted upon the matter through the medium of a freeholders' charter, but is not such an affair when the city has failed to act.[2] How, it may be pertinently asked, could the inherent nature of an affair, as being municipal or non-municipal, be possibly affected by action or non-action on the part of the city? The absurdity of this view is fully shown by the fact that the "municipal affairs" exemption extended to cities under special legislative charters which had never taken action upon *any* affair, municipal or otherwise.[3]

[1] See discussion of the opinion rendered in the Los Angeles School District case, *supra*, 303 ff.

[2] This view was, it may be recalled, somewhat similar to that expressed by Judge Harrison, speaking for himself and two of his colleagues in *Fragley v. Phelan*, *supra*, 263–265.

[3] *Supra*, 254.

It is indeed difficult to understand why the California court did not reach the desired judgment by declaring that the control of police courts was in no respect whatever a municipal affair within the meaning of that phrase as used in the constitutional amendment; that it was, on the contrary, in every possible view strictly a "state" affair; but that the constitution after 1896 expressly conferred upon cities adopting freeholders' charters the power to regulate this state affair in such charters. However curious it might have been to hold that the constitution had endowed cities with the power to control a state affair within their respective jurisdictions (and in last analysis such an endowment of power would not be greatly out of harmony with the actual facts of our governmental organization as created by law) such a view was certainly more logical than the view that was taken by the court.

Further than this, the doctrine had been laid down in several other cases, as we have had occasion to note,[1] that a general law even though it related to a municipal affair would apply to a city operating under a freeholders' charter whenever such charter was silent in respect to the subject governed by the law. The charter of Los Angeles was silent as to police courts. What possible necessity, therefore, existed for the declaration that a police court was a municipal affair when the city had acted on the subject and that it was not a municipal affair when the city had failed to act? The charter contained no provision on the subject and in consequence the law applied no matter what constitutional category police courts were placed in.

To sum up, it may be said that the following points have been determined in respect to the police courts created under the authority of section 8½: (1) that the provision was not retrospective and did not, therefore, revive police courts which cities had previously attempted to establish; (2) that a charter could not confer upon a police court jurisdiction over misdemeanors arising under state laws to the exclusion of the jurisdiction of justices of the peace; (3) that a charter could not confer upon a police court jurisdiction concurrent with that of the "superior" courts of the state because

[1] *Supra*, 320.

of another constitutional provision; (4) that a state law could not confer upon a justice of the peace concurrent jurisdiction with police courts over the enforcement of municipal ordinances and like matters; (5) that a charter could determine the absolute compensation of police court officers and clerks to the exclusion of any compensation authorized by state law for the performance by such officers or clerks of strictly state functions; (6) that a police court is a municipal affair when established by a charter but is not a municipal affair when not so established.

The following points have not been clearly settled: (1) whether a charter could prohibit a police court from exercising jurisdiction conferred by state law — for example, could prohibit a police judge from acting as a committing magistrate for offenses arising under state laws; (2) to what extent, if any, a charter may confer jurisdiction over the enforcement of state laws; and (3) whether a charter may confer any jurisdiction as to municipal matters upon the courts forming a part of the general judicial organization of the state.

To what Extent might the Charter of a Consolidated City and County regulate Matters pertaining to "County" Officers?

In Martin *v.* Board of Election Commissioners of San Francisco[1] the ridiculous contention was made, in an effort to prevent the effectuation of the San Francisco charter of 1900, that the last paragraph of the amendment, so far as it conferred certain specific powers upon consolidated city and county governments, could not be carried into effect because it "would conflict with the general law of the state establishing a uniform system of county and township government." The court pointed out not only that this was tantamount to contending that a law could not be passed because it might perhaps "infringe upon some other law," but also that the act which established uniform county and township government in the state had never applied to San Francisco since the enactment of the consolidation act of 1856, as was "shown by a comparison of law and facts in said city and county."

[1] 126 Cal. 404. 1899.

Among the powers conferred by section 8½ upon a consolidated city and county was the authority to provide for the compensation of county officers. Acting under this authority the framers of the charter of San Francisco provided that $4000 should be the "full" salary of the assessor, whose duty it was, according to the terms of the charter, to make assessments upon property. The state law imposed upon assessors in *all* counties the duty of collecting poll taxes — a duty which was not mentioned in the charter for the reason that the proceeds from this tax went exclusively to the state, the municipality having no interest whatever in them. The law also provided that fifteen per centum of the poll taxes collected should go to the assessor in the form of compensation for making the collections. In the case of the Matter of Dodge [1] the question was raised whether the assessor of San Francisco was entitled to these fees provided by state law for the performance of this state function. The question thus presented was not wholly free from difficulties.

On the one hand, the constitution declared that the charter of the consolidated government might "provide for" the compensation of such an officer; but it did not declare that the state law might not provide for additional compensation out of state funds. On the other hand, the charter declared that the salary provided for the assessor should be his complete compensation and that he should turn over *all* funds collected by him to the treasurer of the corporation. Here was obviously a conflict of provision. The majority of the court took the view that the amendment conferred upon the consolidated city and county the power to determine absolutely the matter of the assessor's compensation; that the charter had in effect determined that this officer should not receive additional compensation for the collection of state poll taxes; and that the provisions of the charter in this regard were in consequence controlling. Chief Justice Beatty, however, read a dissenting opinion in which he held that the amendment did not prohibit the state from providing additional compensation for the performance of a state function not mentioned by the charter; that the

[1] 135 Cal. 512. 1902.

collection of the taxes in question was not a municipal affair; and that in consequence the state law superseded the charter provisions which declared that the salary named should be the *"full"* compensation of the assessor and that he should turn over *all* collections to the treasurer of the city and county. It is manifest that the decision of the case turned upon a somewhat close point of construction. It is of interest chiefly as it demonstrates the difficulty of phrasing a constitutional provision relative to the matter of municipal home rule, even where the provision is concerned with the guarantee of a definite and specific right.

It may be remarked in passing that this case did not necessitate any determination of whether the charter could have prohibited the assessor from performing this function for the state. The charter did not attempt to create any such prohibition. Manifestly, however, the court would have held that in a consolidated city and county government duties could be imposed by general laws upon those officers who correspond to county officers elsewhere in the state, unless the constitution expressly conferred upon the framers of the freeholders' charter the *exclusive* authority to determine the matter of their powers and duties. No such authority was given by the terms of the amendment.

In the case of Crowley *v.* Freud [1] question was raised as to the power of the city and county of San Francisco to prescribe civil service regulations for the appointment of such officers as the sheriff, the clerk, and the recorder — officers that corresponded to county officers elsewhere in the state. It will be recalled that in Kahn *v.* Sutro,[2] decided before the adoption of section 8½, it was held that the officers of the consolidated government could be divided into city officers and county officers. It was evidently the view of the court that the adoption of section 8½ had not affected this situation. It had merely conferred the power to regulate certain specific matters in respect to county officers. In other words, the court was not prepared to hold, as had in effect been declared in the police court cases, that the clause of this section relating to the election or appointment of county officers had trans-

[1] 132 Cal. 440. 1901. [2] *Supra*, 248.

formed this subject into a municipal affair. The view was taken that the section merely operated to give local control over a matter that was of state concern and, this being the case, it was the opinion of the court that the clause in question should be rigidly construed. It was declared as follows:

> The functions of such [county] officers are general, not municipal. And while, in the American system of state governments, the people of the whole state have generally kept in their own hands control over such important public governmental agencies as county officers, still, if they choose to yield up part of that control by adopting a constitutional amendment such as section 8½, there is no apparent reason why they may not do so, unless the amendment should be so revolutionary as to be destructive of a republican form of government, as the same is understood in this country. Section 8½ cannot be said to be of that character. But when the people of the whole state have thus yielded up part of their sovereign power to a local municipality, the grant will certainly not be carried, by construction, to any greater extent than the words of the granting amendment clearly go. By section 8½, power over county officers is given to the municipality, only to the extent of providing for the manner of their election, and their terms of office and compensation. As to their deputies, — and they alone are involved in this action, — the only power granted is to provide "for the number of deputies that each shall have, and for the compensation payable to each of such deputies." By no reasonable stretch of construction, can this be held to include the power to prescribe the *qualifications* of such deputies, by any mode or process whatever.

From the decision of the court in this case three out of seven judges dissented, but the doctrine there announced was reaffirmed and applied in the case of Garnett *v.* Brooks.[1] It was held in the latter case that the civil service provisions of the charter of San Francisco could not be applied to a copyist in the office of the recorder. The court declared that a copyist was within the meaning of the term "deputy" as used in the last paragraph of section 8½. That term was employed, said the court, "in its larger and very usual sense and includes generally all the employees of a county officer and not in the same narrow sense in which it is undoubtedly sometimes used in statutes to distinguish some em-

[1] 136 Cal. 585. 1902.

ployees from others." The effect of these decisions was to remove all the officers of the consolidated government who could be regarded as county officers and all of the employees of such officers from the operation of the civil service provisions of the charter.

In Nicholl *v.* Koster[1] the validity of an act of 1909 providing probation officers for the several counties of California, including the city and county of San Francisco, was drawn into question. The auditor of the city and county government refused to allow the salary provided by law for one of these officers on the grounds (1) that the compensation of city and county officers was a municipal affair, and (2) that under the provision of section 8½ it was competent for San Francisco to provide for the election and appointment of all local officers. The court declared without hesitation that the municipal affairs amendment had no application whatever to San Francisco "except in so far as that subdivision of the state possesses and exercises municipal functions and constitutes a city, as distinguished from a county." Referring to the case of Fleming *v.* Hance,[2] where it was held that a state law regulating the matter of police courts was applicable to a city whose charter contained no provision upon this subject, the opinion recited:

> The principle applied in this passage to inferior courts established by general laws under section 1 of Article VI of the constitution, is equally applicable to laws giving additional jurisdiction to superior courts, such as that here involved. The San Francisco municipal charter makes no provision for the compensation of probation officers and their assistants. They constitute a part of the machinery of the judicial system of the state, officers of the superior court provided to enable that court to effectually exercise the special jurisdiction given by the act concerning which the charter does not speak. Conceding that if that compensation was provided for in the charter, its provisions would prevail over the provisions of the act, both as to the amount and as to the manner of payment, the necessary conclusion, in the absence of such charter provisions in view of this principle, is that the act is in force and that the city and county is bound by its provisions relating to the compensation of the probation officers of the so-called "juvenile court."

[1] 157 Cal. 416. 1910. [2] *Supra*, 257, 383.

It must be observed that the concession which the court here made to the effect that the freeholders' charter *could* have regulated the compensation of these probation officers, whom the court declared to be "officers of the superior court," was not attributable to the first clause of the section, which conferred power over police courts, but to the last paragraph, which conferred power upon a consolidated city and county to regulate the "compensation" of "county officers." Had this case, for example, been brought into court by the city of Los Angeles instead of the city and county of San Francisco, there is no question that this concession would never have been voiced.

It is to be noted also that here was no question as to whether the establishment of the juvenile court together with probation officers was or was not a municipal affair. The municipal affairs amendment was made the basis only of the unsustained contention that the compensation of county officers was such an affair. Had any city in California, under the authority conferred upon it to establish police courts, set up its own juvenile court and probation system, it would have been necessary to decide whether the general law establishing such courts throughout the state (under the power of the legislature to create inferior courts) would have controlled the provisions of the freeholders' charter establishing a similar court. It is idle to speculate as to what might have been the answer of the California court to this question.

Section 8½ as amended in 1911 and 1914

From the above review of cases it will be observed that most of the adjudications that have arisen out of the construction and application of the section, which in 1896 conferred upon home rule cities certain specific powers in addition to general power over their municipal affairs, have involved questions as to the extent of the city's power over police courts and of the control of consolidated cities and counties over so-called county officers. In no case has any important question been decided concerning the powers which this amendment conferred upon cities over boards

of education, although in Bannerman *v.* Boyle [1] it was intimated that a city might not be competent to provide in a freeholders' charter for the removal of members of such boards. So also, no case has defined or delimited the power of cities over police commissioners and police forces, this being probably due to the fact that in the early case of Popper *v.* Broderick [2] the court had given no uncertain expression to the view, without reference specifically to section 8½, that the complete management of the local police was a municipal affair. Likewise, no case has arisen touching the power of cities over boards of election, although as we have seen [3] it has been broadly implied that the control at least of municipal elections is a municipal affair. Whether this amendment does or does not confer power upon cities to create and regulate boards of election endowed with power to conduct state and national, as well as municipal, elections has never been determined. In practice, however, such boards established under the provisions of freeholders' charters do in fact manage *all* elections that are held in their respective cities.

The protagonists of home rule in California were by no means satisfied with the situation that resulted from the cases construing and applying section 8½. In 1911 the section was rewritten with the end in view of nullifying the effect of certain of the decisions of the court. The important changes made were as follows:

(1) Cities were empowered to regulate the qualifications of the judges, clerks, and attachés of police courts. There appears to have been no adjudication upon the power of cities in this regard. Most of the cases relating to police courts had involved jurisdictional questions, but evidently doubt had arisen as to the competence of cities to determine qualifications.

(2) Cities were vested with power to control the qualifications, compensation, and removal of members of boards of education.[4]

[1] *Supra*, 344. [2] *Supra*, 255. [3] *Supra*, 267.

[4] The second subdivision of section 8½ was altered to read as follows:

"For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation, and removal, and for the number which shall constitute any one of such boards."

The grant of this additional power was unquestionably prompted by the doubt expressed in Bannerman *v.* Boyle [1] concerning the validity of a charter provision conferring upon the mayor the power to remove members of boards of education.

(3) Specific power was conferred upon cities to regulate "the manner in which and the times at which any municipal election shall be held and the result thereof determined." [2] It is not easy to understand what was sought to be accomplished by the direct bestowal of this power which home rule cities were already exercising and which the court in Socialist Party *v.* Uhl [3] had already declared to be a municipal affair.

(4) The last paragraph of the section was amended so as to give a consolidated city and county the authority to regulate the "method of appointment, qualifications, tenure of office, and removal" of the deputies, clerks, and other employees of county officers; and the provisions of the San Francisco charter upon this subject, which in the Crowley case [4] and the Garnett case [5] were held to be inoperative, were expressly revived. The primary object of this alteration was, of course, patent upon its face. A secondary object seems to have been to enable San Francisco to establish a more satisfactory relation between its appointed board of education, created by its own charter, and its superintendent of schools, an officer elected according to the requirement of state law. There seems to have been a state of disharmony between the superintendent and the board; and with the end in view of enabling the city to establish a system conducive to greater co-operation, the amendment specifically provided that the consolidated city and county might provide for the manner of the elec-

[1] *Supra*, 344.

[2] The fourth subdivision of section 8½ was altered to read as follows:

"For the manner in which and the times at which any municipal election shall be held and the result thereof determined; for the manner in which, the times at which, and the terms for which the members of all boards of election shall be elected or appointed, and for the constitution, regulation, compensation, and government of such boards, and of their clerks and attachés; and for all expenses incident to the holding of any election."

[3] *Supra*, 267.

[4] *Supra*, 388.

[5] *Supra*, 389.

tion or appointment of every county officer with the sole exception of the judges of the superior court.[1]

Not content with this rewriting of section 8½, the people of California at the general election in November, 1914 again amended this section in two important respects. In the first place, power was conferred upon cities to create, in addition to police courts, "municipal courts with such civil and criminal jurisdiction as by law may be conferred upon inferior courts." The term "municipal court" is not defined by the constitution. As is well known, this is a term that has no very precise meaning in the United States. Apparently, however, the object of this amendment was to confer upon cities the power to regulate the entire organization of courts within the city below the superior court. It is difficult, if not impossible, to say what construction may be given to this provision of the constitution under judicial review.[2]

[1] The last paragraph of section 8½ was amended to read as follows:

"Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent, in any charter framed under said Section eight of said Article eleven, or by amendment thereof, to provide for the manner in which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city and county, excepting judges of the Superior Court, shall be elected or appointed, and for their regulation and removal, and for their compensation, and for the number of deputies, clerks, and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks, and other employees. All provisions of any charter of any such consolidated city and county heretofore adopted, and amendments thereof, which are in accordance herewith, are hereby confirmed and declared valid."

[2] Cities were by the amendment of 1914 empowered by subdivision 1 of section 8½ to provide in their charters as follows:

"For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed and for the qualifications and compensation of said judges and of their clerks and attachés; and for the establishment, constitution, regulation, government, and jurisdiction of municipal courts, with such civil and criminal jurisdiction as by law may be conferred upon inferior courts; and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attachés; provided such municipal courts

In the second place, a provision containing more than three thousand words was adopted which regulates the manner in which any city having a population of more than 50,000 inhabitants may become separated from the county of which it is a part and may form a consolidated city and county government, and which determines also the manner in which territory may in the future be annexed to such a consolidated subdivision of the state. It seems wholly unnecessary here to set forth in detail this provision of the amendment. It exhibits in fact all of the characteristics of a complicated statute, although it concludes with the apparently serious declaration that the legislature shall enact such laws as may be necessary to carry out the provisions of the section.

shall never be deprived of the jurisdiction given inferior courts created by general law.

"In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the Superior Court; and pending actions, trials, and all pending business of inferior courts within the territory of such city or city and county, upon the establishment of any such municipal court, shall be and become pending in such municipal court, and all records of such inferior courts shall thereupon be and become the records of such municipal court."

CHAPTER XII

HOME RULE IN WASHINGTON

In the year 1889 the territory of Washington was admitted to statehood in the Union. The constitution under which this state was organized contained a provision granting to cities of more than 20,000 inhabitants the right to frame their own charters. This provision was obviously copied with slight changes from the constitution of California. It read as follows:[1]

Section 10. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws. Any city containing a population of twenty thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had, at which election there shall be chosen by the qualified electors of said city, fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to convene within ten days after their election and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published

[1] Article XI.

in two daily newspapers published in said city, for at least thirty days prior to the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election, in all election districts of said city. Said elections may be general or special elections, and except as herein provided shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter, or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

Section 11. Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.

There were in the state of Washington at the time of its admission to the Union only two cities that might qualify with the population necessary to avail themselves of the authority conferred by this provision. These cities were Seattle and Tacoma. Almost immediately after the constitution went into effect both of these cities proceeded to draft and adopt charters. Freeholders' charters were ratified in Tacoma in April, 1890 and in Seattle in October of the same year. Tacoma remained under this charter until June, 1909, when a second charter was drafted and accepted by the voters. Seattle adopted a second charter in March, 1896, which charter was amended in certain respects every two years from 1900 to 1910 inclusive, and again in 1911. On June 30, 1914, a third freeholders' charter was submitted to the voters of the city but was rejected. According to the federal census of 1900 the city of Spokane had a population of only 37,000. It had, therefore, attained the population that was fixed by the constitution for the exercise of home rule powers. This city did not, however, avail itself of the opportunity to frame a charter for another decade. Its first freeholders' charter was ratified by the people at a special election held in December, 1910.

In 1908 the city of Everett, having attained a population in excess of 20,000 inhabitants, adopted a charter which had been framed by a local board of freeholders; and in 1912 a second home rule charter was ratified by the voters of this city. According to the federal census of 1910 Bellingham had a population of nearly 25,000 inhabitants, but this city is not as yet (January, 1915) operating under a charter of its own making. Thus of the five cities of Washington which satisfy the requirements of the constitution of 1889 in respect to population, four have taken advantage of the home rule privilege conferred by that instrument. Two of these have been operating under home rule charters for a quarter of a century.

It will be observed that the home rule provision of the Washington constitution was similar to that of Missouri and unlike that of California in its failure to require that charters and charter amendments should be submitted to the legislature for ratification or rejection. Under these circumstances no question could be reasonably raised as to the legal nature of a freeholders' charter — that is, whether or not such charter was "enacted by the legislature by law."[1]

On the other hand, just as in the California provision, cities previously organized might become organized under general laws "for the incorporation, organization, and classification" of cities only upon a majority vote of the electors; and all cities, no matter when or how organized, and all charters, whether of legislative or local origin, were declared to be "subject to and controlled by general laws." Here, then, was a clear contradiction of terms within half a dozen lines of the constitution; for how could cities become organized under general laws only upon a vote of the people and at the same time be subject to and controlled by general laws without any such vote? We have seen that in California an identical declaration of the constitution led to very serious difficulties and to expressions of judicial opinion which were wholly illogical and inconsistent.[2] We have seen, for example, how the California court held that while a city did not become

[1] *Supra*, 206 ff. [2] *Supra*, Ch VIII.

organized under the general municipal corporation act of 1883 until this act had been accepted by the voters of the city, yet such city was, without local acceptance, subject to and controlled by a general law which was in effect an amendment of this act.[1] In California this difficulty was sought to be overcome by the "municipal affairs" amendment of 1896.

The difficulty of construing this conflicting declaration of the constitution never became so aggravated in Washington as in California. And the reason is not far to seek. The legislature of Washington never enacted any general charter for cities of the first class (that is, cities of over 20,000 inhabitants) which were entitled under the constitution to frame their own charters. Such cities, if they failed to take advantage of home rule powers conferred, continued to operate under their old special charters or under the general law for the government of cities of the second class from which they had emerged by growth of population. This being the situation of the statutes, the contention has never been made that cities of the first class were not subject to and controlled by general laws applicable to their class because they had not accepted a general charter law for the "incorporation, organization, and classification" of the cities of such class. It may be said, therefore, that this difficult and complicated question arising out of the uncertain phraseology of the constitution has not arisen in Washington chiefly because the legislature has not seen fit to enact a general charter law which might be accepted by any city of the first class upon a vote of its inhabitants. There are a few cases indeed in which this question might apparently have been raised.[2] But in the main, so far as conflicts between state laws and charter provisions are concerned, the courts have been compelled merely to determine what general laws a city operating under a charter of its own making was subject to and controlled by; and this determination has been made with little or no consideration of the constitutional declaration that cities should become organized under general laws only upon a vote of their inhabitants.

[1] *Supra*, 237. [2] *Infra*, 433, 434.

The first legislature which met under the constitution of 1889 adopted an elaborate statute — a so-called "enabling act" — which added in some minor respects to the procedure laid down in the constitution under which a city might avail itself of the opportunity to frame and amend its own charter.[1] But more important than this, the statute in question *assumed to regulate in great detail the powers which a home rule city might exercise through the medium of its own charter.* The constitution itself nowhere clearly indicated that the legislature was endowed with power to determine the metes and bounds of the home rule right conferred upon cities, although perhaps the requirement that charters should be "subject to the constitution and laws of the state" could be construed to vest this competence in the legislature. At any rate, from the very beginning the legislature acted upon the assumption of its own competence in this regard; and while it must be admitted that the enabling act of 1890 was fairly liberal in its definition of the powers which might be exercised, yet the existence of this statute, accepted by the courts without question, has had an exceedingly important bearing upon the status of home rule in Washington. In consequence of this fact it is very nearly impossible to classify the Washington cases upon this subject into those which have involved questions of conflict between state laws and charter provisions and those which have involved merely questions concerning the scope of powers of the home rule city. In the discussion of the cases which follows no attempt has been made to divide the cases into these two classes. The character of the questions involved is indicated to a limited extent in the topical headings.

Has a City the Power to create a Police Court?

The first freeholders' charter of Tacoma contained provisions that established a police court. For this purpose the framers of the charter employed the language of the general municipal corporations act of 1890 which created a police court in cities of

[1] Laws of Wash., 1890, p. 215. See also Laws of 1895, p. 27; Laws of 1903, p. 86.

the second class. In the case of *In re* Cloherty [1] question was raised as to the legality of this police court created by the charter. It was urged upon the supreme court that the authority to set up a municipal court was necessarily implied from the constitutional grant of power to frame a charter. While admitting that an argument in many respects plausible might be built upon this foundation, the opinion recited in part as follows:

> But it must be remembered that, although the power to frame a charter is conferred by the constitution, no greater intendments are inferred from that fact than if it were conferred by a mere act of the legislature, since, by the same sections, these favored cities are to be at all times subject to the general laws of the state. They are not in any sense erected into independent governments; their existence as municipal governments depends upon the legislative will; their areas may be extended only in the manner prescribed by statute; the elective franchise is exercised under the general laws applicable to the whole state; the power of eminent domain is not extended to them except by statutory delegation; and their municipal legislation is restricted to those subjects which rightfully belong to them in their corporate capacity. A charter framed under the constitutional provision is of no more or larger force than a legislative charter, and can lawfully treat only of matters relating to the internal management and control of municipal affairs, subject to constitutional and legislative regulations; it provides officers, ways and means, police and other minutiæ of local administration which are necessary to the public convenience, peace and good order; but, for the enforcement of criminal ordinances, the constitution and the legislature have provided independent courts of competent jurisdiction in the persons of justices of the peace.

While it is plain to see that the court in this early case was prepared to take a very narrow view of the scope of power embraced within the authority to frame a charter, yet it is not easy to follow the argument that was here advanced. Surely the court did not mean to declare that the legislature of the state was, under the constitution, powerless to incorporate in a legislative charter provisions establishing a police court. The constitution expressly empowered the legislature to create "inferior courts." In reference to this provision of the constitution it was remarked

[1] 2 Wash. 137. 1891.

elsewhere in the opinion that a natural conclusion could be drawn "that a court for the administration of municipal ordinances must have been created by an act of the legislature." In spite of this fact the argument adduced in the above-quoted remarks seems to have been that a city in framing a charter could exercise no greater powers than could the legislature in framing a charter. But this would appear to have been an argument in favor of rather than in derogation of the competence of the city. It was in this manner, however, that the proposition to the effect that a city derived its authority to establish a police court from the grant of power to frame a charter was disposed of by the court.

The claim was also made in this case that if the competence of the city was not referable directly to the constitutional grant of power to frame a charter, it was, nevertheless, supportable under the enabling act of 1890. But the court deemed it sufficient to say that "the power conferred upon the legislature to create additional inferior courts is not one of its original, inherent powers as the supreme legislative body of the state, which can be delegated by it, but is a delegated power which must be exercised in the manner pointed out and cannot be again delegated." The following conclusion was reached:

> The truth is that, whether by oversight, or mistake, or intention, we are not required to guess, the legislature in omitting to enact a general law for the incorporation and government of cities of the first class also failed to supply them with police courts, but left the administration of their criminal ordinances with the justices of the peace, where it had been for many years. It may well be that that body can easily be prevailed upon to supply the deficiency; but it is not within the province of this court to strain constructions to accomplish such an object without legislation.

Apparently the Washington legislature has never supplied the deficiency here referred to. Police court functions are performed in all home rule cities by justices of the peace, one of whom is, under the terms of the general law relating to justices in cities, designated by the mayor to act as "police judge or justice." In Tacoma at least, and presumably in other cities also, the justice so designated is given a salary in addition to the usual salary of

a justice of the peace;[1] and his court is naturally far more important than that of the other justices. This system, however, has manifestly grave disadvantages.

What is the Extent of the City's Police Powers?

Following the section of the Washington constitution which granted to cities the right to frame charters there was introduced a section, identical with that of the California constitution, which expressly conferred the police power upon cities.[2] The courts of Washington have not, however, been called upon to construe and apply this provision in very many cases and have not as yet drifted into the difficulties encountered by the California courts.[3]

Reference will be made in a later connection to certain views on the subject of the police power which have been expressed by the Washington court in one or two of the cases that have involved questions concerning the powers of cities over public utilities.[4] It will be seen, however, that in none of these cases was it clearly asserted that cities enjoyed by direct grant from the constitution any general police powers in addition to those enumerated in the enabling act or in the local charter. In one of them, State *ex rel.* Webster *v.* Superior Court,[5] the court, speaking to the clause of the constitution upon this subject, had this to say:

> The people, not only of this state, but generally in other states, have gone beyond the original conceptions of local self-government; and to sustain and make practical needed reforms, have had to fall back upon the police power of the state as declared by laws general in their application. This rule in many states is the result of judicial construction, but our people left no room for construction. Section 11, art. 11, state constitution, is a positive declaration. Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.
>
> This section is subject to the same interpretation as sec. 10, and under it a general law becomes controlling. The words "not in conflict with general laws," as there employed, do not mean that municipal regulations passed in the absence of general laws foreclose the right of the

[1] Tacoma charter of 1909, sec. 74. [2] Art. XI, sec. 11; *supra*, 397.
[3] *Supra*, 322–333. [4] *Infra*, 438, 442. [5] 67 Wash. 37 (1912); *infra*, 440.

state to assert its sovereignty, but merely that the police power may be exercised until such time as the state acts. They must then give way to the general law. If, by its inaction, the state has permitted a municipality to assume and exercise its police power, it is not foreclosed of its right, if the legislature afterwards sees fit to exercise it.

Applied to the case of home rule cities, the opinion thus expressed would seem to indicate, in the first place, that no law of general application was necessary in Washington to confer the police power. Such a construction of the terms of the constitution appears to have been so obvious as scarcely to have required formulation. But when it is considered, as we shall have occasion to note, that the general law known as the enabling act, if it was not declared to be indispensable, was nevertheless deferred to by the courts as a determining guide in respect to the powers which a city might exercise under the direct constitutional grant of authority to frame a charter, the pertinence of this rule of construction concerning the police power becomes manifest. The real question is: To what extent, if any, has it been applied?

In the second place, the above-quoted views laid down the rule that a general police law of the state, if in positive conflict with a municipal police ordinance, would supersede and control the ordinance. This was ascribed to the specific declaration of the constitution that municipal police regulations should not be in conflict with general laws; but it was after all merely to apply a rule of practically universal acceptance — a rule which in point of fact has little if any relation to the subject of the powers of a city under a freeholders' charter, since cities under legislative charters also commonly exercise concurrent police powers with the state legislature.[1]

In Shepard *v.* Seattle[2] a municipal ordinance regulating the location and maintenance of private hospitals and sanitariums was sustained upon the ground that "in all matters pertaining to the public health and public safety, substantially the entire police power of the state is vested in municipal corporations of the first class." Reference was not specifically made to the ex-

[1] *Supra*, 138, 256.

[2] 59 Wash. 363. 1910.

press constitutional grant of the police power, but this was doubtless what the court had in mind. Even so, the power in question could have been easily sustained by reference to the broad enumeration of powers contained in the enabling act and in the charter. It may be remarked also that the court in this case passed upon the reasonableness of the ordinance in question, thereby indicating that the doctrine as to the competence of the judiciary to declare void an ordinance on the ground of its being unreasonable was in no wise qualified or delimited either by the existence of a direct constitutional grant of the police power or by the fact that the city was under a freeholders' charter.

In Tacoma *v.* Keisel [1] judgment was awarded in support of an ordinance prohibiting treating in saloons. It was urged before the court that the powers given to the cities by the provisions of the enabling act of 1890 did not include the power to enact the ordinance in question. It was held, however, that the power granted by the statute "to regulate the sale or giving away of intoxicating . . . liquors," when taken in connection with the power to license and the power to ordain police regulations as conferred by the provisions of the same act, was sufficient to justify the enactment of the ordinance under review. This reduced the question before the court to the consideration of the reasonableness of the ordinance and resolve was reached in favor of such reasonableness. The court expressly averred, in the course of the opinion rendered, that, since counsel had not urged the point, it was unnecessary to consider the scope of powers which a "city may possess by virtue of the constitutional provisions enabling it to frame its own charter and to enforce local police regulations."

In the case of Seattle *v.* Goldsmith [2] an ordinance requiring that the true weight or measurement of commodities sold in containers should be stamped or printed on such containers was upheld, and the constitutional clause conferring police power upon cities was directly referred to; but here again the authority of the city to enact such an ordinance was found not only in the

[1] 68 Wash. 685. 1912.

[2] 73 Wash. 54. 1913.

constitution but also in the statutes and in the "assertion of the power by the city in its charter."

Finally it may be noted that in Malette *v.* Spokane [1] one of the questions decided was that an ordinance of the city fixing an eight-hour day on all public work executed for the city under contract was a valid exercise of powers conferred, first, by the constitutional grant of the police power and, second, by certain general provisions of the enabling act of 1890. In view of the fact that in 1899 and again in 1903 statutes had been enacted which specifically required that on all public work done for the state or any county or municipality by contract eight hours should constitute a day's work, and in view of the further fact that the court declared the ordinance under review to have been enacted in pursuance of the public policy of the state as laid down in these statutes, it is difficult to understand wherein the necessity lay for any reference whatever to the police power of the city. The absurd contention was indeed made that the ordinance was contrary to public policy because it increased the cost of public work. Even so, it is highly questionable whether either a law or an ordinance upon this subject, when confined solely to public work, can by any course of acceptable reasoning be sustained under the police power of the state or city. The point as to whether the state legislature could compel a municipal corporation organized under a freeholders' charter to incorporate in all of its contracts for public work a requirement in respect to the hours of labor of employees was not raised or discussed, for the obvious reason that the city had apparently without question, recognized this competence in the legislature.[2]

[1] 77 Wash. 205. 1913.

[2] It may be remarked incidentally that the courts of certain jurisdictions have refused to uphold such competence in the legislature even with respect to cities operating under legislative charters, although the cases upon this subject are by no means in harmony. See, for example, People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1 (1901); Street *v.* Varney Electrical Supp. Co., 160 Ind. 338 (1902); Cleveland *v.* Construction Co., 67 Oh. St. 197 (1902); *In re* Dalton, 61 Kas. 257 (1899). The ground advanced in opposition to such statutes is that they operate to deprive the city and the contractors of freedom of contract and thus violate a guarantee of the federal constitution. The application of such a rule is certainly open to serious

From the above review of Washington cases dealing with the subject of the police power in home rule cities the conclusion may doubtless be stated that the direct constitutional grant of the police power has been fairly negligible in its effect. It has produced no grave difficulties, but it has also been productive of no great good. No question has arisen as to what organ of the city government may act for the city in the exercise of a police power referable solely to this direct grant because in no case has any power been sustained which could not have been referred to the enabling act and the charter itself. In respect to the scope of the city's police powers, as well as in respect to the subordination of police ordinances not only to state laws but also to the view of the courts concerning their reasonableness, home rule cities have been in practically the same position as cities in all parts of the country under legislative charters.

What Powers may a City exercise in Respect to the Annexation of Territory?

Shortly after the adoption of its first freeholders' charter the city of Tacoma, acting under the authority of and in the manner prescribed by a provision of the general municipal incorporation act,[1] which provision applied to all cities, annexed certain territory. In the case of State *ex rel.* Snell *v.* Warner[2] contention was made that this territory had not been legally annexed because the "proposed extension of the limits of said city was not submitted to or voted upon by the electors of said city as an amendment to the charter." The question was thus squarely put before the court as to whether the provision of a freeholders' charter containing a description of the municipal boundaries could be amended in a manner different from that prescribed by the constitution for the amendment of such charters.

question and has been absolutely denied by the United States Supreme Court as well as certain state courts (*supra*, 26); but it may be remarked that if statutes of this kind are void as applied to cities under legislative charters, there can be no doubt whatever as to their being invalid as applied to cities under freeholders' charters.

[1] Act of March 27, 1890, sec. 9.

[2] 4 Wash. 773. 1892.

The court took the view that the city was certainly not competent to effect an extension of its boundaries through the medium of its own charter. To permit the city to exercise such power as this would be to make the constitution "read in effect that a corporation might frame a charter for its own government and the government of such additional territory as it might choose to include within its limits." Upon this view it was declared that the grant of power to frame a charter had "no relation to the subject of boundaries or territory." The court entered upon a somewhat elaborate discussion of the meaning of the term "charter" as that term was of necessity affected by the provision of the constitution prohibiting special legislation for cities and requiring general legislation. The conclusion was reached that the charter of a city included: (1) the decree of its corporate existence, which decree, since the prohibition of special legislation, could not be made direct by the legislature: (2) the description of the municipal boundaries contained in such decree, which likewise could not be made direct by the legislature; (3) "the law of its action or government," this law being in the case of cities under general laws established directly by the legislature, and in the case of cities under freeholders' charters, by such charters. Upon the basis of this argument it was in effect declared that the description of the boundaries of a home rule city was no part whatever of the charter for its own government which the city was empowered to frame and adopt. Having established this proposition to its own satisfaction, the court declared as follows:

The city of Tacoma, in adopting its freeholders' charter, could neither exclude portions of the area covered by it under the act of 1886, nor include additional territory, because its previous boundaries were the jurisdictional limits of its existence for every purpose. If, then, the extension of its boundaries would be an amendment of its charter, here would be one amendment which it could not make; and the express provision that it may amend its charter in any particular its people see fit, is made null and inoperative. But it may be said that the legislature may authorize it to annex the territory, provided that the annexation be effected by the adoption of an amendment to its charter in the way prescribed by the constitution and that such annexation might be accomplished even without the consent of people in the annexed territory. This is fully

granted. But in such case whence comes the authority to amend — from the constitution or the act of the legislature? If from the former, how is it that it requires an act of the legislature to make this amendment operative, when every other amendment can be made without any legislation? Plainly the whole power is conferred by the act, and the exercise of the power is not an amendment of the charter, because the legislature has no jurisdiction over amendments. And if it is conceded further that the legislature may make the annexation depend upon the affirmative vote of people inhabiting the territory proposed to be annexed, the argument for the position we take is made stronger, since in that case the adoption of an amendment to a city charter would be made to depend upon the votes of people who are not electors in the city, when the constitution says voters on all amendments shall be electors thereof.

From these premises the next logical step is, that if the annexation of territory to cities which have adopted their own charters is necessarily in amendment of those charters, there can be no such annexation whatever under the constitution, and we should certainly be slow to reach such a conclusion. But, in the presence of a question of so much importance, we deem ourselves fortunate in that we are not driven to any fine arguments to uphold the power of the legislature to deal with this matter since the plain letter of the constitution — "to frame a charter for its own government" — is abundant warrant for doing so. It seems to us that the courts in Missouri and California have overlooked the considerations here mentioned, and that under these constitutional provisions annexation of territory is not to be regarded as an amendment to a city charter.

It is not altogether simple, of course, to follow the argument of the court by which the proposition was sought to be sustained that a description of the boundaries of a city was not part of a charter for its own government. In point of fact there is perhaps no more universal feature of city charters than the provisions establishing municipal boundaries. In practical result this decision of the Washington jurisdiction was identical with that of the California cases upon this subject[1] — that is, the applicableness of a general law governing the matter of annexation of territory was sustained and the power to control this matter in any wise was denied to the city. It would seem, however, that the argument of the California court was in last analysis more logical than that of the Washington court. It was de-

[1] *Supra*, 269, 333; for Missouri cases see *supra*, 146.

clared in the above quoted remarks that the "legislature has no jurisdiction over amendments." This declaration was, as we shall see, plainly out of harmony with most, if not all, of the decisions of the Washington court to the effect that the legislature could amend home rule charters by general laws.

Moreover, the entire argument of the court based upon the necessity of the legislature's delegating to some local tribunal the power to annex territory because of the constitutional requirement of general legislation for cities, falls down utterly in the opinion rendered by the same court in the case of Pacific American Fisheries *v.* Whatcom.[1] In this case a law which, without providing for any local action or consent, extended the boundaries of *every city adjacent to or fronting upon any* bay, lake, sound, or river to the middle of such water was held to be a general law and as such valid under the constitution. Here was certainly an instance in which the extension of municipal boundaries was effected directly by an act of the legislature; and although it may be admitted that the practical aspects of the subject of annexation seem to require that the legislature when restricted to the enactment of general laws should delegate to some local authority the power to initiate and complete the procedure for annexation, it is nevertheless manifest that it is at least possible in *certain* instances to extend the boundaries of cities by direct action of the legislature.

On the whole, it seems appropriate merely to reiterate here the view already expressed elsewhere;[2] to wit, that owing to the complications that have naturally arisen concerning this matter, it would be the part of wisdom for the framers of home rule provisions to deal with the subject specifically, and in the absence of specification for the legislature to enact a law providing a procedure for the annexation of territory under which such action as may be required of the home rule city itself shall be identical with that laid down in the constitution for the initiation and adoption of charter amendments.

[1] 69 Wash. 291. 1912.
[2] *Supra*, 146–149, 271.

To what Extent may the City regulate Matters pertaining to the Procedure for making Charter Amendments?

The home rule provision of the Washington constitution declared that freeholders' charters might be amended "by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election after notice of said submission published as above specified [that is, published in two daily newspapers for at least thirty days], and ratified by a majority of the qualified electors voting thereon." The enabling act of 1890 conferred power upon every city framing its own charter to regulate in any such charter matters relating to the procedure to be followed in the enactment of charter amendments. Every freeholders' charter that has been adopted by any city in Washington has contained some provisions on this subject.[1] Presumably, of course, in regulating through the medium of its charter such a matter as this, the city would be incompetent to violate in any respect the brief constitutional provision quoted above.

Question as to the power of the city in this regard was directly raised in the early case of Wade *v.* Tacoma.[2] The charter of Tacoma required that proposed amendments should be published in full "in the official newspaper" of the city for thirty days. The constitution required publication in two daily newspapers. The court declared that while it was probably true that the notice required by the charter was amply sufficient, yet the trouble was that it was not the notice prescribed by the constitution. The charter provision was in consequence utterly void. No question was presented in this case as to the authority of the legislature to confer upon cities the power to regulate within their own charters matters pertaining to the making of amendments to the extent that such matters were not regulated by the constitution itself.

In the case of State *ex rel.* Wiesenthal *v.* Denny,[3] decided at the same term of court, the validity of the provisions of the first

[1] See, for example, charter of Seattle, 1896, as amended to 1911, Art. XX; of Spokane, 1910, Arts. IX, XIV; of Tacoma, 1909, Art. XXII; of Everett, 1912, Art. XVI. [2] 4 Wash. 85. 1892. [3] 4 Wash. 135. 1892.

freeholders' charter of Seattle upon this subject were also drawn into question. The constitution required that such amendments should be ratified by a majority of the electors voting *thereon*. The charter of the city, among other restrictions placed upon the procedure for enacting amendments, required a majority of the electors voting *at* any general election. It was obvious that while the charter did not violate the constitutional requirement, it nevertheless added to that requirement and made the process of amending a charter more difficult of accomplishment. On this point the court declared:

> Just how far this proposition could be carried without crossing over the line where amendments would become practically impossible at once occurs for reflection. We have already seen how, before a proposition is submitted it must pass by three-fifths vote of the council, be published, pass again by three-fifths, face the mayor's objections, be published again and then be voted upon at an election,[1] where two-thirds of the voters treat it with indifference; and looking upon this as a precedent, it will be safe to say that the freeholders' charter of Seattle bids fair to take rank among the famed oriental laws that never could be changed. But we differ with the relator in this matter. The framers of the constitution went out of the usual way of making such instruments to insert a provision therein looking to the possible solution of a perplexing modern problem — the government of large cities. It granted to certain cities the right to govern themselves, subject only to general laws of the state. The grant was made in the shape of power to enact a charter law and to amend it afterward. Just how far this grant was independent of legislation we are *not called upon to say; but it may be safely said that* wherever in this grant it is declared that a thing may be done in a certain way, when it comes to be done, the doing it in that way will be sufficient. . . .

Under the doctrine of the court as here announced the power of the city to add to the simple procedure laid down in the constitution any requirement that would in effect render the process of amendment more difficult was denied. This was tantamount to a declaration that the city's competence, as conferred by the enabling act to control procedure in this regard, extended, if to anything, only to the regulation of matters of minor significance.

[1] [All of these procedural restrictions were imposed by the charter itself.]

In 1895 the Washington legislature enacted a law which required that the legislative authority of any city of the first class should, upon a petition signed by twenty-five per centum of the voters, call an election for the choice of a board of freeholders to draft a charter and should submit to the electors amendments proposed by a similar petition. The constitution declared that "the legislative authority of such city may cause an election" of freeholders, and that a freeholders' charter once adopted "may be amended by proposals therefor submitted by the legislative authority of such city." It was contended in Reeves *v.* Anderson [1] that this act of the legislature as applied to Seattle, then operating under a charter of its own making, was unconstitutional upon the following, among other, grounds: (1) that the constitution vested in the legislative authority of the city discretion as to whether or not an election of freeholders should be called; (2) that the right to frame a charter through the medium of a board of freeholders was not a continuing right since the constitution pointed out the only method by which such a charter might be amended; and (3) that the constitutional provision on this subject was self-executing and therefore beyond the power of the legislature to control in any manner. Delivering a negative answer to each of these contentions, the court declared:

Third. The argument of the learned counsel for appellants in support of the third objection to the constitutionality of the law under consideration is based very largely upon the use of the word "may" in the constitution, as relating to the duty of the city council. The argument amounts to this, that, notwithstanding under the constitution the power to frame a charter for their own government is lodged in the voters of a given city, still it cannot be exercised unless permission to do so is given by the council, which may exercise its own pleasure in granting or withholding the opportunity to vote for the election of freeholders to prepare a charter. We cannot accede to this contention. To admit of such a construction is to unreasonably abridge, if indeed it might not even prevent, the exercise of the power thus conferred and subject it always to the mere caprice or arbitrary determination of the council, something which surely was not intended by the framers of the constitution. We think the powers conferred upon the council by the section are merely ministerial and not

[1] 13 Wash. 17. 1895.

legislative, and that the object of the act of March 4 was to confer on voters of cities of the first class an opportunity to exercise the right conferred upon them by the constitution, by requiring the council to perform what, under the circumstances of this case, became the plain duty of providing for the election and giving the notice thereof required by law. Neither the constitution nor the act in question makes it compulsory upon the voters to adopt a new charter, but this act affords them an opportunity for so doing without regard to the will of the council, and in making such provision we think the legislature did not transcend its constitutional functions.

Fourth. We think that the power to frame a charter for themselves is a continuing right vested in the voters of the city, and that it does not become exhausted because once exercised. We agree with counsel for respondent that the object of the constitutional provision is to confer upon the large cities of the state the power of local self-government (subject, as already stated, to general laws) and that this right to "home rule is not limited at all in point of time."

Fifth. Nor do we think the contention that the constitutional provision is self-executing, and that legislative interference is unauthorized can be upheld. Certainly we should hesitate before declaring a solemn act of the legislature invalid upon any such ground. The act, as we have seen, is in harmony with the spirit of the constitution, and its object is to further the exercise of a constitutional right and make such right available. A constitutional provision is said to be self-executing "when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Cooley, Constitutional Limitations, p. 100.

The opinion as thus expressed may be set down as the first of a series of liberal opinions delivered by the Washington court on the subject of home rule procedure, although it may be remarked parenthetically that matters pertaining to procedure have been practically the sole objective of that court's liberality. Moreover, so far as the liberality of this particular opinion was concerned, it was extended rather to the legislature than to the city. It was the legislature that might ordain a policy that would more adequately effectuate the provisions of the constitution. Presumably, under the doctrine of the Denny case, the city would not have been competent simply upon its own initiative to incorporate the principles of this statute into its own charter; for it is not easy to see how the right of the city to facilitate the amendment

or revision of its charter could be sustained when its right to surround the process of amendment by additional restrictions was denied. It would seem that the right could be sustained in either case only upon the comprehensive ground that the constitution or the enabling act had conferred upon the city the power to regulate in its charter the matter of the future revision or amendment of such charter, in a manner of course that would not actually violate the provisions of the constitution upon this subject. The Denny case had clearly implied that, even under a grant of authority from the legislature, the city could not exercise the power of regulating in any material respect the method by which its charter might be amended, because when the constitution "declared that a thing may be done in a certain way, when it comes to be done, the doing of it in that way will be sufficient."

The Denny case was expressly declared in the Reeves case to be not inconsistent with the opinion there expressed; but seventeen years later, as we shall see, when the court was confronted with a charter provision that liberalized rather than restricted the process of amending a freeholders' charter, and when it was seen that certain views voiced in the earlier case stood in the way of the judgment which the court desired to reach, it was reluctantly admitted that the two cases could not stand together.[1]

While the judgment of the court in the Reeves case was unquestionably of advantage to the cause of genuine home rule, and as such should doubtless be commended, yet the construction that was placed upon the phraseology of the constitution was not so obvious as to close the door upon possible criticism. It was not declared — as it certainly might have been — that the term "legislative authority" as used in the constitution could easily be construed to include direct action by the voters and therefore to justify the causing of an election of freeholders or the submission of proposed amendments by the method of petition. In other words, since this term was not precisely defined by the constitution, it would seem that the court might have held that it was competent for the legislature, and possibly also for the city, to

[1] *Infra*, 423.

give it any reasonable definition, and that the statute in question providing for the initiation of revision or amendment by a petition of voters simply operated to include the voters themselves within the meaning of the term "legislative authority."

Such, however, was not the argument employed. On the contrary, the opinion turned in effect upon the view that the right to adopt and amend a charter was conferred upon the "city," that the "council" (which the court evidently regarded as the only "legislative authority" intended by the constitution [1]) was not the "city," and that in consequence it was not contemplated that the exercise of this power should be subject to the "mere caprice or arbitrary determination of the council." The powers of the council were "ministerial and not legislative."

Now it is patent that a "city" cannot act except through some duly constituted organ of its government. The home rule provision of the California constitution, after which that of Washington was modeled, declared somewhat vaguely, as has been seen,[2] that the city might "cause" an election of freeholders. The framers of the Washington provision had evidently noted the vagueness of this declaration. In their own provision they substituted at least a degree of definiteness by expressly empowering the "legislative authority" of the city to cause such an election. This was natural. The legislative authority — the city council if you choose — was customarily the primary policy-determining body of the city. The initiation of policies by direct action of the voters was not a commonly accepted institution of American politics in 1889. It was in the early stages of propagandism. It appears to have been resorted to in the statute of 1895 at the specific behest of Seattle only because an intrenched city council was resisting an active agitation for charter reform. The passage of the law was an ingenious stroke of practical politics. It is impossible, however, candidly to read the home rule provision of the Washington constitution of 1889 without reaching the conclusion that the framers of that instrument definitely intended that the "legislative authority" (at that date the council or the

[1] *Infra*, 419. [2] *Supra*, 202, 259 ff.

mayor and council, although in the light of the subsequent development of the principle of direct legislation such authority could certainly have been defined so as to include the voters) should be the specific organ of government endowed with power to represent, if not indeed to *be*, the "city" for this purpose. To assert that the declaration of the constitution to the effect that the legislative authority of the city "may cause" an election of freeholders, which declaration named neither time, conditions, nor circumstances, was the grant of a "merely ministerial" power, seems almost grotesque.

Generally speaking, a ministerial power is nothing more than an obligation which may be compelled when the legally prescribed circumstances for the exercise of such power arise. Generally speaking also, a ministerial power cannot be exercised until such circumstances have arisen. But there were here no circumstances prescribed. It is difficult to comprehend how the legislative authority of the city would know when it was called upon to exercise this ministerial power unless, forsooth, the court meant to declare that the power could not be exercised at all until its ministerial character had been effectuated by the statutory imposition of conditions for its exercise. The court could only have stultified itself by such a holding in view of the fact that Seattle (the legal status of whose charter officers was not questioned, although they were now parties before the court in their official capacity) was operating under a freeholders' charter initiated by the old council of the city before any law imposing such conditions had been enacted. Surely the ministerial power of this former council in causing the election of a board of freeholders in 1890 had been exercised of its own accord and therefore upon its own discretion. There certainly existed at that time no legal means by which the council could have been compelled to call such an election.

The further point of criticism may be made that ever since the decision of the Reeves case the council of every home rule city of Washington has enjoyed concurrently with petitioners the power, subject to such charter restrictions as may be valid, to initiate at

its own discretion either an election of freeholders or a charter amendment. If these powers be merely ministerial, it would seem that urgent necessity exists for a revision of the legal definition of that term.

It will be recalled that in California it was held in Blanchard *v.* Hartwell [1] that under the original provisions of the constitution in that state the power to frame a charter was not a continuing power, this view being premised chiefly upon the ground that the constitution provided a method by which a freeholders' charter might be amended and that this method should be construed to be exclusive. The only difference in this respect between the California and the Washington provisions was that the constitution of the former permitted amendments to be made only at intervals of two years while the latter contained no such limitation. The California court held that this would be a "fatuous limitation . . . if the policy thus clearly indicated could be defeated by adopting a new charter once in sixty days by a mere majority vote" — a somewhat absurd speculation it may be noted incidentally, unless the legislature, which in that state was required to ratify all charters, could be found in session every sixty days. It may be that this difference as to a time limitation in the matter of amendments constituted a material distinction between the California and the Washington provision; but as a final determinant of whether the right to frame a charter was or was not a continuing right, its importance does appear to have been somewhat overstrained.

The truth of the matter is that the California court had no great respect for the opinion of the Washington court as set down in the Reeves case. Its attention was drawn to this case and a somewhat futile effort was made to distinguish the constitutional provisions upon this subject. In Washington, a freeholders' charter was like such a charter in California "only in name!" There the legislature could amend such charters. And why not, pray, in California? Before the "municipal affairs" amendment of 1896 the wording of the two constitutions in respect to the control of general laws was identical, and the interpretation put

[1] 131 Cal. 263 (1900); *supra*, 221.

upon this wording by the courts of the two jurisdictions was precisely the same. Even after the amendment of 1896 freeholders' charters in California could be amended by general laws except as to municipal affairs. Were matters pertaining to the election of freeholders municipal affairs? The California court was apparently happy to avoid upon a technicality the necessity of declaring itself upon this point.[1]

A further distinction was based upon the fact that in Washington "a mode was provided by which the council could be compelled to call an election upon a mere petition," while in California "the movement can only be initiated by the city council — the legislative body of the city" — since it was provided that "the city shall cause the election to be held" and "the city can act only through its legislature." This being the case, it was "at least doubtful" if a law vesting this power in any other authority, such as the voters themselves, "could be enacted." As to all this, it need only be remarked once more that the Washington provision upon this point was far more precise than that of California. The supreme court of the latter state may have wholly dissented from the view that such a law as that sustained in the Reeves case was valid under a constitution that specifically vested the initiatory power in the "legislative authority" of the city; but the validity of this particular law had nothing whatever to do with whether the home rule right was or was not a continuing right. Certainly the California argument for a strict construction upon this ground was rather absurd when it is considered that this term "legislative authority" was written into the Washington constitution by its framers and into the California constitution by the court itself.

On the whole, it seems impossible but to declare that the decisions of these two cases were very nearly, if not wholly, in irreconcilable conflict. The endeavor of the California court to distinguish the Reeves case without simply repudiating its doctrine was quite as unsuccessful in logic as was the effort of the Missouri court, when the same point was at bar in that state, to distinguish the Blanchard case.[2]

[1] Fragley *v.* Phelan, 126 Cal. 383 (1899); *supra*, 262 ff. [2] *Supra*, 198.

The people of Spokane have had especial difficulty through a series of years in forcing their recalcitrant councils to act in the matter of proposed amendments or revision of the local charter. In Hindman *v.* Boyd [1] mandamus was sought to compel the council to submit at the next general election an amendment that had been proposed by petition in accordance with the requirements of an act of 1903.[2] The contention was made that the submission of the amendment would entail an expenditure of municipal funds and that the constitution, while it permitted the legislature to *authorize* the corporate authorities to levy taxes for corporate purposes, forbade the legislature to *impose* taxes for such purposes directly.[3] The contention was denied largely on "practical" grounds, it being asserted that the constitutional provision relied upon related to "taxes concerning ordinary corporate affairs," and that "to hold that it relates also to the expense of an amendment to the organic law of the city would place it within the power of the corporate authorities to perpetually prevent the people from exercising a fundamental power." It was evident that the court, having read the term "legislative authority" in part at least out of the provision of the constitution granting the right to frame a charter, was now reading the term "corporate purpose" in a manner to suit the exigencies of a situation in which the corporate authorities were playing the rôle of obstructionists.

In October, 1909 the incumbent mayor of Spokane launched a movement for a charter establishing the commission type of government by issuing an open letter to the people and appointing an unofficial citizens' committee to investigate and report an outline charter plan. This report, upon its presentation to the mayor, was transmitted to the council with the recommendation that an election of freeholders be called to frame a charter, presumably along the lines proposed by the citizens' committee. The council

[1] 42 Wash. 17 (1906); *infra*, 438, 449. [2] Laws of Wash., 1903, ch. 186.

[3] Art. XI, sec. 12: "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." See *supra*, 52.

was obdurate. A petition of voters was then filed, in accordance with the provisions of the general law, requesting the council to cause the election in question to be held. The law was not free from doubts as to whether the council was vested with discretion in fixing the date for the election demanded.[1] The council, acting upon the assumption of its discretionary competence, provided that the election should be held at the next general city election, which was scheduled to take place nearly a year later. The court declared in the case of the State *ex rel.* Lambert *v.* Superior Court [2] that the "legislature did not intend to vest an absolute discretion in the city council in this matter," but that "the elections provided for must be held within a reasonable time, and may be general, if a general city election is to be held within a reasonable time thereafter; but otherwise, they must be special."

The decision of this case, involving as it did merely a question of statutory construction, is of interest in connection with our study here only as it illustrates the liberal attitude which the Washington court has shown wherever an issue has pertained solely to some matter of home rule procedure. A peremptory writ of mandamus was granted commanding the city council to call a special election for the choice of freeholders. This election was held on September 27, 1910, and a charter drafted by the elected board was adopted December 28, 1910. The validity of this charter, providing a commission form of government, was attacked upon several grounds but was, as we shall have occasion to note in a later connection, sustained by the supreme court.[3]

The troubles of Spokane in the matter of changing its own charter were again before the court in the case of the State *ex rel. Hindley v.* Superior Court [4] where the specific question presented concerned once more the power of the legislative authority of the city in respect to amendments. The constitutional, statutory, and charter provisions involved, which are not clearly set forth in the report of the case, were in fact these:

[1] Rem. & Bal. Code, secs. 7498–7502.
[2] 59 Wash. 670. 1910.
[3] Walker *v.* Spokane, 62 Wash. 312 (1911); *infra*, 452.
[4] 70 Wash. 352. 1912.

(1) While the constitution expressly permitted the election of a board of freeholders or the submission of a charter at either a general or a special election, it apparently required that proposals for amendment should be submitted at a general election.[1]

(2) A statute of 1903 (the same statute that was under review in Hindman *v.* Boyd but not in the Lambert case) required the city council upon petition of fifteen per centum of the voters, to submit any proposed amendment "at the next regular municipal election." This statute was evidently drafted upon the assumption that the constitution positively required the submission of amendments only at a general election.

(3) The charter of Spokane, adopted in 1910, declared as follows: "This charter may be amended by a majority vote on such amendments. The provisions of this charter, with respect to submission of legislation to popular vote by the initiative, or by the council of its own motion, shall apply to and include the proposal, submission, and adoption of amendments."[2] The initiative and referendum provisions of the charter to which reference was thus made required the submission of a proposal presented by petition at a special election unless a general election was "to be held within 60 days after the filing of the petition."[3]

In 1912 mandamus was sought to compel the commissioners (the city council) to submit at a *special* election certain charter amendments which had been proposed by petition. The commissioners refused on the ground that both the constitution and the statute required submission only at a general election. The sole authority for submission at a special election was the authority of the local charter. Referring to the Denny case, where it was remarked in the course of the opinion that general elections had been selected by the framers of the constitution as the time for

[1] *Supra*, 396. The provision was in fact ambiguous; for while it was declared, following the mention of elections for the choice of freeholders and the submission of charters, that "all elections in this section . . . may be general or special elections," it was declared in the succeeding sentence of the same section that proposals for amendment might be submitted at "any general election." Whether the word "general" was here used by carelessness or was designed to create an exception does not appear. [2] Sec. 125. [3] Sec. 82.

the submission of charter amendments in order that there might be a "certain stability" about freeholders' charters and an avoidance of the "vice of non-attention to special elections," the court declared as follows:

This expression was made at a time when amendments could be proposed only by the council, the then "legislative authority." The theory that charter amendments can be proposed only by the commissioners is proposed in relators' briefs, but is now abandoned. However logical the argument in the Denny case may be, the electorate of the city of Spokane have seen fit to abandon the theory of representative government, and have provided for the initiation of amendments at any time, and that a vote thereon shall be had within thirty days after their proposal. The construction put upon the constitution in the Denny case that an election upon charter amendments must be held at a general election, is consistent so long as it applies to the former methods of legislation; but the word "may" should not be given that meaning when the people are acting in their sovereign capacity. . . . Although not directly raised, the principle was discussed, and we think decided, in State *ex rel.* Lambert *v.* Superior Court, 59 Wash. 670, 110 Pac. 622. . . .

While the court said in Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625, that the case of State *ex rel.* Wiesenthal *v.* Denny, *supra*, had been reëxamined, and that it did not militate against its then holding, if the force of law be given to that part of the Denny decision above quoted, the two cases nevertheless seem to be in conflict. Only by rejecting it as dictum or a statement made *arguendo* can the two decisions be harmonized. In the Reeves case, it was argued upon the authority of the Denny case that "with reference to the time, mode and manner of changing a charter, the course to be followed is a mandate, but as to the question as to whether the city will avail itself of the provision of the constitution (art. 11, sec. 10) to frame a charter, it is permissive. . . ."

Recurring now to our premise that the words "consistent with" mean "not hostile to," and considering the spirit of the constitution, that is, to grant the fullest measure of self-government to cities of the first class, subject to the general laws, it would result in a contradiction of terms if we were to hold that, although the manner of proposing amendments was in strict harmony with the intent of the constitution to insure home rule to cities, the charter was nevertheless hostile to the constitution in such degree that its remedial processes are dependent upon the discretion of the commissioners and might thus be indefinitely postponed.

This is the last word in Washington upon the subject of the power of a home rule city to regulate matters pertaining to the

revision and amendment of its own charter. It must be taken to have expressly overruled the Denny case, although it must be borne in mind that this first case involved charter *restriction* upon the exercise of home rule powers, while this last case involved charter *facilitation* of such exercise — a difference which was not, however, specifically adverted to. It must be taken also to mean that the home rule city is competent to regulate such matters by charter provisions to a considerable degree — in fact to any degree that it chooses, so far as the constitution is concerned, except that adequate notice [1] must be given, publication must be made specifically as required "in two daily newspapers . . . for at least thirty days," [2] and presumably some sort of popular ratification must be had.[3] Presumably also, on the other hand, under the general doctrine which, as we shall see, has been consistently applied in Washington to determine the supremacy of general laws over charter provisions, the legislature could, if it cared to do so, occupy the entire field of regulation of this matter and prohibit charter provisions upon the subject. The legislature has not elected to do this, and as the law now stands the home rule city in Washington enjoys a fairly large competence to control by charter provisions the procedure under which a revision or amendment of its charter may be effected.

It may be noted in conclusion that all of the existing freeholders' charters of Washington contain some provisions upon this subject;[4] and in one instance at least the provisions are preëminently restrictive in character. Thus the charter of Tacoma (1909) prescribes that the action of the legislative body shall be by resolu-

[1] The constitution does not specify the kind of notice that must be given "in all election districts of the city." In *State ex rel.* Mullen *v.* Doherty, 16 Wash. 382 (1897), it was held that amendments adopted in Tacoma without being heralded by the particular kind of notice prescribed by the enabling act and by the municipal ordinance governing the subject were not on that account void. This decision was reached by applying the well-known rule that "where the great body of electors have actual notice of the time and place of holding the election and of the questions submitted, this is sufficient."

[2] *Supra*, 411.

[3] If the Reeves case is overruled, the city may doubtless now prescribe ratification by a majority of those voting *at* the election although the constitution declares for a majority "voting *thereon*."

[4] *Supra*, 411, note 1.

tion; that the proposed amendments shall be published in two daily newspapers for thirty days, that *thereafter* the council shall take a vote upon the proposal, and that it shall not be submitted to the voters unless four of the five members of the council vote in favor of the same.[1] It would seem that under the doctrine of the Denny case, now overruled in part at least, such a provision as this, which certainly renders the process of amendment difficult, would, if questioned before the courts, be declared invalid. It does not appear, however, that any contest has arisen concerning the validity of the provision.

To what Extent may the City control Matters pertaining to Elections?

Section six of the enabling act of 1890 "granted" to home rule cities the authority to prescribe the times at which, manner in which, and terms for which the mayor and members of the council might be elected. It is doubtless due to this specific grant of power that the Washington books do not hold many cases involving questions as to the power of cities to regulate matters pertaining to elections. It is simply a fact that the freeholders' charters of that state appear to regulate municipal elections to a considerable extent [2] and adopt state laws to cover the omissions of the charter.[3] Moreover, many of the newer devices of election machinery have been incorporated into these charters and have gone without being questioned before the courts.

In two cases, however, contest has been raised over the election provisions of freeholders' charters. The first home rule charter of Tacoma conferred upon the superior court of the county in which the city was located authority to entertain a proceeding to

[1] Art. XXII.

[2] See, for example, Seattle charter of 1896, as amended to 1911, Art. XVIII; Spokane charter of 1910, Art. VII; Tacoma charter of 1909, Art XV; Everett charter of 1912, Art. IX.

[3] Seattle charter of 1896, as amended to 1911, Art XVIII, sec. 1, subdiv. A, par 7, Spokane charter of 1910, sec. 66, Tacoma charter of 1909, sec. 204; Everett charter of 1912, sec. 78.

contest the election of any city officer. In State *ex rel.* Fawcett *v.* Superior Court,[1] although it was held that there existed "no statutory provision for contesting the election of a municipal officer," a denial of the competence of the city to provide for this matter was sustained by the following astounding argument:

> We must not lose sight of the elementary proposition that municipal corporations have only the powers which are especially conferred upon them by the legislature, or such other powers as by necessary implication flow therefrom. The power to provide a tribunal and clothe it with authority to contest election cases was not specially conferred by the legislature, nor do we think it was necessarily implied, or implied at all, by the constitution, or by any act of the legislature to which our attention has been called. . . .
>
> The authority conferred upon superior courts, who are state officers, [*sic*] even conceding that the state could create a tribunal clothed with the power claimed for the court in this case, must be created by a higher authority than the local legislature of the city. The jurisdiction and duties of the superior court, and the methods prescribed by which the court shall exercise its jurisdiction, must be conferred by the constitution and by legislative authority. . . .
>
> It must be conceded that, inasmuch as there is no manner prescribed by the legislature for trying contested cases in the case of municipal officers, the manner must be prescribed, if tried at all, by a municipality. Again, to show the fallacy of this proposition, if one city which has 20,000 inhabitants can create a tribunal and exact modes and methods for the trial of contested election cases, the other cities of the same class in the state must be conceded the same powers, and the result would be, even conceding that the power was conferred in all cases upon the superior judge, that a mode or method prescribed by one city would be different from the mode and method prescribed by the other cities, and there would be presented the unheard-of spectacle of one officer having his case tried under different form, modes, methods, and practice from those applied to another officer in the same kind of a case in another part of the state. We think, plainly, that the superior court had no jurisdiction to entertain this proceeding, and the permanent writ of prohibition will issue as prayed for.

Here was an almost inexplicable opinion. No state law was alleged to be in conflict with the charter provision. A state law — the so-called enabling act — conferred power upon the city to

[1] 14 Wash. 604. 1896.

regulate the manner of electing its own officers, but this was not deemed adequate to include the regulation of election contests. Apparently the city could exercise only such powers as were conferred by the legislature, not by the constitution; and this grant of powers by the legislature must be strictly construed even though the result be, as in this case, that the matter in hand must go uncontrolled because the legislature had, doubtless by oversight, failed to cover it specifically. Such a ruling, if consistently applied, would merely make the constitutional grant of the right to frame a charter a ridiculous farce, for it is to be observed that the rule was not rested upon the view that this was an inappropriate subject for charter control.

This decision might have been ascribed to the fact that the Tacoma charter had chosen for its tribunal to try election contests one of the courts created by the constitution as a part of the general judicial organization of the state. Had the court rested solely upon the view, which was unmistakably expressed, that a city could not confer jurisdiction upon such a court, there might have been a good deal of justification for the judgment of invalidity that was spoken. But when in the case of State *ex rel.* Navin *v.* Weir [1] the court was urged to declare that the Fawcett case had gone no further than this, a flat refusal was given. The later case concerned the validity of a provision of the Seattle charter which made the city council a tribunal to hear and decide election contests. Declaring this provision to be void and declining to delimit the doctrine of the Fawcett case, the opinion asserted that "an inspection of that case will show that the decision was rested upon the proposition that the power to provide a tribunal and clothe it with authority to try contested election cases was not specially, nor by necessary implication, conferred by the legislature or by the constitution upon municipalities of the first class." Why such power was not conferred by the constitution the court evidently, and perhaps wisely, deemed it superfluous to explain.

It need only be remarked in conclusion that in view of the somewhat extended regulation of election matters by the provi-

[1] 26 Wash. 501 1901.

sions of the home rule charters of Washington cities — regulation which in some instances goes to the length of limiting election expenses and providing punishment for corrupt practices[1] — there must be many of these provisions which are in effective operation simply because they have not been contested.

May a City provide for Recall Elections?

The decisions of the Washington court in respect to the competence of home rule cities to establish the institution of the recall stand in striking contrast with those on the subject of election contests. In 1909 a councilman of the city of Everett sought to avoid the consequences of a recall petition by alleging, among other things, that there was neither constitutional nor statutory sanction for the recall provision of the city's charter. In *Hilzinger v. Gillman*[2] the supreme court refused to sustain this allegation. Under the "enabling act" cities were empowered to prescribe the *terms* for which councilmen should be elected. The pertinent inquiry was, therefore, for what term was the appellant elected, and this inquiry was answered by the charter. He was elected to hold office until a definite date "unless removed for cause or recalled." This rendered his term subject to the recall condition. It was broadly declared that both the constitution and the general law recognized that the larger cities of the state should determine "important and complex questions of local policy for themselves," and "it is only when some act in the execution of that policy conflicts with the general law or contravenes the constitution, that the act can be questioned." Whether the power to provide for the recall be regarded "as being derived from the constitution subject to the control of the general law, or as derived from the latter, the result will be the same If derived from the constitution, it does not conflict with the general law, and if derived from the latter, it is within its spirit and purpose."

Here was the clear intimation of a wholly new doctrine, although there was evidence of judicial caution. It need not be declared

[1] Spokane charter of 1910, sec 65.

[2] 56 Wash. 228. 1909

whether the authority in question was referable to the constitution or the law. But if referable to the constitution, it could be "questioned" *only* on the ground of conflict with some general law. The charter provisions creating tribunals for the settlement of municipal election contests had not been in conflict with any general law. They related to a matter that certainly might be embraced within the term "local policy" with as much propriety as the institution of the recall. The power to establish such tribunals could even be derived from the law, which conferred power to regulate the "manner" of electing city officers, by quite as forceful implication as could the authority to provide for the recall be rested upon the grant of power to fix the "terms" of such officers. The conclusion seems unescapable that the doctrine of the election contest cases is wholly irreconcilable with that of this recall case.

In 1912 the Washington constitution was amended so as to provide generally for the recall of public officers,[1] and in 1913 the legislature enacted a law in pursuance of this amendment.[2] Both the amendment and the law were made applicable to cities under freeholders' charters by specific reference to cities of the first class. In State *ex rel.* Lynch *v.* Fairley [3] it was held that this amendment and law superseded the recall provisions of the Spokane charter, and obviously the same ruling would apply to provisions of like character in all other home rule charters. The assumption by the state, through the medium of a constitutional amendment, of complete control over this matter doubtless renders the decision of the Hilzinger case of less importance than it might otherwise have proved to be.

What is the Scope of the City's Financial Powers?

In the early case of Tacoma *v.* State [4] question was raised as to the competence of the home rule city to exercise the power of eminent domain. The enabling act of 1890 expressly conferred this power but apparently permitted the city to institute only

[1] Art. I, secs. 33, 34.
[2] Laws of Wash., 1913, ch. 146.
[3] 76 Wash 332. 1913.
[4] 4 Wash. 64. 1892.

"such proceedings as may be authorized by the general laws of the state for the appropriation of private property for public use." No such general law existed at the time Tacoma framed its first charter Whether because of this fact or not, the framers included in the charter adequate provisions regulating the matter of condemnation proceedings. Declaring that these provisions were void, the court said:

The exercise of the power of eminent domain is so high and peculiar a thing that nothing less than an act of the legislature of a state can support it, and that act must not only confer the power, but prescribe the method by which it is to be done This statement would apply were there no requirement of conformity to the general law, but with the requirement in the same act which confers the power the rule is doubly binding. Because the constitution permits certain cities to frame charters for their own government is no sufficient reason for their assuming a branch of the sovereignty of the state, which has no element of municipal government in it, and the provisions of the charter must therefore be held void . .

There is no doubt that it was the intention of the legislature of 1890, which was the first state legislature, and had thrust upon it the entire reorganization of the state in many directions, to provide some general law by which municipal corporations not only of the first class, but of the other classes also, could acquire real estate by condemnation, but in the press of its business that subject seems to have been overlooked, excepting that the authority was conferred upon the first, third and fourth classes The legislature of 1891 saw fit to pass an act under which the state might proceed to take private property for public uses, in which the method of procedure was minutely laid down (Acts of 1891, p 138), but again all provisions for the exercise of a like power by municipal corporations was apparently overlooked Probably another session will not be allowed to pass without some adequate legislation to cover the existing defect, but in the meantime there seems to be nothing for the cities and towns of the state to do but to wait, or rely upon voluntary street opening, or the acquisition of the necessary lands by contract

Here was certainly an amazing utterance of doctrine. The provisions of the charter regulating the exercise of the power of eminent domain would have been void even had there been no statutory requirement of conformity to the general law upon this subject, for the reason that this was a "branch of the sovereignty of the state, which has no element of municipal government in

it." It need only be remarked that practically every aspect of municipal government is referable to the sovereignty of the state. Some of its ordinary powers — such, for example, as the power to own and operate a public utility — may indeed be conferred upon private persons or corporations; but most of its powers are strictly public and governmental in character — or, if you choose, "branches of the sovereignty of the state" — and may not be so conferred. The power of eminent domain is in plain fact so low and common rather than so "high and peculiar" a thing that it belongs in the former category, it being a power that is frequently vested in private persons. Moreover, it is well nigh inconceivable that a modern municipal corporation could operate for any length of time without enjoying this power. The truth is that the power of eminent domain is exercised far more frequently by cities than by any other governmental unit in our system. On what ground could it be asserted, then, that this power "has no element of municipal government in it" — whatever may have been meant by such assertion? And finally, without deviating from the line of argument pursued by the court, even though it be conceded *arguendo* that the exercise of this power is a higher and more peculiar thing than the exercise of other strictly governmental powers, that it is an act of sovereignty, yet the question may be asked: was not the power to frame a charter conferred by the sovereign in the most direct manner possible; to wit, through the medium of the fundamental law of the state?

Perhaps the court meant to declare that the right to exercise this power was not included within the grant of authority to frame a charter on the ground that it was not a municipal affair and was therefore not an appropriate subject of charter regulation. If this was the intention, it is sufficient to say that it was not very clearly expressed, and that in any case it was a somewhat arbitrary view, wholly belied by the practically universal provisions of municipal charters in this country, and utterly rejected by the courts of other home rule states in which questions of a similar character have arisen.[1]

[1] *Supra*, 175, 336, *infra*, 471, 536.

In 1893 the legislature of Washington passed "an act to provide for the assessment and collection of taxes in cities of the first class."[1] This act deprived the officers of home rule cities of the power to assess and collect city taxes and vested such power in county officers. It was contended in the case of State *ex rel.* Seattle *v.* Carson[2] that this law did not operate to control the provisions of the Seattle charter upon this subject This contention was rested in part upon an elaborate and refined definition of the meaning of the phrases "subject to," "consistent with," and "controlled by," as used in the home rule provision of the constitution, and in further part upon the view that some of the usual rights, powers, and duties of a city "concern solely the municipality, while in some others the state has a joint interest," and that as to the former the city under a freeholders' charter was not "subject to" the general laws of the state In other words, the Washington court was in effect urged, although the argument employed was somewhat tortuous and involved, to introduce into the interpretation of the constitution upon this point the distinction between affairs of municipal concern and those of state concern — a distinction which a few years later was written into the California constitution and which was ultimately read into the Missouri provision by the courts Said the court

> The construction contended for by appellant is against the weight of authority, however, and is also against public policy, in our opinion. Substantially the same provision as the one quoted from our constitution is contained in the constitutions of California and Missouri, and in these states the right of the legislature to amend the charters of such cities has been recognized and is established The constitution of California differs from ours in that it requires such charters and amendments thereto to be submitted to the legislature for approval or rejection, and for that reason appellant argues that the California cases are without force here But in construing this provision the courts of that state have placed the right of the legislature to amend these charters upon the clause that such cities "shall be subject to and controlled by general laws," and it seems to us that the intention was to include all cities in said clause, from the language of the section, regardless of its construction elsewhere.

[1] Laws of Wash 1893, p 167
[2] 6 Wash 250 1893

There is no question that the Washington court correctly interpreted the California and Missouri decisions that had been handed down prior to that date. The point seems not to have been urged, or if urged was not discussed, that here was a general law relating to the "organization" of cities, which had not been accepted by the voters of Seattle.[1] The declaration of the constitution in this respect was ignored. The decision laid down the far-reaching rule that a law of general application to a class of cities would control a contrary charter provision regardless of the nature of the subject-matter of the law.

In the case of Howe *v.* Barto[2] a provision of the charter of Seattle was upheld which declared that deeds executed by the proper officer upon the sale of land for taxes should be *prima facie* evidence of the fact that the procedure in such matters, as provided for in the charter, had been complied with. The case is of little importance in connection with our study here except perhaps that it was a fairly liberal interpretation of the scope of the city's powers under a *legislative* grant of authority to provide for the assessment and collection of taxes. This competence was specifically referred by the court not only to the constitution but also to the state *law*.

The framers of the Spokane charter of 1910, evidently with a knowledge of the doctrine of the early case of Tacoma *v* State, were careful in the brief article dealing with local improvements[3] to defer to the authority of state laws relating to special assessments. It was therein declared nevertheless that the city should have power "to provide for the payment of the whole or any part of the cost" of any local improvement by special assessments[4] — a policy which did not at the time run counter to the state law. But in 1911 a statute was enacted which limited such assessments to an amount equal to fifty per centum of the value of any property assessed as shown by the tax rolls. The precise contention that was made by the city in the case of Van der Creek *v.* Spokane[5] is not clear. It appears to have been to the effect that the only

[1] *Supra*, 398, 399. [2] 12 Wash 627 1895 [3] Art. X.
[4] Sec 92. [5] 78 Wash. 94. 1914.

limitation on the power of the city in this regard was to be found in another provision of the constitution, which implied that a special assessment should not exceed the benefit.[1] The court declared without qualification, however, that "a general law governing cities and towns . . . which limits the power granted . . . *is, in so far as the subject-matter of the enactment is* concerned and the municipality affected, a limitation of equal force and as imperative in its working as if it were a part of the constitution itself." Than this a broader and more positive statement of the absolute supremacy over a charter provision of any law of general application could scarcely be imagined.

Again in Smith *v.* Seattle[2] the competence of the city to impose special assessments for the laying of water mains was sustained under the authority of a general law applicable to all cities. In the opinion rendered in this case it was expressly declared that the act in question "must be regarded as an amendment to the general incorporation laws theretofore enacted by the legislature under sec. 10, Art. XI of the constitution." It will be recalled that cities were to become organized under these general laws for the "incorporation, organization, and classification" of cities only upon a favorable vote of the electors. Why this act, which was an amendment to such laws, should without acceptance have applied to Seattle, which was not organized under these laws, does not appear. The point was not discussed. It was thus that the Washington court, by persistently ignoring whenever the occasion arose an express provision of the constitution, was able to avoid the necessity of explaining the apparently contradictory declarations of that instrument — declarations identical with those of the California constitution which had been so much discussed and so unsatisfactorily elucidated in that state.[3]

In the case of the Chlopeck Fish Co. *v.* Seattle[4] the authority of the city to construct a pier at a street end was likewise premised upon "the sweeping powers conferred by the enabling act." There was no intimation that the city would have enjoyed

[1] Art. VII, sec. 9.
[2] 25 Wash. 300. 1901.
[3] *Supra*, Ch. VIII.
[4] 64 Wash. 315. 1911.

such a power as a direct result of the constitutional grant of authority to frame a charter.

In Seattle *v.* Clark[1] discussion was had as to the competence of a city under a freeholders' charter to control the matter of liquor licenses. One of the main points at issue was whether one statute upon this subject had repealed a previously enacted statute; but clearly the authority of the city to regulate this matter at all was ascribed to the existence of a law which conferred such power directly. It was not fair to assume that the legislature had given to cities of the second class the right to fix the amount of liquor licenses at the discretion of the city council and had withheld that right from cities of the first class. It was perfectly manifest that "it was the intention of the *legislature* . . . to leave to the cities of the state, of all classes, full power to regulate the sale of intoxicating liquors within their limits."

From this brief review of the cases concerning matters pertaining to the financial competence of the home rule cities of Washington, the conclusion must be reached that such cities are not only completely subservient to the provisions of all general state laws regulating their power to raise revenues but are also actually dependent upon the legislature for a specific grant of powers in this regard, such powers being not embraced within the mere authority conferred by the constitution to frame a charter.

It ought to be noted perhaps that at the time of the adoption of the Everett charter of 1912 a separate article was submitted which made provision for a gradual introduction of the principle of the single tax. This article was defeated at the polls, but the scheme was later approved in the form of a charter amendment. It appears that it has never been acted upon because of the doubt that surrounds the question of its legality. Aside from any question of its conflict with the general principles of taxation that were laid down in the constitution,[2] it seems patent that under the decisions this charter provision is void, for it is certain that neither

[1] 28 Wash. 717. 1902.

[2] Art. VII, sec. 1.

in the enabling act nor in any other statute has the legislature conferred upon home rule cities the power to establish such a system of taxation.

What is the City's Power to regulate Matters pertaining to Public Utilities?

The most numerous group of cases in the Washington jurisdiction that have construed and applied the home rule provisions of the state constitution consists of those which have dealt with the powers of cities in respect to public utilities. In the early case of Seymour *v.* Tacoma [1] it was clearly implied that the city under a freeholders' charter enjoyed the power to purchase a waterworks or an electric lighting plant only as a result of an express grant of such power contained in the enabling act of 1890. No further cases on the subject of municipal ownership have arisen in the state for the reason apparently that no city has ever attempted to exceed the limit of its competence in this respect as fixed by the enabling act.

This same enabling act conferred explicitly upon cities the power "to regulate and control the use and price of water" and "to regulate and control the use" of gas or other lights furnished to the inhabitants of such cities. In addition to this and other enumerated powers it was provided that these cities should have "all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

The first freeholders' charter of Tacoma, adopted in the same year in which this statute was enacted, conferred upon the city council "the power to fix the price of water and light furnished to inhabitants of the city by any person or corporation other than the city." In the case of the Tacoma Gas & Electric Light Company *v.* Tacoma [2] the question was squarely presented to the court whether the city could exercise the power of fixing gas rates. Examining the enabling act with great minuteness the

[1] 6 Wash. 138. 1893. [2] 14 Wash. 288. 1896.

court discovered that while the power to fix water rates was expressly conferred by the act, the power to fix gas rates was not specifically granted. It was urgently pressed upon the court that the city enjoyed this power by virtue of the direct grant by the constitution of the right to frame a charter for its own government; but this wholly reasonable interpretation of the constitutional provision in question was curtly dismissed with the declaration that it was sufficient to say "that the legislature having passed a general law upon the particular subject, the power to fix such rates must be found therein, if at all."

This decision was reached in the year 1896. It took rank, therefore, among the fairly early adjudications construing the home rule provisions of the constitution. It gave small hope that the court could be relied upon to entertain any liberality of view toward the scope of powers conferred by these provisions. Not only did it clearly recognize the competence of the legislature to define the extent of powers included within the grant of the right to frame a charter, but it also declared in effect that the complete list of such powers must be set forth in the law. It was not asserted that the power to fix gas rates was a power inappropriate to a municipal government. It was not even necessary to determine this point. Neither was it asserted that the law had prohibited the exercise of such power. It had simply not conferred it.

It may be that the court was entirely justified in holding that the legislature was fully competent to define the scope of the powers that might be exercised under a home rule charter. The constitution required that such charter should be subject to general laws; and the enabling act, applying as it did to all cities of the first class and being, therefore, of "general application," was doubtless a general law. It is nevertheless difficult to see why the court should have taken the view that the limits of the city's powers must be found in the law — that, even in the absence of any conflict between general law and charter provision, no specific power could be directly referred to the constitutional grant of authority to frame and adopt a charter.

During the ten years following the decision of this Tacoma case the cities of Washington contented themselves with the management of their public utilities to the extent allowed and in the manner prescribed by state law. In 1906, however, in the case of Hindman *v.* Boyd,[1] already mentioned in another connection, contention was made that the city of Spokane was incompetent to apply the institution of the initiative and referendum to the case of franchise grants as provided by the charter of the city. Construing the enabling act the court held that the power to grant franchises was expressly conferred by the act and that the power to regulate such grants in the manner prescribed by the charter was not in conflict with the act.

Two years later, in the case of Benton *v.* Seattle Electric Company,[2] the court was called upon to determine the validity of a similar provision of the Seattle charter when construed in connection with a law of 1903 as amended in 1907 which conferred the power to issue street railway franchises upon the "legislative authority" of the city. It was held that the law in question superseded and controlled the provisions of the charter which required a referendum of all franchise grants to the voters. This decision was not based upon the view that the regulation of matters pertaining to public utilities in general, or street railways in particular, was a matter of state rather than of local concern. In fact as we have already seen and as we shall have occasion again and again to note, this distinction has never been introduced in the Washington decisions construing the home rule provisions of the constitution. The Benton case was reaffirmed in Ewing *v.* Seattle,[3] where a practically identical issue was before the court.

In the case of Tacoma *v.* Boutelle [4] the validity of an ordinance regulating the service to be furnished by street railway companies was sustained. In this case reference was made to the provision of the constitution which specifically conferred the police power upon cities;[5] but the ordinance appears to have been supported

[1] 42 Wash. 17 (1906); *supra*, 420.
[2] 50 Wash. 156 (1908); *infra*, 450.
[3] 55 Wash. 229 (1909); *infra*, 450.
[4] 61 Wash. 434. 1911.
[5] *Supra*, 403.

more largely by reference to the enabling act which conferred power upon the cities of the first class "to authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which such railroad or street railroad shall be located or constructed." Referring jointly to the constitution, the statute, and the provisions of the local charter, the court asserted that these showed "a sufficient conferring of power upon the municipality."

In the case of State *ex rel.* Schade Brewing Company *v.* Superior Court [1] it was held that the city of Spokane had no power to grant to a railway company a franchise that included the right to exclusive occupancy of a city street, even though compensation was required to be paid to abutting property owners for damage sustained as a result of the practical closing of the street. It was not clearly declared or even intimated that the legislature could not have conferred such power upon the city. By a somewhat strict construction of the statutory grant of powers to home rule cities it was held that the legislature had not in fact conferred the power sought to be exercised. The franchise grant which the city attempted to make was distinguished from the ordinary vacation of a street, and emphasis was laid upon the fact that although the rights of abutting property owners were protected by the requirement that compensation for damages should be paid, yet the rights of the public to the use of the street were completely destroyed. The case is of importance in this connection only as it indicates again that the city under a freeholders' charter in Washington was compelled to look to the law in order to ascertain the scope of its powers to control matters relating to public utilities.

In 1903 the city of Seattle granted a franchise to a telephone company in accordance with the provisions of its charter. Eight years later the state legislature enacted a law which transformed the state railway commission into a public service commission endowed with power to establish rates to be charged by public service corporations throughout the state. Shortly after the

[1] 62 Wash. 96. 1911.

enactment of this statute the public service commission issued an order directing the telephone company in Seattle to inaugurate a new schedule of rates which were somewhat higher than those fixed in the franchise previously granted by the city. An injunction was sought by the city to prevent the telephone company from collecting the rates fixed by the commission. In the case of the State *ex rel.* Webster *v.* Superior Court [1] question was presented to the Supreme Court as to whether the order of the commission, issued pursuant to authority conferred by the state law, took precedence over the franchise previously granted by the city. The judgment of the court to the effect that the order of the commission was binding in spite of the contrary regulation imposed by the franchise issued by the city was founded upon the following course of reasoning.

It was assumed that the city had lawful authority to fix telephone rates at the time when the franchise was granted, but it was declared that the authority of the city in this respect had not been conferred by the legislature in "express and unmistakable" terms. "The power to fix rates," said the court, "being a right reserved by the people of the state, cannot, in the light of the constitution be held to be an incident to the right to frame a freeholders' charter." This being the case, the franchise which the city had granted to the telephone company could not be regarded as a contract between the city and the company. "An essential element of a contract was wanting." The city could not enter into such a contract unless the power to do so was explicitly conferred by the state. Its power to fix rates was, therefore, "in the nature of a license." The city might perhaps establish rates, but it could not enter into a contract in respect to rates which would be binding upon the state itself in the exercise of its police power to regulate rates, which power in the state could not be "bartered or bargained away" by the city. It was declared that "without exception, courts have, in the absence of positive limitation, upheld the authority of the state as against municipal corporations when dealing with the problems of public

[1] 67 Wash. 37 (1912); *supra*, 403.

service, and have been careful to warn against the danger of admitting a divided authority either to control or direct."

We are not here particularly concerned with the opinion of the court on the question as to whether the public utilities law of 1911 impaired the obligation of a contract into which the city had entered with the telephone company. This is a federal question which has no especial relation to the subject of home rule. Obviously this guarantee of the national constitution would apply to acts of the legislature or of cities regardless of whether the latter were or were not operating under charters of their own making. The opinion in this case was in fact, however, concerned largely with this federal question, which was thoroughly interwoven with the other question as to the supremacy of a state law over a charter provision, or rather the supremacy of the order of a state commission issued in pursuance of a state law over an action of the city taken in pursuance of a charter provision. Aside from the fact that the superiority of control by the state was completely sustained, perhaps the most important point in connection with our study is the assumption or concession by the court that a city might, through the medium of a freeholders' charter, provide for the regulation of telephone rates in the absence not only of any conflicting state law but also of any express grant of power. This concession, it would seem, was wholly out of harmony with the decision of the first case above noted upon this subject, wherein it was held that the city of Tacoma had no authority to fix gas rates because such authority had not been specifically conferred by the law. It would seem also that this concession, which was made at the outset of the opinion and which constituted in fact the only excuse for the elaborate discussion entered into, was likewise out of harmony with the declaration that was made in the course of the opinion to the effect that the power to fix rates could not "be held to be an incident to the right to frame a freeholders' charter." On the whole it is not easy to understand why the court was not contented to declare, following the doctrine of the Tacoma case, that the power of the city to fix telephone rates in the franchise granted was wholly *ultra*

vires. This would have eliminated all necessity for any discussion of the contractual or non-contractual character of the franchise involved.

In the case of Spokane *v.* Spokane & Inland Empire Railroad Company[1] the relation of the public utilities act of 1911 to the charter powers of home rule cities was again presented to the court for consideration. The city of Spokane enacted an ordinance providing for the abolishment of grade crossings. It was contended by the railroad company that the power to compel grade separations was vested exclusively in the public service commission of the state. Examining the law which created this commission, the court held that the commission was not vested with "any power to change street grades or to exercise the power of eminent domain." This being so, no conflict existed between the state law and the provisions of the city's charter upon this subject. It was asserted that home rule cities still enjoyed all the police power "conferred upon them by the constitution and laws of this state, except in so far as the state, by its general law, had withdrawn that power and sought itself to exercise it." The authority to order a change of grade crossings was an appropriate exercise of the police power of the city. The ordinance in question was held void, nevertheless, upon the ground that in requiring railroad companies to institute condemnation proceedings to bring about changes of grade, and in imposing upon the courts the duty of determining what portion of the cost of such work should be borne by the railways, the city was in effect conferring its power of eminent domain upon the railroad companies and a non-judicial power upon the courts. It was clearly intimated that should the city revise its ordinance so as to eliminate these defects the action of the city would be entirely within the scope of its competence.

In this case the authority to enact an ordinance abolishing grade crossings was referred to the police power of the city. No specific provision of the charter conferring such authority was named. It was not made clear, however, whether it was the view of the

[1] 75 Wash. 651. 1913.

court that the police power of the city was referable directly to the enabling act or to the clause of the constitution which conferred such power upon cities.[1] In fact these several points were not discussed in any detail. But if the authority to abolish grade crossings could be sustained under the *general* police power of cities, whether that power was derived from the constitution directly or from the general law of the state, the decision of this case also was out of harmony with the first public utilities case herein mentioned; for it will be recalled that in the Webster case above referred to the court expressly characterized the power to fix rates as being included within the definition of the police power. If home rule cities enjoy the authority from either the constitution or the statutes to exercise *general* police powers, it is difficult to see why the power to fix gas rates, which was denied in the Tacoma case, should not have been sustained under this general grant of the police power.

In the case of Seattle Electric Company *v.* City of Seattle[2] there was drawn into question the validity of an ordinance enacted for the purpose of regulating the operation of street cars to prevent overcrowding and to secure compliance with a schedule which was required to be filed in the office of the city superintendent of public utilities. The city conceded that the power to regulate such matters as this was, under the public utilities law of 1911, vested in the public service commission; but the contention was made that "until such time as the public service commission shall act, the city retains jurisdiction to regulate street railroads" in the manner attempted. On this point the court declared:

> It is plain that the state must be held to have spoken upon a given subject-matter when its legislative will becomes effective. From that time the policy of the state is declared. But if there is room for the exercise of concurrent jurisdiction, the act of the state legislature does not revoke the right of the city to exercise the police power.
>
> The inquiry then must be directed to the question as to whether the legislature intended that the city should exercise its police power over the subject-matter of the ordinance after the public service commission law

[1] *Supra*, 403. [2] 78 Wash. 203. 1914.

took effect and prior to the time that the public service commission might issue an order.

The public service commission law of this state was substantially taken from the Wisconsin law. This fact is conceded by both the appellants and the respondent. The Wisconsin law contained a provision that the act should not apply to street and electric railroads engaged solely in the transportation of passengers within the limits of cities. In the law of this state, we find no such provision. The terms of the law, as shown by the excerpts already quoted, are most comprehensive. The appellant concedes that these provisions invest the public service commission with the right to control street railways by the issuance of an order after a hearing and also the right of the city to invoke the aid of the commission in regulating and controlling street railways operating within its limits. Had the legislature intended that the city might exercise jurisdiction until the commission should issue an order, it seems strange that, with the Wisconsin law before it, with a provision therein exempting certain street and electric railroads from its operation, that [*sic*] some qualification would not have been inserted in the law of this state.

Again, if it was the legislative will that jurisdiction should be retained by the city, the insertion in the law of the right of the city to invoke the aid of the commission would be entirely useless. To so construe the law that the city might exercise the power of regulation until the public service commission should act, would be of no substantial benefit to the city and would give rise to conflict of authority and inevitable confusion. If this were the meaning of the law, the city, after it had gone to the trouble and expense of acquiring the necessary data and passing a regulating ordinance, might have its work nullified whenever, to use the language of the statute, complaint might be made to the commission by "any person, corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation," and the commission should issue an order. And the public utilities company, if it should comply with the ordinance and incur expenses necessarily incident thereto, might have its work undone in like manner.

Considering the entire statute, and especially the excerpts quoted therefrom it seems plain to us that it was the legislative intent that the power and authority to regulate public utilities was vested in the public service commission from and after the time the law took effect; and that, when the law became effective, it revoked the power of the city to legislate upon the subject-matter covered by the ordinance.

The decision of the court in this case, which denied to the city the power to regulate public service corporations in respect to

any matter over which the state commission had been granted jurisdiction, even though such commission had taken no action under its statutory authority, seems to require no comment.

From this review of the Washington cases involving questions of the power of home rule cities over public utilities it is manifest that the court has for the most part been consistent chiefly in its narrowness of view. To sum up, the following points of law may be said to be fairly established: (1) that the city enjoys no right to acquire and operate a utility except under grant of authority from the legislature, not the constitution; (2) that the power to fix utility rates must likewise be found in statutory allowance, but in one case the power of the city to regulate rates was conceded to have been "in the nature of a license" although it could not be regarded as "an incident to the right to frame a charter" and had not been "unmistakably" conferred by the law; (3) that the power to grant franchises, which must also be given by the legislature, could be regulated by the home rule charter only to the extent that such regulation did not collide with the law as rigidly, if not indeed unreasonably, construed; (4) that the power to regulate service and to order the abolishment of grade crossings might be referred to a specific or a general grant of the police power, although it is not quite clear whether this police power was derived from the constitution, the statutes, or the charter; (5) that after the assumption by the state of control over municipal utilities through the medium of a state commission, the city might regulate utility corporations (presumably within the scope of competence conferred by the law) only in respect to matters over which the state commission was not given potential authority.

To What Extent can the City regulate the Rights of Private Persons having Claims against the City?

No cases have arisen within the Washington jurisdiction involving any question of the competence of cities under freeholders' charters to limit the rights of private persons who may assert claims arising out of taxes, special assessments, or contracts.

The only cases of this general character in the books have been concerned with charter provisions regulating the matter of damage claims.

The contention was made in the early case of Scurry *v.* Seattle [1] that a provision of the charter of Seattle requiring that all claims for damages should be presented to the city council within six months after the time when such claims accrued was in conflict with the general statute of limitations enacted by the legislature. The court held that no conflict between the charter provision and the law existed, for the obvious reason that if the requirement of the charter had been complied with the person making the claim would have had the full statutory period in which to bring an action. There was no intimation in the opinion handed down that the charter provision upon this subject was not entirely within the competence of the city.

In the case of Durham *v.* Spokane [2] it was held that the provision of a freeholders' charter which required that every claim for damages for injuries resulting from a defective sidewalk should be filed with the city council and should set forth the nature and extent of the injuries received did not prevent the introduction, at the trial of a cause arising out of such claim, of evidence concerning the nature of the injuries although such evidence had not been included in the statement of the claim as filed with the city council. The opinion declared in effect that the charter provision in question could not be strictly construed in this respect. But it was also expressly held that a city could not prevent a recovery against itself by requiring claims for injuries to be presented within a given time when in point of fact physical ailments arising out of such injuries might not develop until subsequent to the limit of time prescribed. Said the court:

> It is not the rule that a city may say whether or not it shall be held for personal injuries caused by its neglect of duty. Charter provisions of the character in question, whether enacted by the legislature, or, as in the present case, by the city itself, are to be upheld only so far as they are reasonable and tend to the due administration of justice.

[1] 8 Wash. 278. 1894.

[2] 27 Wash. 615. 1902.

It was not explained upon what constitutional ground the court could have declared void a provision of a legislative charter which imposed such a limitation, or which even went so far as to deny to individuals the right to recover from the city for neglect of duty in maintaining the sidewalks in proper repair. The home rule city and the legislature were apparently grouped together in the declaration which the court made as to their incompetence to enact a charter provision of the character indicated. It can scarcely be said, therefore, that the decision of this case imposed upon the power of the city a limitation based upon the fact that the charter was of the home rule variety.

In the case of Hase *v.* Seattle[1] a claim against the city for damages resulting from personal injuries was contested on the ground that the claimant in the statement which she filed with the city clerk did not, as was required by an ordinance enacted under the authority of the charter, state her residence for the past year nor clearly set forth the defect in the sidewalk which was the alleged cause of the accident. The court pointed to the fact that the powers claimed by cities in all cases of this character were powers in derogation of common law rights. It is, of course, a platitude of our law that statutes enacted by the legislature and the rules of the common law stand upon precisely the same footing before the courts. Common law rules prevail unless repealed or modified by the constitution or the statutes. This being the case, it is not easy to see why the Washington court did not declare that all such charter provisions as the one here under review were void as being in conflict with a general law of the state — in this case, a general principle of the common law. The court, however, did not rest its decision upon any such view. On the contrary, the doctrine of the Durham case was invoked, and the regulation prescribed by the city was declared void because of its unreasonableness. In the view of the court such a regulation "would in no way aid the city in the investigation of the claim."

It may be observed that in this case, where the regulations in question were prescribed by an ordinance rather than specifi-

[1] 51 Wash. 174. 1908

cally by the charter, the judgment of the court might have been sustained under the well-known rule that the courts are competent to declare void any unreasonable ordinance.[1] But since the court expressly declared that the question discussed in the Durham case, where the limitation was imposed directly by the charter, "was the identical question at issue in this case, where the limitation was imposed by ordinance," it would seem that this was not the rule relied upon, but that the court asserted the authority of the judiciary to hold void any charter provision upon this subject which was not in accord with its own ideas of what was reasonable. The opinion did not in fact lay emphasis upon the point that the city was operating under a freeholders' charter, although there is probably very little doubt that the court was influenced by this fact.

It is perhaps obvious that no clear-cut rules of law may be derived from these Washington cases touching the competence of a home rule city to regulate the matter of private claims against itself. The most that can be said is that the court has been inclined to take a somewhat narrow view of the competence of the city, impressed no doubt by the curious fact that the city should be setting limitations upon its own liability.

To what Extent could the Legislature, Irrespective of the Powers to be exercised, impose upon the City Requirements in Respect to the Form of its Government and the Medium through which its Powers might be exercised?

Without allusion to the specific matter under review, a number of cases have been previously referred to in which the decisions of the Washington court turned largely upon an asseveration by the court of competence in the legislature to prescribe by a law of general applicableness the precise agency of the city government which might exercise this or that power conferred by statute. Thus in Seattle *v.* Clark,[2] involving the question of the power of the city to control liquor licenses, one of the main points at issue in the

[1] *Supra*, 181, 325, 405. [2] 28 Wash. 717 (1902); *supra*, 435.

case was whether the enabling act, which empowered cities under freeholders' charters "to fix by ordinance" the amount to be paid for such licenses, operated to prevent the city from fixing the minimum fee by charter provision. The court held that the requirement of the law might be "considered as directory;" and since there was no provision in the act "excluding all other ways for fixing a license fee than by ordinance," that "a liberal construction of the statute expands the meaning of a statute to embrace cases within the spirit or reason of the law. The fixing of this fee can be regulated as well by a charter amendment as by ordinance; and, if it is made uniform and certain in one or the other of these ways, the legislative will of the state in conferring upon the municipality power to govern the traffic is carried out."

Again in Hindman *v.* Boyd [1] it was urged as one of the reasons for opposing the submission to the voters of a proposed amendment to the charter of Spokane (providing for a compulsory referendum on certain franchises upon the petition of a percentage of the voters) that the "legislative power" of the city was by the enabling act vested in the mayor and council, and that such power could not by a charter amendment be revested in the voters. It was held, however, that since the enabling act also provided that the mayor and council should "have such powers as may be provided for in the charter," and that since "the power to make a charter is in a sense" itself "a legislative power," the city was not prohibited from adopting an amendment which would vest some control over the granting of franchises directly in the voters. And it was further held that in any case the act which empowered cities to employ the institution of the initiative and referendum had in effect repealed the provision of the enabling act vesting the legislative power of the city in the mayor and council. The opinion expressed in this case, as well as that delivered in Seattle *v.* Clark, was reaffirmed in Hartig *v.* Seattle.[2]

In these cases the view was not put forward that the powers in question related to matters of state concern and that, therefore,

[1] 42 Wash. 17 (1906); *supra*, 420, 438.
[2] 53 Wash. 432. 1909.

if exercised at all by the city, such powers must be exercised in the precise manner and through the precise agency prescribed by the law. This point was not discussed or adverted to. Neither was the rule laid down that, if the competence of the city to control these matters be conceded because they were matters of local concern, it must also be conceded that the home rule city was empowered to determine the manner in which and the agency through which such powers should be exercised. The only points elaborated by the court were points of statutory construction; and it must be admitted that for the Washington court the constructions noted were of an exceedingly liberal character.

But witness in contrast certain other decisions of the same tribunal.

In Benton *v.* Seattle Electric Co.[1] it was held, as has been noted, that, as applied at least to *street railway* franchises, the provision of the Seattle charter requiring a referendum upon franchises was void as being in conflict with a state law of 1903 which declared that the "legislative authority of the city or town having control of any public street" might grant such franchises. This being the law, a franchise granted by the mayor and council of the city was perfectly valid even though not approved by the voters as required by the charter. Reading the opinion in this case, one is prompted to inquire as to what had become of the "liberal construction of a statute" that embraced "cases within the spirit or reason of the law;" and finding no answer, one is timorously tempted to regret that, after all, the oft-referred-to "books" occasionally contain so little of actual enlightenment.

The opinion uttered in this case was reaffirmed in Ewing *v.* Seattle,[2] the precise point decided being that the "legislative authority" of the city — the mayor and council — was under no obligation whatever to award a street railway franchise to the highest bidder in accordance with the requirement of the charter, because the law, without qualification, had conferred power upon such "authority" to grant such a franchise. It might indeed be conceded that "the showing made in behalf of the plaintiff was

[1] 50 Wash. 156 (1908); *supra*, 438. [2] 55 Wash. 229 (1909); *supra*, 438.

such as to warrant the learned trial court in granting the temporary injunction" for which prayer was made. The argument of "learned counsel" was "plausible." But it was notwithstanding false in its "assumption;" for did not the law confer upon the "legislative authority" of cities not only the power to grant such franchises but also the power to "prescribe the terms and conditions on which such railroads or railways and their appurtenances shall be constructed, maintained, and operated?" What did it matter that "bids were invited and received in the manner provided by the charter"? This in no wise lessened "the power of the legislative branch of the city government to ultimately determine the question in any way it saw fit." Who could doubt in the year 1909 that the term "legislative authority" wholly excluded the voters of a city from the possibility of claiming to be a part of that authority? It was "settled law in this state . . . that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith." To hold that the provisions of such a charter might so limit the power of the "legislative authority" of the city "as to reduce it to a mere ministerial or at most a judicial act . . . would be to take from the mayor and council a portion of the legislative power directly conferred upon them by a general law of this state." This would be unthinkable!

Is it fair to remind the court that this same term — "legislative authority" — as used in the fundamental law of the state, in connection with the procedure prescribed for adopting and amending freeholders' charters, was defined by this same tribunal as a merely ministerial authority? [1]

Again in State *ex rel.* Schade Brewing Co. *v.* Superior Court,[2] where it was very evident that the court disapproved of the policy of an ordinance of Spokane which empowered a railroad company to make an exclusive occupation of a portion of a city street in order to emerge from a tunnel, a rule of strict construction was applied. The title of an act of 1907 indeed purported to confer "additional authority" upon cities of the first class in respect to the grant of

[1] *Supra*, 413–418.

[2] 62 Wash. 96 (1911); *supra*, 439.

authority to railroads to use the streets; but the act was in fact no more comprehensive in this respect than was the original enabling act of 1890. It was held, nevertheless, that there was a "fundamental difference between the two grants of power," and that this difference at once rendered "plain the purpose of the enactment of the latter." The act of 1890 did not grant power to "councils" but to "cities," this power being "left to the cities to be exercised in such manner as the people thereof might provide by their charter." The court took solemn "judicial notice of the fact that, in at least some of these cities, . . . the council was very much limited in the exercise of this power." By the law of 1907 these charter restrictions were removed. The franchise power was to be exercised "by ordinance, which, of course, means by the city council." "Here, then, we have the additional power granted, not to the city in the sense in which power was granted by the enabling act of 1890, but to the city council." This was why the framers of the law in question had entitled it "an act granting additional powers *to cities* of the first class." Surely this was a remarkable elucidation of the purport of the statute.

The validity of the commission government charter of the city of Spokane, adopted in December, 1910, was attacked in the case of Walker *v.* Spokane [1] upon the ground that the organization of government therein provided was in violation of a provision of the enabling act which declared "that the legislative powers of any city, organized under the provisions of this act, shall be vested in a mayor and a city council." In reply to this contention the court said:

> We think the position of the appellant is untenable, even under the provisions of Sec. 7517. There is nothing in that section which undertakes to specify or limit the duties of a mayor as an executive officer. In fact, he is not even described as an executive officer, but as a legislative officer; and the objection to the proposed charter is that it in reality makes nothing of him but a legislative officer. It is contended by the learned counsel for appellant that, while the section does not specifically provide that the executive power shall reside in a mayor, it is necessarily implied by the mention of that official; that if no function other than acting in

[1] 62 Wash. 312 (1911), *supra*, 421.

conjunction with the city council in matters of legislation was intended to be performed by the mayor, no mention of such official would have been made, and the mandate of the law would have been simply that the legislative power of the city should be vested in a city council. Hence, it is necessarily implied that cities of the first class are each to have a mayor possessing the distinguishing characteristics of that office. But there is no room for an implication when the plain, mandatory provisions of the statute are to the contrary. And as we have seen, Sec. 7517 provides that the mayor and council shall have such powers as may be provided for in its charter, and that they shall perform such duties and receive such compensation as may be prescribed in such charter.

The construction put upon the statute in question was doubtless wholly reasonable. The point of importance, however, is that there was here a clear indication that the only reason why a home rule city might adopt a charter providing the commission form of government was that no general law of the state imposed any requirement that prohibited the establishment of such a type of government.

The case of State *ex rel.* Rose *v.* Hindley [1] involved an issue of facts which necessitated a consideration of the power of a city to provide in a home rule charter for a health department. In 1893 the legislature passed an act providing for the establishment of boards of health in every city of the state; but it was expressly declared that the provisions of this law should not "apply to any city in which a board of health is organized and a health officer appointed under the provisions of a special charter." This, of course, left cities of the home rule class free to regulate the organization of boards of health through the medium of charters of their own making. Such a health board was established by the charter of Spokane, but when the city in 1910 adopted a charter of the commission variety no provision was made for such a department. It may be noted that, following the usual plan of such governments, provision was made for the organization of five administrative departments and among these was a "department of public safety." The charter did not enumerate the powers of these several departments but vested power in the council, or

[1] 67 Wash. 240. 1912

commission, to make a distribution of powers and functions by ordinance.[1] This fact was not adverted to by the court in the opinion that was handed down in the case here under review. Whether "a department of public safety" could or could not be held to embrace a department of health was not discussed. Certainly in most commission government charters control over matters pertaining to the public health has been vested in a comprehensive department of this character. However, the court held that the new charter of the city contained "no provision whatever relating to boards of health," nor "did it provide for the exercise of any powers by any of the city departments or boards of the nature of those pertaining to boards of health." Consequently the relator in the case, a bacteriologist formerly in the employ of the health department under sanction of an ordinance of the city, was declared to have been legislated out of office by the adoption of the charter. It may be remarked that one Frank Hinman was made a defendant by the relator who sought to retain his office. This Hinman was employed by the city as a bacteriologist subsequent to the adoption of the charter. The court held that it was unnecessary to inquire as to the legality of his employment. "It might be argued," it was said, "that we must presume that he is employed by the board of health as organized under the general law. This, however, is of no moment in our present inquiry." It was not unmistakably asserted, although it was certainly clearly intimated, that since the city had failed to make in its charter specific provision for a health department, such a department would have to be organized under the state law of 1893. Two of the five members of the court dissented from the decision of the majority upon the ground that the employment of Hinman as a bacteriologist under the new charter precluded the assertion that such office did not exist under the charter.

We are not here especially concerned with the somewhat unsatisfactory conclusions reached by the court. Neither are we especially interested in the inquiry as to whether or not the general law of the state providing for the establishment of boards of health

[1] Sec 22.

did in point of fact become operative in Spokane by reason of the omissions of its charter. The chief point of importance in connection with our study is the declaration that was made at the outset of the opinion to the effect that the only reason why a city enjoyed the power to establish a health department under the terms of a freeholders' charter was because the state law providing for the creation of such departments in all cities had specifically excepted cities under special charters which contained provisions on this subject. Nor was this declaration, let it be once more remarked, based upon the view that the control of public health was a state as distinguished from a local or municipal affair. The court would have held the same view had the case involved a department of waterworks or of parks.

So much for the opinions of the Washington court in respect to the competence of the legislature to prescribe the particular agency of the local government through which any power of the city — regardless of its nature — might be exercised. Whatever may be thought of the consistency and logic of the court's pronouncements, there could be no question that the power of the legislature in this regard was absolutely unlimited.

The Washington cases which have construed the grant of home rule powers as made in the constitution of 1889 present two conspicuous points of interest. In the first place, except in the cases involving questions of procedure in the making and amending of charters, the courts have taken an exceedingly narrow view of the scope of powers embraced within this grant. The competence of the legislature to set the limit of the city's powers in the so-called enabling act was early recognized, and practically no power was sustained, even in the absence of conflicting state law, which could not be referred to this act. This means, of course, that in practice as well as in law home rule in Washington has been and is more largely a matter of legislative grace than of constitutional right. There is no power which cities have actually exercised which might not be taken away by a legislative repeal of the provision of the law by which such power is conferred.

In the second place, a law of general applicableness supersedes and controls a contrary charter provision regardless of the subject-matter of such law and provision. The distinction between state and local affairs has not been read into the constitution by the courts, and therefore no sphere of immunity from the control of state laws has been created for the city even in respect to matters which are sometimes regarded as of strictly local concern.

That the measure of home rule in Washington under the application of these rules of law has not been wholly negligible has obviously been due to the liberal practice of the legislature in conferring powers and in refraining from occupying fields of municipal control through the medium of laws of general application to cities of over twenty thousand inhabitants. It is patent, nevertheless, that this measure has been far short of what has prevailed in certain other states and that it is by no means as extensive as many advocates of home rule conceive that it should be.

CHAPTER XIII

HOME RULE IN MINNESOTA

In 1896 the power to frame charters was conferred upon the cities of Minnesota by the adoption of a constitutional amendment which was itself, as to certain details, amended two years later. As so amended the provision read as follows:[1]

Any city or village in this State may frame a charter for its own government as a city consistent with and subject to the laws of this State, as follows: The legislature shall provide, under such restrictions as it deems proper, for a board of fifteen freeholders, who shall be and for the past five years shall have been qualified voters thereof, to be appointed by the district judges of the judicial district in which the city or village is situated, as the legislature may determine, for a term in no event to exceed six years, which board shall, within six months after its appointment, return to the chief magistrate of said city or village a draft of said charter, signed by the members of said board, or a majority thereof. Such charter shall be submitted to the qualified voters of such city or village at the next election thereafter, and if four-sevenths of the qualified voters voting at such election shall ratify the same it shall, at the end of thirty days thereafter, become the charter of such city or village as a city, and supersede any existing charter and amendments thereof; provided, that in cities having patrol limits now established, such charter shall require a three-fourths majority vote of the qualified voters voting at such election to change the patrol limits now established.

Before any city shall incorporate under this act the legislature shall prescribe by law the general limits within which such charter shall be framed. Duplicate certificates shall be made setting forth the charter proposed and its ratification, which shall be signed by the chief magistrate of said city or village and authenticated by its corporate seal. One of said certificates shall be deposited in the office of secretary of state, and the other, after being recorded in the office of the register of deeds for the county in which such city or village lies, shall be deposited among

[1] Article IV, sec. 36.

the archives of such city or village, and all courts shall take judicial notice thereof. Such charter so deposited may be amended by proposal therefor made by a board of fifteen commissioners aforesaid, published for at least thirty days in three newspapers of general circulation in such city or village, and accepted by three-fifths of the qualified voters of such city or village voting at the next election, and not otherwise; but such charter shall always be in harmony with and subject to the Constitution and laws of the State of Minnesota. The legislature may prescribe the duties of the commission relative to submitting amendments of charter to the vote of the people and shall provide that upon application of five per cent of the legal voters of any such city or village, by written petition, such commission shall submit to the vote of the people proposed amendments to such charter set forth in said petition. The board of freeholders above provided for shall be permanent, and all the vacancies by death, disability to perform duties, resignation or removal from the corporate limits, or expiration of term of office, shall be filled by appointment in the same manner as the original board was created, and said board shall always contain its full complement of members.

It shall be a feature of all such charters that there shall be provided, among other things, for a mayor or chief magistrate, and a legislative body of either one or two houses; if of two houses, at least one of them shall be elected by general vote of the electors.

In submitting any such charter or amendment thereto to the qualified electors of such city or village, any alternate section or article may be presented for the choice of the voters, and may be voted on separately without prejudice to other articles or sections of the charter or any amendments thereto.

The legislature may provide general laws relating to affairs of cities the application of which may be limited to cities of over fifty thousand inhabitants, or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabitants, or to cities of ten thousand inhabitants or less, which shall apply equally to all such cities of either class, and which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for. But no local charter, provision, or ordinance passed thereunder shall supersede any general law of the State defining or punishing crimes or misdemeanors.

The power to frame a charter as thus conferred was extended to every city and village of the state. According to the federal census of 1910 there were about eighty such cities and villages in Minnesota. More than half of these have adopted charters of

their own making. Most of these cities, however, and of course all of the villages, are of comparative unimportance. The only sizable cities of this state which are operating under home rule charters are St. Paul and Duluth. Winona, with a population of eighteen thousand inhabitants, is third in size among the home rule cities of the state. Both St. Paul and Duluth have been organized under freeholders' charters since 1900. St. Paul has had but one such charter, although in May, 1912 this instrument was so fundamentally amended as to introduce the commission form of government.[1] Duluth adopted its second freeholders' charter in December, 1912. The case of Minneapolis, the largest city of the state, has been somewhat pathetic; for ever since the adoption of the constitutional amendment conferring the right to frame charters this city has been in the throes of charter-making. Again and again have charters been submitted to a vote of the people only to meet defeat at the polls. In 1913 months of careful consideration were given to the drafting of a charter, but at an election held in September this charter met the fate of its numerous predecessors.

The provisions of the Minnesota constitution upon this subject present several distinctive features when read in contrast with the home rule provisions of other constitutions which we have considered. As compared with these other constitutions the Minnesota provisions offer peculiarities, first, in respect to the matter of the procedure by which a home rule charter may be framed and adopted; second, in respect to the unmistakable competence of the legislature to determine the scope of powers that may be exercised by the home rule city; and third, in respect to the emphatic declarations of the constitution on the subject of the supremacy of state laws over charter provisions. The conditions of home rule in Minnesota, as established in the practice both of the cities themselves and of the legislature of the state and as interpreted by the

[1] The advocates of the commission form of government in St. Paul proposed this amendment to the charter and secured its adoption just in advance of the submission to the voters of a charter which was drawn along the so-called federal plan and which had been drafted by the board of freeholders.

adjudications of the courts, may be appropriately considered under topics suggested by these distinctive features.

The Procedure for Drafting and Adopting a Home Rule Charter

It is worthy of especial note that the board of freeholders provided for in the Minnesota constitution is not an elected body. Its members are appointed by the district judges of the judicial district in which the city or village is located. Moreover, when once appointed, the members of this board hold office for a definite term not to exceed six years. The constitution does not determine when and under what conditions district judges shall take action in this matter of appointing freeholders. The city does not, therefore, enjoy by direct constitutional grant the right to initiate the movement for the adoption of a charter of its own making. The constitution declares that boards of freeholders shall be appointed under such restrictions as the legislature may deem proper, and pursuant to this authority the legislature has provided [1] that such boards shall be appointed whenever the district judges deem it for the best interests of the city or village in question, and that they *must* be appointed upon the presentation to such judges of a petition signed by ten per centum of the municipal voters. It is thus by statutory rather than constitutional grant that the voters of every city and village are vested with power to take action in the direction of securing a home rule charter. Upon the presentation of a petition of this character the judges of the district court have no option; they are under mandate to appoint the board of freeholders requested.

When once a board of freeholders has been named for any city or village the constitution contemplates that such board shall remain in permanent existence. This is of necessity the case since these boards are empowered to propose charter amendments. The law has fixed the term of office of the members at four years and has provided for the filling of any vacancies that may occur during the term of office and for the making of new appointments at the

[1] Laws of Minn., 1899, ch. 351; 1901, chs. 129, 323; 1903, ch. 238.

expiration of the term. It should be mentioned in this connection that while the constitutional amendment did not itself confer upon cities the absolute authority to require the appointment of a board of freeholders, the amendment did confer upon cities the right, through the medium of a petition of five per centum of the voters, to compel the subsequent submission of charter amendments. It is difficult to see what useful function the board of freeholders performs in the submission of amendments thus proposed. The board has no discretion whatever either to withhold or to alter such amendments. Apparently, also, the power to make provision for the holding of an election and to determine whether an amendment proposed by petition shall be submitted at a general or at a special election is vested in the "law-making authorities" of the city or village, and not in the board of freeholders.[1] In other words, where amendments are proposed by petition any action by the board of freeholders seems wholly superfluous.

An interesting side-light is thrown upon this somewhat curious manner of constituting the charter-drafting body by the facts presented in the case of Young *v.* City of Mankato.[2] Upon the petition of voters in this little city a board of freeholders was duly named by the district court. The board met and by resolution appointed two of its own members "as attorneys to draft for it a proposed charter for its consideration and adoption." This resolution provided for the payment of compensation to the members thus designated. The charter drafted by these two members, apparently without any active participation by the other members of the board, was subsequently adopted by the board and presented to the people for ratification. The state law which regulated the appointments of boards of freeholders permitted the employment by such boards of an attorney at a reasonable compensation, but it also expressly provided that the members of the board should receive no compensation for their services. The court held that "as a matter of law, members of the charter commission cannot employ themselves to assist themselves." Here was doubtless an instance in which the district court had appointed members

[1] Laws of Minn., 1903, ch. 238, sec. 6.

[2] 97 Minn. 4. 1905.

of a board of freeholders who either did not feel themselves competent to perform the duty imposed upon them or were wholly uninterested in the matter before them. They in effect transferred the powers conferred and the obligations imposed upon them by the constitution and the law to two of their number, contenting themselves with merely ratifying the result of the labors of these members. Such a situation would, of course, be well-nigh inconceivable under provisions by which the members of a charter commission were chosen by popular election.

The Minnesota provision required for the ratification of a charter the favorable vote of an extraordinary majority (four-sevenths) of those voting "*at* the next election," and for the adoption of any amendment, a three-fifths majority of those voting "*at* the next election." Manifestly these extraordinary majorities rendered the ratification of a charter or amendment somewhat difficult of accomplishment. Moreover, by the employment of the term "next election" the constitution apparently contemplated the submission of a charter or amendment at some regular election for which provision had already been made.

In the case of State *ex rel.* Greene *v.* Hugo [1] it was held that two amendments to the charter of Duluth which had been submitted at a general city election had not been validly adopted because, although receiving an affirmative vote of three-fifths of those who voted upon the propositions submitted, they did not receive the approval of three-fifths of those who participated in the election. This determination was obviously based upon a correct interpretation of the requirement of the constitution and was quite in accord with the weight of authority upon this subject.

In one or two other respects, however, the supreme court of Minnesota has been exceedingly liberal in its interpretation of the constitutional requirements relating to matters of procedure. Thus in State *ex rel.* Nichols *v.* Kiewel [2] it was held that the requirement that a charter should be submitted "at the next election" after its return by the board of freeholders did not prohibit

[1] 84 Minn. 81. 1901. [2] 86 Minn. 136. 1902.

the submission of such charter at a special election. This ruling was in accordance with the liberal interpretation which had been put upon the constitutional provision in question by the legislature; for in the enabling act of 1899 [1] it had been provided that a charter might be submitted at either a general or a special election. In the course of the opinion rendered in this case the court adverted to the fact that the records in the office of the secretary of state showed that eleven municipalities of the state had already ratified new charters or adopted charter amendments at special elections. While the court uttered an emphatic disclaimer of being influenced by this fact, "no matter what the results to public and private interests might be," and while it was admitted that the question was not free from doubt, it was nevertheless held that "if it had been the intention of the framers of this constitutional amendment to forbid the submission of a proposed charter at a special election, it is reasonable to assume that the intention would have been clearly expressed by using the words 'at the next general municipal election thereafter,' or some similar phrase."

There is no doubt whatever that this interpretation of the constitution by the court has been of tremendous signification in the advancement of the cause of home rule in Minnesota. It is true that some charter amendments (such, for example, as the commission government amendment of the St. Paul charter in 1912) have been adopted at general elections. Perhaps, also, new charters have, in a few instances, been ratified at such elections; but the vast majority of charters and amendments have unquestionably been submitted at special elections because of the obvious difficulty of securing an extraordinary majority vote of all those who participate in a general election.

A constitutional amendment submitted in Minnesota in 1912 with the object in view of removing the extraordinary majorities required by the constitution and of allowing charters and amendments to be ratified at general elections by a majority of those voting *on* the proposition was defeated at the polls.

[1] Laws of Minn., 1899, ch. 351.

Another case disclosing a degree of liberality of view on the part of the court toward the requirements of the constitution in the matter of home rule procedure was the case of Wolfe *v.* City of Moorhead.[1] The constitution required that proposed charter amendments should be "published for at least thirty days in three newspapers of general circulation" in a city or village. Such an amendment to the charter of Moorhead was published in thirty-seven issues of a daily newspaper during a period of thirty-one days and in five issues of two weekly newspapers. It was insisted that the constitution required publication in thirty issues of each of the three newspapers. The court held that this construction was obviously unreasonable. The requirements of the constitution were satisfied by the publication of a charter amendment begun in three newspapers on a particular day and continued in every regular issue of such newspaper during a succeeding period of thirty days. It mattered not how many issues this might include. It is manifest that had the court put any other construction upon the terms of the constitution, practically all of the smaller cities and villages of the state would in effect have been placed under a serious handicap in the making of charter amendments. Certainly the framers of the provision must have contemplated the publication of charter amendments in weekly newspapers since it is only in sizable communities that three daily publications are to be found. Any other construction than that given by the court would have necessitated the publication of charter amendments, in all but the largest cities of the state, in weekly newspapers covering a period of thirty weeks. This would have been little short of ridiculous.

Not many cases have arisen in Minnesota involving questions of procedure in the making and amending of home rule charters, which procedure is determined in part by constitutional provision and in part by statute. It must be conceded, however, that where such questions have arisen the court has shown a commendable breadth of vision. Of especial significance has been the recognition of the competence of cities to submit charters and amendments

[1] 98 Minn. 113. 1906.

at special elections, without which the exercise of the powers conferred would have been placed under severe practical limitations, although it may be that the liberality of the court in this respect went so far as to exceed the bounds of a logical construction of terms.

What Powers may the Home Rule City exercise in the Absence of Any Conflict with State Law?

The provision of the Minnesota constitution expressly declared that "before any city shall incorporate under this act, the legislature shall prescribe by law the general limits within which such charter shall be framed." Here was not only explicit sanction but also an implied mandate for the enactment of such a law as the "enabling act" passed by the legislature of Washington.[1] There could be no question whatever of the competence of the legislature of Minnesota to expand or contract the scope of home rule powers. Indeed it is perfectly apparent that under this clause of the home rule provision the legislature could, if it chose to do so, occupy the entire charter field. In other words, it could prescribe in such great detail the limits within which a freeholders' charter might be framed that the matters which could be determined and regulated by the home rule charter would be of comparative insignificance.

But the legislature of Minnesota did not elect to occupy the charter field to any considerable extent. In 1899 a so-called "enabling act" was passed.[2] The use of this term "enabling act" in Minnesota was manifestly appropriate in view of the express provision of the constitution noted above. The grant of home rule was not self-executing if action by the legislature was specifically required before any city could avail itself of the privilege conferred. But this act was very brief in character. It did not essay to prescribe in much detail the powers which the home rule city might exercise nor to prohibit the exercise of any enumerated list of powers. Neither did the act attempt to outline the framework of the government which might be established.

[1] *Supra*, 400.

[2] Laws of Minn., 1899, ch. 351.

In the case of State *ex rel.* Getchell *v.* O'Connor [1] the first home rule charter of St. Paul was attacked upon the ground that the enabling act passed by the legislature was insufficient in character. The court refused to concur in this view. To construe the constitutional provision in this wise, it was declared, "would wholly nullify the purposes intended to be subserved and secured by the constitution." The opinion recited in part as follows:

> A "broad framework for each topic" pertaining to a city charter would in itself be a charter, and render the act of the city in framing one nothing more than adopting therefor the legislative grant of power, and, instead of exercising the right "to frame their own charter," cities would be confined to what the legislature saw fit to grant them, and nothing more. The general power and authority to frame city charters is granted by the constitutional amendment, and *ex necessitate* extends to all powers properly belonging to the government of municipalities, and the requirement that the legislature shall prescribe limits within which such charter may be framed must be construed to mean limits beyond which the charter may not go. In other words, it is thus made the duty of the legislature to provide such general limitations and restrictions as that body may deem expedient and proper. No other interpretation can be placed on this provision, consistent with the plain and obvious purpose and intent of the legislature and people in adopting the constitutional amendment of which it is a part. In obedience to the requirements of the constitution, the legislature incorporated in the act in question certain specified limitations and restrictions upon certain subjects, and it is not for the court to say that other and further limits or restrictions should have been imposed. There was a sufficient compliance with the constitution in this respect.

While the court here held that the legislature had properly performed its duty of providing "such general limitations and restrictions as it deemed proper," this being a reasonable interpretation of the obligation imposed upon the legislature by the constitution, it must nevertheless be noted that it would have been wholly beyond the power of the court to have prevented the legislature from placing a different construction upon the duty imposed upon it by the fundamental law. In other words, there is no question that the legislature could have prescribed to any

[1] 81 Minn. 79. 1900.

conceivable extent the limits within which a charter might be framed. Certainly it would have been impossible for the court, no matter what its own concept of the obligation of the legislature might have been, to dissect a statute regulating in great elaboration and detail the powers of home rule cities, and to hold that certain requirements were within the competence of the legislature while certain others were beyond that competence.

The home rule cities of Minnesota have in fact been able to look to no statute of the legislature which defined, described, and delimited in any considerable detail the subjects which might be regulated and controlled by locally made charters. There have been a few cases, nevertheless, which have involved the question as to whether in this or that matter the city had exceeded the scope of powers included within the grant of authority to frame a charter for its own government.

1. Police departments. In State *ex rel.* Zimmerman *v.* City of St. Paul [1] the court was called upon to construe the provisions of the charter of St. Paul creating a police commission and establishing and regulating the police department. There was in this case not the slightest intimation that the power to control the police department was beyond the scope of the city's competence.[2] Indeed the court construed the charter in this case precisely as if it had been a statute of the legislature, and throughout the opinion that was rendered the charter was referred to as an "act."

2. Police powers. Several cases involving the police powers of cities are of interest chiefly because they have concerned questions quite similar to those which have arisen in certain other home rule states. In the case of the City of St. Paul *v.* Briggs [3] there was under review a provision of the home rule charter of the city which conferred upon the common council the power "to define, restrain, regulate, and license hawkers, peddlers, porters, runners, agents, and solicitors." Pursuant to this power conferred, the council had defined the term "peddler" to include "every person who shall sell or offer for sale any goods . . . or barter or exchange

[1] 81 Minn. 391. 1900.
[2] *Supra*, 133, 142, 255, 371.
[3] 85 Minn. 290. 1902.

the same at any point or place within the city of St. Paul other than upon land owned or leased by said person or at a store kept by said person or at a stand at one of the public markets." This definition manifestly included persons who are commonly regarded as agents rather than peddlers. A person who was engaged in the business of selling to, or taking orders from, dealers rather than consumers was arrested for violating the ordinance. It was the contention of the city that the definitions of the term "peddler" as given by the lexicographers or found in the adjudicated cases were wholly irrelevant in view of the fact that the charter conferred express power upon the council to define this term. In answer the court declared that "the power to define the offense must be confined within reasonable bounds, and limited to the generally accepted meaning and scope of the law relating to that subject." Charters "must be construed strictly, and this rule should apply with special force to cities authorized to form [*sic*] and adopt their own charters." The opinion continued:

> If a city, organizing under the constitutional amendment empowering cities to form their own charters, may assume and clothe itself with power to define crimes and misdemeanors, it may extend and enlarge the criminal laws of the state to suit the notions of its council. There must, in the nature of things, be some limitation upon such authority; if not, confusion may result. Under authority to define peddling, the ordinances of one city might be entirely different from those of another. What would constitute peddling in St. Paul might not in Minneapolis, or in Duluth. It could not well be said that, if a city was authorized to define petit larceny, it could go beyond, in doing so, the definition of the offense as known to the law generally. The exercise by municipal corporations of the delegated power to enact ordinances must, therefore, be confined within the general principles of the law applicable to the subject of such ordinances. Any other rule would confer upon municipal authorities greater power than was intended they should possess.

In last analysis this opinion probably went no further than to put a very limited construction upon the charter itself in its grant of power to the council to "define" the term peddler. The intimation was tolerably clear, nevertheless, that even if the charter had intended to confer upon the council unlimited com-

petence in this regard, such a grant of power would have been beyond the scope of the city's authority in framing a charter for its own government. This case did not, like the case on the same subject in Missouri,[1] turn upon a conflict between the charter provision and a state law, although a judgment nullifying the city's attempted exercise of power was reached in each case.

The case of City of St. Paul *v.* Haugbro,[2] however, stands in more striking contrast with the Missouri case which we have noted upon a similar subject.[3] The case involved the validity of an ordinance which declared the emission of "dense smoke" to be a public nuisance. Apparently it was not contended in Minnesota, as it was in Missouri, that a home rule city could not declare that to be a nuisance which was not a nuisance *per se* and which had not been declared to be a nuisance by a state law. The city's competence in this regard appears to have been conceded. At least the point was not discussed by the court. The validity of the ordinance was assailed merely upon the ground that the term "dense smoke" as used in the ordinance was indefinite, vague, and uncertain. The court asserted that while it might be true that every emission of dense smoke in small quantities was not so offensive as to constitute a nuisance, yet, following the rule laid down by the supreme court of Illinois,[4] this term would, without any subtle distinctions as to its meaning, be understood as it is commonly employed as meaning "a volume of dark, dense smoke as it comes from the smokestack or chimney where common, soft, or bituminous coal is used for fuel in any considerable quantities." It was further declared that there were well-known devices in common use for mitigating the evils caused by dense smoke, and that the ordinance could not therefore inflict any special hardships upon the consumers of such coal. This case is of little importance except as it illustrates the liberal view of the Minnesota court as compared with that of the Missouri court upon the subject of the police power of a home rule city.

[1] *Supra*, 130. [2] 93 Minn. 59. 1904. [3] *Supra*, 181.
[4] Harmon *v.* City of Chicago, 110 Ill. 400. 1884.

It is a fairly established rule of law that local authorities may not make vaccination compulsory or impose it as a condition for admission to the public schools unless such action is taken as an emergency measure arising out of the existence or danger of an epidemic or unless the legislature of the state has expressly conferred the power to impose such a condition or regulation. In 1902 there existed in Minnesota no statute conferring this power upon the local authorities of the state. There did exist, however, an emergency in the city of St. Paul for the establishment of a regulation by which children who had not been vaccinated should be excluded from the public schools. In the case of State *ex rel.* Freeman *v.* Zimmerman[1] the competence of the city to impose such a regulation was upheld not only upon the ground that an emergency existed but also upon the ground that the home rule charter of the city conferred in definite and explicit terms ample power to support the action that was taken. On this latter point the court declared:

> This charter was enacted by the citizens under and pursuant to constitutional and legislative authority, and it was within their power to include as a subject-matter thereof provisions relating to a health department. Such a department very properly belongs and is incident to the government of municipalities (State *v.* O'Connor, 81 Minn. 79, 83 N. W. 498), and the provisions of the charter, of which we are required to take judicial notice (Laws 1899, c. 351), have all the force and effect of legislative enactments.
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> This charter provides for and creates a health department for the city, designating certain officers as members of that department. By section 2, c. 10, the office of commissioner of health is created; and the occupant of that position is made the head of the department, and is clothed with the management and control of all matters and things pertaining thereto. By section 25 of the same chapter the commissioner is empowered to make such rules and regulations for the government or health of the city as he may, from time to time, deem necessary and expedient. Section 9 makes it his duty to enforce all the laws of the state and ordinances of the city relating to sanitary regulations, and to cause all nuisances to be abated with reasonable promptness. Section 15 provides that in case of pestilence or epidemic disease, or of danger of impending pestilence, it shall be the duty of the commissioner to take such measures, and to do and order,

[1] 86 Minn. 353. 1902.

and cause to be done, for the preservation of the public health as he may in good faith deem the public safety to demand. By section 16 he is expressly required to take such measures as may be deemed necessary to prevent the spread of smallpox, by requiring all persons in the city not vaccinated to be vaccinated within such time as he shall prescribe. Section 33 authorizes him to require a certificate of vaccination as a condition to the admission of children to the public schools. The authority thus granted and the duties imposed are ample to sustain the commissioner of health in the regulation ordered enforced in this instance, if the general statutory provisions be insufficient.

The significance of this decision is this: the court apparently took the view that the rule to the effect that the authority to require vaccination must be found in an express grant of authority from the legislature did not apply to a city operating under a freeholders' charter. This grant of authority could be found in such charter as well as in a legislative enactment, for the reason that such a charter had all the force and effect of a legislative enactment. This seems to have been a fairly reasonable construction for the court to follow. Its liberality must nevertheless be admitted.

3. Financial powers. Several questions have been presented touching the financial powers of home rule cities. In State *ex rel.* Ryan *v.* District Court of Ramsey County[1] it was contended that since the power of eminent domain was "inherent in the state, there must be specific authority directly conferred by the legislature to authorize the exercise of this right," which was not expressly given by the enabling act of 1899. Approving the decision of the Missouri court[2] upon this subject and rejecting that of the Washington court,[3] the Minnesota court declared:

In State *v.* O'Connor, *supra*, we held, as already stated, that the right of the city was by the enabling act amply extended to all powers properly belonging to the government of municipalities, without being expressly designated therein, and that the organization of a police force and the appointment of its chief was a municipal function. We are not inclined to limit or modify the effect of that opinion to exclude the right of the municipality to provide for the exercise of the power of eminent domain. Such right is essential and necessary to the very life and well-being of

[1] 87 Minn. 146 (1902); *infra*, 473. [2] *Supra*, 175. [3] *Supra*, 430.

every city government, for upon it its welfare and progress beyond question depend. It is as necessary that there should be streets and bridges in a city, and that they be improved and extended, as that there should be a police force to walk therein to protect its inhabitants. In the general law of the state providing for the incorporation of cities this right is recognized and conferred (G. S. 1894, secs. 1106–1172); and, if there is to be found in the legislative history of the state any special charter not conferring the right to take private property for public use upon just compensation being first made or secured, we have not been referred to it. We have not seen it. We should be surprised to find it; and, in view of the purpose of the home rule amendment to the constitution, as well as the enabling act adopted to give it force, the view is not to be accepted that a benefit was intended by which an existing charter, having them established therein, might be superseded by one that did not confer these essential benefits to urban life. Hence the decision in State *v.* O'Connor, *supra*, is here affirmed, and extended to embrace this natural, reasonable, and necessary incident of municipal authority.

In State *ex rel.* Otis *v.* District Court of Ramsey County [1] the court was asked to declare void a provision of the charter of St. Paul relating to special assessments. It was held that while the charter provided "studied safeguards to property owners in *original* assessment proceedings," it nevertheless vested absolute power in the board of public works to conduct *reassessment* proceedings without any such safeguards. It was admitted that this feature of the charter had been "severely criticized" and that it failed "to meet with popular approval." Even so, said the court, "the remedy, if any, lies with the people themselves" acting through the medium of a charter amendment.

The principal contention put forward in this case seems to have been that the constitution required that "a mayor or chief magistrate, and a legislative body of either one or two houses" should be a "feature" of all freeholders' charters; that the assessment of property for public improvements was a legislative function; and that this function must in consequence be conferred upon the "legislative body" of the city and not upon a board of public works. The contention was manifestly absurd; and the court dismissed it by pointing out that "similar provisions for reassess-

[1] 97 Minn. 147. 1906.

ment by the board of public works had been embraced in the old charter" of St. Paul and had years previously been the subject of judicial construction. It would be patently unreasonable to conclude that the framers of the home rule provision had intended to declare that the duties of the board of public works "should be limited to the elective body" of the city by the clause cited, which was "in the most general terms."

There seem to have been no further cases in the Minnesota jurisdiction involving questions of the financial competence of cities except those in which a conflict between state law and charter provision was alleged,[1] and except the case of Williams *v.* City of St. Paul,[2] where the guarantee of due process of law was invoked, but not sustained, to defeat an amendment to the city charter by which title to property subject to a special assessment lien might without sale but subject to redemption pass from the owner by an administrative judgment.

4. Power to confer jurisdiction upon regular state courts. In two Minnesota cases question has been raised as to the competence of a home rule city to confer jurisdiction upon one of the courts that form a part of the general judicial organization of the state. One of these — State *ex rel.* Ryan *v.* District Court of Ramsey County[3] — has already been mentioned above. In addition to the futile contention that was made in that case against the authority of the city to exercise the power of eminent domain without express grant from the legislature, it was urged that the particular provisions of the St. Paul charter upon this subject were void because they conferred upon the district court jurisdiction to hear questions involved in the condemnation of property for public use and prescribed the methods by which such issues should be determined. It was sufficient to say, replied the court, that had the same jurisdiction and practice "been prescribed by the legislature, no question could have been raised as to the right of the courts to give appropriate judicial assistance in aiding the results to be secured." The mere fact that the procedure was laid down by the charter "created no substantial distinction, but

[1] *Infra*, 485. [2] 123 Minn. 1. 1913. [3] 87 Minn. 146 (1902); *supra*, 471.

merely a formal difference." It was the "conservatism of the legal profession" — perhaps justifiable — that often led "its members to suspect every new reform." The new system "must be subject to time and experience," and its efficiency and wisdom were in any event "a matter for the people of the state and not for the courts" to consider.

Again the point was pressed in State *ex rel.* Barber Asphalt Paving Co. *v.* District Court of St. Louis County [1] that the provisions of the Duluth charter regulating the manner in which claims against the city should be presented were void because they provided for an appeal to the district court in case of the disallowance and rejection of any claim by the common council. It was contended that the jurisdiction of such courts was "not a subject belonging to the government of municipalities." But the supreme court had "no doubt that the provision of the charter requiring the presentation of all claims to the city council for adjustment and allowance was an appropriate subject for charter supervision, and from that it would seem to follow that it was also proper to continue the subject and provide the manner in which the determination of the city council allowing or disallowing a claim might be removed to the district court."

Here certainly was no narrow and no uncertain view of the competence of a home rule city to confer upon a state court whatever jurisdiction in respect to matters of municipal concern might, in the opinion of the city, be necessary or desirable.[2] Incidentally it may be mentioned that a statute passed in the same year in which decision was reached in this case expressly conferred this power upon home rule cities.[3]

5. Exterritorial powers. No case has arisen in Minnesota involving the authority of a city to provide in a freeholders' charter for

[1] 90 Minn. 457. 1903. [2] *Supra*, 193.

[3] Laws of Minn., 1903, ch. 238, sec. 9. "For the economical and proper operation of the government created by such charter, or its amendments, provision may be made therein for methods of procedure and the performance of duties by the courts of the district and officers of the county, in which such city or village is situated, not inconsistent with the provisions of the constitution and statutes of this state, and such courts and officers shall perform the duties so prescribed in this connection."

the annexation of territory.[1] The probable reason for this is that no such charter has ever attempted to control the matter of annexation. Nor is this matter specifically provided for in the enabling act. The only mention of the subject in this act is that "nothing in this section shall authorize a change of boundaries." Presumably it is regulated by the laws applicable to the several classes of cities created by the constitution, which as we shall see[2] apply to home rule cities as well as to cities under legislative charters.

In one case, however, City of Duluth *v.* Orr,[3] an issue of somewhat related character was presented to the court. The charter of Duluth expressly empowered the common council to regulate or prohibit the storage of combustibles or explosive materials "within the city or within one mile from the limits thereof." The council by ordinance prohibited such storage without a permit from the city and extended this prohibition to embrace the one-mile limit. Denying the validity of this charter provision and the ordinance enacted pursuant thereto, the court said:

> By the constitutional amendment a city is permitted to frame a charter "for its own government." This language contains no express authority to frame a charter for the government of territory or people not a part of or within the city. If such power is conferred, it is by implication as an incident to the internal government of the city. The limitation in section 751, R. L. 1905, the section containing the general grant of power, that "nothing in this section shall authorize a change of boundaries," is significant. The power to enlarge its boundaries being withheld from the city, the power to exercise authority and control beyond its boundaries cannot be fairly implied. . . .
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> An express grant by the legislature to a municipality of extraterritorial dominion rests on a very different basis. The right given to the people within prescribed territorial limits to adopt a complete municipal code does not warrant the assumption by them of power over territory and people beyond those limits, even though the control of such territory and people would be convenient and gratifying to the people within the city. The practical difficulties involved in the assumption by cities of such power are apparent. Innumerable conflicts in authority would inevitably follow. Such a result is not reasonably within the purview of the constitutional amendment. The ordinance, with the violation of which the defendant was charged, is, as to territory beyond the city limits, invalid.

[1] *Supra*, 146, 269, 333, 407. [2] *Infra*, 493 ff. [3] 115 Minn. 267. 1911.

Under the doctrine thus laid down — and its soundness is quite unimpeachable — there seems to be no doubt that had the competence of the city to provide for the annexation of territory, even in the absence of the express prohibition of the enabling act, been arraigned before the court, such competence would have been denied.

6. Power to establish the commission form of government. Finally, as bearing upon the simple question of the scope of powers enjoyed by the city under the grant of authority to adopt a charter, may be mentioned the case of State *ex rel.* Simpson *v.* City of Mankato.[1] The constitution, as we have noted, required that "a mayor or chief magistrate, and a legislative body of either one or two houses" should be a "feature of all such charters." By a state law of 1909, which was in fact in the nature of an addition to the enabling act, boards of freeholders were empowered to draft and submit charters providing a commission form of government.[2] It was contended that such a form of government was in violation of the constitution because the term "mayor or chief magistrate" comprehended "an official clothed with executive power, and executive power only," and because the "legislative body" required was a "body of officials who are endowed with legislative powers and legislative powers only." A charter which made the mayor an integral part of the legislative body and which vested in that body both executive and legislative powers could not, it was asserted, be sustained as being within the contemplation of the constitution.

Even though it be admitted that the mayor-and-council type of city government was at the time of the adoption of this constitutional provision in 1898 — and for that matter still is — a highly various thing, it seems patent that this was the "general" type of government which the framers of the provision had in mind when they called for a mayor or chief magistrate and a legislative body. Commission government, embodying at least one fundamental departure from the mayor-and-council type, had not as such been heard of in 1898. The court could scarcely have been accused of

[1] 117 Minn. 458. 1912.

[2] Laws of Minn., 1909, ch. 170.

narrowness of view had the rule been applied that the terms of a constitution must be construed in the light of their probable meaning at the time of their writing. Thus construed, the provision here in question might not unreasonably have been held to sustain the contention that was made. But since the court found little difficulty in reaching an opposite conclusion it seems worth while to set down a part of the argument that was advanced:[1]

The first and main question, then, for determination in this case, is, not whether the Constitution authorized the law of 1909, but whether such act contravenes any provision thereof. Assuming for the moment that such act authorizes the Mankato charter, does it transcend the constitutional requirement that such a charter must provide for a "mayor or chief magistrate, and a legislative body"? and is the said charter "in harmony with and subject to the Constitution"? Obviously, this involves the determination of the meaning of the terms "mayor or chief *magistrate*" and "*legislative* body." The relator first contends that the obvious meaning of these terms excludes the conception of any participation by one of the departments thus indicated in the functions of the other, and in support of this contention urges that this exclusive meaning of the terms must be held to have been contemplated when the said requirement was inserted in the Constitution, for the reason that such was the common acceptation of such terms at that time. To this contention and argument there are two replies, which to us seem conclusive:

First, the question is, not whether the people, in adopting this provision, had in mind any such city charter provisions as those now under consideration and were endeavoring to make anticipatory provision therefor, but whether, having in mind the possibility of some future attempt thus to intermingle the functions of the executive and the legislative departments of municipal government, they were attempting in advance to frustrate any such attempt.

"Constitutions are not made for existing conditions only," said Mr. Justice Brown in Elwell *v.* Comstock, 99 Minn. 261, 265, 109 N. W. 698, 699, 7 L. R. A. (N. S.) 621, 9 An. Cas. 270, "nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men."

Unless, therefore, it can be said that the constitutional limitation now under consideration was intended to exclude the mayor or chief magistrate of a home rule city or village from the deliberations of the legisla-

[1] For a similar but not identical Washington case, see *supra*, 452.

tive body thereof, and to prohibit the latter from exercising executive and administrative functions, the relator's contention cannot prevail, at least so far as it is based upon the obvious and unambiguous meaning of the terms used. We do not think that by the use of these terms such an intention is indicated with that clearness and particularity necessary to vitiate a solemn enactment of the legislature; for under the doctrine laid down by Brown, J., *supra*, the legislature, unless plainly restricted by the Constitution, had the right to place upon such terms an interpretation that "would meet the advancing and improving affairs of men." . .

Since, therefore, it cannot be said that the terms used in the constitutional provision under consideration, either of themselves or when construed in the light of conditions prevailing when they were inserted in the Constitution, precluded the legislature from authorizing the provisions of the Mankato charter here attacked, we must seek some other reason, if any there be, why the said act of 1909 and the said charter are invalid.

The court refused to sustain any of the other contentions that were made against the validity of the law and in conclusion held that the commission government charter of Mankato was clearly authorized by the statute. It should be noted, however, that the court vested its judgment in the case largely, if not wholly, upon the fact that the legislature had by the statute of 1909 expressly empowered cities to adopt charters providing this type of government. In so doing the legislature had placed an interpretation upon the constitutional clause in question, which interpretation assumed that cities were not thereby restricted to providing a government of the old mayor-and-council form. The query naturally arises whether the court would have sustained the right of the city to introduce commission government in the absence of any legislative grant of authority. There could be no question that the legislature might have prohibited either expressly or impliedly the adoption of a charter providing such a government, for the constitution directly empowered the legislature to prescribe the limits within which freeholders' charters might be framed. But if no limits had been set of such a character as to prohibit commission government, was an express grant of legislative authority none the less necessary?

Under the views expressed by the court, in spite of the reliance placed upon the statute of 1909, it is impossible to understand why

a specific investment of power was essential. In enacting the law the legislature had in effect interpreted the constitution. The court was engaged in considering whether this interpretation was permissible and concluded that it was. Every city was empowered to adopt a charter within the limits prescribed by the legislature and the constitution. If no prohibitive limits had been prescribed by the legislature, and if the city had without *express* authorization adopted a charter of the commission government variety, the court would obviously have been compelled to consider whether the *city's* interpretation of the constitutional provision in question was justifiable. Under such circumstances the question before the court would have been precisely what it was in fact — to wit, does the *constitution* prohibit this form of city government? The opinion of the court upon this point was unmistakable. Prior to the adoption of the statute of 1909 the legislature had declared that, subject to the few limitations of the enabling act, a home rule "charter and its amendments may provide for *any* form and scheme of municipal government, and may embrace provisions for the regulation, management, administration, and control of all departments of the city government and of all local municipal government functions, as fully and comprehensively as could the statutes of the state of Minnesota had section 33 of article 4 of the constitution not been adopted." [1] The conclusion seems unavoidable that under the view of the constitution taken by the court, the statute conferring express power to institute the commission form of government was supererogatory. In the absence of such statute the city would have enjoyed this competence from the constitution and from the enabling act as it stood.

From the above review of cases determining questions as to the powers of home rule cities in the absence of any conflict between charter provisions and state laws, it is apparent that the Minnesota court has been far more liberal than otherwise. From this fact, however, wholly erroneous conclusions respecting the

[1] Laws of Minn., 1903, ch. 238, sec. 9. Section 33 of article 4 of the constitution, referred to in this law, was adopted in 1892 and prohibited special legislation for cities.

conditions of home rule in this state might easily be drawn. These conditions cannot be understood without a full consideration of the relation of supremacy and inferiority between state laws and charter provisions.

Conflicts between Charter Provisions and Previously Enacted State Laws

Attention has been directed to the provision of the Minnesota constitution which imposed upon the legislature the duty of prescribing the limits within which freeholders' charters might be framed, and to the fact that the legislature did not in the enabling act prescribe many such limits, although it is manifest that had it chosen to do so, it might have proceeded to any extent in this regard. Certain other clauses of the Minnesota provision must also be noted in this connection: (1) Upon adoption, a home rule charter was declared to "supersede any existing charter and amendments thereof." (2) Such charter was required to be always "in harmony with and subject to the constitution and laws of the state." (3) The legislature might "provide general laws relating to the affairs of cities" applicable to several classes established by the constitution itself, and such laws should "apply equally to all such cities of either class," and should "be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for." This term "local charter" manifestly meant freeholders' charter, for no other kind of local charter was provided for in the section.

Before discussing broadly the ultimate meaning and the concrete result of these several declarations of the constitution, it seems advisable to set in review the cases which have construed and applied them. These cases, for reasons that will shortly appear, have not been numerous.

1. Contracts for public improvements. The leading case upon this subject of conflicts between laws and charters is Grant *v.* Berrisford.[1] The issue before the court in this case was whether

[1] 94 Minn. 45. 1904.

a state law of 1897[1] regulating the letting of contracts for public improvements and the giving of bonds by contractors controlled the provisions of the freeholders' charter of St. Paul. The charter provisions differed from those of the law, first, in respect to the amount of the bond, and second, in that the charter omitted to require that on any claim notice should be given to the principal and surety within ninety days after the completion of the work, which notice should specify the nature and amount of the claim. It was contended that this general law, enacted three years before the adoption of the local charter, was "applicable to the city of St. Paul, notwithstanding its charter provisions." The court declared that the only question presented by this contention was "whether the charter provisions relating to contractors' bonds are in harmony with and subject to the constitution and laws of the state, as required by the constitutional amendment." Speaking specifically to this requirement, the opinion recited.

If this limitation on the power of cities in framing their charters is to be construed as prohibiting the adoption of any charter provisions relating to proper subjects of municipal legislation and matters germane thereto, unless they are similar to and contain all the provisions of the general laws on the subject, then, as said by the learned trial judge: "All that the framers of a charter can do, where there is a law in existence at the time the charter is adopted, is to add such provisions as are not already contained in the law, and are not repugnant to it. If this is the extent of the power conferred upon cities to make their own charters, then the constitutional grant is a mere form of words, of no practical value" It is clear that such is not a proper construction of the limitation. This limitation forbids the adoption of any charter provisions contrary to the public policy of the state, as declared by general laws, or to its penal code — for example, provisions providing for the licensing of prize fighting or gambling or prostitution, or those which are subversive of the declared policy of the state, as to the sale of intoxicating liquor But it does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws This is necessarily so, for otherwise effect could not be given to the constitutional amendment, which fairly implies that the charter adopted by the citizens of a city may embrace all appropriate subjects of municipal legislation, and con-

[1] Laws of Minn., 1897, ch 307

stitute an effective municipal code, of equal force as a charter granted by a direct act of the legislature. State *v.* O'Connor, 81 Minn. 79, 83 N. W. 498; State *v.* District Court of Ramsey Co., 87 Minn. 146, 91 N. W. 300; State *v.* District Court of St. Louis Co., 90 Minn. 457, 97 N. W. 132.

It follows that if the provisions of the charter of St. Paul as to contractors' bonds are germane to any proper subject for municipal legislation, they supersede the provisions of the general law on the subject. It is practically conceded by the defendants that the subject of contracts with the city, and the form, contents, and execution of the bond required of contractors who undertake to do public work, is a proper one for municipal legislation. But they contend that the city has no interest in the matter of a limitation on the right of any one, except itself, to bring an action on the bond. The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues. Or in other words, it is a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits. It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond.

Now, the prompt payment by the contractor for labor and materials used in the execution of a contract with the city for public improvements is a matter in which the city has a direct interest. Such payment is necessary to secure a speedy and honest performance of the contract, for it has a direct tendency to avoid labor strikes, and the withholding of materials for the work by materialmen. Any condition or burdens which delay or make the enforcement of contractors' bonds more difficult or uncertain tend to increase the cost of labor and materials necessary for the execution of contracts with the city for making public improvements.

We hold, then, that the subject of city contracts for public improvements, and bonds to secure performance of them and the payment of laborers and materialmen, is a proper one for municipal legislation, and that the matter of contractors' bonds, and conditions and limitations as to their enforcement, is germane thereto. State *v.* District Court of St. Louis Co., *supra*. If follows that the charter provision in question is exclusive, and that the plaintiffs in this case were not bound to give the notice required by the general statute as a condition precedent to their right to sue on the contractors' bond.

If this decision is analyzed in the light of the declarations of the constitution which apparently attempt to fix the relation between state laws and charter provisions, the following points may be noted:

(1) The requirement that the charter should conform to "limits" prescribed by the legislature was ignored. The statute here under review did not specifically apply to home rule cities. It was enacted before the adoption of the home rule amendment. It was made applicable to *all* cities. From this fact the rule may doubtless be said to have been implied that the "general limits" within which a freeholders' charter might be framed were not to be found in the general city laws that existed at the time of the adoption of such charter but only in such general laws as were exclusively applicable to home rule cities — laws which clearly purported to set the metes and bounds of the competence of this particular kind of cities. This was probably a wholly reasonable interpretation of this provision of the constitution.

(2) Decision was not reached in the case upon the ground that the law of 1897, although a general law, constituted nevertheless a part of the legislative charter of St. Paul and was therefore repealed by the operation of the provision which declared that the home rule charter should "supersede any existing charter and amendments thereof." On the whole this would seem to have been the most available argument of logic that the court could have used. It was not, however, employed.

(3) No reference was made by the court to the clause of the constitution which empowered the legislature to "provide general laws relating to the affairs of cities," which should be applicable to the cities of any constitutional class, and which should be "paramount" to the provisions of a freeholders' charter. Since the law in question applied to all cities and therefore to all classes of cities, it certainly fell within the category of "general laws relating to the affairs of cities" and applicable to classes. It was expressly held to be a law relating to the affairs of cities. The only possible ground, it would seem, on which the court could have excluded it from the category of laws referred to in this particular declaration of the home rule amendment was that it was a law enacted *prior* to the adoption of the amendment and of the charter made in pursuance thereof. In other words, had this statute been passed *after* the charter was adopted, it is difficult to see how the court

could have avoided the conclusion that it was "paramount to the provisions relating to the same matter included in the local charter." The court did not in any wise advert to nor discuss this aspect of the subject. But the plain words of the constitution cannot on this account be ignored. The only fair deduction seems to be that the silence of the court implied the rule here indicated — to-wit, that this requirement of the constitution did not embrace those general laws regulating municipal affairs which were enacted *before* the amendment and the charter were adopted.

(4) The opinion turned wholly upon a construction placed by the court on the provision that required freeholders' charters to be always "in harmony with and subject to the constitution and laws of the state." This was the only clause of the home rule amendment that was specifically mentioned. The distinction between matters of state and matters of local concern was unmistakably read into this provision by the court. Without this distinction the grant of authority to frame a charter would be a "mere form of words, of no practical value." The subject under review in the case was one "appropriate to the orderly conduct of municipal affairs," and therefore the charter provisions "supersede the provisions of the general law on the subject."

As to the soundness of this view, it is sufficient to note that there was certainly nothing in the amendment that implied any such meaning except the naked grant of authority to frame a charter, and there was much that implied the contrary. The term "laws," which charters were required to be "in harmony with and subject to," was not even qualified by the term "general," which the court might have interpreted to mean of general as distinguished from municipal concern. On the other hand, the legislature was expressly empowered to set the limits, even as to strictly municipal affairs, within which charters might be framed, and to enact laws applying to classes of cities and relating to strictly municipal affairs which should be paramount to home rule charter provisions. In view of these facts it is difficult to see why the court should have been so alarmed at the possibility of construing the grant of authority to frame a charter in such wise as to render it "a mere form of

words, of no practical value." If the words of the constitutional provision are to be given their commonly accepted connotation, this is precisely what the Minnesota grant of home rule powers amounted to. The constitution unmistakably recognized the competence of the legislature to encroach upon these powers to the point of complete destruction if it so elected; and therefore the grant of authority to adopt a charter was in plain fact nothing whatever but a mere form of words. Moreover, as we shall see a little later, home rule in actual operation in Minnesota has been to a very considerable extent a form of words and to its entire extent a matter of legislative concession rather than of constitutional right.[1]

2. Special assessments. The rule of the Grant case was reapplied in Turner *v.* Snyder.[2] In 1906 the city of Crookston adopted a charter which provided that proposals for street improvements should originate with the council and which contained no provision for the payment of special assessments upon the instalment plan. A general state law of 1899, amending a law of 1895, allowed the council upon a petition of three-fourths of the property owners to divide an assessment for such purposes into instalments. The council of Crookston, acting upon a petition filed in pursuance of this statue, was proceeding to contract for a street improvement to be paid for on the instalment plan when injunction was sought. In granting the injunctive relief prayed for the court examined the freeholders' charter and concluded that its framers had not intended to provide two methods of assessment — one under the general law upon the instalment plan, and another upon practically a cash basis The doctrine of Grant *v.* Berrisford was declared to control the decision of the case at bar. Since the subject of assessments was "comparatively covered" by the charter there could be no question that the general law had been superseded. Said the court:

> The rule of construction applicable in a case of this character is different from the rule applied where the question is whether a subsequent general law superseded a special law on the same subject. . . . In cases

[1] *Infra*, 493 ff.

[2] 101 Minn. 481. 1907.

like the one under consideration, where the charter covers the entire subject-matter, the intention to supersede all general laws on the subject will be presumed unless otherwise expressed.

The only point in which this case differed from the Grant case was that the statute under review had been enacted subsequent to the adoption of the home rule amendment although *prior* to the adoption of the home rule charter. The significance of this point, which was not mentioned in the opinion, will be adverted to in a later connection.[1]

3. Debt limits. The enabling act of 1899 imposed a five per cent. debt limit upon cities.[2] In 1903 this was raised to ten per cent. for cities of less than fifty thousand inhabitants; but for cities of more than this population it was provided that the five per cent. limit could not be exceeded except upon a referendum to the voters of any proposal to issue bonds or except for certain specified purposes.[3] Several cases have arisen involving the construction and application of these debt limit provisions,[4] which were manifestly within the competence of the legislature to impose. In only one of these cases has any question been raised that is of interest in connection with our study. In American Electric Co. *v.* City of Waseca[5] the absurd contention was urged that although the enabling act clearly authorized an indebtedness equal to ten per cent. of the assessed valuation of property within a city of Waseca's population, yet a five per cent. limit was imposed upon all cities by a general statute of 1894. It is as difficult to comprehend how counsel should have been willing to stultify themselves by putting this contention forward as it is to understand why the court in refusing to sustain such contention should have considered

[1] *Infra*, 493 ff

[2] Laws of Minn., 1899, ch 351, sec 10.

[3] Laws of Minn., 1903, ch 238, sec 9

[4] Christie *v* City of Duluth, 82 Minn 202 (1901), Beck *v* City of St Paul 87 Minn 381 (1902), *White Townsite Co v City of Moorhead*, 120 Minn 1 (1912). In this last-mentioned case it was clearly decided that within the limit set by the law the city might ordain its own debt limit, but might also by implication from a charter amendment duly adopted advance this limit, keeping always, of course, within the statutory limit.

[5] 102 Minn 329 1907.

it necessary to rely upon the doctrine of Grant *v.* Berrisford and reaffirmative cases. The constitution made it a mandatory duty of the legislature to pass an act prescribing limits for freeholders' charters. One of the few limits imposed was this debt limit. The enabling act was a general law passed subsequent to the law relied upon to defeat the competence of the city. So far as it applied to home rule cities the later law clearly repealed the former, for the two could not possibly stand together. And this, it would seem, was all the argument that should have been necessary to turn so ridiculous a case out of court.

4. Claims. The Minnesota books hold a number of cases dealing with conflicts between state laws and charter provisions regulating the rights of persons asserting claims against the city for damages resulting from personal injuries due to negligence in the care of the highways. Attention must first be called to several of these cases which are not easily reconciled.

In Nicol *v.* City of St. Paul [1] it was held that a general law of 1897 applying to all cities and regulating the filing of notice of such claims with the city council within a limited time [2] operated to repeal the provision on this subject that was embodied in the then existing *legislative* charter of St. Paul. The decision of this case had, of course, nothing to do with the home rule amendment of the constitution. Four years later the case of Olcott *v.* City of St. Paul,[3] involving a question of this kind, was decided without reference to the law of 1897 on the ground that the notice required by the "citizens' charter" had not been given. This clearly though silently implied that the provisions of the charter upon this subject had superseded the previously enacted general law. In 1900 Duluth became organized under a freeholders' charter. This charter contained a provision in respect to this matter which differed in some details from that of the general law.[4] But in Winters *v.* City of Duluth,[5] decided in 1901, and again in Megins *v.* City of Duluth,[6] decided in 1906, the act of 1897 was without

[1] 80 Minn. 415. 1900.
[2] 91 Minn. 207. 1904.
[3] 82 Minn. 127. 1901.
[4] Laws of Minn., 1897, ch 248.
[5] Charter of Duluth, 1900, sec. 426.
[6] 97 Minn. 23. 1906

reference to the charter provision construed and applied as being controlling upon that city. Moreover, in the published code of 5. city this act was included among the "miscellaneous laws" applicable to the city.[1] There is obviously no consistency in these cases; but it does not appear whether the inconsistency may be ascribed to judicial intention or to judicial carelessness resulting from the insufficiency of the briefs of counsel.

However that may be, the court was definitely called upon to declare the law upon this subject in the case of Peterson *v.* City of Red Wing.[2] It was there held, reliance being placed upon Grant *v.* Berrisford and nothing being added to the doctrine of that case, that a notice which complied with the provisions of a city charter although not with the statute of 1897 was all that was necessary. Such a matter was "germane to the subject of municipal legislation."

In Schigley *v.* City of Waseca[3] there was drawn into question the validity of a provision of the freeholders' charter which completely exempted the city "from liability to any person for damages for injuries suffered or sustained by reason of defective streets or sidewalks within said city unless actual notice in writing of such defects . . . had been filed with the city clerk within at least ten days before the occurrence of such injury or damage." Reviewing cases from numerous jurisdictions concerning the source of the liability of cities for the care of the streets, the court concluded that it was clear "that the legislature may grant or deny to individuals a right of action" against cities for negligence in this matter, and that in consequence a law which embraced the charter provision under review "would be constitutional." Reviewing the cases on the subject of home rule from its own jurisdiction — cases which have been noted above — the court declared as follows:

> There can, therefore, be no serious question as to the right to insert in a municipal home rule charter a provision prescribing the conditions under which an individual may maintain an action against the city for personal injuries caused by the failure of the authorities to keep the streets and highways in proper condition. Under the common law of

[1] Code of 1912, p. 20. [2] 101 Minn. 62. 1907. [3] 106 Minn. 94. 1908.

the state, a person so injured cannot recover damages unless he can prove that the municipality had notice of the defect. He may, however, establish this essential element of his right of action by facts which charge the municipality with constructive notice. This charter changes the general rule to the extent of requiring actual notice in writing. The written notice need not, of course, have been given by the injured party. It does not relieve the city from liability in all cases, although it manifestly places a very serious obstacle in the way of the injured party. The policy of such a limitation may be open to serious question; but that is a matter to be determined by the legislature and the voters of the particular city. The legislature has not deemed it advisable to restrict the city in this respect, and, as the subject is clearly one proper for municipal legislation, the charter provision had the force and effect of a direct act of the legislature, and is therefore effective.

The court here placed an existing rule of the common law in precisely the same category as a previously enacted statute. This, it would seem, was eminently proper in view of the fact that a statute may repeal or modify any principle of the common law. It would have been somewhat curious, to say the least, had the rule been laid down that a freeholders' charter could supersede any previously enacted general law, which itself might have abolished or changed a common law principle, but that it could not affect a common law principle which had been unaltered by statute.

It is to be noted, moreover, that under the views expressed in this opinion there could be no doubt that a home rule city of Minnesota, barring the proscription of a governing state law applicable to cities under freeholders' charters, could absolutely free itself from any liability for negligence in the care of its streets. It is interesting to record, however, that in Senecal *v.* City of West St. Paul [1] it was held, by a highly strained construction of a freeholders' charter, that a provision thereof which required an action in damages for personal injury to be brought within one year did not apply to an action brought under a general statute giving the next of kin of a deceased person an action if his death was caused by the wrongful act of another. It was not declared

[1] 111 Minn. 253. 1910.

in this case that the statute superseded the charter but that the charter did not purport to cover such a case.

5. Police courts. In State *ex rel.* Simpson *v.* Fleming [1] the legality of a municipal judgeship established by the freeholders' charter of the city of Virginia was the issue before the court. Such an office was provided for by a general statute of 1899 [2] with which the provision of the charter of 1909 was clearly in conflict. Referring to the several state laws relating to municipal courts, the opinion recited in part as follows:

> The court thus established was a state court, and the judges state officers. The constitution required that all courts not specified should be established by the legislature by a two-thirds vote. (Art. VI, sec. 1.) A vote of the electors of a city on the adoption of a charter is not the establishment of a court, as required by the constitution. A vote of the legislature with reference to other municipal affairs may be by a mere majority. Attention is called to this distinction in State *v.* Porter, 53 Minn. 279, 55 N. W. 134. The subject, and the character of the duties of municipal judges and other municipal officers, is [*sic*] well defined. In the one case they are in the interests of the state; in the other, confined to the interests of the municipality. The powers and duties of the courts provided for are purely and exclusively judicial. They have neither administrative nor legislative powers in the affairs of the municipality. State *v.* Sullivan, 67 Minn. 379, 69 N. W. 1094; State *v.* Dreger, 97 Minn. 221, 106 N. W. 904.
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> The respondent having been elected a state officer under the general law, it was not within the power of the voters of that municipality to legislate him out of office, or shorten his term of office.

The issue in this case was in fact one of conflict. The supremacy of the state law could easily have been sustained by the application of the doctrine of Grant *v.* Berrisford and the reaffirmative cases noted above; for in the view here taken by the court a municipal judge was a state rather than a local officer and a municipal court was a matter of state rather than of local concern. In all the other cases to which reference has been made charter provisions were declared to supersede previously enacted general statutes only upon the ground that the matters in respect to which conflict existed were municipal as distinguished from state affairs.

[1] 112 Minn. 136. 1910. [2] Laws of Minn., 1895, ch. 229; 1899, ch. 271.

It may be that when finally presented with the actual necessity of applying the doctrine that a previously enacted state law on a subject of general concern was not controlled by a charter provision, the court discovered a serious obstacle in the declaration of the constitution to the effect that a freeholders' charter should "supersede any existing charter." It would seem that the only possible answer would be that a general law upon such a subject was not a part of the existing charter. If the Minnesota court had taken a narrow view of the scope of municipal affairs — if, for example, it had been held that a general law relating to police departments would control a subsequently enacted charter provision [1] — it is apparent that such an answer would have been little short of ridiculous. But the fact is that in passing upon questions of this kind the Minnesota court has, as we have seen, taken a very broad view of the scope of powers that may be appropriately controlled by a municipal charter. The case under review is the only case in the books in which that court failed to sustain the supremacy of a charter provision over a previously enacted general law. In this particular case it would have been quite reasonable had the court asserted that a general law establishing police courts was not a part of the "existing charter" of those cities to which it applied, this assertion being predicated upon the fact that such a law could not be enacted in the manner of a general charter law since the constitution required for its passage a two-thirds majority vote.

But this is merely to speculate upon the difficulties which the court would have encountered had the decision here under review been reached by applying the doctrine of the Grant case to the solution of the manifest conflict that existed between the charter provision and the previously enacted law. The fact is that the court elected to rest the decision of this case upon the broader ground. It was in effect held that, regardless of any controlling state law, it was beyond the competence of the city to erect a municipal court for the reason that the constitution required

[1] In fact the contrary was indicated (*supra*, 467) though the point has never been directly raised.

inferior courts to be established by the legislature by a two-thirds vote. Whether in the absence of this requirement of an extraordinary majority vote the court might have proclaimed that the establishment of such a court by a freeholders' charter was equivalent to establishment by the legislature, it is impossible to say. Certainly, however, this requirement of an unusual majority was of importance. A home rule charter was in effect a "statute." Could it be held that a city in enacting such a statute was vested with greater powers than the legislature itself — that it could, wholly absolved from extraordinary limitations, deal therein with a subject in respect to which the legislature was circumscribed by such limitations? In this regard, as well as in the fact that the legislature of Minnesota does not in any wise participate in the making of freeholders' charters, the view of the court in this case may be distinguished from that of the Missouri, California, and Washington courts in cases upon the same subject.[1]

6. Police power. No case has arisen in Minnesota involving a direct conflict between state laws and charter provisions enacted in pursuance of the police power. In State *v.* Collins[2] it was held that an ordinance of Minneapolis — a city under a legislative charter — which prohibited the sale of liquors on Sunday was not void as being in conflict with a state law. Apparently the rule that was applied, without much comment, was that which asserts the concurrent competence of a city in the exercise of police powers so long as no actual conflict of policy is found to exist.[3] In the course of the opinion rendered in this case it was declared that "the provisions of section 36, article 4, of the constitution to the effect that no charter or ordinance enacted thereunder shall supersede any general law defining or punishing crimes or misdemeanors applied only to cities having home rule charters, of which class Minneapolis is not a member." Whether by this declaration the court intended to imply that this provision of the home rule amendment had in any wise altered the well-known rule of law governing the relation between police laws and police

[1] *Supra*, 195, 206, 241, 373, 400.

[2] 107 Minn. 500. 1909.

[3] Reliance was placed on State *v.* Marciniak, 97 Minn. 355. 1906.

ordinances, it is impossible to say. This case appears to be the only case in which this provision has ever been referred to.

In Kleppe *v.* Gard [1] and again in Thune *v.* Hetland [2] it was held that a state law which conferred local option in liquor matters upon "any town or incorporated village" did not apply to cities. In the latter case it was intimated that the provisions of a freeholders' charter upon this subject were not beyond the scope of the city's powers in adopting a charter; but it was also intimated that such provisions must not be "subversive of the declared policy of the state as to the sale of intoxicating liquor." Evidently the fact that the city enjoyed power to regulate such a matter was due to the failure of the state to establish a controlling policy for cities.

No conclusions of much importance can be deduced from this limited number of cases which after all touch only indirectly upon issues of conflict over the police power.

The Supremacy over Charter Provisions of Laws Applicable to Classes of Cities

From a reading of the foregoing cases one may certainly conclude that the Minnesota court has, to the extent that adjudications have been necessary, been extremely liberal toward the city in construing the constitutional grant of home rule powers. One might also be prompted to conclude that home rule in that state has been a thing of great reality and vitality. The facts are quite otherwise, though the books do not disclose these facts.

It will be recalled that no single case has been reviewed in which the court was asked to determine a question of conflict between a charter provision and a general law enacted *subsequent* to the adoption of the charter. Apparently no such case has ever arisen. Why? The answer is written in the plain words of the constitution. "The legislature may provide general laws relating to the affairs of cities, the application of which shall be limited to cities" of several designated classes, which laws "shall be para-

[1] 109 Minn. 251. 1909. [2] 114 Minn. 395. 1911.

mount while in force to the provisions relating to the same matter included in the local charter herein provided for." The meaning of this declaration of the constitution is scarcely open to question. It is small wonder, therefore, that no cases have arisen involving the question of the relation of superiority and inferiority between freeholders' charter provisions and laws of general applicableness relating to the affairs of the city. The presentation of such a question to the courts would be manifestly absurd.

Here, then, is the strange situation created by the home rule provisions of the Minnesota constitution. Although a freeholders' charter is made to supersede any existing charter, the legislature may at will enact laws applicable to the cities of any class, which laws are in turn made to supersede the provisions of the freeholders' charter. In other words, when a city has by the adoption of a home rule charter blotted its old legislative charter out of existence, there is nothing whatever to prevent the legislature from immediately reenacting the whole or any part of the former charter so long as the law or laws by which this is accomplished are made applicable to the cities of an entire class. The statute books of Minnesota teem with laws relating to the affairs of classes of cities which have been enacted since the adoption of the home rule amendment and of charters made pursuant thereto. In most instances these laws apply alike to cities under freeholders' charters and cities under legislative charters. Every law, for example, that is made applicable to cities of more than 50,000 inhabitants operates to amend not only the legislative charter of Minneapolis but also the home rule charters of St. Paul and Duluth. There is eminent authority for the assertion that the charter of St. Paul, adopted in 1900, was amended three hundred and thirteen times during the succeeding eleven years.[1] Such a scheme of home rule is obviously a mere shadow, a travesty indeed upon the term itself. It is precisely what the supreme court of that state declared that it was not — to wit, "a mere form of words."

One question arising out of this curious grant of home rule has not been settled by any case of supreme court record. It does not

[1] Professor William A Schaper in *National Municipal Review*, 1. 110.

appear, for example, whether Minneapolis in drafting a home rule charter at this late date would or would not be bound by all of the provisions of laws relating to cities of the first class which have been enacted since the adoption of the home rule amendment. These laws certainly form a part of the city's existing legislative charter. It would seem, therefore, that they would be superseded by the adoption of a charter of the city's own making. The curious result would then follow that St. Paul, under its charter of 1900, would be subject to the control of these laws although Minneapolis, a city of the same class, would by its own action have emerged from the control of such laws. It would seem also that St. Paul, by the adoption of a new charter or of charter amendments, might at any time release itself from the necessity of being governed by any provisions of the laws applicable to its class of cities to which it might object. If this be the law of the Minnesota constitution it is clear that that instrument has merely established a game of shuttlecock between the city and the legislature.

We are not here especially concerned with the rules that have been laid down by the supreme court of Minnesota in respect to the competence of the legislature to alter in effect the classification of cities as fixed by the constitution upon the basis of population. It is somewhat interesting to note, however, that the court has been more liberal than otherwise in passing upon questions concerning this competence, and that it is practically impossible to reconcile certain of the opinions that have been handed down. Thus in a single volume of the reports are found three cases which cannot possibly be harmonized. In Le Tourneau *v.* Hugo [1] an act which authorized any city of more than 50,000 inhabitants to construct a bridge over any navigable canal in such city was sustained, although Duluth, then operating under a freeholders' charter, was the only city in which such a canal existed. "The canal," said the court, "is in no sense an element of the classification or operation of the act, being limited exclu-

[1] 90 Minn. 420 (1903); see also State *ex rel.* Corriston *v.* Rogers, 93 Minn. 55 (1904).

sively to cities of designated population." Here was sanction not only for the application of a general law to a home rule city but also for the application of a law which was by reason of its subject-matter special in character. On the other hand, in State *ex rel.* Chapel *v.* Justus [1] an act applying to any city of more than 10,000 inhabitants "which has a system of sewer or waterworks" was held invalid on the ground that this was not a permissible classification under the constitution. So also, upon the same ground, in Thomas *v.* City of St. Cloud [2] an act was declared void which empowered any city of less than 10,000 inhabitants to repurchase a waterworks which had formerly been owned by the city and had been sold. In the two cases last mentioned the court wisely avoided any reference to the case first mentioned.

In the case of Hunter *v.* City of Tracy [3] an act was sustained which applied to cities of less than 10,000 inhabitants and expressly excluded from its operation the cities of this class which were operating under home rule charters that contained contrary provisions upon the subject-matter of the law. The court declared as follows:

> The placing of home rule charter cities having ten thousand or less inhabitants in a class by themselves is in accordance with the constitution (article 4, sec 36), which provides, not only for the classification of the cities by population, but also for a class of cities which have or may have home rule charters This classification is not arbitrary, for it rests upon the obvious reason that, if such cities must be made subject to all general legislation affecting cities, then home rule charters would be of but slight, if any, advantage. Again, it would lead to great confusion and conflict between the provisions of home rule charters and general laws, if cities having such charters could not be placed in a class by themselves and excepted from general laws relating to cities. We hold that the statute is not unconstitutional because home rule charter cities are excepted from its operation.

This case was decided in the year 1908. It gave unmistakable sanction to the authority of the legislature to subdivide each of the classes of cities created by the constitution into two

[1] 90 Minn 474 1903 [2] 90 Minn 477 1903
[3] 104 Minn 378 1908

classes — cities under home rule charters and cities under legislative charters. Under the rule thus laid down the legislature of Minnesota has been able to amend home rule charters without being under the necessity of considering the effect of its laws upon cities under legislative charters. This was patently an important decision in the direction of increasing the power of the legislature over cities under freeholders' charters and in correspondingly diminishing the significance of the hybrid grant of home rule extended to cities by the provisions of the constitution.

When it is considered that the legislature of Minnesota is expressly empowered to fix the limits within which a freeholders' charter may be framed (which power has been exercised in great moderation) and that it is further empowered to enact laws applicable to home rule cities of certain specified classes (which power it has exercised with great frequency) it is manifest that such limited power of home rule as exists in this state is referable more largely to the dispensation of the legislature than to any protective guarantee of the constitution.

CHAPTER XIV

HOME RULE IN COLORADO

THE history of the movement which led to the adoption in 1902 of an amendment to the Colorado constitution extending home rule to Denver in particular and somewhat more incidentally to all cities of more than two thousand inhabitants has been so admirably described by Dr. King in his *History of the Government of Denver* [1] that it need not be here retold. Suffice it to say that the movement originated in the metropolitan city of the state and grew out of a combination of exhaustion and exasperation on the part of public-spirited citizens with a long-continued legislative practice of interference in the affairs of the city for political and sinister purposes, and especially with state domination of the police and fire department and practically the entire field of municipal public works through the medium of two all-powerful commissions appointed by the governor. The amendment as adopted was long and complicated, but it seems advisable to present it here *in extenso* for purposes of reference as well as in order that the cases construing its provisions may be more easily understood. It ran as follows: [2]

Sec. 1. The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver." By that name said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed

[1] Ch. V.

[2] Art. XX.

or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, acquire, lease, add to, maintain, conduct and operate, waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory, hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

Sec. 2. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments.

Sec. 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex officio surveyor and said chief of police shall be ex officio sheriff of the city and county of Denver; and the then clerk and ex officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the ther district judge, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

Sec. 4. The charter and ordinances of the city of Denver, as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of

Denver are hereby vested with, and they shall always have the exclusive power in the making, altering, revising or amending their charter, and, within ten days after the proclamation of the governor announcing the adoption of this amendment, the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers, who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention, to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county, who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against), duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election, to be called as above in said city and county, and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection), until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charter and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy-attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty

days after its delivery to the clerk. The charter shall make proper provision for continuing, amending, or repealing the ordinances of the city and county of Denver.

All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury, upon the order of the council.

No franchise, relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes.

Sec. 5. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided:

It shall be competent for qualified electors, in number not less than five per cent, of the next preceding gubernatorial vote in said city and county, to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the same to a vote of the qualified electors at the next general election, not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten per cent. of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election, to be held not less than thirty nor more than sixty days from the date of filing the petition; Provided, That any question so submitted at a special election shall not again be submitted at a special election within two years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance, as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected and all expenses paid, as in said section provided.

The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspaper, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure or proposal for a charter convention, or alternative article or proposition which is to be submitted

to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which shall have been approved by a majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention. Each charter shall also provide for a reference, upon proper petition therefor, of measures passed by the council to a vote of the qualified electors, and for the initiative by the qualified electors of such ordinances as they may by petition request.

The signatures to petitions in this amendment mentioned need not all be on one paper. Nothing herein or elsewhere shall prevent the council, if its sees fit, from adopting automatic vote registers for use at elections and references.

No charter, charter amendment or measure adopted or defeated under the provisions of this amendment shall be amended, repealed, or revived, except by petition and electoral vote. And no such charter, charter amendment or measure shall diminish the tax rate for state purposes fixed by act of the general assembly, or interfere in any wise with the collection of state taxes.

Sec. 6. Cities of the first and second class in this state are hereby empowered to propose for submission to a vote of the qualified electors. proposals for charter conventions and to hold the same, and to amend any such charter, with the same force and in the same manner and have the same power, as near as may be, as set out in sections four (4) and five (5) hereof, with full power as to real and personal property and public utilities, works or ways, as set out in section one (1) of this amendment.

Sec. 7. The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct of affairs and business shall be in the hands of a board of education, consisting of such numbers, elected in such manner as the general school laws of the state shall provide, and, until the first election under said laws of a full board of education, which shall be had at the first election held after the adoption of this amendment, all the directors of school district No. 1 and the respective presidents of the school boards of se ool districts Nos. 2, 7, 17, and 21, at the time this amendment takes effect, shall act as such board of education, and all districts or special charters now existing are hereby abolished.

The said board of education shall perform all the acts and duties required to be performed for said district by the general laws of the state.

Except as inconsistent with this amendment, the general school laws of the state shall, unless the context evinces a contrary intent, be held to extend and apply to the said "District No. 1."

Upon the annexation of any contiguous municipality which shall include a school district or districts, or any part of a district, said school district or districts or part shall be merged in said "District No. 1," which shall then own all the property thereof, real and personal, located within the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those of partially included districts.

Provided, however, That the indebtedness, both principal and interest, which any school district may be under at the time when it becomes a part, by this amendment or by annexation, of said "District No. 1," shall be paid by said school district so owing the same by a special tax, to be fixed and certified by the board of education to the council, which shall levy the same upon the property within the boundaries of such district, respectively, as the same existed at the time such district becomes a part of said "District No. 1," and in case of partially included districts, such tax shall be equitably apportioned upon the several parts thereof.

Sec. 8. Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.

In respect to these elaborate home rule provisions of the Colorado constitution the following points of interest may be listed:

(1) The consolidation of the city of Denver with a portion of Arapahoe County was made directly by the amendment itself and became effective immediately upon the proclamation of the governor.[1] A considerable part of the amendment was concerned with the regulation of details in respect to the manner in which this consolidation should be effected and with provisions for the government of the merged corporation in the interim between the adoption of the amendment and the local adoption of a charter which should establish a new form of government for the single corporation.

(2) Certain broad powers of the consolidated corporation were expressly enumerated in the first section of the amendment, but

[1] Denver *v.* Adams County, 33 Col. 1 (1904); *infra*, 527.

obviously this enumeration was not intended to be exclusive in character.[1]

(3) The consolidated corporation of Denver was not permitted to exercise in its discretion the home rule powers conferred. On the contrary it was specifically required to frame and adopt a charter; and in the event of the defeat of any charter at the polls it was compelled to repeat the process of framing and submitting a charter until an instrument acceptable to the voters should be drafted.

(4) The school districts included within the limits of the consolidated corporation were likewise consolidated into a single district which itself constituted a corporation;[2] but apparently the affairs of this corporation were to be regulated entirely under the general laws of the state.

(5) The right to frame a charter was conferred upon all cities of the first and second classes in the state, which included all cities of more than two thousand inhabitants; and the same process of framing, adopting, and amending charters which was laid down for Denver was made applicable to these other cities. Such cities, however, were not vested with power to effect any consolidation of their governments with county governments.

Acting up to the requirements of the home rule amendment delegates to a charter convention were elected in Denver in June, 1903. A charter of a fairly progressive character was framed and submitted to the electorate in September, but being bitterly opposed by both party machines, this charter was defeated. In December of the same year a second convention was elected, and in March, 1904 the charter framed by this convention was ratified at the polls. This charter has never been completely revised, but it has been amended in a number of respects since its adoption. In 1912 it was so fundamentally amended as to abolish the mayor-and-council type of organization and to substitute in its place the commission form of government.

[1] *Infra*, 532.

[2] The writing of this provision of the amendment was prompted by the fact that all attempts of the legislature to consolidate the school districts of Denver had been frustrated by the supreme court.

Colorado Springs and Grand Junction adopted home rule charters in 1909. Pueblo was added to the list in 1911 and the small city of Montrose in 1914. The charters of all of these cities provided for the commission type of government. Trinidad, with ten thousand inhabitants, is the largest city of Colorado that is not operating under a charter of its own making.

The "Constitutionality" of the Home Rule Amendment

It appears that the home rule amendment of 1902, popularly known as the "Rush Amendment," was, for reasons that it is unnecessary to recount, bitterly opposed by certain powerful interests in Colorado. Scarcely had the governor proclaimed its ratification when it was assailed before the courts in the case of People *ex rel.* Elder *v.* Sours [1] on the ground that it had not been constitutionally adopted. One dissenting and two concurring opinions were written in this case; but the validity of the amendment was sustained upon the points raised against it. We are in no wise interested in the views expressed upon the subject of whether the prescribed constitutional procedure for amending the fundamental law had or had not been properly followed. This was the *only* issue discussed in *all* of the opinions rendered. In the affirmative opinion of Mr. Justice Steele, however, a wholly different issue was discussed, this being the question as to whether the amendment was void because of its conflict with that clause of the federal constitution which guarantees to every state a republican form of government. The contention was that the amendment did not contemplate that the constitution and laws of Colorado should be in force at all in the consolidated city and county of Denver, but that the charter, being declared to be the "organic law thereof," should "displace the constitution, the laws, and the general assembly," thus creating a state within a state. In answer to this contention the learned judge argued as follows:

> If this amendment must be given that construction, it cannot be sustained. Even by constitutional amendment, the people cannot set

[1] 31 Colo. 369. 1903.

apart any portion of the state in such manner that that portion of the state shall be freed from the constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city, government. The duties of judges of the district court, county judges, district attorneys, justices of the peace, and generally, of county officers, are mainly governmental; and, so far as they are governmental, they may not be controlled by other than state agencies without undermining the very foundation of our government. Under the constitution of the United States, the state government must be preserved throughout the entire state, and it can be so preserved only by having within every political subdivision of the state, such officers as may be necessary to perform the duties assumed by the state government, under the general laws as they now exist or as they may hereafter exist.

This distinction between the governmental duties of public officers and their municipal duties is fundamental, and therefore is not avoided or affected by the consolidation. . . .

The respondent's construction, however, is not that placed upon the *amendment by the counsel for the petitioners, or, we assume, by the* people. The provision that "Every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable," completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control. The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the constitution of the United States.

It may be open to question whether the judge was not proceeding too far when he expressed the view that a state was prevented by the United States constitution from vesting, by the terms of its own constitution, power in a local subdivision of the state "to prescribe the jurisdiction and duties of public offices with respect to state government as distinguished from municipal, or city, government," and when he asserted on the same ground that the duties of such officers as district and county judges and attorneys, justices of the peace, and county officers "generally" could not, even under express sanction of the state constitution,

"be controlled by other than state agencies." It is quite true that a state would be powerless to create out of a portion of its territory a "state" within every meaning of that term as it is used in the federal constitution; for such a "state" would have to be admitted to the Union by Congress before it could elect congressmen or senators or participate in presidential elections — functions which, under the contemplation of that constitution, must be performed by every state. It is also true that a constitutional scheme which completely liberated a designated part of a state from all obligation to enforce any and every state law, and vested in the people of the territory thus set off power to legislate practically without restriction on every possible subject of state control, would be a manifest absurdity. Even so, it is difficult to see, barring possibly in respect to some matters the guarantee of the equal protection of the laws, what clause of the federal constitution might be invoked to defeat such a scheme. How could the vague guarantee of a republican form of government be applied? In the view of the United States Supreme Court this is a guarantee that is exclusively committed for enforcement to the political departments of the federal government and as such is wholly outside the jurisdiction of courts.[1] Moreover, if this were not so, the government established by the people of the territory so privileged might in plain fact be far more republican in form (whatever that term may precisely import) than that of the state as a whole; and it would certainly be a part of the government of the state, for its sanction would lie wholly in the constitution of the state, which might at any time be altered.

There exists high authority for the assertion that the legislature of a state, in the absence of state constitutional restriction, may give to a municipal corporation such large powers as to make it "a miniature state within its locality."[2] Surely if the legislature enjoys such power as this, the makers of the fundamental law of a state enjoy equally large power.

However this may be, the point of importance is that Judge Steele specifically declared in the opinion above quoted that the

[1] *Infra*, 525. [2] Barnes v. District of Columbia, 91 U. S. 540 (1875); *supra*, 16.

home rule amendment in Colorado did not purport to establish any such scheme. That amendment in the plainest possible terms recognized that the constitution and the general laws of the state, in so far at least as they imposed duties upon county officers, should be enforced within the city and county of Denver. The people of this corporation were empowered, through the medium of their charter, merely to designate the officials who should perform such duties as were imposed upon county officers by the constitution and the general laws.

The first municipal election under the home rule charter of Denver was held in May, 1904. At this election officers were chosen for the merged city and county government, many of them being required by the charter to perform functions of county as well as of city officers. In November of the same year occurred the general state election at which county officers were to be chosen in all the counties of the state except presumably in the consolidated city and county of Denver. In spite of the obvious contemplation of the home rule provision of the constitution, as well as of the charter framed in pursuance thereof, that the charter officers of Denver should perform county functions, all the county officers that were required by the laws of the state for counties generally were at this general election chosen for Denver.

A number of cases, popularly known as the "county offices election cases," were immediately taken into court to test the legality of the election of these county officers and to determine whether the officers chosen under the provisions of the charter were ousted from the performance of county functions. The leading of these cases was that of the People *ex rel.* the Attorney General *v.* Johnson[1] which concerned the office of county judge. Practically the only question before the court in this and the other cases of this group was whether the constitutional amendment, in so far as it authorized the people of the city and county of Denver to designate the officers who should perform county functions as prescribed by state laws, was or was not *itself* invalid. Or, to employ the more general language of the court, the question was: "Can

[1] 34 Col. 143. 1905.

the people of the state by constitutional amendment set apart any portion of the state and vest the citizens thereof with power to legislate upon matters other than those purely local and strictly municipal in their character?" So far as can be gathered from the somewhat muddle-headed opinion that was handed down by the court, speaking through Mr. Justice Maxwell, the validity of the amendment was assailed in this respect on the ground that it established a government that was not republican in form.

It would seem, however, that the court was also influenced to an extent by the almost unbelievable notion that the amendment likewise violated certain provisions of the state constitution as they existed at the time of its adoption. Just how a subsequently adopted constitutional provision, which expressly repealed all existing provisions in conflict therewith,[1] could be held to be in violation of the instrument of which it became an integral part does not appear.

It is perhaps unnecessary to quote here in detail from the opinion that was expressed. It is sufficient to say that, taking the above-quoted views of Mr. Justice Steele in the Sours case, the court with utter shamelessness warped them in such manner as to sustain the invalidity of the constitutional amendment as to the point involved in the case. It was declared that the question presented in the Johnson case was upon the authority of the Sours case "not an open one" but "must be held to be *stare decisis*." The utter sophistication of the reasoning of the court in this Johnson case is shown in the following declaration that was made:

> To concede that article XX authorizes a charter convention to legislate upon *any subject whatever*, in contravention of *any* of the provisions of the constitution relative to governmental or state matters or to county or state offices and officers, is to concede that such convention might displace the constitution in every respect, and the charter, being the organic law of the city and county, would thereby become supreme within the territory included in the boundaries of the city and county; hence we would have a portion of the state freed from the constitution — over which the state had no right to legislate — which could have no interest whatever in any legislation which might be enacted by the state relating to

[1] *Supra*, 504.

state and governmental affairs. In short, an *imperium in imperio*, a condition which cannot be brought about or exist even by constitutional amendment, as emphatically decided by the majority opinion in the Sours case.

The plain fact is that the constitution authorized the charter convention *only* to designate the officers who should perform those duties in respect to "governmental or state matters" which were imposed upon county officers by the constitution and general laws of the state. It is well-nigh incredible that the court, in the face of this specifically limited grant of power to the people of the city and county, should have had the temerity to assert that to concede the competence of the charter convention to regulate this *specific* matter of state concern was to concede "that such convention might displace the constitution in *every* respect."

As another indication of the obvious lack of logic that was shown by the court in this case, attention may be called to the part of the opinion which emphasized the fact that other cities of the state which were empowered to frame charters might, following the lead of the city and county of Denver, break away "from the straight and narrow path of constitutional limitation" and attempt to free themselves from the restrictions of the constitution that might be irksome to them. When it is noted that no other city of the state was by the constitutional amendment given any power to effectuate a consolidation of city and county governments but was granted merely the power to frame a charter for the government of the city, it is manifest that the court was creating out of its own imagination the specter of a possible dismemberment of the state. Indeed, after a careful perusal of the opinion handed down in the Johnson case, one cannot escape the conclusion that the court, for some reason that appears neither in nor between the lines, was determined at any sacrifice to invalidate in part at least the provisions of this revolutionary constitutional amendment.

Although Mr. Justice Steele, in a dissenting opinion, which was concurred in by only one other member of the court and which was characterized by an admirable display of temperance and

poise, utterly repudiated the violent twist that was given to the views he had expressed in the Sours case, the doctrine of the Johnson case was nevertheless reaffirmed and reapplied in the other cases involving the election of county officers in Denver, including such officers as the assessor,[1] the clerk and recorder,[2] the treasurer,[3] the justices of the peace,[4] the constable,[5] the county commissioners,[6] and the sheriff.[7] Likewise at the next term of court, the doctrine of the Johnson case was reaffirmed in respect to the office of coroner,[8] it being held also at this time that the city and county of Denver was not competent to change the time of election nor the term and tenure of county officers.

It is not surprising that the decision of these cases led to a storm of popular disapproval in Denver and that ugly accusations were hurled with some vehemence. With the truth or falseness of these accusations we are not concerned; but it is interesting to note in passing that one of their results was a judgment of "constructive contempt" rendered by the supreme court against Senator Thomas M. Patterson for the publication in his Denver newspapers of somewhat violent criticisms of the court. These criticisms were published after the decision of the "county offices election cases" but before the application for a rehearing of these cases had been passed upon.[9]

By the decision of these cases the provisions of the home rule amendment of 1902 and of the first charter of the city and county of Denver framed in pursuance thereof were wholly annulled in so far as a consolidation of the offices of the city and county government was sought to be effected. At every general election during

[1] People *ex rel.* Stidger *v.* Alexander, 34 Col. 193. 1905.
[2] Byrne *v.* The People *ex rel.* Stidger, 34 Col. 196. 1905.
[3] People *ex rel.* Stidger *v.* Elder, 34 Col. 197. 1905.
[4] People *ex rel.* Harrington *v.* Rice, 34 Col. 198. 1905.
[5] People *ex rel.* Stidger *v.* Berger, 34 Col. 199. 1905.
[6] People *ex rel.* Lawson *v.* Stoddard, 34 Col. 200. 1905.
[7] People *ex rel.* Nisbet *v.* Armstrong, 34 Col. 204. 1905.
[8] People *ex rel.* Stidger *v.* Horan, 34 Col. 304. 1905.
[9] People *v.* News-Times Publishing Co., 35 Col. 253 (1906). This case furnishes rather interesting readingswhatever may be its value on points of law. Mr. Justice Steele here again found himself in the dissenting minority.

the next six years county officers were elected in Denver, just as in all other counties of the state, and there was in consequence no realization of the economy of administration and simplicity of government which were among the objects sought to be attained by the amendment.

Prompted by the fact that there had been changes in the personnel of the supreme court since the decision of the far-famed "county offices election cases," certain citizens of Denver in the year 1911 brought before the court for reconsideration the identical question that was decided in these cases. In the case of People *ex rel.* Attorney General *v.* Cassiday [1] the doctrine of the Johnson case was utterly repudiated, only two out of seven justices dissenting. The majority of the court, delivering through Mr. Justice Bailey, relied upon the dissenting opinions of Mr. Justice Steele in the Johnson case and of Mr. Justice Gunter in People *ex rel* Stidger *v.* Horan.[2] These dissenting opinions were declared to be "convincing, exhaustive, and unanswerable." It was apparent throughout the entire opinion handed down in the Cassiday case that the court was discussing previously expressed views of the same tribunal for which it held no toleration whatever. "Why scrutinize Article XX in a hostile spirit," it was asked, "or treat it as an interloper?" And having pointed to the unmistakable fact that the amendment did not seek entirely to oust from the consolidated corporation of Denver the operation of the constitution and of the general laws of the state relating to county affairs but, on the contrary, clearly required that county functions should be performed therein, the court propounded the following questions:

> How, possibly, can the fact that different agencies than those provided for other counties of the state are in this territory to perform governmental duties, when all such functions are carefully preserved and their discharge provided for, be held in any manner to affect state government? What federal inhibition is invaded because the officers so designated may be chosen in the early springtime rather than in the autumn, that they serve for four years rather than two, that they are designated by one official title instead of another, or that one set of officers is named to discharge

[1] 50 Colo. 503. 1911. [2] *Supra*, 512.

the duties in that territory pertaining to both local and governmental affairs, since all such governmental acts and duties are retained intact therein and are to be fully performed?

The small esteem — not to say disgust — in which the doctrine of the Johnson case was now held was shown when the court declared:

Until the ingenuity and invention of the human intellect shall have conceived and formulated — which has not yet been done — some sound, or even plausible reason for the conclusion reached in the Johnson case, that article XX provides for the city and county of Denver a government unrepublican in form, that decision must remain, as it now is, wholly unaccountable and incomprehensible, for it must be that the conclusion rests upon that assumption, else it is wholly unsupported.

Again, toward the end of the opinion, it was asserted:

It is unnecessary for this court to say, to escape the application of the doctrine of *stare decisis*, that the decision in the Johnson case is obviously, palpably and manifestly wrong; such bald statements add nothing to the fact. In the discussion as to the correctness of the reasoning of the Johnson case, it has, we think, been demonstrated that upon no theory can it be upheld. It is distinctively and fundamentally wrong in that it declines to recognize as effective and in operation a provision of the state constitution, about the propriety and meaning of which there is no room for two opinions, and thus the court, in that case, by the strength of judicial power, excludes that provision, although it bespeaks a policy approved and adopted by the whole people, whose exclusive and sovereign rights and prerogatives, in that behalf, are thereby abrogated and thrust aside as if mythical and unreal.

The decision of the Cassiday case operated to oust the incumbents of all county offices in the city and county of Denver and to restore the provisions of the charter by which the functions of county officers were imposed upon officials who for the most part performed joint city and county functions. This was to simplify the government of the city and county and to introduce the economies which had been sought to be accomplished by the constitutional merger of the two local governments into one.

Acting upon the assumption that the rule laid down in the Cassiday case applied to the office of judge of the county court as

well as to all other county offices, the people of the city, at the regular municipal election held in May, 1912, elected in accordance with the terms of the local charter two county judges. In Dixon *v.* The People [1] it was held, however, that the rule of the Cassiday case did not apply to the office of county judge. This officer was not a county officer within the meaning of the constitution. Counties, said the court, were subdivisions of the state created for the purpose of aiding in the administration of governmental affairs. They were also quasi-corporations. On the other hand, territorial divisions or districts that were established for judicial purposes had no semblance of a corporate character. The mere fact that the constitution selected the county as one of the judicial districts of the state did not make the functions of the court county functions nôr the officers of such court county officers. This view received additional support, so the court thought, from the fact that article fourteen of the constitution, which dealt with the subject of county government and enumerated certain county officers, did not mention the county judge in the list so enumerated.

When the court's attention was called to the fact that in the Johnson case it was specifically the office of county judge that was in controversy, the reply was made that the decision of that case was not in fact confined to the precise issue therein presented, but that the general issue involved in all of the so-called "county offices election cases" had been considered in the single opinion that was rendered. In this reply the court unquestionably described with accuracy the purport of the opinion in the Johnson case. It may be submitted, nevertheless, that in combining the specific issue of that case with the general issue involved in the other county offices cases the court clearly implied that the office of county judge was in precisely the same category with all other county offices. Moreover, the court seems to have ignored an obvious implication of section three of the home rule amendment. This section, after specifying the several existing city or county officers who should perform functions after the merger of city and county

[1] 53 Col. 527. 1912.

governments was effected but before a new charter should have been adopted, declared that the officers so designated should hold their respective offices until their successors were duly elected and qualified, "except that the then district judge, county judge, and district attorney shall serve their full terms." The question may certainly with some reason be asked why there was any necessity here for the mention of the county judge if this officer was not at the time a county officer and was not to become an officer of the consolidated city and county.

There is no question, moreover, that (subject to the single specific limitation that the county judge in office should serve out his full term) there was here a forceful implication to the effect that at least a degree of control over this officer was by the amendment transferred to the city. However, the opinion in the Dixon case stands, and under its pronouncement the county judge is removed from any possible control by provisions of the locally made charter of the consolidated corporation.

In spite of the vehement repudiation of the doctrine of the Johnson case in the Cassiday case, it should be noted that in two cases thereafter decided the notion appeared still to dominate the mind of the Colorado court that certain powers of home rule were beyond the competence of the people to confer through the medium of a constitutional amendment. This was clearly shown in the decision in 1912 of the case of Mauff *v.* People[1] — a case which will be considered in further detail at a later point. This case involved an issue of conflict between a state law and a charter provision regulating a matter pertaining to elections. In the course of the opinion rendered it was boldly declared that "if by Article XX it had been undertaken to free the people of the city and county of Denver from the state constitution, from statute law, and from the authority of the general assembly, *respecting matters other than those purely of local concern*, that Article could not have been upheld." The court did not, it is true, indicate the specific grounds upon which the provision could have been held to be invalid, had it conferred power in respect to matters other

[1] 52 Col. 562 (1912); *infra*, 543.

than those purely of local concern. It would seem, however, that there was here nothing more nor less than a revival of something that was closely akin to the doctrine of the Johnson case.

Again in the case of Hilts *v.* Markey,[1] decided in the same year as the Mauff case, the question was raised as to whether a provision of the Denver charter which limited the tax levy to fifteen mills could be construed as limiting the tax levy for county as well as for city purposes. Reviewing the opinion expressed in the Cassiday case, as well as that given in the early case of People *v.* Sours, the court declared it to be conclusive "that the people of the city and county of Denver have no power whatever to legislate in the slightest degree upon any matter solely affecting state and county affairs." It was expressly averred that no other construction of Article XX "was possible *if the article was to stand.*" If, therefore, the charter should be held to have "undertaken to legislate upon, or in any way control and fix, the method of making, or the amount of the levy, . . . for county purposes, such attempt is futile, because that is a matter solely under state control and may not be interfered with in any way by local legislation." Within the consolidated municipality, it was declared, there were "two governmental entities, a county with county duties, as provided by the general state law, and the consolidated municipality of the city and county of Denver, with duties wholly of a local character." The duties of both of these governmental entities were indeed to be performed by a single set of officers. But such of their duties as were "of state and county governmental import" were fixed by the constitution and general laws. In respect to these the people of the city and county could not legislate. The designation "City and County of Denver" was a confusing misnomer. It should have been rather "The Municipality of Denver" or "The Corporation of Denver." Had a designation of the latter character been employed, "there could have been no doubt or confusion about its meaning." Under the interpretation which had been given to Article XX by the court and which was now

[1] 52 Col. 382. 1912.

reaffirmed, the term "city and county of Denver" had and could "only have reference to the municipality of Denver *as a city.*" This being the case, the section of the charter imposing a limitation upon the tax levy could apply only to *city* taxes. The people of Denver "could no more legislate upon county taxation, which is exclusively subject to and under the control of the constitution, the general laws, and the state legislature, than they could upon a question of state revenue, or upon the matter defining the duties of a state officer, or upon the offense of grand larceny." Indeed so self-evident was all this that "the wonder is that such controversies find their way into court at all." Such was the line of argument developed by the court.

With due deference to the high authority which was the source of this opinion, it is nevertheless exceedingly difficult to be convinced by the course of reasoning that was employed. The constitution expressly declared that "the consolidated city and county" should be a "single body politic and corporate by the name of the city and county of Denver." A single body politic in which there should exist two distinct municipal entities is manifestly a highly metaphysical concept. One of the most important concrete results of the decision of the court in the Johnson case was that the county government of the consolidated corporation was held to be an integer which could not be destroyed by the consolidation that was attempted by the constitution. The Cassiday case overruled this to the extent of holding that the identity of the county government, so far at least as separation of offices was concerned, was validly destroyed by the constitutional provision which merged the officers of the county and the officers of the city into one group or set of officers.

The Hilts case followed by laying down the refinement that in spite of this merger, the county nevertheless remained a separate and distinct entity, which it was beyond the power of the people of the locality in any wise to affect save that they might designate the officers who should carry on the functions of county government. In this case the court would perhaps have been justified in holding that, since the home rule provision of the constitution

expressly required that the obligation should be imposed upon officers of the consolidated corporation to perform the functions laid upon county officers by the constitution and general laws of the state, the people of Denver were in consequence inhibited from incorporating into their charter any provisions which would be in violation of any general law relating to county affairs. This, however, was not the ground upon which the decision of the case was rested. It was not alleged that the tax limit of fifteen mills was in conflict with any state law. On the contrary, the decision turned upon the broad view that the people of Denver were incompetent to regulate *any* matter of county concern, regardless of whether such matter had or had not been made the subject of specific regulation by state law.

It is well nigh impossible to commend the court's interpretation upon this point. Suppose, for example, that the home rule amendment had expressly empowered the people of the consolidated corporation to regulate through the medium of a charter of their own making the tax levy for *all* corporate purposes. The validity of the provision empowering the city to regulate the election, term, tenure, and salary of officers who were required to perform the functions of county officers had finally been sustained. On what possible theory, then, could the court have ruled out of the constitution an express provision which empowered the city to regulate the tax levy for county purposes? There was certainly no provision of the amendment which either in terms or by clear implication prohibited the people of Denver from regulating this matter. Their incompetence in this respect was based solely upon the view that if the amendment conferred power to legislate in the slightest degree upon matters affecting county affairs, *the amendment itself could not stand.* It is perfectly obvious, however, that the amendment *did* confer upon the people of Denver the authority to legislate, to some degree at least, in respect to county affairs. Where, then, could the line be drawn? It could scarcely be said that the imposition of a tax limit for county purposes was any more inherently a county affair than the complete control over the number, the manner of appointment or election, the

term and tenure, and the salary of officers who were to perform county functions. The argument which sustained the one express grant could have been invoked with equal force to sustain the other. But if power to control and regulate the tax levy for county purposes could have been expressly and directly conferred by the constitutional amendment, just as the control of matters pertaining to the officers who should perform county duties was conferred, how could it be declared that this power had not been vested in the people of the consolidated city and county because it was a matter of state concern *which could not be delegated to the people of a subdivision of the state, even by constitutional amendment?*

On the whole, the conclusion is unescapable that the argument of the court in this case was not only dangerously close to that of the Johnson case, which had been overruled with some vigor and asperity, but was also in itself very nearly, if not quite, as vulnerable as to its logic.

The above critical analysis of the opinion in this case is based upon an assumption which the court itself apparently made — to wit, that the constitution did not expressly authorize the people of Denver to regulate the tax rate for county purposes. Even upon this assumption it seems clear that the argument of the court was unsound. But turning to the constitutional provision in question we find there a pertinent declaration which was completely ignored by the court. In the fourth section of the amendment it was provided that "the council shall have power to fix the rate of taxation on property each year for city and county purposes." Surely if the council was empowered to fix the rate for county purposes, the people were empowered to fix a tax rate limit for such purposes through the medium of their charter. The court must have read this provision, if at all, in such manner as to make it confer the power merely to fix the rate of taxation "for purposes of the city and county corporation," which corporation the court, by an almost ludicrous course of reasoning, construed in effect to be merely the city corporation. It is submitted that even if the force of this reasoning be granted, the provision in

question could with far greater logic have been construed to confer the power to fix the tax rate "for city and for county purposes." If it *had* been so construed without altering the conclusion of the court, the doctrine of the Hilts case would have been not only close to that of the Johnson case but also precisely identical with it. It would have been to declare void a provision of the amendment itself on the ground that the grant of power made by the people of the state was in this respect beyond their competence. This declaration was not actually made; but there can be little doubt that under the view expressed it would have been made had the court deemed it necessary to sustain the judgment of invalidity that was rendered against the power sought to be exercised by the consolidated city and county.

As the law stood in Colorado under the adjudications of the court in the Mauff and the Hilts cases it could only be said that no part of the home rule provisions of the constitution had in fact been held to be inoperative by the application of the doctrine that it was beyond the competence of the people of the state through the medium of a constitutional amendment, to confer certain home rule powers. On the other hand, it seems unquestionable that in the Mauff and the Hilts cases the court still entertained the view that the provision in question, in order that its own validity might be sustained, had to be so construed as not to give occasion for the application of this doctrine. In other words, the doctrine itself was not completely repudiated. In spite of the vigorous opinion uttered in the Cassiday case, and in spite of the judgment of validity that was passed upon the clause conferring certain powers in respect to officers who were to perform county functions, the foundational thought of both the Mauff and the Hilts cases was that *if the amendment was to be construed as delegating power to regulate anything but matters of purely local concern, the amendment itself could not stand.* It was not simply declared that the amendment *had* conferrred no other power. On the contrary, it was unqualifiedly asserted that no other power *was* conferred *because* no other power *could* be conferred. It is difficult to understand what specific principle of our constitutional

law might be invoked to sustain such a rule, unless the court intended once more to rest for frail and shadowy support upon the wholly inapplicable guarantee of a republican form of government.

One or two commentaries may here be made. In the first place, it is pertinent to inquire: why did the Colorado court resort to a doctrine of law which has apparently never been thought of in connection with the home rule provisions of any other state constitution which we have considered? This question is easily answered. In every other provision there was an express clause which could be construed to require that home rule cities should at least be subject to the control of state laws regulating matters of general as distinguished from local concern. In the Colorado amendment there was no such clause. The only clear implication in respect to the applicableness of general laws was that which was found in the somewhat poorly phrased declaration that the charter of Denver should designate the officers who should "perform the acts and duties required of county officers to be done by the constitution or by the general law." This declaration manifestly referred solely to those general laws that related to the duties of county officers and not broadly to those statutes which might be regarded as regulating matters of general or state concern. By what specific clause of the amendment, therefore, could it be held that the provisions of a home rule charter in Colorado were, nevertheless, in so far as they related to matters of general concern, subject to the supersedence of state laws? In the dilemma of finding no such clause the Colorado court might indeed have declared somewhat arbitrarily that the constitutional grant of the power to frame and adopt a charter did not include the authority to regulate any matter of state concern in a manner contrary to the general laws of the state. This would have been merely to supplement the work of the people of the state by reading into the home rule provision of the constitution a limitation that was not expressed in its terms. It would have been to "construe" the term "charter" to suit the court's own idea of what the constitution *should have* provided. Though by and large such exercise

of competence by the judiciary may be regarded as utterly reprehensible, there is no question that in this instance it would have been preferable to the assertion of the strange and vague doctrine which was in fact proclaimed.

In the second place, it is to be noted that the home rule charters of Colorado — and especially the charter of Denver — contained numerous provisions which in plain point of fact regulated matters that have been regarded in many branches of the law of municipal corporations as matters of state as distinguished from local concern. A logical and consistent application of the doctrine laid down in the Mauff and Hilts cases would have obligated the court to hold that these provisions were utterly void as being wholly beyond the competence of the city. As has already been indicated at an earlier point in our study, a grant of home rule powers which should be construed as limiting the city to the regulation merely of those matters which are regarded as strictly local in character would be little short of ridiculous. Under such circumstances the home rule city, even in the absence of any governing state law upon the subject, would not be competent to regulate any matter whatever relating to police, excise, health, education, elections, and perhaps also streets. One and all of these matters have in numerous cases, involving issues of widely varying purport, been held to be primarily matters of state rather than of local concern. Unless, therefore, the Colorado court was prepared to give a new and much broader definition to the term "local concern," it is manifest that under the doctrine which asserted that the home rule provision of the constitution could stand only if it were construed to establish a system of municipal control over matters that were *strictly* of local concern, large parts of the several home rule charters of Colorado would have to be declared invalid. This very obvious result of the doctrine in question seems not to have occurred to the court.

However, in the latest pronouncement of the court upon this subject the doctrine of the Mauff and the Hilts cases seems to have been largely, if not wholly, abandoned. In 1912 the home rule provision of the Colorado constitution was amended in certain

important particulars.[1] Among other things, complete power was conferred upon cities in respect to municipal elections, this provision having been drawn patently with the object in view of destroying the effect of the court's decision in the Mauff case. In the People *v.* Prevost[2] it was contended that the Mauff case had expressly declared that the control of elections was not a matter of local or municipal concern and that power in respect to this matter could not in consequence be conferred upon a city. Answering this contention the court held that the Mauff case had been written before the adoption of the amendment of 1912 and that by that adoption the people of the state had "declared in terms that municipal elections were local and municipal matters, upon which the people of municipalities had the power to legislate." If matters pertaining to municipal elections were not matters of local concern "before the amendment they are so now," for it was plain that the people of the state had deliberately made them so.

It does not appear to have entered the mind of the court that this view was flatly in contradiction of that expressed in the Mauff case, which case was not in terms overruled. It is nevertheless incontrovertible that the underlying principle of the Mauff case was that the constitution *could* not be construed as having conferred upon the city any power to regulate matters pertaining to elections. If by the home rule provision it had been undertaken to free the people of the city from the control of the state in any matter of state concern, the provision itself could not have been upheld. Thus it was declared, and this declaration admits of only one construction.

In the Prevost case, however, the court went on to assert that the contention to the effect that the home rule amendment was subversive of the state government and repugnant to the constitution of the United States was not well taken. "We presume," said the court, "that this is a last mention of that idea that has been advanced by those who have desired to overthrow Article XX of the constitution, ever since that Article was adopted, which idea has vexed the courts not only of this state but of many others, to

[1] *Infra*, 552.

[2] 55 Col. 199 (1913); *infra*, 557.

wit, that the government proposed by the home rule amendment is not republican in form. We are glad to say that at last that question has been fully settled and we trust forever so far as the courts are concerned." As authoritatively settling this question the well-known case of Luther *v.* Borden [1] was cited, as well as the recent case of Pacific States Telephone & Telegraph Co. *v.* Oregon,[2] where the Supreme Court refused to apply the guarantee of a republican form of government to defeat the state institution of the initiative and referendum. Both of these cases laid down the principle that this guarantee of the federal constitution must be enforced if at all by Congress and not by the courts. No judicial question could arise out of it.

With due respect for the opinion expressed in the Prevost case, and with due understanding of the court's laudable aspiration for company, it should nevertheless be remarked that Colorado is in fact the only state in which the question as to whether a constitutional scheme of home rule violates the guarantee of a republican form of government appears to have vexed the courts at all. Moreover, if the decision of the Colorado court in the Mauff and the Hilts cases did not rest unmistakably upon this doctrine, however absurd its application was, it is simply impossible to understand from the opinions given what rule of law the court intended to apply.

Reviewing the cases upon this subject as a whole, and considering the nebulous and sophistical reasoning as well as the irreconcilable utterances of the opinions rendered therein, one would be tempted to conclude, except for the profound importance of the general subject under review, that the cases were scarcely worthy of detailed and critical analysis. After all, perhaps the principal point of importance is that the Prevost case, however impossible it may be to harmonize it with opinions that were expressed as late as the year 1912, is the last word of the Colorado court upon this subject. As such it may be taken to mean that for the time being at least the doctrine which asserts the incompetence of the people of a state to confer power upon cities to regulate

[1] 7 Howard 1. 1849. [2] 223 U. S. 118. 1911.

within their jurisdiction even matters of state concern is no longer a doctrine that may be invoked to defeat any measure of the constitutional grant of home rule powers or to defeat any competence of a city under such grant.

Further Complications arising out of the Consolidation of City and County Governments in Denver

In the famous Johnson case it was not decided that the consolidation of the city and county of Denver into a single corporation was itself void, but merely that all of the county officers required by the constitution or the general laws of the state should be elected in and constitute officers of the consolidated corporation. In addition to the question that was raised in this case certain other complications in respect to the merger of the city and county governments grew out of the provisions of the amendment relating to this matter. Thus it was provided that the merger should become effective immediately upon the proclamation by the governor declaring the adoption of the home rule amendment. This was unlike the provision of the Missouri constitution for a similar consolidation in St. Louis, which was to take place only when the charter for the consolidated government should have been framed and adopted.[1] The details in regard to the organization of the government of Denver during the interim preceding the adoption of a charter were sought to be regulated by the constitutional amendment itself.

As has already been mentioned, the government of the city of Denver in 1902 was in considerable part in the hands of two commissions the members of which were appointed by the governor of the state. In 1903 the term of office of members of the fire and police board expired, and the governor attempted to appoint their successors. In the case of People *ex rel.* Parish *v.* Adams[2] it was held that section three of the amendment expressly provided that "the terms of office of all officers of the city of Denver" should upon the issuance of the governor's proclamation terminate, and

[1] *Supra*, 118, 120. [2] 31 Col. 476. 1903.

that the "boards" of the city government, among other enumerated officials, should immediately become "officers of the city and county of Denver." The court regarded this language as being so clear and imperative as to leave no room for construction. The members of fire and police boards were upon the adoption of the amendment no longer appointees of the governor. They held their office, on the contrary, direct from the constitutional amendment itself, and this amendment further declared that they should continue in office until such time as their successors, as provided in the charter to be adopted, were duly elected and had qualified. "The language of section 4," said the court, "by which the charter of the old city was continued in force does not prolong the life of this removal clause" — referring to the clause of the law which vested power of removal in the governor — "for it is not only inconsistent with the right of defendants to hold until their successors are elected, but it is inapplicable to the condition confronting the governor, since the power of removal therein delegated accompanies only appointments made by the governor himself."

It was provided in section one of the home rule amendment that the city and county of Denver should be possessed of all property, real and personal, formerly owned by the county of Arapahoe out of which the new corporation was created, and that it should likewise succeed to the liabilities and assume all the indebtedness of the said county. The same legislature which submitted this amendment to the people of the state passed an act for the creation of two new counties out of the portion of the old county of Arapahoe that should remain after the establishment of the city and county of Denver. In this act provision was made for the settlement of the claims and demands which the two new counties might have against the old county. In 1903 this act was amended so as to provide for a complete adjustment of the division of property and of claims as among the three new corporations which were created upon the territory formerly occupied by the one county.

In the case of the City and County of Denver *v.* Adams County [1] it was contended that the amendment itself, so far at least as the

[1] 33 Col 1 1904

consolidated corporation of Denver was concerned, made a complete adjustment of the rights and equities involved in the change of boundaries. Under a strict construction of the terms of the amendment this would seem to have been a reasonable contention; but the court held that the contemporaneous construction which the legislature evidently placed upon the amendment by the enactment of the statute of 1901 showed that it had not been intended that the amendment should settle and completely adjust the respective property rights and liabilities that grew out of the subdivision of Arapahoe county into the three new political entities. It was declared that while this legislative construction was not absolutely binding on the court, yet there was nothing in the amendment that was absolutely inconsistent with such interpretation. The practical difficulties which arose out of the situation created by the constitutional amendment and which the legislature attempted to meet by the adjusting statute were thus described by the court:

> Old Arapahoe county was subdivided into three new bodies politic. All of the property owned or possessed by original Arapahoe county was given to the new city and county of Denver. This property was acquired from taxes levied upon all the property of the old county. To the revenue thus derived, and so used, the territory which was set off to the county of Adams contributed its portion, as did the territory which was constituted into the county of South Arapahoe. The constitutional amendment made no specific provision for the payment by the new city and county of Denver to the county of Adams or to the county of South Arapahoe for their proportionate interest in this county property, but provision was made for payment by the new city and county of Denver of all the obligations and liabilities of the county of Arapahoe, and to its rights these newly created counties succeeded. When, therefore, that portion of old Arapahoe county, exclusive of the city and county of Denver, was subdivided into the two counties, it was entirely competent for the general assembly to provide that the successor of all the property of Arapahoe county, viz., the new city and county of Denver, should pay to each of the new counties, the other constitutent elements of the original county, a just proportion of the value of that property which their citizens and taxpayers helped to buy. That is all that has been done in this case. There is nothing in the constitutional amendment opposed to this view, and the separate acts of the general assembly expressly authorize it.

In the case of Denver *v.* Iliff [1] it was held that the city and county of Denver was by the amendment specifically made successor to the old city of Denver and that a suit previously instituted against the former city corporation might be continued against the new city and county corporation. This was the only point determined by this case that is material to our inquiry here; and this, it may be noted, was merely to apply the well-known rule governing the disposition of liabilities upon the dissolution of a municipal corporation and the substitution of a successor.

Again in Denver *v.* Bottom [2] the question was raised as to the liability of the consolidated corporation for a claim asserted by an individual against the former county of Arapahoe, which claim, it was contended, had been transferred by the constitutional amendment to the new city and county of Denver. Applying what was evidently the doctrine of the Johnson case, the court held that although there existed only a single city and county corporation, nevertheless the municipal government of that corporation was distinct from its county government. The new county, it was said, was one of the governmental subdivisions of the state and its board of county commissioners was legally existing when this action was brought. A claim, therefore, which was in fact a claim against the *county*, could be enforced only in the manner prescribed by law for the enforcement of claims against any other county government. The claimant was compelled to follow the general law which required that all claims against a county should be audited and allowed by the board of county commissioners before an action upon such claim might be maintained in any court. In this case the claimant had not complied with the statutory requirement in this regard. In consequence his pleading was held to be fatally defective. In the face of the express requirement of the amendment to the effect that the new consolidated corporation should succeed to all of the liabilities of the dissolved county of Arapahoe, it is not easy to follow the line of reasoning upon which the decision of the court in this case turned. It must be remembered, however, that this so-called

[1] 38 Col. 357. 1906.

[2] 44 Col. 308. 1908.

county government within the corporation of the city and county of Denver was an entity created by judicial construction and not by the letter of the constitution. It is scarcely surprising, therefore, to note the thin refinements of logic which the court employed in its effort to square the implications of the doctrine of the Johnson case with the express declaration of the amendment itself.

In Hallett *v.* Denver [1] it was held that during the interim between the adoption of article twenty and the adoption of the charter of the city and county of Denver the consolidated corporation was vested with all the authority previously reposed in the city of Denver except to such extent as that authority was rendered plainly void by reason of some express provision of the article. The power, therefore, to create sidewalk districts and to assess the cost of the sidewalks constructed therein upon the owners of abutting property was a power to which the city and county succeeded. This resulted from the first declaration of section four to the effect that the charter of the city of Denver should "for the time being only, and as far as applicable, be the charter of the new city and county."

Again in Aichele *v.* Denver [2] it was declared that the incumbent who held the office of county clerk during the interim between the adoption of the amendment and the adoption of the charter was not entitled to the salary of city clerk as well as to his salary as county clerk. This ruling was based upon the requirement of section three of the amendment by which the clerk of the county was declared to be the *ad interim* clerk of the consolidated city and county. The clear implication, of course, was that the office of city clerk as such was abolished and that the functions performed by that officer were transferred to the county clerk who was made clerk of the entire consolidated corporation.

So also in Elder *v.* Denver,[3] upon precisely the same course of reasoning, it was held that the city treasurer, who was by the express declaration of the amendment made *ad interim* treasurer of the consolidated corporation, was not entitled to the salary of both the county treasurer and the city treasurer. Of somewhat

[1] 46 Col. 487. 1909. [2] 52 Col 183 1911 [3] 53 Col 496 1912.

similar purport was the decision in Denver *v.* Meyer[1] involving the question of the salary of the superintendent of schools of the consolidated corporation.

In any candid view it must be admitted that the framers of the Colorado home rule amendment entered upon a somewhat ambitious undertaking in attempting to combine the grant of power to frame a charter with a detailed scheme for the immediate consolidation of city and county governments in Denver. It can scarcely be said that they acquitted themselves of their task with great distinction. The constitutional amendment as adopted was unquestionably pregnant with ambiguities — ambiguities to which the courts contributed little in the way of resolution and much in the way of complication.

In spite of the general common-sense arguments that may be advanced with irresistible force for the consolidation of city and county governments in the case of sizable cities, this proposal inevitably presents embarrassing difficulties in any state in which the county has been traditionally a time-honored unit of government. It is very nearly absurd to essay to regulate the details of such a merger by the terms of a constitutional provision. In spite of the elaborateness of the constitutional amendment in Colorado, the court was compelled to admit the binding effect of supplementary legislation and was likewise compelled to interpret numerous clauses of the amendment that were by no means free from uncertainty.

Has the Home Rule City the Power to erect and maintain an Auditorium?

The case of Denver *v.* Hallett,[2] involving the question of the competence of Denver to issue bonds for the construction of a municipal auditorium to be used for sundry public and quasi-public purposes, was pending in court at the time of the decision of the "county offices election cases."[3] It had been argued before the supreme court but had not been decided at the time of Senator

[1] 54 Col. 96. 1912. [2] 34 Col. 393. 1905. [3] *Supra*, 509.

Patterson's famous onslaught upon the court which led to the "constructive contempt" proceedings already mentioned.[1] In addition to criticizing the decisions rendered in the election cases, the Senator had predicted that this case would be decided adversely to the claim of the city as to its competence. It is naturally impossible to ascertain what arguments of expediency may have been impressed upon the judicial mind by the furious warfare of words that ensued — a warfare that was waged upon the very brink of public scandal. Suffice it to say that while the specifically proposed issue of bonds, which were to be payable at the option of the city fifteen years after date, was held void under the affirmative vote of the people for an issue of bonds "payable in equal annual instalments," the court nevertheless sustained the authority of the city to undertake the enterprise in question.

One of the principal contentions made in the Hallett case was that the first section of the home rule amendment enumerated certain powers which the consolidated city and county might exercise and that such enumeration was exclusive. To the court, however, as to any one of normal intelligence, it seemed to be very clear that this brief enumeration was "simply the expression of a few of the more prominent powers which municipal corporations are frequently granted." The intention of the amendment was to enlarge the powers of cities "*beyond* those usually granted by the legislature." In fact, "it was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver *every power possessed by the legislature in the making of a charter for Denver.*" [2]

Now surely the court would have admitted that the legislature could have regulated within a city, by the provisions of a legislative charter, matters of strictly state concern. Yet the Johnson case, which was decided in the same year, had vehemently declared that not even the people of the state could by a provision of their fundamental law confer upon the people of Denver the power to regulate, through their local charter, any state or county affair. Is it unjust to surmise that this wide discrepancy of

[1] *Supra*, 512. [2] Italics are interpolated.

doctrine — a discrepancy that swung from the extreme of illiberality to the extreme of liberality — had some explanation that was not recorded in the books?

At any rate, upon this sweeping premise of the city's competence the gravamen of the case came to this: could the legislature "have conferred upon the city of Denver power to purchase a site, erect an auditorium thereon, and issue bonds to discharge the indebtedness?" After pointing to the fact that Denver had for years exercised many powers that were not indispensable to the existence of the municipality,[1] and after reviewing a number of cases, many of which had involved the application of the doctrine of no taxation for a private purpose, the opinion concluded:

It will not be disputed that the public buildings in Denver are not now suited to the demands of the public. They are poorly ventilated, and crowded, and a wise and economical administration of public affairs will require that an auditorium, if erected, be so constructed as to provide accommodations for a portion of the public officers and public records. Moreover, as the power is now vested exclusively in the people themselves of making, revising, altering or amending their charter, and as they have the power to petition for any measure or charter amendment or for a charter convention, and may have referred to them, upon petition, any ordinance passed by the council, or may have by petition ordinances submitted to the qualified electors, and as other matters must be submitted to them, it would seem to be within their power to provide a place where matters of municipal policy and expediency may be proposed, considered and acted upon. We have cited authorities holding that school districts have authority to provide a public place designed to accommodate the schools and the inhabitants of the district, for the purpose of examinations and exhibitions, or such other things as are proper and customary in connection with district schools. Without considering the question as to what power should provide the place, the power exists; and it would seem to be entirely proper for the city to own a place where the public can witness the exercises of commencement day of the various high schools of the city. Such a place does not now exist in Denver, and never has existed. At no time in the history of Denver have one-half of the

[1] Such as the power "to appropriate funds for the entertainment of visitors and for the expenses of funerals, power to take an enumeration of the inhabitants, to foster and encourage manufactories, for laying out, and ornamenting grounds for a cemetery and for the sale of lots therein, and to support or own a public library."

persons desiring to do so been able to witness the commencement exercises of our high schools, and no good reason is apparent why the city should not provide a suitable place for the accommodation of the public.

If Cincinnati may build a railroad connecting it with a city in another state, if Philadelphia may appropriate public money for the entertainment of visitors, if Brooklyn may enjoy a public bath, if New York may build a bridge over water not owned by it, to connect it with another city, if Knoxville may appropriate money to aid a college located outside its limits, if the municipalities of Nebraska, Tennessee and Pennsylvania may appropriate money to exhibit their resources, if towns in Massachusetts may erect memorial halls, if Vermont towns may build halls for school exhibitions, if New England towns may build town halls for the accommodation of their citizens, under constitutional provisions limiting the power of levying taxes to "city purposes," to 'county purposes," to ' public purposes, ' or to "corporate purposes, ' as the case may be, there is no apparent reason why the taxpayers of Denver may not, under a constitutional provision limiting the power to assess and collect taxes to the ' purposes of such corporation," by vote order the erection of an auditorium for public purposes, even though it be incidentally used for conventions and national associations

As power to erect an auditorium is not granted by the twentieth article, the provisions of that article relating to the issuance of bonds to carry out the powers and purposes enumerated in section 1 of the article, however they may be construed, have no application to the case at bar Bonds for the building of an auditorium must be issued under the limitations of section 8 of article XI of the constitution, and the question, if again submitted, should be drawn with reference to that article and section.

Our conclusions, therefore, are

1 That the bonds proposed are not responsive to the question submitted

2 That the question submitted not being in compliance with section 8 of article XI of the constitution, the bonds proposed would be illegal, and therefore nothing can be done under the present charter provision

3 That it is within the power of the city and county of Denver to provide by charter for the erection of an auditorium and to purchase a site therefor.

The court did not make clear what rule of constitutional law was being construed and applied to the determination of the competence of the city, but manifestly the only pertinent rule was that which asserts that taxes may not be levied for other than a public purpose The only question here was this granting the authority

of the city to provide in a home rule charter for any matter of local public concern, was the erection of an auditorium a matter of public concern? Reduced to this formulation, the issue of the case was not strictly speaking in any wise an issue pertaining to the competence of a home rule city. It was an issue which might just as well have arisen under a statutory grant of authority to erect an auditorium. It turned merely upon the application of a general doctrine of our constitutional law.[1]

It may be mentioned in conclusion that the corporation of Denver subsequently submitted the question of the issuance of bonds for this purpose in compliance with the requirements of section eight of article eleven of the constitution and that the auditorium was erected.

What are the City's Financial Powers and to what Extent are they subject to the Control of State Laws?

Regulations imposed upon the sale of intoxicating liquors constitute everywhere and at all times a perennial source of controversy before the courts. In 1902 the legislature of Colorado enacted a statute requiring a state license of all persons who engaged in this business. Among numerous grounds upon which the court was asked to hold this act invalid, it was contended that so far as it applied to Denver it was in violation of the home rule amendment. Denver had not at this time adopted its own charter, but for the most part the opinion expressed by the court upon this point would have been equally applicable to the provisions of a charter of local adoption. It was held that section five of the amendment put the matter in dispute beyond question, for it was there declared that "no such charter, amendment or measure shall diminish the tax rate for state purposes fixed by act of the general assembly, or interfere in any wise with the collection of state taxes." One of the objects of the act under review was to provide a revenue for state expenses. This being

[1] McBain, "Taxation for a Private Purpose," in *Political Science Quarterly*, 29: 185. See also *supra*, 363; *infra*, 567 ff.

so, it was manifest that nothing in the local charter did or could interfere with the operation of the act. In other words, while no opinion was expressed as to the scope of the home rule city's powers to determine the sources of its own revenue, it was asserted — and the constitution clearly left no doubt upon the point — that the competence of the state to fix its own financial policy could not be affected by the provisions of locally made charters. So far as the law was concerned this was an adequate protection of the interests of the state as such; but so far as practice was concerned it is manifest that the state might find itself handicapped in any attempt to establish even a fairly scientific revenue policy drawn along the lines of a separation of the sources of central and local revenues.[1]

In Londoner *v.* Denver[2] a contention, *inter alia*, was made that the city could not exercise the power of eminent domain for the purpose of acquiring lands for park purposes except upon the approval of a bond issue for such purpose by the "taxpaying electors" as required in section one of the home rule amendment for a bond issue for the acquisition of certain enumerated public utilities. Following the doctrine of Denver *v.* Hallett[3] the court held that this section did not purport to be a complete enumeration of the powers of the consolidated corporation. There was no constitutional prohibition upon the competence of the city and county, "on whom was conferred every power possessed by the legislature in the making of a charter for Denver," to exercise the power of eminent domain.[4] It was "elementary" that it was a "legislative function to determine what powers shall be granted, what withheld, and what restrictions shall be imposed on the exercises of powers granted." The competence of the city in framing and adopting a charter was measured only by the competence of the legislature in enacting a legislative charter. Here again was announced this extremely liberal rule — a rule which was so incongruously juxtaposed not only to the early doctrine that operated to suspend a part of the amendment itself but also to certain later

[1] *Supra*, 132, 176, 278, 435.
[2] 34 Col. 393 (1905); *supra*, 531.
[3] 52 Col. 15. 1911.
[4] *Supra*, 175, 336, 430, 471.

cases, which, as we shall see, without hesitation sustained the home rule amendment only to the extent that it conferred power to regulate strictly local affairs.[1] Has any one ever heard of a provision of a municipal charter of legislative origin which was held to be invalid upon the ground that it regulated or controlled a matter of state as distinguished from local concern?

The two cases discussed in this section appear to be the only cases that have arisen in the Colorado jurisdiction involving questions of the financial competence of cities under home rule charters. The first of these did not resolve an issue of absolute conflict between state law and charter provision, but merely indicated that the constitution had established something in the nature of a concurrence of power as between the city and the state in the matter of the sources of their respective revenues. The case last mentioned was settled by the application of a canon of interpretation which is certainly not wholly reconcilable with other views expressed by the court and which may at some future time arise to confound still further the already confused and illogical utterances of the Colorado court.

In spite of the small amount of controversy before the courts of this state on the subject of the financial competence of home rule cities, a constitutional amendment was adopted in 1912 which conferred specific power in respect to the assessment of property for purposes of municipal taxation and the levy and collection of municipal taxes and special assessments.[2] The books do not disclose that this amendment was prompted by any adverse decision of the supreme court upon this subject, although it may have been suggested by doubts or complications that had developed in practice. However this may be, it is interesting to record that in November, 1913 the charter of Pueblo was amended so as to introduce to a limited extent the principle of the single tax. Whether the constitutional amendment of 1912 can be construed to confer the power to establish such a system of taxation remains for judicial determination. The power is certainly not conferred in unmistakable terms.

[1] *Infra*, 542, 544. [2] *Infra*, 553.

Does a State Law supersede a Charter Provision regulating the Manner in which a Home Rule City shall enter into Contracts?

In Keefe *v.* People [1] the court was urged to declare void, at least in its application to the city and county of Denver, a general law of the state which fixed an eight-hour day as the legal day of labor on all public work, whether for the state itself or any of its political subdivisions, and whether carried on by direct employment or by contract. In the opinion that was rendered the court pointed to the obvious fact that a law of this kind could not be sustained under the police power but only "upon the ground that the state in its proprietary capacity" — whatever that might import — might "properly prescribe for itself and its auxiliary arms of government the terms and conditions on which work of a public nature might be done." Following the decision of Atkin *v.* Kansas,[2] where the United States Supreme Court upheld a law of somewhat similar purport as applied to cities under legislative charters, the Colorado court sustained the validity of the law in its application to the cities of that state. And when it was urged to declare that although such a law was valid as applied to cities under legislative charters, it was nevertheless not binding upon cities operating under home rule charters, the court declared:

> But the municipality of Denver, though created by a constitutional amendment by a direct vote of the people, and having the power to frame its own charter, is just as much an agency of the state for the purpose of government as if it was organized under a general law passed by the general assembly. The mode of its creation does not change the nature of its relation to the state. Like cities and towns organized under the general statutes, it is still a part of the state government. It is as much amenable to state control in all matters of a public, as distinguished from matters of a local character, as are other municipalities. The state still has the supreme power to enact general laws declaring what shall be its public policy, and it can make them applicable to the city of Denver, as well as to all other cities of the state. This act, in effect, declares that it is the public policy of the state not to permit any officer or agent of the state, or its municipalities, or any contractor thereof, to employ any working-man in the prosecution of public work for more than

[1] 37 Col. 317. 1906.

[2] 191 U. S. 207 (1903); *supra*, 26.

eight hours a day, and for a violation of the statute a penalty is provided. What the public policy of the state is, rests with its legislative department. The work of building a sanitary sewer by a city, in a sense, is local, in that it affects, primarily, its own citizens; but it is directly connected with the public health, and is a matter of concern and great importance to the people of the entire state. The state has never relinquished to the new city and county of Denver, and never can surrender, to it, the power to enact laws to punish crimes and misdemeanors, and the operation of such laws embraces all of the people of the state, whether living in municipalities or counties created directly by the constitution, or organized under general laws. Such legislation would not be valid if it expressly exempted the city and county of Denver from its operation.

One or two points of importance may here be noted. In the first place, although the law in question was not overtly in conflict with any charter provision, yet since the charter contained provisions in respect to the making of contracts which, in the absence of the law, would have been entirely valid without obedience to the requirement imposed by the statute, there was in fact a conflict between the two. This was not referred to by the court.

In the second place, the court's attempt to escape the contention that this was a matter wholly of local concern was manifestly disingenuous. The Supreme Court of the United States had indeed held in Atkin *v.* Kansas that such a law did not deprive a municipal corporation of the federal right of freedom of contract;[1] but here was a wholly dissimilar question. The rule applied by the Supreme Court was that a municipal corporation could not invoke the protection of the federal guarantee of due process of law in respect to its liberty of contract *because of the relation of complete subordination in which such a corporation stood toward the legislature of the state.* But in Colorado this relation of subordination had been largely destroyed by the constitutional amendment granting home rule powers. It had certainly, even in the opinion of the Colorado court, been destroyed as to matters of local concern. Was it not patent, therefore, that the question here before the court did not in any respect involve the federal right of freedom of contract as applied to municipal corporations, but only the Colorado right

[1] For discussion of this point see *supra*, 26, 406.

of home rule? The former issue had been settled by the highest court of the land — settled by the application of the doctrine of legislative supremacy over municipal corporations so far as the United States constitution was concerned. The supreme court of the state was morally, if not legally, bound to accept that decision. But this had nothing whatever to do with the construction of the home rule provisions of the state constitution. This was a matter upon which the United States Supreme Court had never passed. It was not a federal question at all. The question was simply whether the conditions under which a home rule city shall enter into contracts for local public improvements should be regarded as a matter of state or of municipal concern. Propounded thus, there could be only one answer to the issue presented by the case. If there was any such thing as a matter of strictly local concern, it was sheer nonsense to declare — barring unusual circumstances — that "the work of building a sanitary sewer" in a specific city was of "great importance to the people of the entire state," or to rest the supremacy of the state law over a charter provision regulating the making of contracts upon the ground that the law carried a penal sanction and that the state had "never relinquished . . . the power to punish crimes and misdemeanors." To express such views was merely to trifle with the solemn guarantee of home rule powers that was written into the fundamental law of the state.

Finally, it may be appropriately noted at this point that this is one of the few cases of Colorado record in which the applicableness of a general law of the state to a home rule city has been drawn into question. In that state it has apparently been accepted without question that a law applicable to cities of the first or the second class did not apply to any city under a home rule charter but only to cities which have voluntarily remained under legislative control. This has doubtless been due in part to the fact that the home rule amendment contained no specific declaration to the effect that cities under home rule charters should be subject to the general laws of the state — the kind of declaration that would raise even in the minds of the layman speculations as

to its significance. But the absence of adjudications upon this point seems to have been due in larger part, strange as it may seem in the light of recorded history, to an attitude of deference on the part of the Colorado legislature toward the grant of home rule powers as written into the amendment of 1902.

Has the City the Power to regulate Matters pertaining to Elections and to what Extent is it Subject to the Control of State Laws pertaining to such Matters?

The first home rule charter of Denver conferred upon the county court power to control municipal election contests. In the case of Williams *v.* People[1] the validity of this provision was drawn into question before the court. The provision was held void by the application of the general nebulous doctrine of the Johnson case to the effect that the state could not set apart any portion of its territory and vest in the citizens thereof the power to legislate upon matters other than those of strictly municipal concern.[2] When the court was asked to reconsider the doctrine of that case in the light of wholly contrary opinions expressed in certain Missouri and California cases, it was asserted that if it were "important or necessary" it would not be difficult to demonstrate that home rule as established in Colorado was fundamentally different from that created by the constitutional provisions of these other states, and that even if this were not so, the Johnson case laid down the law of the Colorado constitution upon this subject.

It is perhaps just as well that the court did not attempt to show wherein lay the fundamental difference between the Colorado amendment and the home rule provisions of these other states; for while there were unquestionably certain differences there was in fact little if any fundamental difference in respect to the scope of home rule powers conferred. So far as this matter was concerned it involved in each of the states mentioned merely a consideration of what powers might properly be included within the grant of authority to frame a municipal charter. On the other

[1] 38 Col. 497. 1906. [2] *Supra*, 509.

hand, so far as questions of conflict between state laws and charter provisions were concerned, it might indeed have been said that the provisions of the several constitutions were not identical.

However that may be, the court held in the Williams case that "a judicial investigation" to determine the validity of an election was not a municipal function and that a municipality was not competent to confer by the terms of a home rule charter jurisdiction upon a state court to make such an investigation. Moreover, that the charter provisions in question obviously related to a matter of governmental and state concern was evidenced by certain specific provisions of the constitution. Thus that instrument declared that a county court should have "such other civil or criminal jurisdiction as may be conferred by law;" [1] and that the legislature should "pass laws to secure the purity of elections and guard against abuses of the elective franchise;" [2] and further, that the legislature should "designate the courts and judges by whom the several classes of election contests not herein provided for shall be tried, and regulate the manner of trial and all matters incident thereto." [3]

In this last-noted provision of the constitution it may be that the court might have found fairly reasonable justification for asserting that the matter of election contests could be regulated only by state law, although it may be mentioned also that the home rule amendment expressly declared for the repeal of all constitutional provisions with which it might be found to be in conflict. However, if this declaration of the constitution had been the sole ground upon which the judgment of the court was reached, it would have been manifestly unnecessary to reaffirm and apply the doctrine of the Johnson case or to assert, as was asserted, that the trial of a municipal election contest and the grant of jurisdiction over such trial to a court which formed a part of the general judical organization of the state were matters wholly of state concern. It would have been necessary only to declare that regardless of whether election contests were or were not matters of state concern, a specific provision of the constitution required

[1] Art. VI, sec. 23. [2] Art. 7, sec. 11. [3] Art. 7, sec. 12.

that such matters should be regulated by general laws enacted by the legislature. On the whole, it seems reasonable to conclude that this decision of the Colorado court was entirely out of harmony with most, though not all, of the cases in other jurisdictions involving the competence of the city to control matters pertaining to elections or to confer jurisdiction upon a state court.[1]

Now in plain point of fact the charter of Denver, which was the only home rule charter in the state at the time this decision was rendered, contained numerous provisions regulating matters pertaining to elections.[2] Under the broad doctrine of the Williams case it was at least doubtful whether any of these provisions were valid. It seems, nevertheless, that elections in Denver were for some years thereafter conducted under the charter requirements.

In 1911, as has been noted, the rule of the Johnson case, which was here relied upon, was overturned by the Cassiday case. It might have been supposed that the doctrine of Williams *v.* People had collapsed with that of the case which had furnished its chief support. But this was not so; for in 1912 decision was rendered in Mauff *v.* People,[3] to which brief reference has already been made. It seems appropriate at this point to describe in more detail the nature of the controversy that was presented in this case.

Among other provisions relating to elections the charter of Denver established an election commission and prescribed its powers and duties. In 1911 a state law was enacted which required that judges of elections should be selected in every county from lists certified by the local chairmen of the two major party committees. This requirement was in open conflict with the provisions on this subject contained in the Denver charter. In the Mauff case the court was asked to declare that this law was inapplicable to the city of Denver as being in conflict with the valid provisions of its home rule charter. In answer to this request the opinion recited:

(1) If by article 20 of the Constitution the city and county of Denver is freed from the Constitution and general laws of the state concerning elections, then by the charter the people of that political body may proceed

[1] *Supra*, 141, 193, 259, 267, 425, 473; *infra*, 583, 635.
[2] Secs. 10, 20–23, 166–184. [3] 52 Col. 562 (1912); *supra*, 516.

to fix the qualifications of electors therein, provide a complete system for the conduct of elections, declare what shall constitute an offense against the laws so enacted, prescribe punishment therefor, say how and in what courts election contests shall be waged and in short, upon the entire subject of elections, which it requires no argument to show, in the very nature of things, is of more than local concern, may act independently of the provisions of the state Constitution and the general laws relating thereto. A construction of this article that leads to a result so absurd and utterly impossible is palpably wrong and should not have the sanction or approval of the courts. That the entire state is interested in having the qualifications of electors, of offenses against election laws and punishments therefor, methods of conducting election contests, provisions for the preservation of the purity of the ballot, fixed and defined throughout the state by uniform laws, and that the sovereign power of the state alone can do this, seems so plain as to amount practically to a demonstration.

The state Constitution declares that the General Assembly shall pass laws to guard against abuses of the elective franchise and to secure the purity of elections, and statutes have been enacted in compliance with this mandate. It is not possible that in the city and county of Denver this provision of the Constitution, and the wise, wholesome and beneficent laws passed pursuant thereto, have been swept aside, that they are no longer in force there, and that the people of that locality are in this respect freed therefrom and have ceased to be subject thereto. Those laws and the above referred to provision of the Constitution, with others thereof, concerning elections and the exercise of the elective franchise, were in force in that territory prior to the adoption of article 20, and unless we find something therein setting them aside, they are still so in force.

Having quoted from the opinions expressed in the Sours and the Cassiday cases the court went on to declare:

It is manifest, from these excerpts from former opinions of this court, that no part of the Constitution of the state has been set aside by article 20, unless directly so, or by necessary implication, through some one or more provisions of that article. Where the Constitution and general laws of the state have not been, either by direct provision or necessary implication, set aside, they are as much in force in the city and county of Denver as they are in other portions of the state. The purpose of article 20 was to give to the people of the city and county of Denver exclusive control in matters of local concern only. The people of the city and county of Denver have no power whatever to legislate by their charter upon matters of state and county governmental import and character. The fact that the authority given by article 20 to the people of the city and county of Denver to legislate was confined and limited solely to local

matters was the precise thing that made it possible for the courts to uphold and enforce it. If by article 20 it had been undertaken to free the people of the city and county of Denver from the state Constitution, from statute law, and from the authority of the General Assembly, respecting matters other than those purely of local concern, that article could not have been upheld.

(2) Keeping in mind the fact that the state Constitution is a limitation upon the powers of the General Assembly, and that but for inhibitions found therein its legislative power is plenary, let us examine article 20 and see whether by its express terms, or by implication, necessary or otherwise, a limit of any sort is placed upon the General Assembly respecting the enactment of laws to govern and control the conduct of elections in the city and county of Denver. We search this article in vain for a single expression which hints at or even suggests any such limitation. There is no provision in article 20 by which, upon any pretext, either directly or indirectly, it can be said that it is sought thereby to in any respect change the Constitution of the state, or the laws in force under it, upon the subject of elections, except as hereinafter pointed out. The only special power thereby given the city and county of Denver upon this subject, beside permitting therein the use at elections of the automatic voting register, is to fix the term, which includes the time of election, and to designate the officers who, as agents, are to perform in that municipality state and county governmental functions. Except as thus modified, the state Constitution and general laws concerning elections remain in full force and effect and are as much applicable to the city and county of Denver as to any other section of the state.

The contention is that the exclusive power having been given to the citizens of the city and county of Denver, by article 20, to amend their charter, or to adopt a new charter, or to adopt any measures as therein provided, the power is with the people to provide for the conduct and control of elections as they may see fit. By every decision of this court, from the Sours case, *supra*, down to and including the case of Hilts *et al. v.* Markey *et al.*, 122 Pac. 394, decided February 21, 1912, which is the last expression upon this subject, it has been held that this power extends to nothing except matters of local concern. All elections are public in character, and are of governmental and state-wide importance, rather than of local or municipal interest merely, and hence must be under the control and regulation of the state Constitution and general laws. The right to vote comes from the sovereign authority of the state, and that right can only be fully preserved and enforced by the same authority. Every citizen of the commonwealth is interested in the purity of elections, which consists chiefly in affording qualified electors an opportunity to vote and have their votes counted, and in preventing those not qualified

from voting. It means protection, in the exercise of this right, to those entitled to have it. The right of the elector to be thus safeguarded carries with it the corresponding duty on the part of the state to furnish all needed protection. It is a matter of general public concern that, at all elections, such safeguards be afforded. The state at large is interested in the purity of every election, municipal or otherwise, and it must be apparent that it is only through the power of the sovereign state itself that purity in elections can be obtained. In determining what is of local, and what is of state interest in this connection, the right of the elector to the protection of the state, which cannot be fairly doubted, is a potent factor.

Attention has already been called to the fact that the fundamental point in the first division of the court's argument in this case was that the home rule article of the constitution "could not have been upheld" if it had to be construed as conferring upon cities power in respect to "matters other than those purely of local concern." In spite of this the court, with utter lack of logic, proceeded in the same division of its argument to make an examination of the article with a view to ascertaining whether the city of Denver had been expressly granted any power over elections which would oust the operation of a conflicting state law upon the same subject. The court found to its apparent gratification and relief that no such power had been expressly conferred. However, in the conclusion of the opinion, where the effort was made to show that this power was not included within the mere grant of authority to frame a charter, the court seemed to rest once more upon the point that was registered in the first part of the argument. Elections, whether municipal or otherwise, were so much a matter of general state concern that they "*must* be under the control and regulation of the state constitution and general laws;" for "it is only through the power of the sovereign state itself that purity in elections can be obtained." Of course the court did not intend to declare that the power to frame and adopt a charter had been conferred by any other than the "sovereign state itself." Reduced to less high-sounding terms these expressions could have meant only that the regulation of elections was a matter which could be controlled only by the constitution itself or by an agency of state-wide jurisdiction; to wit,

the legislature. Moreover, the implication was strongly given that not even the fundamental law of the state could have made any other disposition of control in respect to this matter.

The opinion handed down in this case has been presented and discussed in some detail chiefly because it is so completely out of harmony with opinions expressed upon this subject in most other jurisdictions,[1] as well as because it seems to illustrate the incapacity which the supreme court of Colorado has shown in attempting to apply logical and consistent rules of construction to the somewhat complicated home rule provisions of the constitution of that state.

As has already been indicated, the power to regulate practically all matters pertaining to elections was, among other powers, conferred upon the cities of Colorado by an amendment proposed by initiative petition and adopted in the same year in which the opinion was handed down in the Mauff case.[2] In spite of the views that were so unmistakably expressed in this case concerning the incompetence of the people to grant such power by the terms of the constitution, this amendment was unhesitatingly upheld in People *v.* Prevost.[3]

Has the City the Power to supplement the Procedure laid down for the Amendment of Home Rule Charters?

In the case of Speer *v.* People [4] one of the contentions raised was to the effect that the provisions of the existing home rule charter of Denver which regulated certain matters of detail pertaining to the form and filing of petitions for charter amendments were void as being beyond the competence of the city to control. On this ground the city council, which was opposed to the introduction of the commission form of government provided for in certain proposed charter amendments, refused to call a special election at which such amendments might be submitted to the electors. The court held that the power to amend the charter was by the constitution plainly conferred upon the citizens of Denver

[1] *Supra*, 141, 267, 425; *infra*, 583, 635.
[2] *Supra*, 523; *infra*, 553.
[3] 55 Col. 199 (1913); *supra*, 524; *infra*, 557.
[4] 52 Col. 325. 1912.

and that it was in essence a legislative power. From all participation in the exercise of this power the council was by the clear meaning of the constitution excluded. By the terms of the fifth section of the home rule amendment the council was not even permitted to propose charter amendments. Such amendments could be originated only by a petition of voters. The function of the council in respect to the submission of such proposed amendments to the voters was purely ministerial in character. The situation in which the council was placed in respect to the submission of any charter amendment was compared to that of the secretary of state in the submission of proposed amendments to the state constitution. It was not the duty of the secretary of state before he published the notice of submission of a constitutional amendment to look into the proposed measure with reference to its validity. By a parity of reasoning the city council enjoyed no power under the constitution to sit in judgment upon the validity of an amendment proposed by a petition signed by the requisite number of voters. On this theory the court without hesitation issued a mandamus compelling the council to submit the amendments proposed.

In respect to the specific contention that the provisions of the existing charter regulating certain details in respect to petitions were void, the court simply declared without argument or discussion that since these matters of detail were not regulated by the constitution, they were "all proper subjects to be regulated and controlled by the charter." It was not intimated that details such as these, which were in fact supplementary to the constitution, should have been regulated by the legislature. Certainly the case may be held to have declared that, at least in the absence of regulation by law, such matters were appropriately made the subject of charter control.

In this case the court found it unnecessary to decide whether so fundamental a change in the city government as the introduction of the commission form of organization could be made through the medium of a charter amendment. The contention was that such an amendment was in effect a new charter and that a new charter could be adopted only after it had been drafted

and proposed by a charter convention. On the theory that the judicial branch of the government could not interfere with the process of legislation while a law was in the making and that the citizens of Denver in amending their charter were in fact a part of the legislative department of the government, it was held that the court had no power to consider the validity of the amendment until it had been duly adopted and its validity questioned in a cause properly brought before the court.

The amendment establishing the commission form of government was duly adopted in Denver in February, 1912. Immediately thereafter its validity was questioned before the court in the case of People *ex rel.* Moore *v.* Perkins.[1] The main point that was discussed and settled by the court was that the amendment was properly included within the definition of that term as used in the home rule provision of the constitution. Certain other points of hair-splitting nicety were also disposed of, but they are of no material consequence to the purposes of our study.

Does a State Law supersede a Charter Provision in Respect to the Police Power?

A number of cases have come before the Colorado courts involving questions of the police powers of home rule cities, but most of these have turned merely upon a construction of the competence of the city as limited by the fundamental guarantees of due process of law and the equal protection of the laws. Thus it was held that an ordinance of Denver which prohibited the opening of barber shops on Sunday was a valid exercise of the police power of the city.[2] On the other hand, although it is difficult to appreciate the superfinical distinction, an ordinance prohibiting the sale of meats and groceries on Sunday [3] was void upon the authority of an earlier case which held invalid a similar ordinance applied to the clothing business.[4]

[1] 56 Col. 17. 1913.
[2] McClelland *v.* City of Denver, 36 Col. 486. 1906.
[3] Mergen *v.* City and County of Denver, 46 Col. 385. 1909.
[4] Denver *v.* Bach, 26 Col. 530. 1899.

So also an ordinance was held void which prohibited the giving away of trading stamps on the ground that this was an unjustifiable exercise of the police power and that the ordinance was a "palpable invasion of the rights guaranteed by the federal and state constitutions." [1] Likewise an ordinance regulating the height and distance back from the street line of bill-boards was declared void on the ground that the requirements imposed had no relation whatever to the public health or safety.[2] Since this ordinance was passed in 1898 and therefore before the adoption of the first home rule charter of Denver, it was in fact the provisions of the city's old legislative charter that were construed by the court. In any case, however, the real question at issue was whether the liberty and property rights guaranteed by the federal and state constitutions were invaded.

Again the court refused to sustain an ordinance of Denver which declared that "a brick-yard where bricks are burned within twelve hundred feet of any residence, or public schoolhouse, or park belonging to the city without permission of the owner or occupant of such residence or of the city . . . is a nuisance." [3] Such ordinance was held to be unreasonable and to be a deprivation of property without due process of law. So likewise within this category of inhibited police ordinances was one which prohibited the erection of any store building upon a lot fronting upon an ordinary street except upon the written consent of the owners of property in the same block on each side of such street.[4] In this case there was no express charter authority for the ordinance in question, and one of the points decided was that such an ordinance could not be sustained under an incidental or general grant of police power to the legislative authority of the city. In other words, the charter was strictly construed in this respect; but the ordinance was also held invalid by the application of the principle of due process of law.

[1] Denver *v.* Frueauff, 39 Col. 20. 1906.
[2] Curran Bill Posting & Distributing Co. *v.* Denver, 47 Col. 221. 1910.
[3] Denver *v.* Rogers, 46 Col. 479. 1909.
[4] Willison *v.* Cooke, 54 Col. 320. 1913.

However one may agree or disagree with the rules laid down by the Colorado supreme court in these several cases, it is manifest that they have no relation whatever to the subject of home rule. It is too obvious to necessitate expression that a city under a charter of its own making cannot invade the rights of liberty and of property that are guaranteed to persons by the provisions of the federal constitution.

The Denver charter of 1904 contained elaborate provisions controlling the matter of the issuance of liquor licenses.[1] In the case of Slater *v.* Fire and Police Board of Denver[2] these provisions were the subject of judicial consideration, but apparently no contention was made that the control of such a matter as this was beyond the power of the city and no intimation to this effect was given in the opinion that was handed down. In Schwartz *v.* People,[3] however, it appears that a state statute of 1907 which conferred local option upon municipal wards and precincts in the matter of liquor licenses was without hesitation considered as applicable to the city of Denver. It was not even contended that the statute was void as applied to Denver, although there was certainly a conflict between the state law and the charter provisions. The latter did not in any manner contemplate that the people of a ward or precinct of the city should have the authority to prevent the opening of saloons within their jurisdiction. The implication of the case was that the state law upon this subject took precedence over the conflicting provisions of the charter.

In Glendinning *v.* the City and County of Denver[4] the court was compelled to determine specifically the relation of superiority and inferiority between a state police law and a municipal police ordinance that were found to be in conflict. A statute prohibited the sale of "oleomargarine made in imitation of butter." The city enacted an ordinance which required a license for the sale of "oleomargarine made in imitation of butter." Said the court:

> The city requires a license for doing the very thing forbidden by the statute. All municipal ordinances must be in harmony with the general

[1] Secs. 70–81.
[2] 46 Col. 239. 1909.
[3] 43 Col. 225. 1908.
[4] 50 Col. 240. 1911.

law of the state; if they are inconsistent or repugnant to such general law, they are void, *ultra vires*, and no one can be convicted for violating a void ordinance.

This case did not turn upon any consideration of the home rule powers of the city. It in fact merely applied the well-known and practically universally accepted rule to the effect that municipal police ordinances and state police laws may run concurrently, but that in case of actual conflict the state law takes precedence. In other words, the case is authority for the rule that in the exercise of police powers a city under a home rule charter is in no different position from a city under a legislative charter.[1]

The Home Rule Amendment of 1912

As has already been mentioned, an amendment to section six of the Colorado home rule article was proposed by initiative petition and ratified by the electors at the regular November elections in 1912. As thus amended this section reads as follows:

The people of each city or town in this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the State of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the State in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general state or municipal elections, upon petitions filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the Secretary of State of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall

[1] *Supra*, 138, 176, 256, 322, 403, 467.

have the powers set out in sections 1, 4, and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employment; the definition, regulation and alteration of the powers, duties, qualifications and terms of tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers, and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessment, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

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

herein of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the State of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the City and County of Denver and the Cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the Secretary of State, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the Secretary of State, which provisions are not in conflict with this article, and all elections or electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the City and County of Denver.

This article shall be in all respects self-executing.

It is as difficult to ascertain what were the motives that prompted the writing of certain provisions of this amendment as it is to declare what will be the probable judicial construction of these provisions. In a general way it may perhaps be said that the enumeration of express powers as set forth in this amendment was due to the doubts which were aroused by reason of the opinions handed down in the above-mentioned Mauff and Hilts cases.[1] For example, the charter of Denver established and regulated a municipal court.[2] If the supreme court had been asked to pass upon the validity of this provision of the charter it is quite possible that matters pertaining to a municipal or police court would have been declared to be matters of state concern. Under the doctrine of the Mauff case, even in the absence of any conflicting state law, such provision would in consequence be void.

The provisions of subdivision "*d*" which conferred powers in respect to municipal elections were obviously incorporated

[1] *Supra*, 516, 517, 543.

[2] Sec. 141.

because of the decision rendered in the Mauff case. This subdivision appears to confer upon the home rule city absolute power to control every possible phase of the subject of elections. However, the city may under this provision unquestionably occupy the field of regulation to whatever extent it chooses and allow the general election laws of the state to govern all matters not governed by the provisions of the charter. If conclusion may be drawn from the provisions of their charters, that is precisely what the home rule cities of Colorado prior to the decision of the Mauff case had assumed in respect to their competence.

Concerning the other specific powers granted by this amendment the most that can be said is that their incorporation into the constitution does not appear to have been prompted by reason of any decisions of the court directly in point. The reason for their existence could scarcely be given without an intimate knowledge of precise questions of doubt that may have arisen in the minds of those who have been interested in or connected with the operation of home rule charters in the state. It is worthy of note that this amendment clearly implies that the specific powers therein enumerated relate to matters of local and municipal concern. It is not to be believed that the declared intention of the amendment to grant and confirm to the people of home rule cities "the full right of self-government" adds anything of importance to the rights of cities. It introduces the new term "self-government," but it also limits the exercise of such self-government to local and municipal matters. Prior to the adoption of this amendment the court had in effect declared that the home rule cities of Colorado enjoyed self-government in respect to their local and municipal affairs.

The assertion that "the statutes of Colorado, so far as applicable, shall continue to apply" to home rule cities, except in so far as they are superseded by the charters or ordinances of such cities, must doubtless be taken to mean that a state law, even though it related to a matter of strictly local concern, would apply to any home rule city in the absence of a contrary charter provision. Whether or not this introduces a new element of impor-

tance it is difficult to say. It has never been supposed in Colorado that a law that was made applicable to cities of the first class would apply, for example, to the city of Denver. Under this express provision, however, it would seem that such a law would apply if the charter was silent upon the subject of the law. It should be noted finally that this amendment does not introduce any express clause which may be construed to require that the provisions of a home rule charter must be in harmony with the laws of the state upon any subject of general as distinguished from local concern.

The home rule situation in Colorado as determined by judicial decisions and as affected by this amendment may be doubtless summed up somewhat as follows:

(1) The city may through the medium of its own charter regulate all matters of local and municipal concern.

(2) The city may also exercise certain powers that are specifically enumerated in the constitution even though they relate to matters that would otherwise be regarded as of state concern.

(3) Wherever the charter is silent upon a matter of either state or local concern a state law regulating such matter will apply.

(4) A state law would naturally supersede a charter provision upon any unenumerated matter of general as distinguished from local concern for the reason that such charter provision would, even in the absence of such state law, be void as being beyond the competence of the city. On the subject of education, for example, a state law would control a contrary charter provision for the simple reason that the charter provision itself would have no validity. If this be the true interpretation of the purport of the home rule provision of the Colorado constitution, it need only be remarked that the scope of home rule powers in that state is somewhat narrower than in certain other states where the doctrine has been laid down that a city in framing a charter for its own government is competent to regulate even a matter that is regarded as of state rather than of local concern to the extent that such matter is not subjected to positive control by state law. However, the

possible narrowness that might result from this general rule is to a large extent overcome by the specific enumeration, which includes wide powers in respect to the ownership and operation of public utilities,[1] as well as extensive powers over police and municipal courts, elections, bond issues, and taxation. It is at least implied that the troublesome question of the annexation of territory is subject to control by state law.[2]

The only case which has arisen under the amendment of 1912 is that of People *v.* Prevost,[3] where, as we have already seen, the provision conferring power in respect to municipal elections was sustained. Subdivision "*g*" relating to the subject of municipal taxation appears also to have been somewhat vaguely at issue in this case.

[1] *Supra*, 499. [2] *Ibid.* [3] 55 Col. 199 (1913); *supra*, 524, 547.

CHAPTER XV

HOME RULE IN OKLAHOMA AND ARIZONA

EARLY in 1908 Oklahoma was admitted as a state of the Union with a constitution which contained the following provisions granting home rule to cities [1]

Sec 3 (a) Any city containing a population of more than 2,000 inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this State, by causing a board of freeholders, composed of two from each ward, who shall be qualified electors of said city, to be elected by the qualified electors of said city, at any general or special election, whose duty it shall be, within ninety days after such election to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board or a majority of them, and returned, one copy of said charter to the chief executive officer of such city, and the other to the register of deeds of the county in which said city shall be situate Such proposed charter shall then be published in one or more newspapers published and of general circulation within said city, for at least twenty-one days, if in a daily paper, or in three consecutive issues, if in a weekly paper, and the first publication shall be made within twenty days after the completion of the charter, and within thirty days, and not earlier than twenty days after such publication, it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereon shall ratify the same, it shall thereafter be submitted to the governor for his approval, and the governor shall approve the same if it shall not be in conflict with the constitution and laws of this State. Upon such approval, it shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it A copy of such charter, certified by the chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its ratification by them, shall, after the approval of such charter by the governor, be made in duplicate and deposited, one in the office of the secretary of state, and

[1] Art XVIII

the other, after being recorded in the office of said register of deeds, shall be deposited in the archives of the city; and thereafter all courts shall take judicial notice of said charter. The charter so ratified may be amended by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof (or by petition as hereinafter provided) at a general or special election, and ratified by the governor as herein provided for the approval of the charter.

Sec. 3. (*b*) An election of such board of freeholders may be called at any time by the legislative authority of any such city, and such election shall be called by the chief executive officer of any such city, within ten days after there shall have been filed with him a petition demanding the same, signed by a number of qualified electors residing within such city, equal to 25 per centum of the total number of votes cast at the next preceding general municipal election; and such election shall be held not later than thirty days after the call therefor. At such election a vote shall be taken upon the question of whether or not further proceedings toward adopting a charter shall be had in pursuance to the call, and unless a majority of the qualified electors voting thereon shall vote to proceed further, no further proceeding shall be had, and all proceedings up to that time shall be of no effect.

Sec. 4. (*a*) The powers of the initiative and referendum, reserved by this constitution to the people of the State and the respective counties and districts therein, are hereby reserved to the people of every municipal corporation now existing or which shall hereafter be created within the State, with reference to all legislative authority which it may exercise, and amendments to charters for its own government in accordance with the provisions of this constitution.

Sec. 4. (*b*) Every petition for either the initiative or referendum in the government of a municipal corporation shall be signed by a number of qualified electors residing within the territorial limits of such municipal corporation, equal to 25 per centum of the total number of votes cast at the next preceding election, and every such petition shall be filed with the chief executive officer of such municipal corporation.

Sec. 4. (*c*) When such petition demands the enactment of an ordinance or other legal act other than the grant, extension, or renewal of a franchise, the chief executive officer shall present the same to the legislative body of such corporation at its next meeting, and unless the said petition shall be granted more than thirty days before the next election at which any city officers are to be elected, the chief executive officer shall submit the said ordinance or act so petitioned for to the qualified electors at said election; and if a majority of said electors voting thereon shall vote for the same, it shall thereupon become in full force and effect.

Sec. 4. (*d*) When such petition demands a referendum vote upon any ordinance or any other legal act other than the grant, extension, or renewal of a franchise, the chief executive officer shall submit said ordinance or act to the qualified electors of said corporation, at the next succeeding general municipal election, and if, at said election, a majority of the electors voting thereon shall not vote for the same, it shall thereupon stand repealed.

Sec. 4. (*e*) When such petition demands an amendment to a charter, the chief executive officer shall submit such amendment to the qualified electors of said municipal corporation at the next election of any officers of said corporation, and if, at said election, a majority of said electors voting thereon shall vote for such amendment, the same shall thereupon become an amendment to and a part of said charter, when approved by the governor and filed in the same manner and form as an original charter is required by the provisions of this article to be approved and filed.

Almost immediately upon the admission of the state the cities of Oklahoma became active in the direction of framing and adopting charters. There were in the state about sixty cities of more than 2000 inhabitants. Within a period of six years about twenty cities had organized under charters of their own making. The vast majority of these, if not indeed all of them, provided the commission plan of government.[1] By January, 1915 there were certainly not more than six cities in Oklahoma with a population of more than 4000 inhabitants that had failed to adopt home rule charters.[2]

The most distinctive feature of the Oklahoma provision, as compared with the provisions of the other states which have been considered, was the requirement that the charter or any amendment thereof should, after its ratification by the electors, be submitted to the governor of the state for approval. The governor was apparently obligated to approve the charter or amendment unless he found it to be in conflict with the constitution or laws of the state. Manifestly, however, there would be no means of

[1] At least the following cities have adopted home rule charters: Muskogee, Oklahoma City, Enid, Guthrie, MacAlester, Tulsa, Ada, Ardmore, Bartlesville, El Reno, Lawton, Miami, Okmulgee, Purcell, Sapulpa, Wagoner, and Duncan.

[2] These cities were Altus, Chickasha, Durant, Hugo, Shawnee, and Vinita. In some of these freeholders' charters had been rejected at the polls.

controlling the discretion of the governor in this matter. The provision, therefore, conferred upon the chief executive of the state the absolute power to veto the action of the city. There has, however, been no instance in Oklahoma of the exercise of this veto power by a governor.

The introduction of this device into the home rule provisions of the Oklahoma constitution might have been prompted in part by consideration of the fact that a charter framed by a city was in effect a statute, and that since the governor was given a veto over statutes enacted by the legislature it was appropriate that he should likewise be given a veto over statutes enacted by the cities of the state. It is far more probable, however, that the idea in the minds of those who framed the provision was that the chief executive of the state should assist in keeping the charters of cities in harmony with the general laws and policies of the state. This was much the same idea that the framers of the California constitution entertained when they required that all charters should be approved or rejected by the legislature. We have seen how this provision in California utterly failed to accomplish its purpose.[1] It is highly probable that the Oklahoma provision requiring the approval of the governor will result in a similar failure. It is preposterous to suppose that any governor will have a comprehensive knowledge of all the general laws upon the statute books, or that, having such knowledge, he will devote to the examination of a municipal charter the time and attention that would be necessary to convince himself that such charter is consistent with such general laws. The veto power of the governor even as applied to bills enacted by the legislature has seldom operated to prevent conflicts in statutes or to preserve harmony and consistency in legislation. Moreover, in recent years it has tended more and more to become one of the governor's weapons for the furtherance of a constructive program of legislation; for not infrequently has the governor employed the threat of the veto to force his program through the legislature. Indeed, in the modern relations that exist between legislatures and governors this may doubtless be

[1] *Supra*, 218–220.

said to be the most important aspect of the veto power. But when it is considered that in respect to the framing and adopting of freeholders' charters the governor cannot practically make use of his veto power in any such manner, it is immediately apparent that this power is a far less useful device as applied to municipal charters than as applied to laws enacted by the legislature. In fact it is impossible to see how this scheme could be productive of any material benefit. On the other hand, it is quite easy to see that in the hands of a notional and stubborn executive it might on occasion be used with a degree of pettiness that would serve no wise purpose but would only create bitterness and hostility.

In spite of the fact that home rule for cities has been in operation in Oklahoma for only a comparatively short time the courts have in a considerable number of cases been called upon to construe and apply the provisions of the constitution upon this subject. A review of these cases will indicate at least the direction which the interpretation of the courts has taken.

The Power of the City to control Matters pertaining to the Procedure for adopting Charters and Amendments

Almost immediately upon the effectuation of the constitution demand was made upon the Oklahoma court, in the case of State *ex rel.* Reardon *v.* Scales,[1] to determine whether the home rule provisions were or were not self-executing. The main ground of contention seemed to be that the constitution did not explicitly prescribe by whom a proposed charter should be submitted to the qualified electors of a city nor who should fix the date upon which the election should be held. The court declared that since it was provided that an election of freeholders might be called by the legislative authority of the city, it was clearly implied that the charter should be submitted to the voters at an election determined upon by the same authority. The conclusion was reached that this slight omission in the constitutional provision did not operate to prevent it from being self-executing. The scheme was

[1] 21 Okla. 683. 1908.

effective, declared the court, "without any further legislation to that end."

The case under review involved a situation in which a board of freeholders in Oklahoma City had enacted an election ordinance providing for the submission of a charter at a special election and providing also for a primary election to be held for the nomination of officers under the charter at a date preceding the election upon the charter. Having declared that the legislative authority of the city was by constitutional implication the appropriate authority to set the time for the election at which the charter should be voted on, the court naturally held that this ordinance enacted by the freeholders was void. It was urged before the court that a constitutional convention has "inherent power to adopt an ordinance without having been specially authorized thereto by the act which calls such convention into being." But the answer was given that even if there had chanced to be absolute harmony among the cases upon this subject, "such authority would not be applicable to this case," because a constitutional convention represents sovereignty while "a board of freeholders, . . . coming into being by virtue of delegated power, have no inherent authority but only such as is clearly expressed in the delegation of the power." In this case the question raised was not as to the power of the *city* to regulate matters pertaining to the procedure of drafting and adopting a charter but merely as to the competence of the *board of freeholders* in this regard. It was held in effect that the powers of such a board must be strictly construed.

In Stearns *v.* State *ex rel.* Biggers [1] the court was compelled to recede somewhat from the position taken in the Reardon case, although that case was in no wise overruled and was not even expressly qualified. The Stearns case arose out of an application for a mandamus to compel the mayor and council of Shawnee to reconvene as a canvassing board and to recanvass the vote cast on the adoption of a charter for the city. The constitution made no provision for the recanvass of votes in a contested election upon the subject of adopting a charter. Nor was any pertinent provi-

[1] 23 Okla. 462. 1909.

sion found in the statutes of the state. The court simply declared that "if no other remedy exists by which it may be ascertained whether frauds were committed in the holding of this election, the legislative department of the state should be compelled to provide such a remedy." In other words, it was clearly admitted that in respect to this matter the provisions of the constitution were incomplete and that supplementary legislation was needed. Moreover, one of the other points urged in this case was that the notice of election issued by the mayor had not been properly given; but the court concluded that the notice had been issued in conformity with a provision of the general laws of the state [1] regulating the manner of the issuance of proclamations for municipal elections. It was declared that this "statute was applicable to the election held in April, 1908 for the purpose of selecting the freeholders, as the only statute requiring the notice of the election to be given." Here again the court looked to the laws of the state as determining the sufficiency of the call of the election issued by the mayor of the city. It was clearly implied that the state law supplemented the provisions of the constitution upon the subject of procedure for framing and adopting a charter.

The home rule provisions of the Oklahoma constitution expressly provided for the exercise of initiative and referendum powers in the amendment of freeholders' charters as well as in the enactment of municipal ordinances. The exercise of these powers was regulated by the constitution in considerable detail. The home rule charter of the city of Guthrie, adopted in 1911, failed to provide specifically for the initiative and referendum as applied to the amendment of such charter. It had been held by the supreme court of the state that the general initiative and referendum provisions [2] of the constitution were not self-executing, but that for effectuation they required supplementary legislation. The statute which provided this supplementary legislation regulated certain details as to the manner in which initiative and referendum

[1] Wilson's Rev. and Ann. Stats. of Okla., 1903, sec. 354.
[2] Art. V, secs. 1–8.

powers might be exercised in those cities that failed to provide for the exercise of such powers through the medium of their own charters.

In Lowther *v.* Nissley[1] the issue was presented whether this statute did or did not apply to the home rule city of Guthrie. The court held that the statute did apply and that the charter of Guthrie, which was silent upon this subject, might be amended by initiative and referendum procedure taken under the provisions of the constitution as supplemented by the general laws of the state. It was not declared that the city could not have regulated the manner in which the initiative and referendum powers that were reserved by the constitution should be exercised in the making of charter amendments; but it was clear that had the legislature failed to enact the law in question, and had the city also failed to regulate this matter in its charter, there would have been no means by which the constitutional provision applying the initiative and referendum procedure to the case of charter amendments could have been effectuated. In other words, supplementary legislation was, under certain conditions at least, indispensable.

These Oklahoma cases which have touched upon the matter of procedure in the framing and adoption of charters and amendments are of importance chiefly because they indicate that although a home rule provision of a constitution may be declared to be self-executing and may in fact appear to be so, it is nevertheless not easy, even if it be admitted to be desirable, to cover in a constitutional provision all of the infinite details pertaining to the elections which must be held in the course of the procedure for the framing and adoption of a charter. These elections must be regulated, and it is perfectly apparent that, at least for the first exercise of the home rule powers, regulations of this kind must be found in the state laws, unless the city should be expressly empowered to establish such regulations by ordinance, or unless the home rule provisions of the constitution are elaborated into an election code.

[1] 38 Okla. 797. 1913.

Has the City the Power to provide for the Sale of Public Property?

In the law of municipal corporations it is a fairly established rule that a city may not voluntarily alienate property devoted to a public use without express grant of authority to do so.[1] Moreover, in the cases upon this subject the public property of the city has been defined so comprehensively that the municipal corporation is in fact commonly possessed of very little property that it may dispose of without direct legislative sanction.[2] We are not here concerned with the argumentative foundation upon which this rule is predicated. Suffice it to say that property in a park has been specifically held to be one of the many forms of property in respect to which the municipality may be seized of title subject to this all-significant limitation.[3]

In Owen *v.* City of Tulsa [4] action to prevent the city from contracting to sell a public park was brought upon the ground that a freeholders' charter could not confer such competence upon a city. The charter in question unequivocally recognized the authority of the governing board of commissioners to alienate such property by ordinance.[5] Relying largely upon the Missouri case in which the right of a home rule city to exercise the power of eminent domain was sustained,[6] the court declared that the charter provision and the action of the city taken under it must stand. In other words, it was in effect held that although the power in question had not been conferred upon the city by statute it was nevertheless embraced within the scope of the direct constitutional grant of authority to frame a charter.

[1] Dillon, *Municipal Corporations*, 5th ed., II, sec. 575.

[2] On this point, as well as on the power of the city to sell property acquired for public use but not actually so used, or property which has ceased to be so used, see McBain, "Due Process of Law and the Power of the Legislature to Compel a Municipal Corporation to Levy a Tax or Incur a Debt for a Strictly Local Purpose," in *Columbia Law Review*, 14 407–426, notes 32, 33, 34.

[3] See, for example, State *v* Woodward, 23 Vt. 92 (1850); Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y. 234 (1871).

[4] 27 Okla. 264. 1910.

[5] Art. II, sec. 7.

[6] Kansas City *v.* Marsh Oil Co., 140 Mo. 458, *supra*, 174.

Has the City the Power to acquire or regulate a Public Utility?

The constitution of Oklahoma left no uncertainty about the competence of cities, whether under home rule or legislative charters, to acquire public utilities. Such competence was settled by the following clause:[1]

> Any incorporated city or town in this state may, by a majority of the qualified property taxpaying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section twenty-six, for the purpose of purchasing or constructing public utilities, or for repairing same, to be owned exclusively by such city; Provided, that any such city or town incurring any such indebtedness requiring the assent of the voters as aforesaid, shall have the power to provide for, and, before or at the time of incurring such indebtedness, shall provide for the collection of an annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same.

In State *ex rel.* Edwards *v.* Millar[2] question was raised as to the meaning of the term "public utility" as used in this clause of the constitution. This case did not relate to the powers of a home rule city, but it was held that the term "public utility" was synonymous with the term "public use." Under this view a sewer system was declared to be a public utility.

In State *ex rel.* Manhattan Construction Co. *v.* Barnes[3] the issue before the court was whether the city of Guthrie, then operating under a legislative charter, enjoyed the power to issue so-called public utility bonds for the construction of a convention hall. The principal question before the court was whether a convention hall could be included within the category of public utilities. Following the doctrine of the Millar case the court discussed at some length the meaning of the term "public use" as defined chiefly in the cases arising out of the exercise of the power of eminent domain. This power was not involved in the Barnes case for the city did not propose to condemn property for the purpose

[1] Art. X, sec. 27. [2] 21 Okla. 448. 1908. [3] 21 Okla. 191. 1908.

of constructing the proposed convention hall The cases on this subject were regarded as in point merely because of their definitions of the term "public use" Referring to the two definitions, one of which lays emphasis upon the actual *ownership* of property by the public and the other upon the *use* of the property, whether under public or private ownership, in such a manner as to inure to the public benefit, the court declared as follows

It is unnecessary, however, for us to consider further the relative merits of these two different views, or to determine which one is correct Under the facts admitted by the pleadings and agreed to in the statement of facts filed in this case, the use or the utility under consideration meets all the requirements of both views Said convention hall is to be constructed exclusively by the city of Guthrie, and is to be a public building owned exclusively by the city, and to be used by the public in accommodating any public gathering of the people of the city, at any and all times desired and for such other public uses as may be designated by the mayor and council

The opinion recited also

In a government where the right of public assembly for the redress of grievances is guaranteed to the people, where the policies of government are in a great measure determined at public gatherings of the people in political conventions, where the lecture platform has become so important a factor in public education and where people frequently assemble for the purpose of discussing and devising ways and means of promoting their varied interest, a place in large cities where such gatherings may be had under comfortable hygienic conditions is not only a public convenience and benefit, but a public necessity We know of no case in which the question of whether a convention hall is a public use has been determined, but courthouses jails, schoolhouses, city halls, public markets, almshouses, public parks boulevards, commons or pleasure grounds, and places of historic interest are examples of uses that have been declared by the courts to be "public uses '

Upon this course of reasoning it was held that a convention hall was properly included within the definition of a "public use" and therefore within the meaning of the constitutional term "public utility." There is doubtless no reason to cavil with the reasoning of the court by which it was declared that a convention hall was a property devoted to a public use Such holding was merely in

line with those more or less progressive ideas which contemplate without alarm the gradual expansion of American municipal activities. There are, however, many who would take issue with the definition given by the court in this case of the term "public utility." It is manifest that under the doctrine here laid down any property that might be acquired by a city for a public purpose (and the city can acquire, by taxation at least, no property for any other purpose) would be a public utility. This is certainly not the popular concept of what is included within the meaning of the term in question, and it is doubtful whether it is a justified legal concept unless the court desired to withdraw from this term every vestige of distinctive meaning. It may be difficult to define the term "public utility" with precision; but the term has unquestionably been associated with those properties, whether publicly or privately owned, which have been acquired by the exercise of the power of eminent domain, or which necessitate the making of such peculiar uses of the public highways as to require a grant of special privilege from the government, or which, being by nature monopolistic or quasi-monopolistic in character, occupy a position which gives the public peculiar rights in and powers over them. One or more of these elements certainly enters into the meaning of the term "public utility" as it is commonly employed. In the case of a convention hall, however public may have been its use, there was no necessity for the exercise of the power of eminent domain; a private person would have been under no obligation to secure a special privilege from the government to launch such an enterprise; nor would it have had any monopolistic or quasi-monopolistic characteristics. Indeed, had the enterprise been undertaken by a private person or corporation and had occasion for a declaration upon the subject arisen, the court would unquestionably have ridiculed the idea that a convention hall operated for purposes of private emolument was a public utility.[1]

For our purposes here the real significance of the decision of the court in this case lies merely in the exceedingly liberal construction that was placed upon the term "public utility." The

[1] See somewhat different California and Colorado cases, *supra*, 363, 531.

case did not in fact turn upon any question of the home rule provisions of the constitution. Guthrie, as has already been said, was not even operating under a charter of its own making. The competence of the city was not in any wise referred to the grant of power to frame a charter but only to the grant of power to acquire a public utility. This grant of power was not limited to cities under freeholders' charters. Questions of the kind presented in this case, even in the absence of express provisions of the constitution like the Oklahoma provision relating to public utilities, are in fact not questions that bear directly upon the subject of the right to frame a charter. If it be granted that the constitutional right to frame a charter (where the legislature is not authorized to define the scope of powers to be exercised) includes the right to regulate and control all matters of municipal concern, practically the only rule of law that should be considered in such cases is that rule which declares that taxes may not be imposed for other than a public purpose. Barring the constitutional provision here relied upon by the Oklahoma court, and considering the competence of a home rule city to provide through the medium of its own charter for the construction and maintenance of a convention hall, it is obvious that the only question the court would be under obligation to determine would be as to the public character of such an enterprise; for it would have to be conceded that if this enterprise could be regarded as one for which taxes might be properly levied, there would be no question whatever that it was a matter of strictly local or municipal concern. As bearing upon this point the opinion handed down in the Barnes case is of considerable significance, regardless of agreement or disagreement with the court as to the manner in which its argument was applied in reaching a definition of the term "public utility."

It does not appear that the legislature of Oklahoma has enacted any law purporting to control or regulate the manner in which cities that are operating under *legislative* charters might exercise the power conferred upon them by the constitution in respect to the acquisition of public utilities. It seems to have been assumed nevertheless, as in the Barnes case just discussed, that the con-

stitutional provision under review was self-executing and that such a city was fully competent to take steps in this direction even though neither its charter nor any state law contained any provision upon the subject A reasonable deduction from this apparent assumption would be that a city under a *freeholders'* charter would have the authority under the constitution of Oklahoma to acquire any public utility, wholly in the absence of any express grant of authority contained in its charter

However, in the so-called "enabling act" passed in 1908 the legislature left no uncertainty in respect to the competence of the *home rule* city in this regard This act declared as follows [1]

Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said corporation, and every city containing a population of more than two thousand inhabitants shall have the right and power to acquire own and maintain, within or without the corporate limits of such city, real estate for sites and rights of way for public utility and public park purposes, and for the location thereon of water-works, electric light and gas plants, hospitals, quarantine stations, garbage reduction plants, pipe lines for the transmission and transportation of gas, water and sewerage, and for any plant for the manufacture of any material for public improvement purposes, public buildings, and for all such purposes shall have the power to exercise the right of eminent domain either within or without the corporate limits of such city, and to establish, lay and operate any such plant or pipe line upon any land or right of way taken thereunder, and shall have and exercise the right to manufacture any material for public improvement purposes and to barter or exchange the same for other material to be used in public improvements in such city, or to sell the same to other cities for like purposes and for any or all such purposes, in order to raise means to carry out the same, shall have power to issue and sell bonds, bearing interest not to exceed five per centum per annum, maturing in twenty-five years, and redeemable at will in not less than ten years, and whenever any such public improvement shall have been constructed by means derived from the sale of bonds, as above provided, it shall be the duty of such city to fix the rates charged for service to the public, as nearly as practicable, so as to pay the interest and not less than three per centum per annum on the principal of such bonds in excess of the expense of maintenance and operation, provided, that whenever it shall

[1] Laws of Okla, 1907–08, p 190 sec 3

be found impractical to issue bonds as above provided for any improvement deemed by such city necessary for the public welfare, without increasing the total indebtedness of such city beyond the constitutional limit, it shall be lawful for such city to lease at a stipulated rental any public improvement or utility from any person, firm or corporation which will contract to furnish the same; provided, any such rental contract shall reserve to such city the option to purchase such improvement or utility in future.

It is interesting to observe, perhaps, that if this act may be taken as a legislative interpretation of the municipal ownership powers conferred by the constitution, the definition placed upon the term "public utility" by the law-making body was far more nearly in accord with the commonly accepted meaning of that term than was the definition given by the supreme court in the above-mentioned Barnes case.

No case has as yet arisen in the Oklahoma jurisdiction expressly determining the question of whether the home rule city is empowered under the grant of authority to frame a charter to regulate rates and other matters concerning public utilities. In one case,[1] however, in which the only issue actually settled by the court was that a town had no power under an act of Congress applying to the Indian Territory to regulate telephone rates, the following significant declaration was made:

Section 15, art. 9, of the Constitution, provides for the creation of a corporation commission; and section 18 of the same article provides that:

"The Commission shall have the power and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regu-

[1] South MacAlester-Eufala Telephone Co. v. State ex rel. Baker-Reidt Mercantile Co., 25 Okla. 524. 1910.

lations and requirements, the Commission may, from time to time, alter or amend."

That the power to regulate the charges for public service by municipal corporations is a power which it was the intention of the framers of the Constitution should be exercised by the sovereign power only is further evidenced by section 7 of article 18, entitled, "Municipal Corporations," which provides that:

"No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality shall divest the state or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public service be surrendered, and no exclusive franchise shall ever be granted."

While the latter consideration may not be of great weight in the construction of these statutes, yet it is entitled to mention as a fortuitous circumstance, at least.

With due respect for the view thus expressed — to wit, that it was the intention of the framers of the constitution that the power to regulate utility rates should be exercised only by the "sovereign power" — it ought to be noted that the court accidentally omitted a very important proviso contained in the section of the constitution regulating the powers of the corporation commission. This proviso declared that "nothing in this section shall impair the rights which have heretofore been or may hereafter be conferred by law upon the authorities of any city . . . to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with services performed by it under a municipal . . . franchise granted by such city . . . so far as such services may be wholly within the limits of the city." It thus appears that the existing statutory or charter rights of cities to regulate public utility corporations were expressly confirmed to them by the constitution. It was also recognized that powers in this regard might in the future be "conferred by law." Whether for this purpose a home rule charter might be regarded as a "law" has not been determined in Oklahoma. But in view of the opinion expressed by the court in the excerpt quoted above it is probable at least that the competence of the city to confer upon the corporate authorities established

by its freeholders' charter the power to regulate utility corporations would *not* be sustained.

Does a State Law control a Charter Provision in a Matter pertaining to the Organic Form of the Municipal Government?

The home rule provision of the Oklahoma constitution, like that of the Missouri constitution of thirty-three years before, contained the same curious and wholly illogical contradiction of terms. A freeholders' charter was declared to "supersede any existing charter and all amendments thereof" and in the same breath was required to be "consistent with and subject to" the laws of the state. At the time of the admission of the state into the Union the municipal charters in force consisted of a combination of general and special laws. These were certainly "laws of the state." How, then, could a home rule charter supersede such "laws" and still be consistent with and subject to them? For the future the constitution forbade the legislature to enact special laws for cities.[1] But could the legislature enact general laws for classes of cities which the charters of home rule cities must be consistent with and subject to? In other words, would any law that applied generally to a class of cities operate to amend a freeholders' charter to the extent of any conflict, just as such laws had been held to amend home rule charters in California under the original constitutional provision, and in Washington under the provision as yet unchanged, and in Minnesota under a far more explicit declaration of the fundamental law?

The uncertainty of the constitution upon this point appears to have been considered by the first state legislature that assembled in Oklahoma. In spite of the opinion handed down in the Reardon case to the effect that the home rule provision of the constitution was self-executing, the legislature promptly enacted a so-called "home rule" or "enabling" act. After rewriting the provisions of the constitution itself this act declared as follows:[2]

[1] Art. XVIII, sec. 1.
[2] Laws of Okla., 1908, ch. 12, sec. 4.

When a charter for any city of this state shall have been framed, adopted and approved according to the provisions of this act, and any provisions of such charter shall be in conflict with any law or laws relating to cities of the first class in force at the time of the adoption and approval of such charter, the provisions of such charter shall prevail and be in full force, notwithstanding such conflict, and shall operate as a repeal or suspension of such state law or laws to the extent of such conflict; and such state law or laws shall not thereafter be operative in so far as they are in conflict with such charter; provided, that such charter shall be consistent with and subject to the provisions of the Constitution, and not in conflict with the provisions of the Constitution and laws relating to the exercise of the initiative and referendum, and other general laws of the state not relative to cities of the first class.

Here was at least a partial legislative interpretation of the uncertain requirements of the constitution. *Existing* statutes applicable to cities of the first class (all cities of over two thousand inhabitants and therefore all cities entitled to frame charters) were not to be construed as being included in those "laws" which a freeholders' charter must be "consistent with and subject to."

In the case of Lackey *v.* State *ex rel.* Grant,[1] where contention was made that a general municipal law enacted many years before by the territorial legislature operated to control the provisions of a freeholders' charter in conflict therewith, the court declared among other things that to give the constitutional provision the construction asked for would necessitate that this home rule statute "be struck down as in violation of the constitution;" for, said the court, if the constitution required every charter "to be consistent with every law of the state, whether the same pertains to municipal matters or not, then clearly the legislature could not by its act free such a charter from such limitation."

This was strange doctrine indeed. It was equivalent to asserting that the legislature could not by law repeal a law. At the time of the passage of the home rule act there existed a great body of municipal charter statutes. This act simply declared that under certain conditions cities should not be subject to this body of statutes. Was this act any less a "law" which charters should

[1] 29 Okla. 255. 1911.

be consistent with and subject to than the laws which it conditionally repealed? Obviously not. It would seem unquestionable, unless it could be held that this was not a general law within the requirement of the constitution, that it was entirely within the competence of the legislature by its own grace to withhold by statute the controlling force over freeholders' charters of a body of statutes which the legislature itself had previously imposed. Under such circumstances, however, the freedom of home rule charters from the domination of state laws would naturally be referable to the action of the legislature rather than to the constitution.

Aside from the impeachable doctrine thus laid down, this Lackey case is of prime importance because of the views expressed by the court, wholly irrespective of the statute referred to, as to the meaning of the apparently conflicting declarations of the home rule provisions of the constitution. The case involved the validity of a charter providing the commission form of government. It was contended that a general law of the territory of Oklahoma, which required that the powers of cities of the first class should be exercised by a mayor and council and that members of the council should be elected by wards,[1] operated to invalidate the freeholders' charter of Oklahoma City, which vested such powers in a commission of five members elected at large. On the subject of the meaning of the constitution the court expressed its opinion as follows:

> Counsel for respondents concede that the foregoing section authorizes cities and towns having the population specified to frame a charter for their own government, but they insist that that portion of the section reading "consistent with and subject to the Constitution and laws of the state" renders invalid any provision of such a charter that is in conflict with any law of the state, whether such law pertains to general matters of the state and its government, or peculiarly to municipal affairs. Uninfluenced by the context of the section in which the foregoing clause is found, there is reason in the broad language of this clause to support respondents' contention; but this clause must be read in connection with the whole section and all its parts, and the whole be construed so as to

[1] Wilson's Rev. and Ann. Stats., 1903, secs. 348, 353.

give each and every part meaning and force It must have been contemplated by the framers of the Constitution and the people in adopting it that the charters authorized by this section to be framed by the cities would not be uniform, but would be adapted to the various needs of the localities in which they are adopted, and that some of them, if not all, would in some respects, conflict with the charters theretofore existing in such municipalities, for, unless such be true, then that portion of the section providing that upon such a charter being approved it shall become the organic law of the municipality, and supersede any existing charter, is meaningless All municipal corporations that now exist or may hereafter exist in this state may be classified with respect to the time of their creation into two classes — first, those existing at the time of the admission of the state, and, second, those created thereafter The charter of those existing at the time of the admission of the state consists of the statutes extended in force, defining their powers and regulating the exercise thereof, and except as is authorized by section 3a, article 18, the charter of all corporations of the second class will always be found in a general statute of the state, for by section 1, article 18, *supra*, the Legislature is prohibited from granting to such corporations powers in any other way. The framers of the Constitution must have been aware of this condition when they provided that the newly created charter by the freeholders should supersede any existing charter and must have known that in order for a newly created charter to supersede an existing charter it must supersede some statute of the state If it was meant that the freeholders could adopt only a charter in conformity with the provisions of the general statutes, and add thereto provisions not inconsistent with the statute creating such corporations, that would not be the formation of a new charter, but would be the adoption of the previously existing charter, with amendments thereto not inconsistent with its previous provisions

Again, if the present general statute for the organization of municipal corporations does not cover and make provisions for all municipal affairs, still, the Legislature might, under the construction contended for by respondents, pass a general act that embraced the entire field of municipal matters, and grant every possible power that could be exercised by such a corporation, or by its terms prohibit any municipal corporation of the state from exercising any power not granted in its provisions. In that event, all that a city could do under the provisions of section 3a, *supra*, in the formation of a charter for its own government, would be to adopt *in hac verba* the general statute Such a result would render section 3a nugatory and the exercise of any power it is supposed to grant useless, and result in its effectual repeal by an act of the Legislature without such power having been specifically granted to the Legislature A construc-

tion of this section that will lead to such result ought not to be adopted when such is not the clear manifest meaning indicated by its terms. It was intended that the Legislature should have power, under the limitations expressed in section 1, art. 18, *supra*, to provide for the incorporation and organization of all cities and towns in the state into municipal corporations except those cities which might in the future exercise the power of framing their own charter as provided by section 3a. By this section the people of the state, in the exercise of their sovereign power and by means of their organic law, have delegated to the inhabitants of cities having a population of more than 2,000 the power, to be exercised by such inhabitants at their option, to frame a charter for their own local government, which is to become the organic law of such government, and is to supersede the laws of the state in conflict therewith, in so far only as they attempt to regulate merely municipal affairs. . . .

The conclusion was reached that whether the powers of the city under a freeholders' charter shall be exercised by a board of commissioners or by a mayor and council "is purely a matter of municipal or local concern." "It in no manner," said the court, "interferes with or infringes upon matters of the state at large, or affects its people generally; and, in the absence of such provision in the charter being in conflict with any provision of the constitution, it supersedes the statute."

Although this case involved the relation between a *previously* enacted law and a charter provision, the court expressed no uncertain opinion as to the supremacy of a home rule charter in all matters of local concern over conflicting state laws whether enacted before or after the adoption of such charter. The laws which charters must be consistent with and subject to, no matter when enacted, were only those laws which did not "attempt to regulate merely municipal affairs." Otherwise the grant of power to frame a charter was "meaningless." It was thus that the uncertain clause of the Oklahoma constitution was by judicial legislation made in effect to read that home rule charters should be "consistent with and subject to state laws of general applicableness which related to other than municipal or local affairs." This was practically identical with the rule of construction that was ultimately laid down in Missouri.

In Adler *v.* Jenkins [1] one of the contentions made was that the provision of the charter of Guthrie which required the appointment of the treasurer by the mayor was void as being in conflict with a previously enacted general law of the state requiring the election of such officer in cities of the first class. Applying the doctrine of the Lackey case, the court held that the regulation of the manner in which such an officer should be chosen was a matter of local concern and therefore subject to charter control.

In Bridgman *v.* Roberts [2] the point at issue was whether the city of Ardmore was competent by amendment to a freeholders' charter to reduce the salary of the incumbent city commissioners from six hundred dollars a year to a stipend of two dollars per meeting with a maximum of one hundred and four dollars a year. The principal contention in the case seems to have been that such action by the city was invalid in its application to incumbent officers by reason of a provision of the constitution [3] which declared that "in no case shall the salary or emoluments of any public official be changed after his election or appointment." It was held that there was no "vested right in any municipal office;" that "in the absence of a constitutional limitation to the contrary, the power that creates a municipal office . . . may, by an amendment of its charter, abolish the office and its tenure at any time, and create another office of like character with different tenure and salary;" and that "a constitutional provision that in no case shall the salary or emoluments of any public officer be changed during his term of office does not impair such right" vested in the creating authority. While the court did not in this case expressly declare that this was a municipal affair, and while it was not a state law but a provision of the constitution that was urged against the competence of the city, it was apparently in the mind of the court that the matter of the compensation of municipal officers was clearly an appropriate subject of local control.

The above-mentioned cases, as well as others to be mentioned, present a fairly adequate conception of the general doctrine which

[1] 33 Okla. 117. 1912. [2] 40 Okla. 495. 1914. [3] Art. XXIII, sec. 10.

has been and doubtless will in the future be applied by the supreme court of Oklahoma in the construction of the provisions of the constitution which purport to determine, though certainly without accuracy or precision of meaning, the order of supremacy between state laws and charter provisions that are found to be in conflict.

Does a State Law control a Charter Provision in Respect to the Issuance of Municipal Bonds?

In March, 1910 the legislature of Oklahoma passed "an act for the protection, validation, and sale of bond issues of the state, counties, and municipalities, and all other political organizations and subdivisions of the state." [1] This act made the attorney general *ex officio* "bond commissioner" and required him to "propose uniform forms and prescribe a method of procedure under the laws" for the issuance of all public securities, and to "examine into and pass upon any security so issued." In State *v.* West [2] — a case which did not involve any home rule question — this statute was interpreted to impose upon the bond commissioner the duty of ascertaining whether statutory authority existed for the issuance of every public security and whether the forms and methods of procedure prescribed by the statute had been complied with. The statute expressly provided that "no bond hereafter issued by any political or municipal subdivision of the state shall be valid (howsoever authorized) without the certificate of said bond commissioner." In the interest of avoiding the difficulties that so frequently arise out of informalities or *ultra vires* action in the issuance of public securities, this law merely established the system of centralized administrative supervision which has been provided in a number of states.

In August, 1911 the people of the city of Tulsa, pursuant to certain provisions of their freeholders' charter, voted in favor of an issue of street-paving bonds. The case of *In re* Submission of Certain Bonds of the City of Tulsa [3] arose out of an application

[1] Laws of Okla., 1901, p. 182. [2] 29 Okla. 503. 1911.
[3] 31 Okla. 648. 1912.

that was made to the bond commissioner for his certification. This the commissioner refused to give on the ground that the statute imposed no duty upon him in respect to bonds issued by authority of a home rule charter. The court declined to sustain this view, holding that the authority and obligation of the commissioner extended to every municipal bond without regard to the source of its authorization.

The home rule charter of the city manifestly contemplated that action thereunder was sufficient to legalize a bond issue. On the other hand, the statute expressly required the examination by and the certification of a state officer to validate such local action. The applicableness of the law was nevertheless fully upheld, and the implication was thus given that this was not a matter of municipal concern in respect to which a charter need not be consistent with and subject to the laws of the state. This point was not specifically discussed, for the reason doubtless that the city itself had acquiesced in this measure of state control. But the significance of the implication of this case is obvious; for if matters pertaining to the issuance of municipal bonds are state affairs it is difficult to see why the state legislature might not through the medium of general laws successfully assert a complete supremacy over every other aspect of local finance.

Has the City the Power to impose Qualifications for Municipal Suffrage?

An interesting question, which was in no wise touched upon by the court, is presented by one of the facts involved in the Tulsa bond case just mentioned. The constitution of Oklahoma required the assent of three-fifths of the voters for every municipal indebtedness in excess of current annual income and revenue.[1] It also imposed a debt limit which might be exceeded only for the purchase or construction of public utilities and only upon the approval of a majority of the qualified *taxpaying* voters.[2] From

[1] Art. X, sec. 26.

[2] Art. X, secs. 26, 27.

the statement of the court it appears that the charter of Tulsa required a three-fifths vote of the "qualified *property taxpaying* voters" for the approval of the issue of street paving bonds involved in the action, which vote was secured. It is obvious at a glance that this charter requirement added to the general constitutional qualifications for suffrage the important qualification of being a taxpayer. No voter who had not this additional qualification might participate in an election of this kind, where, it will be noted, there was no question of exceeding the debt limit for a public utility purpose, unless, indeed, the paving of streets could be gathered under the expansive wings of the term "public utility" as defined by the Oklahoma court.[1]

Provisions of a character similar to this are by no means uncommon in legislative charters; and the rule is well established that the legislature is competent to enact such provisions, on the ground that it is restricted by the constitutional qualifications for suffrage only in respect to those elections for which the constitution itself makes provision. Although the point has never been judicially passed upon in any home rule state,[2] it is a fact that a number of freeholders' charters have, like this charter of Tulsa, imposed additional qualifications for the exercise of municipal suffrage in elections held upon financial or franchise propositions and have otherwise recognized the voice of property owners or taxpayers in certain municipal activities. But logic would seem to declare that if the city is competent to impose suffrage limitations in one kind of election, it enjoys a like competence in respect to all local elections; and if the city is empowered to restrict the suffrage, it is likewise empowered to expand it — to extend the suffrage to women, for example. Of the states which have granted to cities the power to frame their own charters, Arizona, California, Colorado, Oregon, and Washington have conferred the ballot privilege upon women. It would seem, however, that the leaders

[1] *Supra*, 567 ff.

[2] In *Mitchell v. Carter*, 31 Okla. 592 (1912), *infra*, 584, a somewhat strained point in respect to imposition of suffrage qualifications by a freeholders' charter appears to have been raised, but it was dismissed on the ground that such a question could not be raised in the proceedings of that case.

of the anti-woman's suffrage movement are perhaps missing an opportunity in not waging a fight before boards of freeholders or charter conventions in these states for the withdrawal of this privilege as to municipal elections in specific cities. And it would seem also that the protagonists in the cause of woman's suffrage have been somewhat derelict in their failure to institute campaigns for an extension of the voting right through the medium of freeholders' charters or amendments in the cities of Missouri, Minnesota, Oklahoma, Ohio, and Nebraska.[1]

Does a State Law control a Charter Provision regulating Elections?

In the case of Lackey *v.* State *ex rel.* Grant,[2] already mentioned in another connection, one of the contentions made was that a law enacted in 1910 which purported to fix the date upon which municipal elections should be held superseded and controlled a conflicting provision of the charter of Oklahoma City. It was specifically provided in this law that in all cities with freeholders' charters establishing a commission form of government "the elective officers provided for therein shall be elected at the same time and in the same manner as herein provided for the election of officers in other cities and towns in this state." It was further provided that in all cases in which the commission form of government should be adopted more than four months before the date fixed by the law for the holding of the general municipal election, the legislative authority of such city should be empowered to call a special election for the choice of officers. The charter adopted in Oklahoma City required that a special election for the choice of officers be held on the eighth Tuesday following the adoption of the charter and its approval by the governor. This provision was in conflict with the law, which, as above noted, required that the date of a special election for such purpose should be fixed by the legislative authority of the city. On the question of the con-

[1] Michigan and Texas would doubtless be excluded since the home rule powers of cities in those states are enumerated by statute. In neither state is the authority conferred upon cities to regulate the qualifications for suffrage.

[2] 29 Okla. 255 (1911); *supra*, 575.

flict between the state law and the charter provision the court declared as follows:

> The time of holding a special election for the election of the officers provided for under any charter is a matter that in no way concerns the state at large, or affects the people generally, but pertains peculiarly to the municipality and the people thereof in which the charter has been adopted; and, under the conclusion reached upon the proposition first discussed, the charter will supersede the general act of the Legislature providing for the fixing of the time of such election, unless the charter provision is inconsistent with some provision of the Constitution.

In Mitchell *v.* Carter [1] the main point determined by the court seems to have been that the validity of a freeholders' charter could not be collaterally attacked in a proceeding brought by a person elected to an office created by such charter. But in addition to the rule laid down in respect to this matter the court discussed at length certain contentions that were made in regard to the supremacy of state laws over charter provisions in the matter of elections. The first of these contentions was that a provision of the charter which required the appointment of election officers by the mayor of the city was void as being in conflict with a state law which provided for their appointment by the county election board. The second contention was that the provision of the charter which required a non-partisan ballot was void as being in conflict with the general primary election law of the state.

In answer to these contentions it was held by the court, following the Lackey case, that "the election of municipal officers is strictly a municipal affair," and that it was in consequence within the power of the people of the municipality to provide for this purpose and to fix the time and place of holding local elections. Reference was made, however, to a provision of the constitution [2] which imposed upon the legislature the duty of providing a mandatory primary election system which should "provide for the nomination of all candidates in all elections for state, district, county, and municipal officers." It was clear, said the court, that it was an obligation of the legislature to create a primary

[1] 31 Okla. 592. 1912.

[2] Art. III, sec. 5.

system for the *nomination* of candidates for office in all municipalities, including those operating under freeholders' charters, although no legislative obligation was provided by the constitution in respect to the *election* of municipal officers. For the purpose of providing a primary system the people of a city, in framing and adopting a charter, could not be regarded as within the meaning of the term "legislature" as employed by the constitution. Otherwise it would result that the city could "provide for the nomination of all candidates in all elections for state, district, county, and municipal officers"; and this would be to recognize the competence of a home rule city "to legislate not only upon purely municipal matters, but also upon purely state matters." In other words, although the regulation of municipal elections was strictly a local affair, yet because of an express declaration of the constitution the regulation of municipal nominations was taken out of the hands of home rule cities and vested in the state legislature. This ridiculous situation obviously resulted from the carelessness of the framers of the constitution.

In this case it was unnecessary to decide whether failure to comply with the primary election law of 1909,[1] so far as it regulated nominations of candidates for municipal offices, operated to invalidate the election held under the non-partisan system provided in the charter.

Does a State Law control a Charter Provision on the Subject of Education?

In the charter of the city of Ardmore, adopted in 1908, provision was made for the election of a board of education which should constitute a corporation separate and distinct from the city proper and which should be vested with title to all school property and with the power exclusively to control and manage the public schools. This provision of the charter was in direct conflict with the general laws of the state which provided a board of education for a school district that included the city. In the

[1] Laws of Okla., 1909, ch. 16.

case of the Board of Education of the City of Ardmore *v.* State *ex rel.* Best [1] it was held that the charter provisions upon this subject were utterly void not only on the ground that they were in conflict with a controlling state law but also on the ground that it was beyond the competence of a home rule city to regulate "this important function of government." Reference was made to the article of the constitution [2] which was devoted to the subject of education and in which many duties were imposed upon the legislature with respect to the establishment and maintenance of a "system" of public schools. Reliance was placed also upon the opinions expressed in certain cases from the California jurisdiction.[3] Upon the basis of these it was argued that the word "system" as used in the constitution imported a "unity of purpose" and an "entirety of operation" which withdrew the control over matters pertaining to education from the scope of powers embraced within the right to frame a charter.

While this case was pending before the court, or immediately after its decision, the legislature enacted a law [4] which was in the nature of a supplement to the so-called enabling act. This law conferred upon cities framing their own charters the authority to fix the number and terms of office of members of boards of education, to regulate the time and manner of their election, and to enlarge the jurisdiction of such boards of education by attaching, for the purpose of the administration of education, territory adjacent to the corporate limits of the city. The residents of the territory so attached were to participate in the election of the members of the board of education.

In Cotteral *v.* Barker [5] question was raised as to the validity of certain provisions of the charter of Guthrie which were in substantial harmony with this statute. The real issue before the court was as to the competence of the legislature to enact a law conferring such powers upon home rule cities. The court held in

[1] 26 Okla. 366. 1910.

[2] Art. XIII.

[3] Kennedy *v.* Miller, 97 Cal. 429; *supra*, 295; Hancock *v.* Board of Education, 140 Cal. 554; *supra*, 300; Los Angeles City School District *v.* Longden, 148 Cal. 380; *supra*, 303.

[4] Laws of Okla., 1910, p. 238.

[5] 34 Okla. 533. 1912.

effect that the statute did not violate either the letter or the spirit of any constitutional provision imposing an obligation upon the legislature in respect to the public school system and that the statute certainly could not be struck down as an unauthorized delegation of legislative power in so far as it extended to cities under freeholders' charters merely the right to regulate the number, the terms of office, and the time and manner of electing members of boards of education. The statute, however, also conferred upon the city exterritorial jurisdiction; for although the residents of any attached territory were to participate in the election of the members of the board, they were given no voice in the determination of certain matters in respect to the constitution of the boards. These matters were subject to regulation by the home rule charter of the city, and in the adoption of this charter non-residents could not participate. On this point the court declared as follows:

It has already been stated that the school district involved embraces the whole of the city of Guthrie, as well as certain attached territory and people; and it is urged vigorously that the effect of this act is to enable the city proper to legislate for those persons residing outside of the city, but constituting a part of the school district, and that this is a delegation to the municipality of the right to legislate for persons not residing therein; and this is true to a certain extent. This charter provides for the election at large of the members of the board of education and all those persons residing upon the attached territory are permitted to vote in the election. Instead of having two members of the board elected by the attached territory, those persons therein residing participate in the election of all six members of the board. The city, in framing the charter for its own government, incidentally operates upon those persons not living in the city, but who form a part of its school district. In passing upon the constitutionality of a law enacted by the Legislature, which is a co-ordinate department of the government, the courts should resolve every doubt in favor of the validity of the law, and technical refinements, not affecting substantial rights, should not be pressed to the extent of defeating the will of the people. The school district is, of course, a separate entity from the city; but, while this is true, it is composed, to a very great extent, of the same people and of the same property; and, while it may be true that a city cannot be given the power to legislate for a county, or for the remainder of the state, where, as in this case, the school district lines have been extended by the consent of the city and of the persons residing in the attached property, we do not think that the power of the

Legislature to permit the city to devise this manner of electing a school board should be destroyed, because it incidentally affects this property which has been attached by mutual consent, where, as in this case, those persons so attached are given full power of participation in the election of the members of the board of education.

There was certainly a considerable measure of liberality in the view thus taken by the court. It is worthy of remark in conclusion, however, that while the decision of the Cotteral case was certainly somewhat out of harmony with the views expressed in the Ardmore case respecting the "unity of purpose" and the "entirety of operation" which were contemplated by the term "system" as used in the constitution, the later case did not in fact overrule the earlier. The power of the home rule city of Oklahoma to control matters pertaining to public education is referable to statutory and not to constitutional grant.

It is probable that many other points in respect to the relation of state laws to charter provisions and in respect to the scope of powers embraced within the grant to the city of authority to frame and adopt a charter will arise in Oklahoma in the course of time. Certainly it cannot be said that the amount of litigation involving questions of this character has been small when it is considered that the system has been in operation for a comparatively short time. The court has laid down the general rule that the laws which home rule charters must be "consistent with and subject to" are laws relating to matters of general as distinguished from local concern. As we have had frequent occasion to note, this is a rule which is exceedingly difficult and in some instances well-nigh impossible to apply; but in applying it the Oklahoma court unquestionably rescued, just as the Missouri court ultimately did, a considerable measure of the home rule right. It is fortunate, to say the least, that the court did not adopt the more literal California construction of the original provision in that state, nor the Washington construction, nor the construction which has in practice, and it would seem of constitutional necessity, been adopted in Minnesota. It is none the less regrettable that any

court, in an effort to effectuate the probable spirit of a provision of the fundamental law and to read coherence out of incoherence, should be compelled by the makers of that law to ignore or to slur the plain meaning of terms.

Home Rule in Arizona

The constitution with which Arizona was admitted to the Union in the year 1912 contained a provision [1] which conferred upon cities the power to frame their own charters in substantially the same terms as the provision of the Oklahoma constitution.[2] Aside from a few insignificant variations in phraseology the only differences of even a fairly material character were that (1) the authority to frame a charter was in Arizona extended to cities of more than 3500 inhabitants instead of 2000 inhabitants as in Oklahoma, and (2) the board of freeholders was to be composed of fourteen electors chosen at large instead of two from each ward as in Oklahoma. In view of the practical identity of the constitutional provisions of these states upon this subject it seems unnecessary to set forth the Arizona provision in detail.

According to the census of 1910 there were in Arizona only eight cities which fulfilled the population requirement for the exercise of home rule powers. Of these Tucson with a population of a little over 13,000 was the largest. Phœnix with a population of 11,000 was the second city of the state. This latter city was the only city which within the first two years of the operation of the home rule provision availed itself of the power to frame and adopt a charter for its own government.

This home rule charter has been in operation only since April, 1914. It is not surprising, therefore, that the Arizona courts have not as yet been called upon to give the bent of judicial interpretation to any phase of the provision in question. It may be remarked, however, that the first legislature which assembled in Arizona after the admission of the state enacted a home rule statute or "enabling act" which was practically identical with

[1] Art. XIII, secs. 1–6.

[2] *Supra*, 558–560.

the similar act passed by the Oklahoma legislature.[1] This statute did little more than to elaborate the constitutional grant of power to acquire public utilities[2] and to determine certain matters in respect to possible conflicts between charter provisions and general laws of the state.[3] Considering the fact that both the constitutional convention and the legislature of Arizona looked almost wholly to the state of Oklahoma for guidance in this matter, it is perhaps reasonable to expect that the courts of that state will likewise defer to the decisions of the Oklahoma courts in the matter of construing the provisions of the constitution when occasion shall have arisen.

[1] Rev. Stats. of Ariz., 1913, Title VII, ch. xvi, secs. 2033–2037.
[2] *Supra*, 571. [3] *Supra*, 575.

CHAPTER XVI

HOME RULE IN OREGON AND MICHIGAN

THE constitutional provisions by which home rule powers were conferred upon the cities of Oregon in 1906 and upon the cities of Michigan in 1909 were in two fundamental respects quite dissimilar from any of the provisions which have thus far been analyzed. In the first place, the provisions in these two states were exceedingly brief. In the second place, neither provision attempted to establish the procedure for the exercise of home rule powers. As we shall see, however, they were wholly unlike in effect; for while the Oregon provision went to the extreme of imposing prohibitions upon the legislature and of *compelling* the cities of the state "to be free," the Michigan provision apparently veered to the other extreme of subjecting the home rule city to a large degree of legislative control; and although under the legislative practice in the latter state city charters have been subject to change *only* by the exercise of the self-governing powers conferred, it is by no means certain that this practice is a matter of constitutional obligation upon the legislature.

Home Rule in Oregon

The Oregon constitution of 1857, following the provisions of certain other constitutions of that period,[1] specifically excepted corporations for municipal purposes from the requirement that corporations be created only under general laws.[2] Special legislation for cities prevailed in that state down to 1906 when the section on the subject of enacting laws for corporations was amended to read as follows:[3]

[1] *Supra*, 66–68. [2] Art. XI, sec. 2. [3] *Ibid.*

Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon.

In 1910 this section was further amended by adding the following clause:

The exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the state of Oregon.

On the very face of its recitals this constitutional provision is pregnant with ambiguities and omissions. In the first place, it appears to provide no means whatever by which a new municipal corporation may be brought into existence. It is scarcely to be imagined that the people of any unorganized community could of their own action and without regard to any legal forms or fixed procedure organize themselves into an incorporated city. Yet in the second sentence of the section it is expressly declared that "the legislative assembly shall not enact . . . any . . . act of incorporation for any municipality." This restriction is not qualified by the word "*special.*" Surely a general law is none the less, by reason of its generality, "an act of incorporation" for a city which becomes organized under its provisions. Literally construed this provision would seem to prohibit the Oregon legislature from enacting even a general act for the incorporation of new cities. There has apparently been no necessity as yet for the Oregon courts to decide whether or not this is a correct interpretation of the constitution upon this point.

Of more importance, perhaps, is the consideration of this same declaration in its relation to cities that were in existence at the time when the amendment was adopted. For the most part such cities were operating under special legislative charters. Did the amendment declare that such charters might not be amended

even by a statute applicable alike to all cities and even though the statute were optional in character? Apparently this is precisely the situation created by the provision, for such a law would unquestionably "amend" the "charter" of "any municipality" to which it applied. In other words, it would seem that the Oregon legislature is deprived of competence to enact *any charter laws whatever*, whether special or general in character, and that the existing cities of the state were by this amendment put into the vise of their charters antedating 1906, which vise can be broken only by the exercise of the charter-making or charter-amending powers conferred. The Oregon amendment has not received judicial construction in this regard; but if this is in fact the situation which it establishes, it is sufficient to remark that it goes further than the home rule scheme of any other constitution that we have considered. It not only confers the home rule right but also in effect compels its ultimate exercise by every city. There are in the state of Oregon nearly a hundred so-called cities. Less than a fifth of these have populations of over twenty-five hundred inhabitants. The overwhelming majority are nothing more than hamlets. It seems almost ludicrous that these insignificant municipalities, most of which will doubtless develop but slowly, should be not only permitted but also positively forced to make a choice between remaining under a completely static organic law and organizing a government to suit themselves. In many states an earnest struggle has been carried on to secure and establish the principle of home rule as a legal *right*. Oregon has transformed the principle into a legal *duty* upon the theory perhaps — if it be conceded that the framers of this amendment definitely intended what they apparently provided — that communities like individuals grow in capacity for self-government by the exercise of self-governing powers.

Strange to recount, however, the powers of home rule have been exercised less in Oregon than in any other state in which the charter-making power has been enjoyed by cities for a similar length of time. This is due in part perhaps to the fact that there is only one important city in the state — the city

of Portland. Salem with a population of 14,094 ranks second in size; and according to the census of 1910 there was no other city with a population that required five figures for its writing.

At the time of the adoption of the amendment of 1906 Portland was operating under a charter which, under statutory authorization,[1] had been drafted by a local "charter board," ratified by the municipal voters at an election held in June, 1902, and passed by the legislature without amendment in 1903.[2] This charter was in effect a home rule charter by legislative grace.[3] Under the home rule provision of 1906 this charter was several times amended; but in spite of a very considerable amount of agitation and effort to effect a general revision, it was not until May, 1913 that the existing charter was thoroughly overhauled by the adoption of numerous amendments under which a government of the commission type was provided.[4] In addition to this exercise of home rule powers by Portland the small cities of St. Johns,[5] Baker,[6] La Grande,[7] and Salem[8] have adopted charters or thoroughgoing charter amendments. These are doubtless the only instances in the state in which cities have fundamentally revised their charters under the grant of authority contained in the amendment, although it may be that specific charter amendments of minor import have been adopted here and there by one or more of the numerous cities of negligible importance.

1. Procedure. The limited extent to which home rule powers have been exercised by the cities of Oregon may be ascribed in considerable measure to the character of the home rule amendment itself. It will be observed that the provision confers upon "the legal voters of every city or town" the "power to enact and

[1] Act of Feb. 27, 1901.

[2] Act of Jan. 23, 1903.

[3] In this respect it was not wholly unique. Numerous charters and charter amendments have in other states been adopted by the legislature at the proposal of the city affected. For example, the New York city charter of 1830 was drafted by a municipal convention, submitted to a vote of the electors, and passed by the legislature as it was submitted to them.

[4] Somewhat similar amendments were defeated at the polls in November, 1912.

[5] 4872 inhabitants.

[6] 6742 inhabitants.

[7] 4843 inhabitants.

[8] 14,094 inhabitants.

amend their municipal charter." Now it is clear that the legal voters of a city, whatever may be the scope of their power, cannot act up to their capacity in this matter unless some form of procedure shall have been prescribed. The amendment does not essay in any wise to determine the manner in which the legal voters may exercise the power in question; nor does it indicate whether the legislature or some corporate authority of the city shall prescribe the manner in which the voters may exercise this competence. It is easy enough, of course, to declare that the voters collectively shall enjoy this or that power, but it is perfectly manifest that where collective political action is contemplated some legal procedure must be prescribed.

Under the usual interpretation of American constitutions it would certainly seem that the legislature of the state could claim the authority to elaborate by statute so vague a provision of the constitution as this. In other words, it would seem appropriate for the legislature to enact a law prescribing the manner in which the legal voters might avail themselves of the power conferred by the constitution. It is a fact, nevertheless, that the legislature of Oregon has never attempted to enact any such statute. To the extent that the power to enact and amend charters has been exercised by the voters of any municipality of the state, it has been exercised through the institutions of the initiative and referendum. At the same election at which the home rule amendment was adopted another amendment was ratified which declared in part as follows:[1]

> The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town.

[1] Art. IV, sec 1a.

If it be conceded that these two amendments were intended to have a special relation to each other — that the power to make and amend municipal charters was, in other words, included within the scope of the power to enact "all local, special, and municipal legislation" — it is nevertheless manifest that a considerable degree of vagueness and uncertainty inheres in the expressions that were employed. The manner of exercising the initiative and referendum powers by the voters of cities was to be prescribed by general laws, *except* that "cities" might, if they chose to do so, regulate this matter for themselves. At the time of the adoption of these amendments it is improbable that any city of the state was operating under a charter containing an initiative and referendum provision. For example, the Portland charter of 1903 expressly declared that "the council shall have and exercise exclusively all legislative powers and authority of the city." [1] It is true that the amendment of 1906 conferred legislative powers directly upon the voters to be exercised through the institutions of the initiative and referendum, but it also conferred power upon *cities* and not upon *city councils* to prescribe the manner in which the powers of direct legislation should be exercised.

In spite of this obvious fact the city council of Portland enacted in 1907 an ordinance which regulated the manner in which the powers of initiative and referendum might be exercised.[2] All of the amendments to the charter of the city which have been voted upon have been submitted in accordance with the provisions of this ordinance. Moreover, the validity of the ordinance has apparently received the unqualified sanction of the supreme court of the state. In the case of State *ex rel.* Duniway *v.* City of Portland [3] the court, referring to the home rule and the initiative and referendum amendments and to this ordinance, expressly declared that "in these two constitutional provisions and in the ordinance referred to, we have complete machinery for submitting charter amendments and declaring the result of the vote thereon."

[1] Sec. 72.

[2] Ordinance No. 16,311, of March 26, 1907.

[3] 133 Pac. 62. 1913.

To the same effect precisely was the decision of the court in State *ex rel.* Fleck *v.* Dalles City,[1] where an amendment to the city charter proposed by initiative petition was held void because the common council had refused to publish the proposal in accordance with the requirements of the ordinance of 1907 regulating the manner in which initiative and referendum powers should be exercised, and the advocates of the measure had failed to make application at the proper time for a mandamus compelling such publication. "As authorized by the state constitution," said the court, "the city by its constituted authorities, the mayor and councilmen, prescribed a law governing the exercise of the initiative within its limits." It was indispensable that the process by which the people should enact local legislation should "be in accordance with the formula prescribed by the people themselves through their representatives in council assembled."

In neither one of these cases was the point discussed that the power to prescribe the manner in which direct legislation might be enacted was by the terms of the constitution conferred upon the *city* and *not* upon the *city council* to be exercised by ordinance.[2] It would not have been unreasonable perhaps had the court held that the institutions of the initiative and referendum could be regulated by cities only when their charters contained adequate provisions upon this subject. This would have been tantamount to the declaration that no city operating under a legislative charter could amend such charter by the exercise of the initiative and referendum powers except under the provisions of the general laws of the state pertaining to the exercise of such powers. Acting under the general laws, however, there could be no question that any city could adopt a charter amendment regulating the manner in which these powers should be exercised as to *future* charter changes. This, it would seem, would have been a wholly reasonable construction of the provision of the constitution here under review. Such construction was not, however, given by the court; and the law seems to be that any city of Oregon, even though it be operating under a legislative charter antedating 1906, may

[1] 143 Pac. 1127. 1914. [2] *Supra*, 259 ff., 322 ff., 413 ff.; *infra*, 625 ff.

merely by ordinance provide for the manner in which charter amendments or a complete charter may be adopted through initiative and referendum action.

In case of the failure of the council of any city to enact such an ordinance the general laws of the state regulating the exercise of initiative and referendum powers in cities apply to the enactment of charters and charter amendments. In 1907, in accordance with the mandate of the initiative and referendum provisions of the constitution, the legislature of Oregon enacted a statute elaborating the manner in which these powers might be exercised by the voters of the state.[1] Certain sections of this statute regulated in detail the manner in which the powers of direct legislation should be exercised in those cities in which this matter was not regulated by ordinance or charter, and specific reference was made in this law to the enactment of charters and charter amendments subject to its provisions.[2] It is to be noted, therefore, that in spite of the brevity and uncertainty of the home rule amendment here under review every city of Oregon has the machinery available for the making or amending of its charter.

Whether this machinery, which is limited to action by initiative and referendum, is or is not adequate is open to question. The experience of Portland, although it must be admitted that Portland has not been heard to complain, would seem to indicate that it is wholly inadequate. In 1911–12 four more or less different groups of persons were engaged in the task of drafting a charter for that city. There was a committee appointed by the mayor, which was known as the "official charter committee." There was a "people's charter committee" constituted under the auspices of the East Side Business Men's Club. There was another citi-

[1] Laws of Ore., 1907, p. 405, repealing an Act of Feb. 24, 1903.

[2] Secs. 10–12. It is absurd, of course, to say that this law did not amend the charters of the cities to which it applied, for doubtless the charter of every such city vested the local legislative power elsewhere than in the voters. But if this law is a legislative amendment it is nevertheless an amendment that is expressly authorized by the initiative and referendum provision of the constitution — a provision that was adopted at the same time as the home rule provision which prohibited the amendment of charters by the legislature. It is, therefore, an obvious exception to the general inhibition laid upon the legislature in this regard.

zens' committee which framed a charter known as the "short charter." And there was finally a group of persons who rallied around Mr. W. C. Benbow of the "people's committee" in the framing of a charter which became popularly known as the "Benbow Charter." The city council, realizing the hopelessness of the schisms among the several citizen groups, finally appointed a special committee which in turn named nine men who should attempt to consolidate the four charters drafted. The compromise charter thus prepared was submitted by the city council to the voters in November, 1912. At the same election the advocates of the so-called "short charter" placed this charter also before the voters through the medium of an initiative petition. Both charters were defeated. In February, 1913 the city council again provided for the appointment of a charter committee. Certain compromises among the several charter advocates were effected by this committee, and the proposed revision was accepted by the people at an election held in May, 1913.

These details are of interest only as they illustrate the chaotic situation that developed in Portland as a result of the fact that no orderly procedure was provided either by the constitution or by statute for the framing of a charter. Under the requirements of the initiative and referendum amendment it is probable that it is impossible for any governmental authority in Oregon to deprive the voters of cities of their competence to make and amend their own charters by initiative and referendum procedure. It is not certain, however, that the legislature could not enact a statute which would supplement the home rule amendment by providing an orderly procedure (such, for example, as the election of a charter commission) and regulating the manner in which voters might proceed to exercise the home rule powers conferred upon them. Nor is it certain that a city itself might not establish such procedure by provisions of its own charter. Doubtless any provisions either of statute or charter looking to the accomplishment of this end would have to be in addition to and not in lieu of the initiative and referendum procedure. In view of the fact that the governmental authorities of Portland have, in spite of their lack of specific

authority, taken a very active part in the initiation of charter revision, it would seem highly desirable that a regular and orderly procedure in such matters should be established by statute or by charter provision.

2. The scope of home rule powers. The limited extent to which home rule powers have in fact been exercised by the cities of Oregon doubtless accounts for the absence of any considerable number of cases adjudicating questions relating to this subject. Only one or two points have been judicially determined.

In McKeon *v.* City of Portland[1] the validity of an attempt to annex the city of St. Johns to the city of Portland was drawn into question. In 1907 St. Johns adopted a charter under the home rule amendment of the previous year. Acting under the requirements of its legislative charter of 1903,[2] the city council of Portland, having received the necessary petition, ordered that the question of annexation be submitted to the voters of St. Johns at the general election held in November, 1910. A majority vote was cast in favor of the proposed annexation. The court held, however, that this attempted annexation was utterly void. Decision was reached upon the ground that while the home rule amendment empowered the voters of any city to enact or amend the charter of the city it did not confer power upon them to repeal that charter without substitution and to commit what the court was pleased to call "municipal suicide." It was declared that "having once assumed municipal functions and obligations either of their own volition or at the behest of the legislature, under the former constitution, the voters of St. Johns could never repudiate them or lay them aside except under sanction of the whole people of the state in whom now rests the power formerly exercised by the legislative assembly in that behalf."

The argument employed by the court in this case is certainly open to grave criticism. It would seem that it might have been held with much force that the voters of St. Johns were, in assenting to annexation to Portland, merely repealing their own charter and adopting the charter of the larger city as their own. They

[1] 61 Ore. 385. 1912. [2] Art. IV of ch. I.

were expressly empowered by the home rule amendment to repeal one charter and adopt another. The reference to "municipal suicide" appears to have been somewhat overstrained, for while the identity of the suburban city as such would have been completely blotted out had this action been sustained, yet its "life" would simply have been merged into the "life" of the larger municipality. It is difficult to appreciate the propriety of applying the term suicide to an action which does not result in complete loss of life.

The situation which resulted from the decision in this case was indeed curious. There was no authority in the state of Oregon that was competent under the constitution of the state to provide for the amalgamation of two adjacent cities each operating under a charter of its own making. This was the legal situation even though every person in each municipality might be enthusiastically in favor of a merger of their governments. It had to be met, of course, by constitutional amendment. In November, 1914 the voters approved an amendment upon this subject which read as follows:[1]

> The Legislative Assembly, or the people by the initiative, may enact a general law providing a method whereby an incorporated city or town or municipal corporation may surrender its charter and be merged into an adjoining city or town, provided a majority of the electors of each of the incorporated cities or towns or municipal corporations affected authorize the surrender or merger, as the case may be.

It will be observed that the McKeon case is not authority for the doctrine that the regulation of matters pertaining to the annexation of territory is not within the scope of powers conferred upon the home rule city.[2] The city of Portland had not attempted to regulate the matter of annexation under charter provisions which were locally made. The provisions here under review had been enacted by the legislature in the charter of 1903. The question of the competence of the city to write such provisions in its own charter was therefore not raised. It is perhaps worthy of remark in passing that in the extensive revision effected in 1913

[1] Art. XI, sec. 2a.

[2] *Supra*, 146, 269, 333, 407, 474.

the charter provisions upon this subject were wisely left as the legislature had written them. The McKeon case did not in any wise imply that these provisions were completely void. It was merely declared that they could not apply to territory included within the corporate limits of a city operating under a charter of its own making. In point of fact Portland has several times since 1906 annexed other kinds of territory under these charter provisions, and the action of the city in this regard has apparently not been contested. The amendment adopted in 1914 clearly declares that the annexation of one city to another is a matter that must be regulated by general law and therefore not by a charter provision of local origin. Even so, this does not cover the entire subject of annexation. The question as to whether a home rule charter may provide for the annexation of other kinds of territory remains yet to arise and be judicially answered in Oregon.

In the case of State *ex rel.* Duniway *v.* City of Portland [1] the commission government amendments to the charter of that city were attacked on numerous grounds. None of the contentions that were made appears to have had any very sound basis in reason, and the opinion that was rendered after somewhat hurried consideration by the court does not shed much light upon the home rule situation in Oregon. One or two points may, however, be noted.

In 1908 the article of the Oregon constitution which deals with suffrage and elections was so amended as to declare that "provisions may be made by law for the voter's direct or indirect expression of his first, second, or additional choices among the candidates for any office." [2] Preferential voting was introduced in Portland by the charter revision of 1913. The contention was made that under the constitutional amendment of 1908 preferential voting could be established only "by law." To this contention the court replied that "a city charter enacted by the voters of the municipality is as much a law as if it were enacted by the legislature." It was also declared without hesitation that "municipal elections and the choice of municipal officers are matters of purely municipal

[1] 133 Pac. 62 (1913); *supra*, 596.

[2] Art. II, sec. 16.

concern; and, as to these, the people of the city have ample power to legislate." It does not seem to have been a matter of contest that the regulation of elections was beyond the competence of a home rule city as being a state as distinguished from a local affair, or that there was any conflict between the election laws of the state and the charter provisions upon this subject. But the court expressed its opinion with so little reservation as to leave little doubt concerning the answers that would be given upon these specific points should the occasion present itself.

In conclusion the court declared as follows:

> We think the true test is this: Could the Legislature before it was deprived of the power to enact or amend charters have enacted this revision? We are of the opinion that it could have done so, and that the courts would have held it valid. If the Legislature could lawfully have done this before the amendment, the people of the city of Portland can do the same within its corporate limits since the amendment.

Voice was thus given to the unguarded view that the scope of the powers of a city in framing its own charter is coextensive with the powers which the legislature enjoyed prior to the grant of home rule powers. This is a view which we have already had occasion to consider.[1] As we have seen, it has nowhere been consistently followed and applied by the courts. Nor is it unlikely that the view thus expressed may yet arise to confound the courts in the Oregon jurisdiction.

The McKeon and the Duniway cases are the only cases in the Oregon books which have construed the home rule amendment of 1906. Very little, therefore, has been judicially determined in respect to the extent of powers included within the grant of authority "to enact and amend" municipal charters. Moreover, nothing at all has been directly settled in respect to the relation of superiority and subordination between state laws and conflicting charter provisions. It is highly significant that the home rule amendment requires merely that locally made charters shall be "subject to the constitution and criminal laws of the state." In other words, as in the Colorado provision,[2] no phrase was employed

[1] *Supra*, 357, 365, 367, 473, 532, 536.

[2] *Supra*, 522.

which might be interpreted to require that state laws relating to matters of state-wide or general concern should supersede the contrary provisions of home rule charters. It is idle to speculate concerning what may be the judicial determination upon this point when the Oregon courts find it necessary to answer some of the numerous concrete questions of this character which have been presented in other states. It seems safe to predict, however, that the courts will have no easy task before them.

Home Rule in Michigan

The constitution adopted in Michigan in the year 1908 contained the following brief provisions on the subject of home rule:[1]

> Sec. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.
>
> Sec. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and through its regularly constituted authority, to pass laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of the state.

The language of these sections is by no means free from uncertainty. The legislature is commanded[2] to enact one "general law for the incorporation of cities" under which "the electors of each city . . . shall have power and authority to frame, adopt and amend its charter." The first question that arises is this: Is the legislature, having fulfilled its duty in this regard, prohibited by implication from enacting any other charter laws?

1. The power of the legislature to enact special city laws. Let us first consider the case of the special law. Was the legislature prohibited from enacting a special law applicable to a city

[1] Art. VIII.

[2] In the first case that arose over this subject the court declared that the provision was mandatory upon the legislature; but, as in all such instances, it is manifest that there would have been no available legal remedy had the legislature failed to obey the mandate of the constitution.

which had not elected to exercise home rule powers under the terms of the statute contemplated by this provision of the constitution? Such special acts were certainly not expressly forbidden. On the contrary, the constitution in another connection declared that the "legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question;" and further that no such "local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected." [1] What, then, was the relation between this declaration and the provision which required the enactment of a general law for the incorporation of cities?

The Michigan legislature certainly did not construe these provisions of the constitution as imposing an absolute prohibition upon the passage of special laws relating to cities. In the first session of the legislature following the adoption of the constitution special acts were passed amending the charter of Grand Rapids in respect to "dock, safety, sanitary, and building lines" and changing the name of the city of Bad Axe.[2] Both of these acts were submitted to a referendum. In the legislative session of 1911 nine such local acts were passed, all of them being subject to local approval.[3]

One of these, which amended the charter of Detroit by raising the debt limit from two to three per centum, was promptly haled before the courts. In Attorney General *ex rel.* McRae *v.* Thompson [4] the court declared that the constitution of 1909 had sought to remedy the "growing evil" of special legislation for cities by the provisions conferring home rule powers; and that this was a "palpable attempt to amend the charter in violation of the con-

[1] Art. V, sec. 30.

[2] Local Acts of Mich., 1909, Nos. 323 and 325.

[3] Local Acts of Mich., 1909, pp. 7–25. Three of these amended the charter of Detroit in respect to bond issues, the debt limit, and the compensation of aldermen; three of them, one of which amended the charter of Grand Rapids, related to school matters; one related to building districts; another made the mayor of a city ex-officio member of the county board of supervisors; another changed the boundaries of a city.

[4] 168 Mich. 511. 1912.

stitutional inhibition." It was apparently the view of the court, although the point was not clearly brought out in the discussion, that the inhibition thus referred to was implied in the requirement that the legislature should enact "a general law for the incorporation of cities" under which cities might frame and adopt charters; for it was argued that the only "suggestion of justification" for this violation of the inhibition in question was found in the above quoted provision relating to the enactment of local and special acts, and that the act could not be sustained under this provision since it could not seriously be contended that a *general* law imposing a debt limit on cities could not have been made applicable.

In the decision of this case no satisfactory explanation was given of the precise relation between the clause of the constitution on the subject of local and special legislation and the clause of the same instrument which conferred home rule powers subject to "a general law for the incorporation of cities." It was clearly intimated that special legislation for cities was impliedly prohibited by the clause requiring a general law. On the other hand, it was not declared that the provision authorizing special legislation under certain conditions had no reference to laws enacted for cities. Literally construed this provision appeared to countenance the enactment of special laws for cities (whether under home rule or legislative charters) subject first to an absolute veto by the local electors, and secondly to a veto by the courts on the ground that a general law could have been made applicable. Of course these limitations were so far-reaching in character that the power of the legislature in the matter of special legislation was enormously circumscribed. If the people of a city are willing to vote in favor of a special act passed by the legislature, it may well be asked why the same result could not be reached in most if not all cases by the city itself, acting under the general law passed in pursuance of the home rule provision of the constitution.

Indeed it would seem that in its application to cities and villages the only practical use of the special law enacted under these severe limitations would be to create some exception to the general law

under which all cities and villages might exercise charter-making powers. Employed for such a purpose as this, the special act would manifestly have no easy sailing before the courts, endowed with absolute power to determine whether a general law could be made applicable.

The probability is that the framers of the Michigan constitution did not intend that the provision relating to local and special legislation should have any reference at all to special legislation for cities. But whatever their intention may have been, it was not clearly written into the constitution; and the ambiguity of that instrument yet remains to be completely resolved by the courts.

It should be remarked that in the year following the decision of the Thompson case the legislature enacted a special law (which clearly became a part of the city charter although it was not so enacted) creating a bridge commission for Bay City and another law amending the charter of Mackinac Island in respect to the duties of the mayor and the treasurer.[1] Such acts, however, have not in any case been numerous since the adoption of the constitution in 1908; nor is it certain that all of them were ratified at the polls.

2. The power of the legislature to restrict the powers of home rule cities by a general law. Let us next consider whether the Michigan constitution prohibits the enactment of general laws applicable *only* to those cities which do not elect to exercise home rule powers. There is here again no express prohibition against such legislation. Such a prohibition, however, seems fairly implied in the mandate of "a general law for the incorporation of cities," under the terms of which cities may exercise charter-making powers. Doubtless this positive requirement may be fairly construed to exclude the enactment of any other general laws for cities, even though such laws be made to apply only to cities which fail to exercise home rule powers and even though they be optional in character. For example, it is probable that an optional commission government act would be void. The Michigan courts have never had occasion to declare for or against this interpreta-

[1] Local Acts of Mich., 1913, nos. 416 and 417.

tion of the constitutional point in question for the reason that the legislature has not as yet attempted to enact general laws of the character indicated.

There remains to be considered, then, only the possibilities for legislative control of cities through the medium of the "general law for the incorporation of cities," which law must provide for the exercise of home rule powers. Several points may be noted.

In the first place, "a law for the incorporation of cities" is a comprehensive, though perhaps somewhat indefinite, expression. The Michigan court has itself declared that an "act of incorporation . . . includes the idea of a charter"; [1] and again, that "framing or revising the charter is part of the necessary process of incorporating a city." [2] The fact is that a "law for the incorporation of a city" is an expression that is commonly used interchangeably with the "charter of a city." Had the requirement that the legislature should enact a law for the incorporation of cities been unaccompanied by any grant of home rule powers under such law, it is probable that both the legislature and the courts would have construed this provision as imposing the duty of enacting a general optional or mandatory charter for all cities (or perhaps classes of cities). Here, therefore, was a manifest obscurity in the use of terms. For how could the legislature enact a general charter law while cities were at the same time empowered to frame, adopt, and amend their charters under such law. The law itself might occupy the entire field of charter control. How, then, must this phrase "law for the incorporation of cities" be defined?

It may be said that so far as concerns the point here under review the phrase has not been defined by the Michigan courts because no occasion for such definition has arisen. It would seem that the legislature of Michigan might have enacted a law for the incorporation of cities which was mandatory upon all cities and which provided in considerable if not complete detail for their government. In accordance with the mandate of the constitution this law might have contained provisions for the exercise of

[1] Common Council of City of Jackson v. Harrington, 160 Mich. 550. 1910.
[2] Gallup v. City of Saginaw, 170 Mich. 195. 1912.

home rule powers; but under such circumstances these provisions would have been obviously farcical in character. Nevertheless it is difficult to point out the ground upon which the courts could have declared such a law void.

The fact is that the Michigan legislature has not enacted such a law. Nor has it incorporated into the law which was enacted any provision that was mandatory upon cities *except* when they elected to frame, adopt, or amend their charters. In other words, no attempt has been made to amend the existing special legislative charters of the cities of the state through the direct medium of this general law for the incorporation of cities. Under the practice of the legislature the charters which were in force in 1909 have remained static except as they have been altered by action of the city itself. This situation, however, is somewhat different from that which prevails in Oregon;[1] for there seems to be little doubt that the Michigan legislature is fully competent to include in the one general statute which it is commanded to enact provisions of a mandatory character that would operate to amend the charter of every city of the state, whether such charter was of legislative origin before 1909 or of home rule origin thereafter. It remains to be seen whether the legislature will ever attempt to exercise its competence in this regard.

3. The home rule act of 1909. The legislative interpretation of the constitution on this point has been disclosed only in the so-called "home rule act" enacted by the first legislature which assembled after the adoption of the constitution.[2] This act is worthy of some analysis. It applied only to cities which elected to exercise home rule powers. It not only prescribed in detail the procedure by which cities might avail themselves of the authority to frame, adopt, and amend their charters but it also enumerated in considerable detail, first, certain provisions which every charter *must* contain;[3] secondly, certain provisions which every such charter *might* contain;[4] and thirdly, certain powers which *no* city *should* exercise.[5] It is interesting to note that

[1] *Supra*, 592, 593.
[2] Pub. Acts of Mich., 1909, no. 279.
[3] Sec. 3, subdivs. a–o.
[4] Sec. 4, subdivs. a–t.
[5] Sec. 5, subdivs. a–i.

among the group of mandatory provisions is the requirement of an elected "mayor who shall be the executive head, and a body vested with legislative power," [1] and also the specific requirement of "a clerk, a treasurer, an assessor or board of assessors, and a board of review," which latter officers may be either elected or appointed. In other words, the Michigan legislature has definitely prescribed certain officers for which every city adopting its own charter must make provision. Another of these mandatory provisions is that which requires the regulation by the charter of the "time, manner and means of holding elections and the registration of electors." Thus the authority to control matters pertaining to municipal elections is definitely vested in the city by the legislature. In the matter of finance the charter is required to make provision "for a system of accounts which shall conform to any uniform system required by law," and the subjects of municipal taxation are made "the same as for state, county, and school purposes under the general law."

Among the provisions which may be optionally incorporated into the locally made charter are provisions regulating the sale of intoxicating liquors, except where the city is located in a county in which such sale has been prohibited by a vote under the state local option law; provisions imposing punishment for violations of local ordinances, except that the degree of punishment is specifically limited; provisions for the separate incorporation of any department of the city government, except that the city may not regulate matters pertaining to the public schools; provisions for the municipal ownership of public utilities, although this right was in fact conferred upon cities by the terms of the constitution itself; [2] provisions for the initiative and referendum; and "for

[1] This requirement has not in practice been regarded as preventing a city from adopting the commission form of government although it would seem that literally construed it might be held to necessitate that all charters should provide governments of the mayor and council type. The point does not appear to have been raised before the Michigan courts. But see *supra*, 452, 476.

[2] Art. VIII, secs. 23, 24, reads as follows:

"Sec. 23. Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the munici-

the enforcement of all such local police, sanitary, and other regulations as are not in conflict with the general laws;" and finally provisions "for the exercise of all municipal powers in the management and control of municipal property and in the administration of municipal government, whether such powers are expressly enumerated or not."

Chief interest, however, centers in the powers which, in addition to the above noted exceptions, have been expressly denied to cities that may elect to frame their own charters. Among the limitations imposed are, first of all, an eight per centum debt limit and a two per centum tax-rate limit. The city is also prohibited, after the adoption of the first home rule charter, from submitting to the electors a charter or charter amendments oftener than once in two years; from calling more than two special elections in one year; from voluntarily alienating public property of specified value and kinds; from investing money in any business enterprise — whatever that may mean — in excess of ten cents per capita; and from issuing bonds unless approved by three-fifths of the voters and unless a sinking fund be provided.

Another matter that is settled in detail by this law is the manner in which two or more cities may be consolidated and in which

pality and the inhabitants thereof; and may also sell and deliver water, heat, power and light without its corporate limits to an amount not to exceed twenty-five per cent. of that furnished by it within the corporate limits; and may operate transportation lines without the municipality within such limits as may be prescribed by law: *Provided*, that the right to own or operate transportation facilities shall not extend to any city or village of less than twenty-five thousand inhabitants.

"Sec. 24. When a city or village is authorized to acquire or operate any public utility, it may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law: *Provided*, that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such city or village, but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

The purport of these sections was under review in Attorney General *ex rel.* Hudson *v.* Common Council of City of Detroit, 164 Mich. 369 (1911) and in Attorney General *ex rel.* Barbour *v.* Lindsay, 178 Mich. 524 (1914).

territory may be annexed or detached. This is not left to be regulated by the local charter.[1]

There is nothing especially distinctive about the procedure that is required by this law for the making and amending of charters.[2] It follows the general lines of the procedure that is established by the constitution itself in most of the other states, although it is worthy of note perhaps that the provisions of the Michigan statute in this respect appear to be drafted with more precision and clearness than most of the constitutional provisions. Representation in the charter commission consists of one member from each ward and three members at large.[3] Every charter or amendment must be submitted to the governor of the state for his approval, but, unlike the Oklahoma and Arizona provisions,[4] the veto of the governor may be overridden by a two-thirds vote of the charter commission, if the proposal was drafted by such commission, or of the city council in the case of amendments proposed by that body or by petitioners.

4. The extent of the exercise of home rule powers in Michigan. According to the census of 1910 there were in Michigan 116 cities which were entitled to exercise the home rule powers conferred by the constitution and elaborated by the law. Of course there were also a considerable number of villages. Of the cities of the state there were twenty-four with a population exceeding 10,000 inhabitants. Detroit with nearly half a million inhabitants was the largest city. Grand Rapids with slightly over a hundred thousand inhabitants ranked second in size. Within a period of five years following the adoption of the constitution of 1908 neither of these cities had adopted a charter of its own making. Proposed charters were defeated in Grand Rapids in 1912 and in Detroit in 1914. Charters were also rejected at the

[1] The legislature has enacted at least one special law changing municipal boundaries. *Supra*, 605, n. 3.

[2] *Supra*, 116, 117.

[3] The act requires that every home rule charter shall provide "for the establishment of one or more wards." It would seem that if any city in effect abolished ward lines by establishing only one ward, its future charter commissions would consist of only four members.

[4] *Supra*, 560 ff., 589.

polls in a number of other cities; but charters were adopted or fundamental charter revision made in sixteen cities during this five-year period. The most important of these were Saginaw, Lansing, Jackson, Battle Creek, and Port Huron.[1] In addition to these instances of general charter revision, existing legislative charters were amended in a number of cities, including Detroit, Grand Rapids, and Kalamazoo; but as we shall have occasion to note all such amendments adopted prior to November, 1912 were void.[2]

5. The meaning of grant of home rule powers to the electors of cities. Considering the brevity of the Michigan home rule provision and the practice of the legislature under that provision, it is not surprising that the declaration of the constitution itself upon this subject has not received much construction at the hands of the courts. Most of the cases which have arisen have merely construed and applied the provisions of the elaborate home rule statute. However, one or two constitutional points have been determined.

It will be observed that the Michigan provision, like that of Oregon, confers the power of home rule upon the *electors* of each city, but, unlike the Oregon provision, subjects the exercise of

[1] The total list of such cities with populations according to the census of 1910 and with the dates upon which the charters or general revisions were approved by the governor were as follows: Battle Creek, 25,267, May 3, 1913; Easton Rapids, less than 2,500, Dec. 12, 1914; Grand Haven, 5,856, Dec. 2, 1914; Holland, 10,490, July 23, 1914; Jackson, 31,433, Nov. 9, 1914; Lansing, 31,229, Sept. 25, 1912, amended Apr. 23, 1913; Manistee, 12,381, Jan. 28, 1914, amended Sept. 8, 1914; Marquette, 11,503, Dec. 29, 1913; Monroe, 6,893, Dec. 23, 1913; Owosso, 9,639, Nov. 12, 1913; Pontiac, 14,532, Feb. 8, 1911; Port Huron, 18,863, Nov. 9, 1910, amended Apr. 21, 1914; Saginaw, 50,510, Nov. 19, 1914; Three Rivers, 5,072, May 2, 1913; Traverse City, 12,115, Mar. 15, 1913; Wyandotte, 8,287, Mar. 18, 1911.

[2] Amendments were adopted in the following cities and approved by the governor on the dates indicated: Ann Arbor, 14,817, Nov. 23, 1910 (void), Dec. 22, 1911 (void), Oct. 2, 1913; Cadillac, 8,375, Dec. 2, 1914; Cheboygan, 6,859, Apr. 13, 1914; Detroit, 465,766, Dec. 6, 1910 (void), May 3, 1913, Nov. 14, 1914; Fremont, less than 2,500, Mar. 28, 1912 (void); Grand Rapids, 112,571, May 12, 1913; Holland, 10,490, Dec. 28, 1910 (void), May 5, 1914; Ironwood, 12,821, July 22, 1910 (void); Kalamazoo, 39,437, May 7, 1914, Nov. 25, 1914; Marquette, 11,503, Apr. 11, 1910 (void); Muskegon, 24,062, Apr. 23, 1914; Saginaw, 50,510, July 18, 1910 (void), Apr. 21, 1913; South Haven, 3,577, Mar. 13, 1915; St. Joseph, 5,936, Apr. 3, 1914; Ypsilanti, 6,230, May 9, 1913.

such power to the general law which the legislature was commanded to enact. In other words, it was the electors themselves who should have the power to frame, adopt, and amend the charter of their city. Obviously this was a somewhat vague declaration. Was the legislature, in the enactment of the general mandatory law, prohibited from vesting the power to *frame* a charter or amendment in any other than the entire body of electors? In Common Council of City of Jackson *v.* Harrington [1] the court, referring to the home rule statute of the year before, in which provision was made for the election of a charter commission endowed with power to draft a charter, declared that in enacting this law the legislature "intended to and did pass a general law giving to the electors of cities the power to frame, adopt and amend charters." The point was not specifically discussed that this act vested the power to *frame* a charter in an elected commission and not in the electors themselves. But it was obviously the view of the court that the statute satisfied the requirements of the constitution in this respect.

In Attorney General *ex rel.* Hudson *v.* Common Council of City of Detroit [2] one of the specific contentions made was that the home rule statute, in providing for the initiation of charter amendments by a petition of voters or by the legislative authority of the city, was void because such provision deprived the electors of their constitutional right to "frame" charter amendments. The court said that there was "nothing in the new provision to indicate that it was contemplated that the whole body of the electors in a city like Detroit should convene for the purpose of framing an amendment, as a strict construction of the language might require." This would be impracticable. "Some indirect means must be adopted," and the means adopted by the legislature completely satisfied the constitution. This was certainly a practical and doubtless also a wholly reasonable interpretation of the somewhat uncertain use of the term "electors" in the constitutional provision in question.

6. The power of the city to amend an existing legislative charter. Of more importance in the case last mentioned was the question

[1] 160 Mich. 550. 1910.

[2] 164 Mich. 369. 1911.

which was raised as to whether the home rule statute of 1909 permitted a city to adopt an amendment to an existing legislative charter without having first adopted a home rule charter proposed by a locally elected commission. It was held that the act of 1909 did not confer such power upon the cities of the state but that the charter amendments provided for in that act were amendments which might be made after a "new charter or general revision equivalent thereto" had been framed and adopted under the provisions of the act. "This construction," said the court, "is in harmony with the letter and spirit of the constitution." Attention was called to the language of the constitution upon this point and it was expressly declared that "the authority 'to frame, adopt and amend its charter' naturally refers to authorized amendment to a charter framed and adopted 'under such general laws.'"

In spite of the apparent view of the court that the constitution itself prohibited the granting of power to cities to amend their existing legislative charters, the legislature of the state proceeded to amend the home rule statute so as expressly to confer this power.[1] In Attorney General *ex rel.* Vernor *v.* Common Council of the City of Detroit[2] the court reiterated the view expressed in the Hudson case and held that it was beyond the competence of the legislature to confer such power upon the cities of the state. The opinion of the court seemed to turn upon the view that if such power were exercised by cities they could by piecemeal amendment of their charters avoid the necessity of coming within the mandates and inhibitions of the general law under which they were compelled to exercise home rule powers. In other words, it might be that while a general charter revision would of necessity have to conform to the requirements of the home rule act, amendments might be adopted which would, nevertheless, leave the charter of the city in some respects repugnant to the provision of this general law. The effect of this decision was unquestionably to render

[1] Pub. Acts of Mich., 1911, No. 203, sec. 21.

[2] 168 Mich. 249 (1912); reaffirmed in Gallup *v.* City of Saginaw, 170 Mich. 195 (1912).

void amendments which had previously been adopted in a number of the cities of the state.[1]

The somewhat overstrained fears of the court in respect to the possible results of charter amendment by piecemeal were evidently not shared by the legislature and the people of the state; for at the general election in November, 1912 the home rule provision of the constitution was amended to read as follows:

> SEC. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its *own* charter, *and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village* and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.

The decision of the supreme court was thus "recalled" by conferring upon cities the power to amend existing legislative charters without undertaking complete charter revision.

In this respect the Michigan home rule scheme differs fundamentally from that established in all the other states except Oregon and Texas.[2] In every other state the home rule powers conferred must be exercised *ab initio* by the adoption of a complete charter. It is only the charter thus adopted that may be thereafter amended by piecemeal process. The difference between these two schemes may seem slight; but from the practical point of view it is of considerable importance. Arguments of some force may be presented for and against each plan. On the one hand, it may be urged that there is little logic in imposing upon a city the trouble and expense of drafting and adopting an entire charter when as a matter of fact the existing legislative charter, being on the whole a satisfactory instrument, stands in need of only one or a few specific amendments. This argument is especially forceful perhaps as applied to the case of the small city, for the process of amendment is always simpler and less expensive than the process of complete revision. On the other hand, it must be remembered that many cities when they come into the possession of home rule

[1] *Supra*, 613, n. 2.

[2] *Supra*, 592; *infra*, 649.

powers find the source of their governments in a conglomeration of statutes and amendments that are generically referred to as their charters. The bulk, the uncertainty, and the disarray of such a charter, and the complications of the government which it establishes have in most instances been at once the result and the cause of much legislative tinkering. It is from this tinkering that escape has been sought through the grant of home rule powers. The objections to legislative tinkering have lain quite as much in the practice itself as in the fact that it had its seat in the legislature. It is open to question whether the mere transferrence of the seat of the practice from the legislature to the city is a step of profound signification in the interest of better city government, the furtherance of which is in final analysis the chief, if not the sole, argument for home rule. May it not be the part of wisdom to compel every city that would avail itself of the home rule grant to take the complete measure of the government established by its fundamental law and to embark upon its self-governing career with an entirely new instrument? In the light of the actual experience of home rule cities it may certainly be said that such an instrument is usually briefer, clearer, and more orderly than the charter which it displaces. A charter so framed and adopted does not usually stand in need of amendment on account of its chaos and ambiguity; and certainly when necessity for amendment does arise such amendment may more intelligently and more easily be considered by the voter in its relation to the charter as a whole.

Contrast, for example, the situations in San Francisco and in Detroit. The former city, because of the refusal of its voters to adopt any one of the charters that were submitted,[1] was compelled to operate under a complicated legislative charter for twenty years following the grant of home rule powers by the constitution. In the end it secured in 1899 a well-ordered charter which, with the amendments that were made down to 1913, covers less than two hundred printed pages. When the laws constituting the charter of Detroit were compiled in 1904 [2] they filled a volume of nearly

[1] *Supra*, 204, 229.

[2] By Timothy E. Tarnsey, Corporation Counsel of the city.

six hundred pages. The laws relating to the city which were passed by the legislature in the sessions of 1905 and 1907 covered nearly two hundred printed pages.[1] With the adoption of the new constitution in 1908 such legislation ceased. But it is the antiquated and complicated government established by this absurd charter — a compilation in fact of numerous statutory enactments through a long period of years — that Detroit, having failed at the polls in her one attempt at general charter revision, has been patching and revamping by home rule amendments.

7. *Judicial construction of certain points in the home rule act.* It is sufficient briefly to enumerate the points which have been determined by the cases in which the provisions of the Michigan home rule act have been construed and applied. Thus it has been held that under this act the submission to the voters of the question of having a general charter revision may be initiated either by a two-thirds vote of the legislative body of the city or by a voters' petition;[2] and it was strongly intimated that the legislature could not have vested this power solely in the legislative body since this would have been to deprive the "electors" of their constitutional "authority to frame, adopt and amend" the charter.[3] But the common council of a city, in ordering a vote to be taken on this question, was without power to prescribe the manner in which candidates for membership in the charter commission should be nominated, since the home rule act provided that "the nomination and election of the members of such commission except as herein specified [the only exception being that the names should go on the ballot without party designation], shall be conducted as near as may be as now provided by law for the nomination and election of city and ward officers in the respective cities of this state." A scheme of non-partisan nomination, as provided by the resolution of the council of Grand Rapids, was therefore void, because the primary law of the state recognized party nominations.[4] In other words, the law created the situation that nomina-

[1] Compiled in 1908 by George T. Gaston, City Clerk.
[2] Common Council of Jackson *v.* Harrington, 160 Mich. 550. 1910.
[3] *Supra*, 614.
[4] Meves *v.* Schriver, 162 Mich. 359. 1910.

tions could be made by parties although there could be no party designation on the ballots.

Again it has been held that where a city has voted in favor of charter revision and has, as the law required, at the same election chosen a charter commission, mandamus may issue to compel the council, as also required by the law, to appropriate for the expenses of the commission. The council could not avoid making such appropriation by waiting till after the time fixed by the existing charter for the making of appropriations for the year. Even if the charter forbade such an appropriation, any provision that could be construed in this wise must yield to the home rule act.[1]

The absurd contention that the requirement of a residence of three years in the city as a qualification for membership in a charter commission was a "test" of "office or public trust," as that term was used in connection with the provision of the constitution relating to the oath of public office [2] was, as might have been expected, denied by the court.[3]

In a case decided in 1913 [4] the home rule act was construed as expressly conferring power upon a charter commission to fill a vacancy in its membership; but having once made an appointment to fill such a vacancy, the commission was held to be without power subsequently to oust the member thus appointed.

To sum up, it may be said that it is difficult to estimate the actual extent of home rule powers which the cities of Michigan enjoy by virtue of a direct constitutional grant. This is due to the fact that the legislature has apparently met the situation sought to be established by the constitution without subterfuge and without any effort to test the measure of its own competence. Numerous important limitations, however, it has imposed upon the cities which elect to frame and adopt their own charters and numerous additional limitations it might prescribe if it cared to

[1] Attorney General *ex rel.* Graves v. Mayor and Common Council of the City of Adrian, 164 Mich. 143. 1910.

[2] Art. XVI, sec. 2.

[3] Attorney General *ex rel.* Selby v. MacDonald, 164 Mich. 590. 1911.

[4] Eikhoff v. Charter Commission of the City of Detroit, 176 Mich. 535. 1913.

do so. It seems to be beyond cavil that home rule in Michigan is a matter of legislative grace rather than of constitutional right. It remains to be seen whether the legislature will continue to display a fair attitude of deference toward what may doubtless be called the spirit of home rule as contemplated by the brief provision of the fundamental law.

CHAPTER XVII

HOME RULE IN OHIO, NEBRASKA, AND TEXAS

In the year 1912 the constitutions of three additional states were amended so as to provide for the exercise of home rule powers. The amendment to the constitution of Ohio was framed by the convention which met in that state in the spring of that year, which convention instead of drafting an entirely new constitution submitted to the voters of the state at an election held the third of September forty-one separate amendments. The amendments in Nebraska and Texas were drafted by the legislatures of these states and were ratified at the general November elections in 1912.

Home Rule in Ohio

The amendment which was adopted in Ohio was as follows:[1]

Sec. 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Sec. 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Sec. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Sec. 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the

[1] Art. XVIII.

product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Sec. 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

Sec. 6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality.

Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Sec. 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made

by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Sec. 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments shall be mailed to the electors as hereinbefore provided for copies of a proposed charter. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

Sec. 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part, to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Sec. 11. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per centum of the cost of such appropriation.

Sec. 12. Any municipality which acquires, constructs, or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not

impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Sec. 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Sec. 14. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election.

This amendment to the Ohio constitution went into effect on November 15, 1912. At the time of its adoption every one of the eighty-two cities of the state, varying in population from five thousand to more than five hundred thousand inhabitants, was operating under the general municipal code of 1902 which established a uniform system of government for all cities.[1] Almost immediately a number of cities became active in the direction of framing and submitting charters of their own making. Within a period of two years after the amendment became effective charters had been adopted in nine cities — to wit, Cleveland (July 1, 1913), Lakewood (July 22, 1913), Middletown (Aug. 8, 1913), Dayton (Aug. 12, 1913), Springfield (Aug. 26, 1913), Columbus (May 5, 1914), Sandusky (July 28, 1914), Ashtabula (Nov. 3, 1914), and Toledo (Nov. 3, 1914). Within the same period proposed charters were rejected by the voters in six cities — to wit, Akron, Canton, Elyria, Salem, Youngston, and Cincinnati. In one city, Lorain, the charter convention, apparently upon its own initiative, decided not to submit a charter; while in a number[2] of

[1] *Supra*, 73, 74.

[2] Among these were Amherst, Gallipolis, Ironton, Jackson, Mansfield, Marietta, Norwood, and Washington Court House.

other cities the voters declined to sanction the election of a commission to frame a charter. In other words, within the brief space of time mentioned more than one-fourth of the cities of Ohio, including practically all sizable cities, had essayed to exercise the home rule powers conferred by the constitution; but of this number only nine had succeeded in adopting charters.

For the purposes of analysis and of discussion in the light of certain legal difficulties which have arisen in other home rule states the Ohio amendment and the few cases that have thus far been adjudicated may be considered under two main heads.

1. *The scope of the city's powers apart from any question of conflict with state laws.* In respect to this phase of the home rule problem it is manifest upon a careful reading that the Ohio provision introduced an element of grave uncertainty which has been met with only to a limited extent in other jurisdictions. This uncertainty arose from the failure of the amendment to indicate clearly that the "powers of local self-government," which are conferred broadly upon "municipalities" (sec. 3), and the specific powers of municipal ownership of utilities (secs. 4, 5, and 6), and of excess condemnation (sec. 10) are to be exercised *only* through the charter-making power conferred (secs. 7 and 8). In other words, was it intended that these *substantive* powers of local self-government generally, and of municipal ownership and excess condemnation specifically, should or should not be dependent upon the exercise of the *adjective* power of framing and adopting a charter?

It will be recalled that in the case of every other home rule provision we have considered practically all of the substantive powers of home rule that were granted were simply included within the grant of an apparently adjective power — the power to frame and adopt a charter for the government of the city. Whatever concrete subjects-matter were by reason of this grant placed within the controlling competence of the city depended solely upon the conception of the scope of powers that might be appropriately provided for by the "charter" of a city. There could be no question that the exercise of the charter-making power was the sole means by which a city could avail itself of the self-governing powers

contemplated. In respect to this matter, then, the ambiguity of the Ohio provision was almost wholly unique.

Whether a city that is still operating under the general municipal code of Ohio may exercise the specific powers of municipal ownership and of excess condemnation that are mentioned in the home rule provision, the Ohio courts have not yet been called upon to determine, although it is possible, if not indeed probable, that the right to exercise such powers would be resolved in favor of such a city.[1] On the other hand, the question as to whether a city could exercise powers beyond the scope of its legislative charter by reference merely to the constitutional grant to "*municipalities*" of "*powers of local self-government*" was the first question that arose under the home rule amendment.

The only fact in this first case — The State *ex rel.* City of Toledo *v.* Lynch[2] — was that the city, while still organized under the general code, enacted an ordinance providing for the establishment of a motion-picture theater to be publicly owned and operated. Was this ordinance valid? Five out of six judges held that the ordinance was void. Three concurring opinions and one dissenting opinion were written. Two distinct questions of law were involved. The first of these was whether a city, not having framed a home rule charter, enjoyed any power of local self-government that was not conferred upon it by law — enjoyed such power, in other words, by direct grant from the constitution. The second question was whether the power to own and operate a motion-picture theater was in any event included within the powers of local self-government. Four out of seven judges answered both of these questions in the negative; but they were not the same groups of judges, for one member of the court con-

[1] It would seem that the procedure prescribed in section 5 is sufficiently elaborate to enable any city to enter upon a policy of municipal ownership without the necessity of making any alteration in its charter, although certain regulations in respect to the filing of a petition of electors would doubtless have to be prescribed either by municipal ordinance or state law. So also it would seem that the power to condemn property in excess of actual public needs could be exercised through the ordinary machinery for condemnation — a machinery which every city possesses.

[2] 88 Oh. St. 71. 1913.

curred in the final judgment without expressing any opinion as to the latter question, while another member rested wholly upon a negative answer to the latter question and utterly repudiated the opinion of the majority as to the former. It is manifest that under these circumstances, which in themselves constitute an eloquent commentary upon the amazing incapacity either of the court or of the makers of the constitutional provision, with the odds in this instance overwhelmingly in the court's favor, it is somewhat difficult to set forth briefly what the "court" as such "held."

Four judges [1] agreed that the fatal defect in the city's contention lay in the assumption that the powers of local self-government conferred upon "municipalities" by the constitution were thereby conferred upon a particular agency of such municipalities — to wit, the city council. The city had neither approved any "additional law" [2] granting this power to its council nor framed and adopted a charter which bestowed such power. The council could exercise only such powers as were vested in it by valid law or charter. *The council was not the municipality.* It followed, therefore, that the council of Toledo could not without specific authority exercise any power in addition to the powers which it enjoyed prior to the amendment.

The question here raised was practically identical with that which vexed the California court in respect to the direct constitutional grant of the police power to cities and which has never been answered in that state with entire consistency.[3] It may be remarked also that the police power is conferred by this same section 3 of the Ohio amendment in much the same way, although the section has not as yet been the subject of judicial construction upon this point.

The decision of the majority of the Ohio court upon this subject was doubtless justified by the consideration of the difficulties

[1] Shank, C. J., and Newman, Johnson, and Wilkins, J.J. [2] *Supra*, 632.

[3] *Supra*, 322 ff. See also the discussion of a somewhat similar question in connection with the initiative and referendum provision of the Oregon constitution, *supra*, 596–598. See also 259 ff., 403 ff., 413 ff.

into which a contrary decision might have led. If the city council could in the exercise of one power of local self-government be regarded as the municipality, it certainly would have to be regarded as competent to exercise all such powers. However difficult it may be to define the powers of local self-government, it must be recognized that the scope of such powers is considerable. If the city council was vested broadly with such powers, so that it could exercise a power not specifically conferred upon it by law or charter, it would seem that in sound logic it could also exercise a power of local self-government that was positively conferred by such law or charter upon some other agency of the municipality. In other words, if the council could successfully assert its competence to be considered the municipality itself within the meaning of the constitution, it could actually amend the charter of the city in respect to any matter pertaining to local self-government. This would be to recognize in the council authority not only to repeal provisions of the general municipal code, where a city was still operating under such code, but also perhaps to abrogate provisions of a home rule charter, where a city had framed and adopted such a charter.[1] If it was the intention of the framers of the constitution that the council should thus exercise complete powers of self-government it might well be asked why they incorporated the elaborate provisions relating to the making and amending of charters.

It is obvious that the interpretation put upon this wholly inexcusable phraseology of the Ohio amendment was a very serious matter if the court desired to pave the way for any consistency of view. It was far more serious than the construction of a provision conferring the police power upon cities without designating the agency by which such power was to be exercised. The power of local self-government is much more comprehensive than the municipal police power. Moreover the latter power is commonly exercised by ordinance and therefore

[1] In the latter case it could doubtless be held that, since a higher authority of the municipality as such had spoken through the medium of the locally made charter, the council was to that extent prohibited from putting itself forward as the municipality.

chiefly if not exclusively by the council, but the powers of local self-government are commonly exercised by a great variety of municipal agencies.

In respect to the second question involved in the Toledo case it seems probable that the three judges who concurred in the view that the power to own and operate a motion-picture theater was not one of the powers of local self-government were in fact applying a doctrine which was closely akin to that which asserts that the power of taxation may not be exercised for other than a public purpose. It is a significant fact, however, that this doctrine was not specifically mentioned. The incompetence of the city to exercise the power in question was founded upon a somewhat vague definition of the term "self-government." While admitting that a "conceptual definition" of this term was practically impossible, the opinion was nevertheless expressed that a "descriptive definition" could be given. This so-called descriptive definition of the powers of local self-government was set forth in the following language:

> They are such powers of government as in view of their nature and the field of their operation, are local and municipal in character. The force of the terms employed requires the inclusion of such powers to be exercised by officials who in some manner and to some extent represent the sovereignty of the people. It as clearly excludes the exercise of functions which are appropriately exercised by caterers and impressarios. The suggestion that moving-picture exhibitions might be made educational is gratuitous because that is not their natural object. It is unavailing because article VI of the Constitution shows that education supported by taxation is to be conducted by "a system of common schools throughout the state."

Considerable emphasis was also laid upon the fact that, while the constitution empowered municipalities to own and operate public utilities, it also imposed certain restrictions upon their powers in this regard. It was strange indeed, thought the court, that the power to acquire utilities was surrounded with certain safeguarding limitations if the capacity to own and operate amusements was to be regarded as having been conferred without restrictions. It is interesting to note that, contrary to the view of the

Oklahoma court in respect to a municipal auditorium,[1] the notion that a moving-picture theater could be included within the meaning of the term "public utility" was utterly repudiated.

It ought to be said, perhaps, that the ordinance under review in this case did not in any wise indicate that the proposed motion-picture theater was to be established as a part either of the city's educational work or recreational services. So far as the ordinance disclosed on its face the city was attempting to undertake this enterprise as a business for profit just as it might have decided to establish a retail shoe store or dry-goods store. There is no question that the court was influenced by this fact. One of the judges, as has already been said, reached his conclusion as to the invalidity of the ordinance solely upon this ground. Indeed when the several opinions handed down in this case are carefully analyzed, it seems probable, to say the least, that a majority of the Ohio court would not prevent a home rule city from entering upon such an undertaking as that of owning and operating a motion-picture theater provided the enterprise in question should be clearly established as a part of the city's educational or recreational activities.[2]

The Toledo case is the only case that has been adjudicated by the Ohio courts involving simply a question of the scope of powers included within the meaning of the term "self-government" without regard to any question of conflict with state law. Even in this case the decision, as we have seen, turned in large part upon a point that was wholly unconnected with the meaning of the term "self-government." What may be the ultimate definition of this term in cases where the city, without running counter to any statute, nevertheless embarks upon this or that specific undertaking remains to be worked out through the joint travail of the cities and the courts.

2. The relation between conflicting "general laws" and charter provisions. It will be observed that on the subject of the subordination of charter provisions to the control of general laws of

[1] *Supra*, 567–569.

[2] The point raised by the term "local self-government" was in fact the question of taxation for a private purpose; *supra*, 363, 535, 570.

the state the Ohio amendment is by no means free from ambiguity. In the first place, the legislature is commanded (sec. 2) to pass "general laws . . . for the incorporation *and government* of cities and villages." There is no indication that this refers merely to the *initial* incorporation and the *initial* government of new cities and villages. In fact the clause here employed is very similar to that used in the Ohio constitution of 1851,[1] under which the legislature provided the complete government of all cities and villages. Taken literally it unquestionably confers upon the legislature complete power over the government of cities under the sole restriction that such power shall be exercised by general laws. There is in the entire amendment no intimation of the relation which the framers intended to exist between this apparently comprehensive power of the legislature to deal with cities as they had been dealt with prior to the adoption of this amendment and the self-governing power conferred upon cities by the subsequent provisions of the amendment. However, the powers of self-government are not *specifically* made "subject to" these general laws.

It must be borne in mind that at the time of the adoption of this amendment the government of every city of Ohio was established under the general municipal code of 1902 — a law which was in fact as well as in legal theory a law of general application.[2] Manifestly a city could not adopt a home rule charter without abrogating, in large part at least, the provisions of this code in their application to such city. Yet here was the legislature placed under express mandate of the constitution to continue to provide for the government of cities by general laws. Did this mean that the legislature was to provide by these laws for the government of only such cities as had failed to exercise self-governing powers? Would an amendment to the general municipal code in respect to a matter pertaining to the "local self-government" of cities apply *only* to cities which had not framed and adopted their own charters? Apparently this is the construction that has been put upon this clause in the practice of the legisla-

[1] *Supra*, 70.

[2] *Supra*, 73, 74.

ture [1] and of cities, as well as by the courts, although the point has not been fully discussed by the latter.[2] Clearly, however, laws that are applicable only to cities which have not adopted home rule charters are not general laws in the sense of absolutely uniform application, which was the ultimate construction given to this same phrase by the Ohio court under the constitution prior to its amendment.[3] Such laws apply only to a class of cities. It would certainly be both confusing and absurd to authorize cities to supersede provisions of the general code and at the same time subject them to the control of subsequent amendments to that code; but the confusion and absurdity would be directly referable to the wholly contradictory declarations of the constitution.

It may be said that, as this clause of the constitution has been interpreted in practice and impliedly expounded by the courts, a division of the cities into two classes — cities under home rule charters and cities under the general code — has been read into the fundamental law. It is the government of these latter that the legislature is commanded to provide for by general laws.

There has been no intimation in Ohio as yet that the clause here under review must be construed to mean laws of general as distinguished from local concern. As we shall see, this distinction has, without reference to this clause, been introduced into the judicial interpretation of the term "local self-government;" but evidently no doubt has arisen that the legislature may by a law of general application to the class of cities still under the general code regulate *any* matter, whether of general or of local concern.

In the second place, as bearing upon the relation of state laws to the provisions of home rule charters, it must be noted that under the Ohio amendment the legislature is further empowered to pass "additional laws" for the government of municipalities

[1] A number of provisions of the municipal code were amended in the legislative sessions of 1913, 1914, and 1915. These did not in practice apply to cities which had adopted home rule charters.

[2] In State *ex rel.* Lentz *v.* Edwards, 107 N. E. 768 (1914), *infra*, 642, the supreme court declared the Toledo case to have held that the existing general laws for the government of cities could be amended in "one of three modes." The first of these was "by the enactment of general laws for their amendment." [3] *Supra*, 73.

which shall become operative only upon a vote of the municipal electorate (sec. 2). This merely permits the enactment of optional laws for cities. Such laws have been sustained as "general laws" in many states in the absence of any express authorization in the constitution. The Ohio amendment, however, unlike the contradictory provisions of the California constitution of 1879,[1] does not introduce any confusion in respect to the general laws which the legislature may make mandatory and those which may be made optional. Whether they shall be the one or the other is obviously within the discretion of the legislature.

In the first session of the Ohio legislature following the adoption of the home rule amendment an optional charter law was enacted. Under the terms of this law any city might by a vote of its electors abandon the old general code and become organized upon any one of the three different plans of government for which provision was made.[2] This would seem to be of peculiar advantage to the smaller cities in that it obviates the necessity of incurring the trouble and expense of drafting and adopting an individual charter. Few cities,[3] however, have availed themselves of the privilege granted by this law, local sentiment being influenced perhaps to an extent at least by the notion that a ready-to-wear garment should not be thought of when the opportunity is open to all to secure a government especially tailored to suit the local taste.

It is not expressly declared by the constitution that a home rule charter shall be "subject to" such optional additional laws as may be adopted by a vote of the people of the city. Apparently, however, there is no reason why a city which has framed and adopted a charter of its own may not subsequently accept a charter proposed by such a law.

In the third place, as bearing upon the relation between state laws and the home rule charters in Ohio, it is to be observed that the only laws to which the exercise of self-governing powers by cities is *expressly* made subordinate are general laws enacted in

[1] *Supra*, Ch. VIII.

[2] Laws of Ohio, 1913, pp. 767–786.

[3] Westerville adopted the city manager plan offered by this law on July 31, 1915.

pursuance of the police power (secs. 3 and 7). We have already had occasion to note that in every home rule state in which the question has arisen, the courts have without exception declared in effect that the city under a charter of its own making stands in no different position whatever from the city under a legislative charter in respect to the complete subordination of its police ordinances to the police laws of the state.[1] The police regulations of the city may parallel similar regulations imposed by state law but in case of actual conflict between the two the state law supersedes. This is a rule which is applicable to the case of a home rule city in precisely the same manner that it is applicable to a city operating under a legislative charter. No peculiar difficulty has arisen in applying this rule to home rule cities and there is no patent reason why such difficulty should arise. It would seem, therefore, that the only respect in which the powers of Ohio cities were expressly subordinated to the control of state laws was a respect in which there was no apparent necessity for a specific declaration of the constitution.

Finally, it may be noted in this connection that the city is empowered to "frame and adopt or amend a charter for its own government" and to "exercise thereunder all powers of local self-government" (sec. 7). While from the phrasing of this section it is not absolutely certain that the subjects-matter of such a charter must relate *exclusively* to the local self-government of the city, this is perhaps a reasonable interpretation of the loose language of the grant. So interpreted the Ohio provision ranges itself somewhat in line with the Colorado provision as construed by the courts of that state.[2] Although there is no specific declaration, except as to the police power, that home rule charters shall be subject to state laws in matters of state as distinguished from local concern, the implication of such a distinction is unmistakable. The relation, therefore, of superiority and inferiority as between state laws and charter provisions turns upon the old vague distinction embodied, as it is in Ohio, in the definition of the new term "local self-government." In respect to matters pertaining

[1] *Supra*, 138, 256, 403.

[2] *Supra*, 516, 522, 556.

to the local self-government of the city the charter provisions supersede and control state laws. In respect to all other matters charter provisions must yield to state laws. Indeed, even in the absence of a state law governing a matter not pertaining to the local self-government of the city it is questionable whether such matter may be made the subject of charter control, although this point has not been specifically determined by the courts.

Already several cases have been adjudicated involving questions of conflict between state laws and charter provisions:

(*1*) *Elections.* In the case of Fitzgerald *v.* City of Cleveland [1] the court was asked to issue an injunction restraining the city from holding a primary election for the nomination of candidates for municipal offices under the provisions of the home rule charter adopted in July, 1913. Briefly put the allegation was that the provisions of the city's charter upon the subject of nominations were in conflict with the general election laws of the state, and that it was beyond the power of the city to regulate matters pertaining to the *nomination* of candidates for offices even if it was within the competence of the city to regulate matters pertaining to the *election* of such officers. Three judges concurred in the judgment which sustained the validity of the charter provisions, each of these judges rendering a separate opinion. Three judges also dissented. In all, the opinions handed down were spread over sixty pages of the published reports of the court and in consequence it is again somewhat difficult briefly to analyze the views expressed.

It may be said that all of the concurring judges were of the opinion that matters pertaining to municipal elections were within the "powers of local self-government." And it may also be said that the dissenting judges refused to express any opinion generally upon this point, it being their view that the issue before the court was only in respect to the *nomination* of officers and that this issue was determined by the application of specific provisions of the constitution wholly outside of the home rule amendment. It is probable, to say the least, that had the question been

[1] 88 Oh. St. 338. 1913.

broadly as to the competence of the city to regulate matters pertaining to municipal elections in a manner differing from that prescribed by state law, and had there been no other complicating constitutional provision, there would have been a large concurrence of the members of the court in the judgment that was rendered.

The opinion expressed by Johnson, J. may be selected from among the opinions as setting forth the clearest argument in support of the view that municipal elections pertain to the local self-government of a city. After reviewing certain of the cases upon this subject which we have had occasion to discuss above, he said:

> It is clear upon reason and authority that municipal elections are and should be regarded as affairs relating to the municipality itself, and, in the absence of fundamental limitations prohibiting, are things that may be provided for by the local government. This does not involve the loss by the state of its proper authority within the city.
>
> It is true, as contended, that the state at large is interested in the purity of every election, municipal or otherwise, and is interested in making provisions fixing the qualifications of electors and for the preservation of the purity of the ballot effective throughout the state, but the state is likewise interested in the protection of every other right of the citizen and should and will throw around all of these rights every protection which can be afforded by the sovereign power. The state itself is interested in protecting the municipality in the exercise of every right and power granted to it by the constitution. Every energy of the state, executive, legislative and judicial, may be properly invoked and will respond to the protection of such rights.
>
> But it does not follow from this that the state would or could interfere with the exercise of the powers of local self-government which the people of the state had conferred upon the municipality by their constitution. The method of electing municipal officers would seem to be a matter peculiarly belonging to the municipality itself. The very idea of local self-government, the generating spirit which caused the adoption of what was called the home-rule amendment to the constitution, was the desire of the people to confer upon the cities of the state the authority to exercise this and kindred powers without any outside interference.

It should be noted that section 14 of the Ohio home rule article declared that "all elections and submissions of questions provided

for in this article shall be conducted by the election authorities prescribed by general laws." Did this provision have any bearing upon the subject under review by the court? It would seem not. The only "elections and submissions of questions" provided in the article itself were: first, the elections mentioned in section 2 for the adoption or rejection of "additional laws" for the government of cities, which elections were expressly required to be conducted "under regulations to be established by law;" second, the elections mentioned in section 5 for the ratification or rejection of proposals to acquire public utilities; third, the elections mentioned in section 8, for the submission of the question "shall a commission be chosen to frame a charter," for the choice at the same time of members of a charter commission, and for the ratification or rejection of the charter, provisions for which latter elections were required to be "made by the legislative authority of the municipality in so far as not prescribed by general law;" and fourth, the elections mentioned in section 9 for the submission of charter amendments. It is manifest at a glance that the election of officers provided by the terms of a home rule charter was not within this list. It was not, in other words, one of the elections referred to in section 14, which section in consequence had no bearing whatever upon the issue at bar. This point was made in more than one of the opinions rendered. Indeed since it was evident that the subject of elections had been under the consideration of the constitutional convention, it was "natural to suggest" that, if the convention had intended that all municipal elections should be regulated by state law, "so important an exception to the grant of all power of local self-government would have been included in the article."

Attention may be directed in passing to the fact that section 14 contained only a single specific requirement — to wit, that the elections provided for in the home rule article should be conducted *by the election authorities* prescribed by general law. Even in respect to these elections, therefore, it would seem that a city might perhaps, through the medium of its own charter, regulate as to the future any matter in connection therewith except the matter

of election officials.[1] It appears, however, from a review of the home rule charters in force in Ohio that no city has attempted to regulate any matter pertaining to such elections. On the other hand, it would seem that the requirement of section 14 might at some time prove to be rather vexing and embarrassing. If, for example, a city should establish by charter provision, as many home rule cities in other states have established, the authorities who should conduct city elections, and if such city should thereafter hold an election upon a proposal to acquire a public utility, such election could obviously not be conducted by the election officials prescribed by the charter but only by such officials as might be provided for in the general laws of the state. This is so nice a point that it is in itself of little significance. It is noted here solely because it illustrates that in the phrasing of a constitutional provision granting home rule powers the most painstaking care is necessary. Every word and every expression should be laboriously scrutinized. It is not to be supposed that the framers of the Ohio provision intended by section 14 to open the way for any such absurd situation as the one just indicated. The possibility simply never occurred to them. Yet the law is in fact as firmly fixed as if there had been deliberateness of purpose; and petty embarrassment may easily develop out of it. As Ohio charters now stand, such a difficulty is not likely to arise for the reason that every home rule charter has voluntarily adopted the election authorities as prescribed by general law. Such adoption by these cities was, however, *wholly voluntary*.

To return, then, to the final point covered by the opinions expressed in the Fitzgerald case, it may be noted that in another amendment ratified in September, 1912 it was expressly declared that "all nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law."[2] The provisions of the Cleveland charter which were in dispute established a nominating system

[1] This would not be true in respect to any election for the ratification or rejection of a charter, for the clear implication of the provision is that such elections may be regulated by general laws.

[2] Art. V, sec. 7.

by which candidates for municipal offices in that city should be chosen. Were these provisions in violation of the amendment and was the city subject to the control of the state law in this matter? In the opinion of the three dissenting members of the court this was the only point involved in the case. While it was admitted that the term "law" did not lend itself to precise definition, it was nevertheless the view of these judges that the connection in which it was used in the primary election amendment showed conclusively that the framers of that amendment intended this term to mean a law passed by the legislature.

It will be recalled that this was in accord with the decision of the Oklahoma court upon practically the same point;[1] and it must be admitted that, everything considered, there was strong force to the argument that where the constitution in unmistakable terms required that a system of nominating "municipal officers" by primary elections or by petition should be provided by law, this clearly implied a law enacted by the legislature. However absurd it might be that the legislature should have power to control, within the limits set by the constitution, the matter of municipal *nominations*, while the city, there being no constitutional mandate to the legislature in respect to municipal *elections*, should be competent to regulate all other matters pertaining to its own elections, the fact is that this absurdity was created by the constitution and not by the judiciary. The probable truth of the matter is that the primary election amendment was drafted without any thought or consideration of the purport of the home rule amendment and possibly without any knowledge whatever of the fact that this subject of election control had arisen to harass the courts in nearly every state in which home rule powers had been conferred upon cities. It is undeniable that the framers of the constitutional amendments in question should have considered them in relation to each other; but since they apparently did not do so, it is open to question how far the courts, in order to eliminate a practical absurdity created by the express terms of the fundamental law, should allow themselves to be led into at-

[1] *Supra*, 584, 585.

tenuated arguments founded upon an utterly unwarranted twisting of the plain meaning of terms. This sort of thing is perhaps justified to an extent where a more or less static constitution must be applied to meet situations which its framers could not reasonably have anticipated. But where a convention has been assembled for the avowed purpose of revising a constitution to meet all modern requirements, it is doubtful, to say the least, whether the courts within a year after its adoption should assume the function of correcting by judicial decree such blunders, whether of carelessness, ignorance, or stupidity, as might be found written in terms that admit of no alternative construction.

Read, for example, the following attempt that was made by Judge Johnson to "reconcile" the two amendments here under review:

> The mandate in Section 7, Article V, is to provide by law for the nomination by primary or by petition of all elective *state, district, county and municipal officers.* Such a law applying throughout the state to all of the officers named must of course be passed by the general assembly, and will therefore apply uniformly throughout the whole state and to every municipality which has not taken the steps pointed out in the Toledo case "to secure immunity from such general laws."
>
> It must be remembered that any statute passed under Section 7 of Article V, which provides by law for nomination, by primary, or by petition, of all elective state, district, county and municipal officers, is a general law. But this general law passed under this provision must yield to a charter provision adopted by a municipality under a special constitutional provision, which special provision was adopted for the purpose of enabling the municipality to relieve itself of the operation of general statutes and adopt a method of its own to assist in its own self-government, and which charter when adopted has the force and effect of law.

The logic of this reasoning is far to seek. The home rule amendment was no more a "special constitutional provision" than was the primary election law amendment. The latter amendment did not either expressly or impliedly except home rule cities from its operation. Let it be fully conceded that the power to regulate municipal nominations belongs inherently among the powers of local self-government and that no express exception in respect

to this matter was made in *direct* connection with the grant of "all" such powers. It is nevertheless perfectly manifest that this grant of powers was not as comprehensive as the use of the term "all" might imply. The amendment did not, it is true, *expressly* declare that the city should exercise all powers of local self-government subject to the limitations of the fundamental law itself. But surely it could not be contended that the home rule city was empowered even in the exercise of self-governing powers to override the constitution of the state. Now in plain point of fact there were a number of powers of local self-government that were by the terms of the constitution withdrawn from the city that elected to frame its own charter — powers in respect to which such a city was placed in precisely the same category as cities under legislative charters. Thus in the same article that conferred home rule powers *all* cities were placed under certain restrictions in respect to the matter of acquiring public utilities. Was not the home rule city to this extent deprived of a power of local self-government? Again restrictions were imposed by this article upon *all* cities in the matter of issuing bonds for the condemnation of property in excess of what might be actually occupied for public improvements. If the validity under the federal constitution of this grant of power be conceded, was not the city to this extent deprived of a like power by the limitation placed by this article upon the competence of *any* municipality to levy special assessments? Could it be contended for a moment that a city, because it was authorized to exercise *all* powers of local self-government, was freed from the control of the laws restricting the financial powers of *all* cities, in spite of the fact that the article clearly contemplated the enactment of such laws?

In another amendment which was adopted in the year 1912 the "initiative and referendum powers" were "reserved to the people of *each* municipality." [1] Surely it was a matter pertaining to the local self-government of a city to decide whether or not ordinances should be enacted in this manner. But could it be contended that a city in framing a charter was competent to pro-

[1] Art. II, sec. 1f.

hibit the exercise of initiative and referendum powers? This provision also declared that "such powers shall be exercised in the manner now or hereafter provided by law." Most, if not all, of the home rule charters of Ohio have in fact by their own terms provided for the exercise of such powers; and presumably, under the doctrine of the Fitzgerald case, the court would hold that these charter provisions superseded the law upon this subject. In other words, if the occasion should arise, the court would be compelled to dissect this provision of the constitution and to declare that, while a home rule city *was* embraced within the term "each municipality," so that in the exercise of local self-government the people of the city could not deprive themselves of initiative and referendum powers, such a city was, on the other hand, *not* within the meaning of the term "each municipality" when it came to the consideration of the clause of the same sentence which declared that such powers should be exercised in the manner provided by law.

There are other provisions of the Ohio constitution that impose limitations upon cities in the exercise of specific powers of local self-government; but further enumeration seems unnecessary. The point is that the grant of *all* such powers was certainly subject to some constitutional exceptions. This being so, it is at least open to debate whether the court, in an effort to sustain the spirit of the home rule article and to read substance into its vagueness, was justified in declaring that another article of the constitution did not mean what it plainly said.

(*2*) *Civil service.* Almost precisely the same difficulty in the way of interpreting the home rule amendment in the light of another amendment adopted in 1912 was presented in the case of State *ex rel.* Lentz *v.* Edwards.[1] The other amendment involved was that which required the establishment of the merit system in "the civil service of the state, the several counties, and cities," and expressly declared that "laws shall be passed providing for the enforcement of this provision."[2] The legislature promptly complied with this mandate by enacting a new civil service law

[1] 107 N. E. 768. 1914.

[2] Art. XV, sec. 10.

in which provision was made for the appointment of civil service commissioners in every city by the "mayor or other chief appointing authority."[1] Subsequently the city of Dayton adopted a charter which provided for the appointment of such commissioners by the council, and the commissioners appointed under the law instituted a proceeding in *quo warranto* against the commissioners appointed under the charter.

The court held that it could "not be contended that the civil service of a city is not a matter of municipal concern, nor that the power of regulating that service is not one of the powers of local self-government." So long as the charter provisions comply with the merit principle required by the constitution "they are valid, and . . . discontinue the general law on the subject as to that municipality." There was no specific discussion of the fact that the responsibility for the enforcement of the merit principle was by the constitution expressly imposed upon the legislature; but the "principles declared in the case of Fitzgerald *v.* City of Cleveland" were held to "apply here and control the decision of this case."[2]

It may be remarked in passing that this is the first case involving a civil service question proper that has arisen in any of the home rule states,[3] although it will be recalled that question has arisen in respect to the power of the city to regulate the matter of making removals from office in a manner contrary to state law.[4] Incidentally it may also be recorded that in a case decided at the same term of court as the Lentz case the Ohio court held that the civil service law did not confer upon the state commission power to investigate acts of the mayor of a city in remov-

[1] Laws of Ohio, 1913, pp. 608, 708.

[2] A case involving the legality of the sinking fund commission of Cleveland was decided in 1915 by applying the rule of the Lentz case. No opinion was written because the cases were regarded as being so similar. The charter provisions establishing the sinking fund commission were sustained, although in conflict with the general law, and although the home rule amendment expressly authorized the legislature "to limit the power of municipalities to levy taxes and incur debts."

[3] Except Crowley *v.* Freud, *supra*, 388, which involved the power of San Francisco to apply the merit system to county officers.

[4] *Supra*, 103, 313, 364.

ing local civil service commissioners although it did vest in them power to investigate the acts of the commissioners themselves.[1] The city in which such an investigation was contemplated had not adopted a home rule charter. Whether the state commission would have powers of investigation over a local commission established by a home rule charter was not discussed; but under the doctrine of the Lentz case it is probable that such powers would not be sustained. It is probable also that as to the home rule city the governor would be held to have no power to remove the mayor, although he enjoys this power under the general municipal code. The court referred to this provision in the code as showing that the view which they held concerning the investigatory powers of the state civil service commission as prescribed by law would "not weaken in any way the arm of the state in the exercise of a supervisory power over the conduct of the mayor of a city." Yet the mere exercise of home rule powers would doubtless not only "weaken" but also completely destroy the "arm of the state" in this capacity.

(3) *Streets and public utilities.* In Billings *v.* Cleveland Railway Co.,[2] decided in July, 1915, the supreme court of Ohio refused to sustain the contention that an ordinance of Cleveland granting to a street railway company a franchise to extend its tracks in a certain street was void because, although enacted in compliance with the provisions upon the subject contained in the home rule charter of the city, the consent of the property owners in the street had not been obtained as required by the General Code.[3] It was declared to have been "contemplated by the framers of the amendment to the constitution that the provisions in a charter, adopted by a city, would differ from the general laws of the state, within the limits defined by the constitution." No reference was made to the fact that the amendment expressly commanded the legislature "to provide for the . . . govern-

[1] Green *v.* State Civil Service Commission, 107 N. E. 531. 1914.

[2] Not yet reported. A typewritten copy of the opinion rendered was kindly furnished the author by Chief Justice Hugh L. Nichols.

[3] Secs. 3777, 9105.

ment of cities" by "general laws."[1] General control over the streets of a city, as well as specific control for public utility purposes, was held to be a matter of purely local concern and therefore included within the powers of local self-government.[2] Moreover, express authority to regulate this matter by the provisions of a home rule charter was found in the constitutional amendment itself, where, in addition to broad powers of municipal ownership, the city was authorized "to contract with others" for the "product or service" of any public utility.[3]

This case is not authority for the rule that the power to regulate *all* matters pertaining to the operation of public utilities is one of the powers of local self-government. It involved no question of the competence of the city generally to regulate public utility corporations in the exercise of their *existing* franchises. Whether such broad competence can be derived from the power to control streets remains to be determined in Ohio. But certain it is that the doctrine that in its management of streets a city acts merely as an agency of the state[4] was utterly rejected. Moreover, it would seem that the power of the city to make charter provision for the regulation of utility corporations in their exercise of future franchises is plenary. For franchises are contracts of very variable content,[5] and if the right to prescribe the terms of such contracts be conceded to the home rule city, it is manifest that the local charter might require that every franchise should expressly reserve to the city the power of general regulation.

Home Rule in Nebraska

At the general election held in November, 1912 the following amendment conferring powers of home rule upon the cities of Nebraska was by ratification at the polls incorporated into the constitution of that state:[6]

[1] *Supra*, 631.

[2] Sunset Telephone & Telegraph Co. *v.* Pasadena, 161 Cal. 265 (1911), *supra*, 309, 349, was quoted with approval.

[3] *Supra*, 622.

[4] *Supra*, 276.

[5] *Supra*, 310–313; 450.

[6] Art. XI A.

Sec. 2. Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a convention of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city at any general or special election, whose duty it shall be within four months after such election, to prepare and propose a charter for such city, which charter, when completed, with a prefatory synopsis, shall be signed by the officers and members of the convention, or a majority thereof, and delivered to the clerk of said city, who shall publish the same in full, with his official certification, in the official paper of said city, if there be one, and if there be no official paper, then in at least one newspaper published and in general circulation in said city, three times, and a week apart, and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified voters, voting thereon, shall ratify the same, it shall at the end of sixty days thereafter, become the charter of said city and supersede any existing charter and all amendments thereof. A duplicate certificate shall be made, setting forth the charter proposed and its ratification (together with the vote for and against) and duly certified by the city clerk, and authenticated by the corporate seal of said city and one copy thereof shall be filed with the secretary of state and the other deposited among the archives of the city, and shall thereupon become and be the charter of said city, and all amendments to such charter shall be authenticated in the same manner, and filed with the secretary of state and deposited in the archives of said city.

Sec. 3. But if said charter be rejected, then within six months thereafter, the mayor and council or governing authorities of said city may call a special election at which fifteen members of a new charter convention shall be elected to be called and held as above in such city, and they shall proceed as above to frame a charter which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated may be repeated until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, and a copy thereof deposited in the archives of the city, whereupon it shall become the charter of said city. Members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city.

Sec. 4. Such charter so ratified and adopted may be amended, or a

charter convention called, by a proposal therefor made by the law-making body of such city or by the qualified electors in number not less than five per cent. of the next preceding gubernatorial vote in such city, by petition filed with the council or governing authorities. The council or governing authorities shall submit the same to a vote of the qualified electors at the next general or special election not held within thirty days after such petition is filed. In submitting any such charter or charter amendments, any alternative article or section may be presented for the choice of the voters and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, as provided in section two hereof. The city clerk of said city shall publish with his official certification, for three times, a week apart in the official paper of said city, if there be one and if there be no official paper, then in at least one newspaper, published and in general circulation in said city, the full text of any charter or charter amendment to be voted on at any general or special election.

No charter or charter amendment adopted under the provisions of this amendment shall be amended or repealed except by electoral vote. And no such charter or charter amendment shall diminish the tax rate for state purposes fixed by act of the legislature, or interfere in any wise with the collection of state taxes.

This provision, as compared with the provisions of certain other states, is in no respect distinctive. The fourth section, although the point is not free from doubt, may perhaps be construed as regulating the manner in which a first charter convention as well as subsequent conventions may be called. So construed it reads precision into the vague declaration of the first section to the effect that the city may exercise the power conferred "by causing a convention of fifteen freeholders . . . to be elected." It is open to question, however, whether the "mayor and council or governing authorities" are by the third section vested with absolute discretion, upon the rejection of a charter, to decide upon the call of another convention within six months. Such discretion appears to be vested in these authorities; but if the call of a first convention may be initiated by a five per centum petition of voters, it is passing strange that the call of a second convention, when the

work of the first has proved abortive, may be initiated *only* by the corporate authorities. If these are the conditions established by the constitution — and such they appear to be — it is none the less to be noted that, in case the authorities fail to act upon the call of another convention within the prescribed six months, the original *status quo* in regard to this matter would presumably be restored. In other words, a charter convention could doubtless be thereafter initiated by petition of voters as well as by action of the law-making body of the city. On the whole, however, it must be said that the provisions of the constitution touching this matter of procedure are somewhat inexcusably vague and uncertain.

Under the existing election laws these provisions have nevertheless been regarded in practice as eliminating the necessity of the passage of an enabling act by the legislature. In 1913 a brief statute was enacted with the object of clearing up at least one ambiguity in respect to the matter of procedure. Section four declares that "in submitting any such charter or charter amendments, any alternative article or section may be presented for the choice of the voters." This does not clearly indicate that an article or section might be submitted by petition as an alternative to some article or section submitted by a charter convention. The statute in question [1] expressly provides that additional or alternative articles and sections may be proposed by petition of ten per centum of the voters and submitted at the same time that any charter or charter amendments prepared by a charter convention are submitted. This statute is apparently merely in the nature of a supplement to the home rule requirements as laid down in the constitution.

The Nebraska amendment contains the provision that is found in the constitutions of so many home rule states to the effect that the charter framed and adopted by any city shall be "consistent with and subject to the constitution and laws of the state." What may be the scope of powers included within the grant of authority to frame a charter and what may be the order of precedence

[1] Laws of Neb., 1913, p. 569.

between state laws and charter provisions that are found to be in conflict are questions that remain to be determined in this state.

As yet no home rule charter has been adopted in Nebraska. Charters were defeated by the voters of Lincoln in December, 1913 and by the voters of Omaha in March, 1914. A charter convention was elected in the city of Hastings in the spring of 1913 but adjourned without submitting a charter to the people. According to the census of 1910 there are only twelve cities in this state which have a population of as many as five thousand inhabitants — the number required by the constitution before a city may exercise the home rule powers conferred. The history of the Nebraska home rule amendment in practice as well as in judicial construction remains yet to be unfolded.

Home Rule in Texas

The Texas constitution of 1876 provided that "cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law," [1] and that "cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the legislature." [2] At the general election held in November, 1912 an amendment was adopted which wrote this latter provision out of the constitution and substituted the following declaration: [3]

> Cities having more than five thousand (5,000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the state, or of the general laws enacted by the legislature of this state; said cities may levy, assess, and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the

[1] Art. XI, sec. 4. [2] Art. XI, sec. 5. [3] Art. XI, sec. 5.

interest thereon and create a sinking fund of at least two per cent. thereon; and provided further that no city charter shall be altered, amended, or repealed oftener than every two years.

According to the census figures of 1910 there were in Texas forty cities with a population of more than 5000 inhabitants. Eight of these cities had populations of more than 25,000. The largest and the second largest cities — San Antonio and Dallas — were still slightly below the one hundred thousand mark. Houston and Fort Worth had between seventy and eighty thousand inhabitants, while Galveston with a population of 36,000 ranked fifth among the cities of the state.

Under this constitutional grant of power, amplified by an "enabling act" passed in April, 1913,[1] activity among the cities of Texas in the framing, adopting, and amending of charters began almost immediately. Within a period of less than two years following the adoption of the constitutional amendment the cities of Amarillo, Denton, McKinney, Sweetwater, Waco, Wichita Falls, and Taylor had framed and adopted new charters, while one or more amendments had been submitted and ratified in Beaumont, Corsicana, Dallas, El Paso, Ennis, Galveston, Houston, Houston Heights, Marshall, San Antonio, and Terrell. Some of these amendments were of minor importance but others effected charter changes of a fundamental character.

At the time of the adoption of this home rule amendment every city of importance in Texas was operating under a special legislative charter. It will be observed that the amendment does not *specifically* prohibit the enactment of special laws relating to the affairs of those cities which had not elected to exercise the home rule powers conferred. Moreover, when it is considered that the declaration of the constitution to the effect that cities of 10,000 inhabitants or less "may be chartered alone by general law" was not altered by the amendment but remained as a part of the fundamental law, it would seem that by somewhat clear implication the power of the legislature to continue the policy of special legislation, at least for those cities which may not take advantage

[1] General Laws of Tex., 1913, ch. 147.

of the power to form charters, remained undisturbed. What may be the correct interpretation of the constitution upon this point has not as yet been determined by judicial decision.

So far as home rule charters are concerned it is to be noted that their provisions are required to be consistent with "the general laws enacted by the legislature." Of course this points the way for the courts to declare void any charter provision which is found to be in conflict with a state law on a subject of general, as distinguished from local, concern. But this requirement in the Texas amendment is of especial significance in view of the fact that the amendment itself is obviously not self-executing. Unlike the Oregon provision it was not accompanied by another amendment conferring initiative and referendum powers. It was manifestly necessary that procedure should be prescribed by which the qualified voters of a city might exercise charter-making powers, although it may be noted incidentally that during the months immediately following the adoption of the amendment but preceding the enactment of an enabling statute, certain cities of Texas took steps of an informal and unregulated character in the direction of exercising the home rule powers conferred.[1]

There seems to be little doubt that, as in the case of Michigan, the legislature of Texas is competent to enact a general law regulating not only the procedure for the exercise of charter-making powers but also the scope of powers which may be exercised. In other words, it does not seem possible that the courts could construe the term "general laws" as being limited to laws of general or state-wide concern, for since it is patent that a general law effectuating the home rule amendment is indispensable, which law would unquestionably relate to the affairs of cities, it would seem that the courts would probably be under compulsion to declare that the general laws with which charter provisions must be consistent embraced not only laws of general concern but also laws of municipal concern but of general application to cities. The only essential difference, then, between the Texas scheme and the Michigan scheme is that in the latter state the competence of the

[1] Such steps were subsequently confirmed by the enabling act.

legislature appears to be limited to the enactment of a single general law for the incorporation of cities, while in Texas the legislature is competent to enact any number of general laws relating to the affairs of cities. If this is the proper construction to be placed upon the home rule amendment it is manifest that the cities of Texas are wholly at the mercy of the legislature in respect to the extent of powers which they may exercise. Moreover, the possibility of the classification of cities — a practice which would greatly facilitate the subordination of home rule cities to legislative domination — must be considered.

In spite of the fact that the power of the legislature to override the home rule competence of cities appears to be practically without limit, it is worthy of remark that the enabling act of 1913[1] discloses an inclination on the part of the legislature to defer with respect to the spirit of the home rule amendment rather than a desire to assert the letter of its own authority. While the statute is somewhat rambling and prolix in character it does not impose nearly so many limitations as does the Michigan home rule act. It regulates in detail the procedure for the exercise of charter-making powers, this procedure being very similar to that prescribed in other states.[2] "A charter commission" must consist of "not less than fifteen members or more than one member for each three thousand inhabitants." The law does not expressly declare what authority shall determine the exact number of commissioners, but presumably this matter would be settled by the legislative authority of the city or by the voting petitioners according to whether the one or the other of these authorities initiated the movement for the selection of a commission. The law specifically contemplates the amendment of existing legislative charters as well as of home rule charters;[3] and this would seem to be likewise within the contemplation of the constitutional amendment itself.

In addition to the tax-rate limit and the requirement of a sinking fund for debts, as prescribed by the constitution itself, the home rule city is prohibited from issuing bonds except upon the authorization, by a majority vote, of the qualified tax-paying

[1] Laws of Tex., 1913, ch. 147. [2] *Supra*, 116. [3] *Supra*, 614 ff.

voters, and all bonds are required to be submitted to the attorney-general for his approval and to the state comptroller for registration "as provided by the state law." On the other hand, it is well worth noting that the home rule amendment itself apparently proposes that cities may, if they choose to do so, exercise practically complete power over their systems of taxation. They "may levy, assess, and collect such taxes as may be authorized by law *or by their charters.*"

So far as the general scope of the city's powers is concerned the enabling act expressly declares that "by the provisions of this act it is contemplated to bestow upon any city adopting a charter or amendment hereunder the full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty." After an exceedingly comprehensive detail of the powers which every city may exercise the law declares that "the enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government."[1]

In the light of certain questions which have arisen in the other home rule states which we have considered, attention may be called to a few of the powers which are expressly conferred upon cities by this enabling act. Thus the right to make provision for the annexation of territory is expressly granted. In this connection it may be noted that the Texas amendment does not employ the phrase "a charter for its own government" but merely declares that cities may "adopt and amend their charters." Since municipal charters commonly contain provisions on this subject of annexation it may be held that the legislature was competent to confer the power to control this matter. On the other hand, the impolicy of vesting in a city the complete power to add to

[1] It is further provided that "all powers heretofore granted any city by general law or special charter are hereby preserved to each of said cities, respectively, and the power so conferred upon such cities, either by special or general law, is hereby granted to such cities when embraced in and made a part of the charter adopted by such city; and provided that, until the charter of such city as the same now exists is amended and adopted, it shall be and remain in full force and effect."

its own territorial jurisdiction, perhaps without the consent of the people residing upon the annexed territory, is obvious. And this is not to mention the difficulties that might arise from any attempt to amalgamate adjacent cities with charters containing conflicting provisions upon this subject.

Practically complete power is vested in the city to own and operate public utilities as well as to regulate privately owned utilities as to rates and service. Complete control is also conferred in respect to streets and street improvements. The city appears to be able to exercise extensive police powers, although it is provided that "no ordinance shall be in conflict with the state law or provide a penalty in conflict therewith save and except in the case of the obstruction and incumbrance of the public streets alleys, avenues, and boulevards of said city." The local charter may provide for a police department and impliedly the charter may regulate all matters pertaining to such department, but there is no mention of the competence of a city to create a police court. Likewise the power of the city to establish a health department is expressly confirmed. Of especial significance is the grant of power "to provide for the establishment of public schools and public school system . . . and to have exclusive control over same and to provide such regulations and rules governing the management of same as may be deemed advisable" and "to levy and collect the necessary taxes, general or special, for the support of such public schools and public school system." Under this comprehensive grant of powers it would seem that the entire control of matters pertaining to education has been transferred to the cities which elect to exercise the powers of home rule.

It is too early to declare what may be the result in law and in practice of the home rule scheme as established by constitutional amendment and the elaborating enabling act in the state of Texas. There has been as yet no judicial interpretation of any point in connection therewith. The constitutional amendment itself is by no means unambiguous although, as has already been noted, it appears to vest very large powers in the legislature either to make the principle of home rule a vital and comprehensive reality or to

transform it into a hollow mockery. While the legislature has unquestionably inaugurated a policy of great liberality toward cities, it remains to be seen what the ultimate legislative practice may be. The nature of this practice will determine not only the existence of home rule as a fact but also, in considerable measure at least, the number and character of the difficulties which the courts will encounter.

CHAPTER XVIII

SOME GENERAL CONCLUSIONS

Most if not all of the legal difficulties that have arisen in the home rule states have been discussed in the preceding chapters. There remains the task of formulating such conclusions as may be reasonably deduced from a brief review of these difficulties as a whole. Surely these cannot be without meaning to the serious student of our ever evolving institutions or to the practical statesman who participates directly in their molding. These conclusions may be presented in three comprehensive divisions, the first relating to the machinery of home rule, the second to grant of home rule powers, and the third to the relation between the powers of cities and the powers of the state legislature.

The Machinery of Home Rule

Our national constitution, in reserving "all other powers" to the states, prescribes no machinery whatever for the exercise of these powers. The reason for this omission lies in facts of history that are too well known to excuse repetition. Had the federal element in our system of government originated in an abstract political philosophy, had it been adopted merely because of belief in its soundness as a principle of governmental organization, had it been introduced in place of an existing centralized system, it is possible, if not indeed probable, that the constitution which established the federal system would have had something to say concerning the machinery by which the states might exercise the powers reserved to them.

As it is, however, the states have been left to their own devices in this matter. In one respect practically complete uniformity

prevails in the machinery which they have voluntarily adopted; in every state there is a fundamental law which establishes the government and which cannot be changed at the pleasure of that government. There are, however, more or less important variations in the machinery which the several states have themselves created for the alteration of their constitutions. Moreover, as every student of our government knows, the machinery which they have provided has sometimes been imperfect or incomplete, and occasionally constitutional amendments have been made, as well as wholly new constitutions put into effect, in somewhat irregular fashion.

Now it is entirely conceivable that power over their own affairs — without considering for the moment what that imports — might be conferred upon cities by a state constitution in much the same way as power over state affairs is reserved to the states by the constitution of the nation. The people of each city would then be compelled to work out for themselves an appropriate machinery for the exercise of these powers. It may be assumed perhaps that the custom of providing a charter or fundamental law for the city would be continued. However the terms may differ in origin and in precise definition, the "constitution" of a state and the "charter" of a city are in many respects similar instruments. Each is the fundamental law of its governmental unit. Varying greatly in the matter of elaboration and detail, each provides an organic form of government for its unit and establishes at least the principal agencies of that government. Neither can be altered at the pleasure of the government which it creates, for the sanction of each is referable to a superior authority. This authority is the electorate in the case of a constitution. It is the legislature or the electorate in the case of a municipal charter. The problem of the city, therefore, if it were simply vested with power over its own affairs in general terms, would be to set up a machinery for the making and amending of its own charter, just as the problem of the states was to create a machinery for the making and amending of constitutions. In the transition from legislative control (through the enactment of

charter statutes) to local control over municipal affairs, where no process of charter-making was prescribed by the superior authority which granted the powers of home rule, it is obvious that the electorate of a city would be compelled to act in an irregular manner until such time as they had incorporated into their charter or fundamental law a regular procedure for the making and amending of that law.

It is open to grave question whether such a scheme for the establishment of a system of home rule would be at all desirable. Moreover, accustomed as the courts have been to construe the powers of cities with strictness and to hold the corporate authorities of cities to a rigid compliance with the letter of the law, it is doubtful whether they could be made to appreciate the close analogy between the evolution of constitution-making and the evolution of charter-making. It is more than likely that under such a grant of powers as we are here discussing the city would under judicial decree, find itself incapable of acting in the absence of a prescribed machinery for acting.

Certain it is that no state has yet conferred home rule powers upon cities with the contemplation that the people of the several cities would evolve their own machinery for the complete exercise of those powers and in this evolution gradually emerge from irregularity to regularity. The home rule amendment in the state of Oregon contained a grant of powers that was apparently of the type here indicated. It is nevertheless difficult to say how the courts of that state would have construed this grant for purposes of effectuation had not an initiative and referendum amendment to the constitution been adopted at the same time.[1] So far as practice is concerned it may be said that the machinery for the exercise of home rule powers by cities had been prescribed almost wholly by the state itself. Moreover, this machinery has been established for both the initial and the subsequent exercise of such powers. This raises several interesting questions.

1. Shall the machinery for the initial exercise of home rule powers be prescribed by the constitution or by statute? It will be recalled

[1] *Supra*, 549 ff.

that the home rule provisions of all of the states which we have considered, with the exception of Oregon, Michigan, and Texas, regulate in considerable detail the procedure that must be followed in the making, adopting, and amending of city charters. Although these detailed provisions have in one or two states been held to be self-executing, to require no supplementary legislation whatever,[1] it is simply a fact that not one of them *has* been completely self-executing. Every one of them makes provision for certain elections in connection with the exercise of the home rule powers conferred. Now it is perfectly plain that the conduct of elections necessitates the regulation of numerous details. It would be ridiculous to incorporate a complete set of these details into the state constitution. They are everywhere prescribed by statute. If in practice cities have found themselves competent to exercise home rule powers without any legislation *directly supplementing* the constitutional grant of powers, this has been simply because the *existing* general election laws contained provisions adequate for their exercise. These laws were none the less supplementary and the exercise of home rule powers was none the less dependent upon them because of their previous enactment. Moreover, it is quite conceivable that the existing election laws of a state might not contain sufficiently adequate provisions for the conduct of such elections as might be required by the home rule provision. Where, for example, the provision required the nomination of candidates for a charter commission or board of freeholders upon petition and the placing of their names upon the ballot without party designations, and where the state election laws contained no provisions regulating the filing, examination, and certification of such petitions, it might well be that the city would be powerless to act without additional legislation.

In point of fact the enactment of legislation in direct supplement of the home rule provisions of the constitution has been found necessary or desirable in most of the home rule states,[2] although it is true that some of this legislation was necessitated

[1] *Supra*, 259 ff., 562 ff.

[2] *Supra*, 146, 262, 400, 465, 564, 571, 589, 609, 648, 652.

by constitutional uncertainties or insufficiencies that might easily have been avoided.

In Michigan and in Texas the entire machinery for the exercise of home rule powers by cities is a matter that is regulated and controlled by statute. The constitutions of these states contain no provisions whatever upon this subject except that both of the provisions contemplate that home rule powers shall be exercised through the medium of elections and the constitution of Texas forbids charter changes to be made oftener than once in two years.[1] These are the only two states that have adopted this plan. Let it be recorded to the credit of the legislature in each of them that the requirement of the constitution in this respect was promptly met. In neither state, moreover, is it certain that the legislature could not have refused to act in this regard and yet have continued to provide for the government of cities by law.[2] Whether future legislatures in these states will make inroads upon this practice remains to be seen.

It must be recognized that unless a home rule provision expressly prohibits the legislature from enacting any further laws for the government of cities,[3] it is quite within the legislative competence to refuse to effectuate the home rule provisions of the constitution wherever supplementary legislation is necessary. The degree of temptation that might be presented to the legislature in this matter of refusing to act would obviously depend somewhat upon the character of control that would remain in its hands if it failed to act. If, for example, it could continue to enact special laws for the government of cities the temptation would be strong. If, on the other hand, it was compelled to deal with cities through the medium of general laws without classification, the temptation to retain control over them would obviously be greatly modified, for much if not all of the political significance of such control would be lost.

On the whole it seems reasonable to conclude that since it is practically impossible to create within the constitution a completely self-executing machinery for the exercise of home rule

[1] *Supra*, 604, 649. [2] *Supra*, 604–609, 650–652. [3] *Supra*, 252, 592; *infra*, 676 ff.

powers, the constitution itself should contain only such elements in respect to that machinery as appear to be of fundamental importance. If the legislature is to exercise the power of supplementation in *any* respect, it would seem that the plan followed in Michigan and Texas, under which the legislature regulates practically *all* matters pertaining to the machinery of home rule is quite as satisfactory as the plan followed in most other states of prescribing the home rule machinery in considerable detail in the constitution. Experience thus far indicates a readiness on the part of the legislature to perform whatever may be required of it in the matter of procedural legislation.

2. Shall the power to regulate the machinery for the initial exercise of home rule powers be vested in some corporate authority of the city? It will be recalled that in a few instances the courts have permitted the corporate authorities of cities to regulate by ordinance certain matters in connection with the exercise of home rule powers which were apparently provided for neither by the constitution nor by statute.[1] The most important instance of this was that in which the city of Portland was, by a somewhat strained construction of the constitution, permitted to enact an ordinance regulating the exercise of initiative and referendum powers, there being no other constitutional machinery provided by which the grant of home rule could be realized.[2] It is probable, moreover, that the corporate authorities of cities have in practice regulated certain matters pertaining to the exercise of home rule powers and that these regulations have not been challenged before the courts.

It is a fact, however, that in none of the states that we have considered has the power to supplement the constitutional machinery for the initial exercise of home rule powers been conferred generally and unmistakably upon the existing governmental authorities of cities. This plan of effectuating the grant of self-governing powers seems to have received scant consideration. There is little question that it could be made to work. There is no inherent reason why the principal ordinance-making authority

[1] *Supra*, 259, 411, 547, 562, 594.

[2] *Supra*, 596.

of each city, instead of the legislature of the state, could not be empowered to regulate the necessary details of the home rule machinery. To place this power in the hands of a designated corporate authority of the city would of course clothe that authority with competence completely to frustrate the exercise of home rule powers, especially where such authority, as has not infrequently happened, stood opposed to the introduction of governmental changes that were being agitated in the city. It is to be noted, however, that this power to oppose and obstruct changes in fundamental laws is placed in the hands of existing governmental authorities throughout our entire system, except in those states which require a periodic submission to the voters of the proposition to revise these fundamental laws and those which permit the voters, through the medium of an initiative petition, to propose amendments or to initiate the call of a duly constituted body to draft a revision of such laws. In most of our states the initiation of constitutional amendments and the authority to set in motion the machinery for a constitutional convention are within the discretion of the legislature. Why might not the ordinance-making authority of the city be placed in a similar position with reference to the amendment and revision of charters?

As another means of securing to the city itself complete independence of the legislature in the matter of the exercise of home rule powers, provision might be made for the *appointment* of an initial charter commission by some existing corporate authority such as the mayor.[1] This would eliminate the necessity of conducting an election, the detailed conduct of which would have to be regulated by some authority, local or central. The election for the submission of the charter prepared by such a commission would require little, if any, regulation; and the council of the city could easily be placed in the position in which it could be compelled by mandamus proceedings to provide by ordinance for such election. It is probable that appointed charter commissions

[1] It might be difficult in some states to find a term in which to describe a corporate authority which would be found in every city and which would at the same time be an appropriate authority to vest with such power.

would on the whole be of a higher grade than those commonly secured by popular election. Even so, this plan also would be open to the objection that the appointing authority might be obstructive; and doubtless in particular instances it would be far from ideal.

The advisability of devising some means to secure the complete elimination of the legislature from control over home rule procedure is of chief importance when considered in relation to a scheme of home rule under which cities may exercise an option of adopting their own charters or of remaining under legislative control. This scheme is discussed below. If the exercise of home rule powers is in effect made compulsory upon cities and the legislature is, as in Oregon, absolutely prohibited from enacting *any* laws governing their affairs, the plan of permitting the legislature to regulate the machinery of home rule is doubtless as satisfactory as any other.

3. Shall the home rule machinery prescribed by the constitution or statute be binding upon the city which has once exercised home rule powers? The problem here presented is somewhat different than that which has just been discussed. At the time of the grant of home rule powers existing cities are invariably operating under legislative charters. These naturally contain no provision in respect to their own amendment or revision. There is, however, no practical reason why a city in framing and adopting a charter of its own might not incorporate in that charter, following the analogy of state and national constitutions, provisions in respect to its amendment and revision. Certain home rule charters have included provisions of this kind.[1] But in view of the fact that the procedure in the matter of making, adopting, and amending charters has in most states been prescribed in some detail by the constitution, and in view of the further fact that the provisions on this subject have not by the terms of the constitution been limited to the *first* exercise of home rule powers but have on the contrary usually contemplated a continuous application, the power of cities in this regard has been somewhat circumscribed.

[1] *Supra*, 411, 424.

If the theory is sound that a city should enjoy the power of making its own charter, there seems to be no very strong reason why the city should not also determine for itself the manner in which and the conditions under which that charter shall be altered, just as the states determine for themselves the manner in which and the conditions under which their constitutions shall be altered. If it be argued that a city might bind itself to too rigid requirements in this matter, it may be answered, first, that certain of the states have committed the same mistake in the matter of their constitutions, and second, that upon principle (if the soundness of the home rule principle be conceded) this is the city's own affair.

It would certainly not be difficult to draft a constitutional provision which would confirm to the city the power to create within its charter the process for amending and revising that charter. The chief danger that would inhere in this plan has already been pointed out.[1] When state constitutions have contained incomplete or imperfect provisions upon the subject of amendment and revision the courts have been fairly liberal in permitting the governmental authorities of the state to take appropriate, if not strictly legal, action looking to amendment or revision. On the other hand, accustomed as they are to a strict construction of the charter powers of cities, they might be wholly unwilling to permit the municipal corporate authorities a similar liberality of action. A city which, having adopted a charter, had failed to incorporate therein adequate provisions upon the subject of amendment and revision might find itself in a straight-jacket. If, therefore, the constitution conferred power upon cities in respect to this matter, it would be advisable to reserve also to the legislature power to provide for this same matter by law, under the proviso that such law should apply only in the absence of adequate charter regulation.

4. Shall the exercise of home rule powers be made optional or in effect compulsory? The experience of most home rule states has been such as to indicate that for many years after the grant of home rule powers certain cities will not, for one reason or another,

[1] *Supra*, 266.

have availed themselves of the privilege conferred. This has sometimes been due to satisfaction with the existing charter or to an apathetic attitude on the part of the people. It has sometimes also been due to the inability of the city to secure a charter which the voters would accept, especially where extraordinary majorities or a majority of those voting *at* a general election have been required. Whatever may have been the contributing causes, it seems at least open to debate whether such cities should be compelled to remain under completely static charters until such time as they secured charters of their own making. In Missouri this problem has not arisen because both of the cities that were empowered to adopt charters exercised this power as soon as possible. In Oregon a city must exercise home rule powers or have its charter remain absolutely without alteration.[1] In Michigan and in Texas the situation has been practically the same, although it is by no means certain that the constitution enforces it.[2] In all the other home rule states there is no question that the legislature may enact laws for the government of cities which do not themselves elect to exercise charter-making powers. These laws must, however, be general in their application to classes of cities. In California this was true even though the literal wording of the constitution clearly indicated the contrary.[3]

There is no doubt that a very great amount of confusion has arisen in the home rule states by reason of the failure of those who drafted the provisions of the constitution upon this subject to recognize the plain fact that in all probability some cities will exercise the powers conferred and others will not. This of itself will result in the establishment of two classes of cities — (1) cities under home rule charters, and (2) cities under legislative charters.[4] Most of the constitutions have attempted to set forth the degree of control which the legislature might exercise over cities without any reference whatever to this classification, which was almost sure to come about in practice.

Now it seems obvious that, unless the Oregon plan is followed, the extent of control over cities by the legislature should be de-

[1] *Supra*, 593. [2] *Supra*, 604–609; 650–652. [3] *Supra*, 252. [4] *Supra*, 632.

termined with specific reference to this classification. It may well be a very sensible idea to retain the power of the legislature to amend and revise the charters of cities which do not adopt charters of their own, this power being placed under such limitations as may seem advisable, such, for example, as the requirement of general laws for classes of cities created upon the basis of population, as in many states, or the subjection of special city laws to a veto of the corporate authorities, as in New York.[1] On the other hand, it is little short of ridiculous to subject home rule cities to the application of such laws. This plan can only result in rendering the home rule provisions of the constitution largely a farce, as they are in fact under the operation of the plan in such states as Washington[2] and Minnesota.[3] It would certainly greatly simplify the legal difficulties arising out of the grant of home rule powers if the power of the legislature over cities remaining under legislative charters should be declared to be one thing and the power of the legislature over home rule cities should be declared to be another. Moreover, it is easy to see that the very power of the city to translate itself by its own action from the legislative charter class to the home rule class would have a salutary effect upon the legislature. Indeed it might transpire that the needs of cities in the matter of government would be met by the legislature in a perfectly satisfactory manner, and that there would be no necessity for an actual exercise of the home rule powers conferred. It is a fact, however, that in no state has a constitutional provision as yet been drawn with this classification of cities in mind.

In connection with what has been said above, however, it is clear that if this classification were expressly provided for in the constitution, and if the option were clearly presented to cities to frame charters of their own or to remain under charters of legislative origin and subject to legislative amendment and revision, it would be necessary to provide a machinery for the exercise of charter-making powers by cities which would not be dependent upon the enactment of supplementary laws by the legislature. Otherwise the legislature might by simple inaction, very easily

[1] *Supra*, 101 ff. [2] *Supra*, 400, 455. [3] *Supra*, 493 ff.

nullify the entire optional feature of the scheme. Unless it should prove possible to devise a constitutional provision that would be completely self-executing, it would be necessary to confer upon the corporate authorities of cities the power to supplement the provisions of the constitution by ordinance.

5. Shall the city be required to frame and adopt an entirely new charter or shall it be permitted to amend its existing legislative charter? The pros and cons of argument upon this point have already been presented [1] and need not be reiterated here. Oregon, Michigan, and Texas are the only states that permit cities to amend their charters prior to the adoption of a charter of their own making. Whether the one or the other plan should be followed is open to debate. The practice in the three states mentioned, as compared with other home rule states, does not perhaps justify a categorical judgment in the matter.

6. Shall either the legislature or the governor be given a veto power over charters and charter amendments? It will be recalled that in California the legislature is required to reject or adopt without power of amendment every charter and charter amendment subsequent to its ratification at the local polls. This feature of the home rule machinery in California has in practice been a mere formality. It certainly has had no apparently effective use. On the other hand it has given rise to a number of difficult legal questions in the courts.[2] In Oklahoma and Arizona the governor of the state is given an absolute veto over charters and charter amendments. The Michigan home rule statute gives the governor a suspensive veto. These provisions will doubtless prove as wholly useless as the California provision. The political psychology of the situation seems to have escaped the notice of those who drafted these provisions. It is perfectly manifest that governmental authorities will hesitate to impose their negative upon acts which have already been directly ratified at the polls. It seems reasonable to conclude that provisions of this kind have not justified themselves in experience and are scarcely supportable even upon theory.

[1] *Supra*, 616–618.

[2] *Supra*, Ch. VII.

The Grant of Home Rule Powers

In respect to the terms in which the grant of home rule powers is made two points are of especial importance. The first of these arises out of the necessity of establishing a clear relation between the substantive powers of self-government that are granted and the adjective power of charter-making. The second arises out of the necessity of defining the scope of powers that are intended to be granted.

1. Shall the substantive powers of home rule be simply included by implication in the apparently adjective grant of power to frame a charter? Most of the home rule provisions grant to cities merely the charter-making power. The actual subjects-matter which are by reason of this grant placed within the competence of the city to control depend wholly upon the implications of the term "charter." These implications are naturally more or less indefinite. They are no more indefinite, however, than the implications of such an unprecise phrase as the "powers of local self-government," employed in Ohio and recently in Colorado. Unless it is intended that the city may exercise at least certain powers of self-government without the necessity of exercising the charter-making or charter-amending power, it is certain that the power to adopt and amend a "charter for its own government" confers quite as much substantive power upon the city as does the grant of authority to exercise the "powers of local self-government" through the sole medium of the charter-making or charter-amending power.

There would seem to be little objection to conferring the substantive power of self-government as well as the adjective power of charter-making, *provided* the two are properly correlated as substantive and adjective. Likewise there would seem to be little to be gained, since the substantive is so manifestly implied in the adjective. But where the two powers are granted separately it is of high importance in the interest of legal certainty that the power to adopt and amend the municipal charter should be granted *to the end that* the powers of self-government may be realized;

or, to put it conversely, that the powers of self-government should be clearly made dependent for realization upon the exercise of the charter-making power.

This appears almost too trite for remark. A city is a corporate entity operating usually under a charter of limited powers and of many details and restrictions. Few of its powers are conferred upon the corporate entity as such. They are vested for the most part in specifically designated corporate authorities. The city as such can act only through the agency of these established authorities. From time out of mind the courts have held these authorities specifically, and in consequence the city as such generally, to a more or less rigid accountability to the letter of their delegated competence. When, therefore, under such circumstances as these, the city as a corporate entity is suddenly vested with full powers of local self-government two questions are presented: Which of the existing corporate authorities can assume to act for the city beyond the written letter of his competence? And what is to become of the charter of the city if all powers of self-government are to be regarded as being vested in the corporate authorities?

These questions, as we have seen, are neither fanciful nor speculative. They have arisen in both California [1] and Ohio [2] and have been trenched upon in Washington,[3] Oregon,[4] and Michigan.[5] In spite of the obvious commonplaceness of the facts and rules of law out of which they originate, the framers of home rule provisions continue to blunder blindly. It is simply an axiom of home rule that the grant of substantive powers must not be separated from the adjective process prescribed for the exercise of such powers. Either the one must be allowed to imply the other or, if both are expressed, unmistakable correlation must be established between them.

2. Shall the grant of home rule powers be made only in general terms or shall there be a descriptive enumeration in addition to such general grant? No more obvious conclusion can be drawn from

[1] *Supra*, 259 ff., 322 ff. [2] *Supra*, 625 ff. [3] *Supra*, 403 ff., 416 ff.
[4] *Supra*, 594 ff. [5] *Supra*, 613 ff.

the study of the difficulties that have arisen in the home rule states than that the grant of powers to cities in general terms has been the origin of the chief complications that have arisen. Whether the city is empowered to adopt a "charter for its own government" or to exercise "powers of self-government" through the medium of such a charter, it is manifest that the terms of the grant do not lend themselves to precise definition. Nor is it possible that precision may be secured by the employment of any other general phrase. It is a plain fact that under any general phrase that makes a direct constitutional grant of home rule the scope of powers actually conferred must be defined by the courts. This means uncertainty, delay, and expensive litigation.

As we have had frequent occasion to note, this question concerning the scope of the powers of a home rule city is presented in two different connections. It sometimes arises, without any attendant complication, as a result of the existence of a conflicting state law. In this, its simplest, form the question involves merely a consideration of whether this or that function is properly embraced within the activities of a city as such. More frequently, however, the question involves also a consideration of superiority and inferiority as between a charter provision and a state law. In this form the question is no longer merely as to the competence of the city. It concerns the competence of the city *in relation to* the competence of the state legislature. Whether the question of the scope of home rule powers is offered in one or the other of these forms depends usually upon whether the state legislature has or has not acted in respect to the subject-matter under consideration. It is somewhat difficult to consider the problem of the grant of powers as a problem separate from that of the relation between this grant and the powers that are reserved to the state legislature. The two problems are nevertheless somewhat separable, and for the sake of clearness the question of the relation between state laws and charter provisions is considered below as a question distinct in itself.

The difference between the city as an organization for the satisfaction of local needs and as an agency for the performance within

its jurisdiction of state functions is a distinction which, however varying in its aspects, has nevertheless been introduced into many branches of the law of municipal corporations. This distinction has naturally been applied also in the cases which have involved questions of the scope of powers included within the grant of home rule. Speaking generally, however, it must be said that the courts have in the home rule cases applied this distinction in such wise as to permit a fairly wide latitude of action on the part of the city in its so-called capacity as an organization for the satisfaction of local needs. Indeed the latitude permitted in these cases has extended the concept of the city's local capacity far beyond its limits as applied in other branches of the law of municipal corporations. Even so, the question has been presented in one form or another as to whether the grant of home rule included the power to regulate matters pertaining to taxation,[1] eminent domain,[2] police,[3] police courts,[4] health,[5] education,[6] the annexation and separation of territory,[7] streets,[8] the ownership of public utilities,[9] the regulation of privately owned public utilities,[10] municipal elections,[11] the presentation of claims against the city,[12] and the grant of jurisdiction in respect to municipal affairs to courts forming a part of the regular judicial organization of the state.[13] Moreover, as we have seen, question in respect to many of these matters has arisen recurrently from state to state. From this fact alone, as well as from the wide variations in the views expressed by the courts, it is certain that doubt exists as to whether or not power to control such matters as these is or is not embraced within the grant of home rule powers.

[1] *Supra*, 127, 173, 277, 340, 432, 535, 610, 653.
[2] *Supra*, 174, 336, 429, 471, 485, 536.
[3] *Supra*, 133, 142, 255, 371, 467, 654.
[4] *Supra*, 195, 206, 241, 373, 400, 490, 553, 654.
[5] *Supra*, 286, 343, 453, 470, 654.
[6] *Supra*, 295, 344, 371, 505, 585, 610, 654.
[7] *Supra*, 146, 269, 333, 407, 474, 557, 600, 611, 653.
[8] *Supra*, 153, 156, 190, 271, 308, 337, 485, 644.
[9] *Supra*, 355, 499, 567, 610, 621, 654.
[10] *Supra*, 149, 186, 308, 345, 436, 572, 644.
[11] *Supra*, 141, 182, 233, 259, 425, 428, 541, 583, 602, 610, 635.
[12] *Supra*, 165, 340, 445, 487.
[13] *Supra*, 193, 386, 426, 473.

It would assuredly be a difficult task to undertake within a constitutional grant of home rule to enumerate specifically the complete list of powers that might be exercised by cities. Would it not, however, be not only possible but also highly desirable to add to the general grant of power over local affairs a specific enumeration in respect to the matters above indicated? In other words, would it not be the part of wisdom to take as a basis for a partial enumeration of the powers to be conferred the list of powers in respect to which actual difficulties have arisen in the home rule states and have been repeatedly presented to the courts for solution?

It will be recalled that both California and Colorado have adopted the practice of amending their constitutional provisions so as to confer specific powers of home rule *after* such powers had been held by the courts to be not embraced within the general undefined grant. In other words, these states arrived at the policy of an enumeration supplementing the general grant after a lengthy travail of doubt, disappointment, and harassing litigation. Why should this travail be necessary? The self-governing powers that a municipality should enjoy are far more a matter of policy than of law. Why should the courts by reason of the vagueness of the constitutional terms employed be compelled to determine these questions of policy? Vagueness and generality may have been excusable in the beginning; but the experience of the home rule states now points the way. Certain questions are *sure* to arise under any general grant. The list of these questions is formidable. They are written clearly in the books. The framers of a constitutional provision granting home rule have at this late day not the smallest justification for ignoring them. They have no right to cast the cities of the state into a maelstrom of doubt and to impose upon the courts the onerous burden of resolving this doubt by piecemeal decree.

It is not meant to imply that every doubt that has arisen concerning the content of the general grant should by express declaration of the constitution be resolved in favor of the city. As has been said, whether this or that power lying in the twi-

light zone between matters of state and matters of local concern should or should not be conferred upon the city is wholly a question of policy. The supplementary enumeration here referred to might and probably should include negations as well as grants of power. In respect to certain of these "doubtful" matters, such, for example, as control over privately owned public utilities, a division of power might be made between the city and the state government. The point, and the only point, to be made is that the home rule provision of a constitution should deal specifically and emphatically with the entire list of these moot questions, denying or confirming them to the city as the political wisdom of the framers may dictate. The silence of the constitution means uncertainty. As between a narrow but certain grant of home rule and a possibly broad but uncertain grant there is small justification for hesitation.

Relation between the Powers of Cities and the Powers of State Legislatures

In the drafting of a constitutional provision granting home rule to cities perhaps the most difficult problem is that of establishing a clear line of demarcation between those subjects-matter which cities may regulate and control in a manner that may be contrary to the provisions of state laws and those in respect to which state laws will supersede the provisions of a home rule charter. The subjects-matter that have given rise to this problem are those that are commonly dealt with in charters of legislative origin. No city has ever attempted to draw unto itself the complete powers of the state. By common understanding such general subjects as crime, domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others have never been regarded by any one, least of all by the cities themselves, as appropriate subjects of local control. No city has been so foolhardy as to venture generally into any one of these fields of law. It has simply been universally accepted that these matters are strictly of "state

concern." But a considerable number of matters that are frequently if not invariably regulated in whole or in part by municipal charters granted by the legislature are also in legal theory as well as in popular concept regarded as matters of state rather than of local concern. The list of such matters is indicated above in the discussion of the terms in which the grant of self-governing powers should be made. What was said in connection with that discussion may be repeated here; to wit, that the problem of establishing a proper relation of superiority and inferiority as between charter provisions and state laws is closely related to the problem of setting forth the grant of home rule powers in sufficiently explicit terms.

The powers conferred upon cities have been made expressly "subject to" certain superior laws in all of the home rule states except Colorado. In this latter state, in spite of the silence of the constitution, the courts did not hesitate to read a limitation of this kind into the home rule provision.[1] This feature of the several constitutional provisions is worthy of the most careful analysis and consideration.

1. Shall home rule powers be made expressly "subject to" the other provisions of the constitution? In every home rule provision that we have considered, except those of Colorado, Michigan, and Ohio, the exercise of home rule powers is specifically subordinated to the other provisions of the constitution. It is not easy to understand the necessity for an express declaration of this kind unless it is intended that the constitutional grant of home rule powers shall be placed in a position of *peculiar* subordination to the other clauses of the constitution. It is a well-known principle of constitutional construction that the several provisions of the fundamental law of a state must be read together, and that each must be given its meaning in the light of the others. There are occasionally apparent conflicts between clauses. In such cases it is the duty of the courts to read these conflicts out of the constitution by giving to each clause the fullest possible meaning that can be given in the light of the other. An express declara-

[1] *Supra*, 543 ff.

tion to the effect that the home rule provision shall be "subject to" other provisions might conceivably operate in cases of conflict to compel the courts to give complete effect to another provision of the constitution, even at the sacrifice of this or that element of home rule. In other words, the grant of home rule would have to be strictly construed in the light of other provisions of the constitution and preference given to the latter in all cases of doubt.

In plain point of fact the courts have not always given such a construction to the requirement that the home rule provisions shall be "subject to" the constitution. Indeed they appear to have construed the home rule provisions, where the binding force of another constitutional provision was urged, in practically the same manner that they have construed any other alleged constitutional contradiction. In some cases they have sacrificed home rule to the express declarations of the constitution upon the subject at issue. In other cases they have sustained a right of home rule in spite of some other provision of the constitution to the contrary. If this is the meaning — and so it appears to be in the opinion of the courts — that is to be given to the phrase "subject to the constitution," it is perfectly patent that the phrase is wholly superfluous. And so in fact it seems to be. Whether or not the letter of some other section of the constitution is to be applied by the courts to the narrowing of the home rule grant depends much more largely upon the mental predilections of the judges than upon a rigid application of the peculiar requirement that the home rule provision shall be "subject to the constitution."

However, all this is of comparatively negligible importance. The point of real significance is that other clauses of the constitution are so frequently raised to sustain the contention that this or that matter is not a proper subject of regulation by a home rule charter, or the more frequent contention that a state law enacted in pursuance of some other constitutional clause controls a home rule charter in this or that respect. This situation undoubtedly results in large part from the fact that the home rule provision is not properly compared and correlated with the other provisions of the constitution. In order to avoid difficulties of this kind

every section of a constitution should be carefully studied in comparison with a home rule proposal. If the general grant of self-governing powers were accompanied by an enumeration of moot powers it would be a matter of no great difficulty to incorporate within this enumeration clauses that would establish complete harmony with all other provisions of the constitution.

2. Shall the provisions of home rule charters be made subject to "general laws"? In one form or another the constitutions of all the home rule states, except Colorado, Oregon, and presumably Ohio, declare that the self-governing powers conferred upon cities shall be "subject to the general laws of the state." The California provision expressly declares that the powers of cities shall be subject to general laws "except in municipal affairs." In these four states, therefore, there can be little doubt that charter provisions are not subject to laws relating to matters of local concern even though such laws are of general application to cities. In the other home rule states, however, in which the subordination of charters to the control of state laws is sought to be accomplished by the use of the vague phrase "general laws," the question presents itself whether the phrase means laws of general as distinguished from local *concern* or laws of general as distinguished from local *application*, or whether both of these constructions may be placed upon the phrase. In a general way it may be said that this phrase has more usually been construed in these other states to mean laws of general concern. In fact in practically all of the states this is at least one of the constructions that has been put upon it. But in Missouri the status of the law upon this subject is somewhat in chaos; in Washington and in Minnesota the phrase has been construed to mean laws of general application as well as of general concern; while in Michigan and in Texas there can be no question that the legislature has the power to enact a law of general application to the cities of the state even though such law relates wholly to a matter of local concern.

Now it seems perfectly obvious that no real necessity exists for vagueness and uncertainty in respect to this matter. To those who believe that the powers of home rule should be a matter of

direct constitutional grant, wholly removed from the interpretative discretion of the legislature, there is obvious danger in prescribing that the exercise of these powers shall be "subject to general laws." If it is the purpose of the drafters of a home rule provision to subject charters to the control of legislative statutes in matters of state *concern*, and to leave the definition of such matters to the courts, there seems to be no reason why the phrase "laws relating to matters of state concern" should not be employed. If, on the other hand, it is their purpose to subject charters to the control of state laws of general *application* to cities even though they deal with matters of strictly local concern, it would seem that the phrase "laws of general application" should be employed, and that this phrase should be properly qualified by specification, if it is intended that these laws shall be of absolutely uniform application to all the cities of the state without classification. There is no excuse whatever for the use in a home rule provision of the vague term "general laws" unless the meaning of the term "general" is clearly indicated. Even though it be intended that home rule charters shall be subject to "general laws" in both of the possible meanings of that term — to "laws relating to matters of general or state concern" as well as to "laws of general application" to cities — there is no possible reason why both of these expressions should not, for purposes of precision, be employed.

3. Shall home rule charters be made subject to laws of general application to cities? It is idle to discuss whether home rule charters should be made "subject to" laws of *special* application that deal with matters of local concern. The establishment of such a relationship between the self-competence of the city and the superior competence of the legislature would be little short of ridiculous. It would rob the grant of home rule of its entire substance. Except in the state of Missouri, where the courts for a time apparently construed the constitution as having created such an absurd relationship between the city and the state legislature,[1] no home rule provision has been so construed either by the courts in law or by the legislature in practice.[2] The question

[1] *Supra*, 123 ff.

[2] But see the Michigan situation; *supra*, 604 ff.

remains, however, whether the legislature shall, as an antidote to the home rule grant, be empowered to deal with subjects of local as well as of general concern through the medium of laws that apply generally to all the cities of the state or to all the cities of a class.

In California, Colorado, and Oregon there can perhaps be no question that the legislature has no power to enact such laws. This is doubtless the situation also in Ohio, except in respect to the optional "additional laws" which the legislature is empowered to enact.[1] Because of the difficulty of understanding and harmonizing the Missouri decisions, that state may be eliminated from consideration in this connection. In Oklahoma there has apparently been no thought that laws of "local concern" but of "general application" to cities operated to control the provisions of home rule charters, at least in so far as such laws were enacted *after* the adoption of such charters. In Arizona and Nebraska there has been little if any experience in this respect and no judicial interpretation. In Washington a law of general application to the cities of a class, no matter what may be the nature of its subject-matter, has been held to apply to home rule cities. So also a law defining and delimiting the scope of powers that might be exercised by self-governing cities has been sustained and deferred to by the courts as conclusive. In Minnesota practically the same situation has prevailed, although the legislature did not, as in Washington, and as it was apparently commanded to do, elaborate from the very beginning the powers that cities might provide for in charters of their own making. In Michigan and in Texas the home rule provisions clearly contemplate that a statutory description and delimitation of the powers of home rule cities shall be made; and in both states this practice has been followed.

In our discussion above of the terms in which the grant of home rule powers should be made, it was assumed that these powers were to be conferred upon cities *directly* by the constitution and that the legislature should not be competent to define and delimit

[1] *Supra*, 632.

their scope. It is quite possible, however, as we have seen, to grant powers of home rule subject to the power of the legislature to define them. The constitutions of Minnesota, Michigan, and Texas do this in unmistakable terms. The same result has been reached in Washington by construing the phrase "subject to general laws" to include, among other things, laws of general *application* to cities. This would seem to be by no means a strained construction. It might very easily be adopted by the courts in certain other states in which this phrase is employed should the legislature attempt to place its own interpretation upon the powers that might be exercised. It must be recognized, therefore, that in using such a phrase the way is opened for the legislature to contract or to expand the powers of home rule at its pleasure.

It has been frequently asserted that a law providing a complete charter for the government of cities that vary widely in number of inhabitants and in other conditions would for practical reasons be impossible of enactment. The Ohio legislature proved in 1902 the folly of this assertion. A charter was enacted which was fairly restrictive in character and which applied uniformly to every city of the state.[1] Under the home rule provisions of Minnesota, Michigan, and Texas, which leave the matter of the definition of the powers of cities to the legislature, there appears to be no reason why a similar code might not be passed and the grant of home rule powers thus reduced to a "hollow mockery of words." The same result might be reached in Washington and perhaps in any other state in which the grant of home rule powers is made "subject to general laws."

Whether or not this power of definition should be left to the legislature is a debatable question. On the one hand, cities, like individuals, like to feel that their self-governing rights are referable directly to the constitution, and that they may invoke the protection of the courts to sustain these rights against legislative encroachment, even though such encroachment be made through the medium of a law or laws of general application to cities. On the other hand, the plan of legislative definition is certainly more

[1] *Supra*, 74.

elastic. It enables the legislature to deal by statute with unforeseen difficulties that may arise. Where the cities of a state are numerous and vary widely in population, and where all classification of cities for this purpose is expressly prohibited, it is not likely that the legislature will define the home rule grant with narrowness. Nor is it probable that they will attempt the difficult task of exercising this power for partisan purposes. It must be recognized, however, that it is practically impossible to combine the scheme of a statutory definition of home rule powers, by a law or laws of general application, with the scheme of optional home rule as above described.[1] Under such a combination the temptation would be strongly presented to the legislature to narrow the home rule grant and thus discourage the exercise of powers thereunder. If this temptation were yielded to, it would operate in effect to destroy the optional feature of the scheme and to preserve the power of the legislature to provide directly for the government of all cities.

Of great importance is the question whether the vesting of competence in the legislature to define the powers of home rule by laws of general application does or does not result in greater certainty and less litigation. The answer to this question depends upon several circumstances. If the legislature adopts the practice, as it has thus far in Michigan and in Texas, of enacting a single home rule act and of deferring with respect to that enactment, the doubts that might otherwise arise in respect to the competence of cities are reduced largely to a matter of construing this law. But having enacted such a statute, as in Washington, or having failed to elaborate at the outset the content of home rule powers, as in Minnesota and in certain other states which subject such powers to general laws (and therefore perhaps to laws of general application to cities), if the legislature nevertheless proceeds to pass numerous laws of general application to cities, the result cannot fail to be harassing to cities, to give rise to many doubts as to the relation of this or that law to a partially conflicting charter provision, and in the course of time to destroy the spirit as well

[1] *Supra*, 664 ff.

as the substance of the home rule principle. Moreover, certain contributing factors may aggravate this result.

In the first place, if these laws need not apply generally to *all* the cities of the state but merely to general *classes* of cities, the opportunity for the legislature to make inroads upon the home rule powers of cities is greatly increased while the opposition, lacking the concert of many cities, is greatly weakened. There is no question that if the legislature is empowered to enact laws of general application to cities and thus to define the scope of home rule powers, the constitution should expressly require that these laws should apply to all cities without classification. The experience of Washington and Minnesota cities is eloquent upon this point.

In the second place, the situation is often complicated by the fact that some of the cities of the state, or of a class, will have exercised home rule powers while others will not have done so. A city still operating under a legislative charter may make demand upon the legislature for an amendment which is perhaps much needed and which the city itself, for one reason or another, has been unable to secure through the home rule procedure. This amendment must take the form of a law applicable to all cities or to all the cities of a class. If there are home rule cities in the class it is perfectly clear that the "rights" of these cities must be balanced against the "needs" of another city or other cities. Under such circumstances it is not surprising that the legislature should in practice resolve the doubt in favor of the needs of the latter and thus in favor of its *own* competence. The state of Minnesota, where the first class of cities embraces St. Paul and Duluth under home rule charters and Minneapolis under a legislative charter, is the state *par excellence* in which this situation has developed. It would seem that the only way to avoid this difficulty would be to make a constitutional classification of the cities of the state into home rule cities and cities under legislative charters. But, as has already been said, the scheme of empowering the legislature to define the powers of home rule cities can scarcely be joined with the scheme of such a classification. More-

over, this would eliminate the possibility, if such a plan be regarded as desirable, of permitting cities to amend their charters prior to the adoption of a complete home rule charter.

In the third place, whether the uncertainties of a home rule grant are largely resolved by allowing the enactment of laws of general application to cities depends upon whether the distinction between laws of general as distinguished from local *concern* is also introduced by the constitution or is read into that instrument by the courts. It is easy to see that a home rule provision might be so drawn as to make it perfectly clear that the self-governing powers of cities should be subject to (1) laws of general application to cities even though these laws related to matters of local concern, and (2) laws relating to matters of general concern even though the application of these laws be special to a particular city. The fact is, however, that in no home rule state which we have considered has the home rule provision been entirely clear and unmistakable in this regard. In most of the states the distinction between laws of general as contrasted with those of local concern has been introduced by the courts with or without sound constitutional foundation. But our review of the cases that have arisen certainly warrants the conclusion that the judicial mind has frequently been muddled in the application of this distinction. Laws have been sustained on the ground that they dealt with matters of general concern which might much more easily have been sustained on the ground of their general application. It would seem, therefore, that, until a home rule provision shall have been written which is perfectly explicit in regard to this matter, it can scarcely be said that the plan of allowing the legislature to enact laws of general application to cities and thus to define the scope of home rule powers has gone far in the direction of striking down doubts and lessening litigation.

4. Shall home rule charters be made subject to laws of general concern? It is entirely conceivable that a home rule provision might be drafted which would empower the legislature by a law or laws of general application to cities to define the scope of home rule powers and would at the same time require the legislature to deal also

with those matters pertaining to the government of cities which are regarded as matters of general or state concern, through the medium of laws of general application. In other words, the legislature would be compelled to exercise its *complete* powers with reference to the government of cities by the enactment of laws of general and uniform application. It could confer upon cities as much or as little home rule as it chose, but no law could be passed that would apply to a city, even in a matter of state concern, unless that law applied to every city. In effect this would be to destroy, so far as the problem of home rule is concerned, the legal distinction between matters of state and matters of local concern; for while the legislature could itself regulate matters of local concern it could also empower cities to regulate this or that matter of state concern. It may be that this is the situation created by the Michigan home rule provision, although this is by no means certain.

The question of the propriety of restricting the legislature to the enactment of uniform laws dealing with cities in their capacity as agents of the state for the performance of functions of so-called state concern is wholly one of policy. It need only be said that if this is the intention of those who draft a home rule provision it should be expressed in unequivocal terms. So expressed it would leave the scope of home rule powers entirely within the competence of the legislature and would relieve the courts of the burden of deciding whether this, that, or the other matter was of general or of local concern.

On the other hand, if it be conceded that it is undesirable to place such a limitation upon the legislature, or that it is undesirable to clothe the legislature with unlimited competence over the scope of home rule powers, it need only be said that the constitution should itself indicate which of those subjects that have given rise to doubt and judicial controversy are to be left in control of the legislature and which of them are to be handed over to local control. In other words, there should be an express enumeration in respect to these moot subjects. This would again destroy in large part, so far as the problem of home rule is concerned, the

nebulous distinction between matters of state and matters of local concern. The relation, for example, between a charter provision and a state law relating to education, or the control of public utilities, or any other of the common subjects of vexation would be determined not by the application of an uncertain and varying juristic concept but by an interpretation and application of the express terms of the constitution upon the subject at issue. As has already been indicated, if the plan were adopted of accompanying the general grant of self-governing power with a specific enumeration of powers within what may be called the twilight zone, it would be a matter of no great difficulty, in connection with this enumeration, to set forth with fair precision the respects in which state laws should take supremacy over charter provisions. Let it be said again that the actual scope of the concrete powers of self-government which cities should enjoy and the scope of powers which the legislature should enjoy over cities are in first as well as in last analysis wholly questions of policy. If the formulation of this policy is not to be left entirely to the legislature, it should certainly be made with as much exactness as possible by the terms of the fundamental law itself. It is as inexcusable in reason as it is unsatisfactory in practice that the heavy burden of developing the lines of this big problem of policy should be imposed upon the judicial branch of the government.

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