

NEW JERSEY COURT OF ERRORS AND
APPEALS.

EDMUND WILSON, ATTY. GEN.

EX. REL. RICHARD W. BOOTH,
Defendant in Error.

VS.

PATRICK J. MCGUINNESS,
Plaintiff in Error.

ON ERROR.

BRIEF OF HERBERT BOGGS AND FRANK
H. SOMMER, COUNSEL FOR PLAINTIFF IN
ERROR ON RE-ARGUMENT OF CASE UPON
THE TWO POINTS UPON WHICH THE
COURT DIRECTED A RE-ARGUMENT.

I.

Is an act of the legislature valid, which confers subject to a referendum to the voters of a municipality, local governmental powers to be exercised in the municipality, upon a commission the members of which are not selected from among the citizens of the municipality. In other words, can the legislature, under such form of government as ours, delegate municipal governmental powers to a commission, the members of which are not selected from among the citizens of the municipality, even though the exercise of those powers in the municipality, by the commission is made to depend upon the consent of the voters thereof.

In discussing this question, it may be necessary to keep in mind THE VERY EXTRAORDINARY

POWERS OF THE LEGISLATURE OF NEW JERSEY, and to distinguish, carefully, BETWEEN THE POWERS OF THE LEGISLATURES OF THE THIRTEEN ORIGINAL STATES AND THE SOURCES OF THEIR POWERS, and THE POWERS OF THE LEGISLATURES OF THE states afterwards admitted to the Union under the Constitution of the U. S. of 1787, AND THE SOURCES OF THEIR POWERS.

Congress is a creature of the United States Constitution. It was created by that instrument. It drew its first breath of life therefrom, and until that Constitution was adopted by the requisite number of states, there was no Congress of the United States. All the powers of Congress are to be found in the Constitution. The Constitution of the United States is not a limitation upon the powers of Congress, but creates Congress and is the source and fountain from which all its powers flow. The legislature of New Jersey is diametrically the opposite of Congress. It existed long before the Constitution. It derives its powers, not from the Constitution, but, from the Crown of Great Britain. It existed in colonial days, and its powers were, in the main, absolute and unrestricted. It derives no power or force from the Charter of 1776. The only effect of that instrument was to limit and restrict its powers in some respects. So the Constitution of 1844, did not create the present legislature. It continued it, as it was before, with all the powers it possessed before the adoption of that Constitution, save as limited and restricted by the terms thereof. The Constitution of New Jersey of 1844, and the amendments of 1876, only act as a limitation upon the powers of the legislature. The legislature possesses all the powers it possessed before the Con-

stitution of 1844, save as restricted, limited and taken away by that instrument.

The legislature of the colony possessed the powers of the English Parliament. Within certain broad lines, it was omnipotent. The Charter of 1776, does not in anywise, except as hereinafter noted, define or restrict the power of the law makers; nor is there any restriction upon its powers, either in the instruction of Queene Anne to Lord Cornbury, or in the letters-patent from Charles II. to the Duke of York. These letters-patent confer upon the Duke, his heirs and assigns, the power to "make, ordain and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government and magistry fit and necessary," "so also that the same be not contrary to the laws and statutes of this our realm of England, but as near as may be agreeable thereunto."

In their "Concession and Agreement of the Lords Proprietors of the Province of New Caesaria or New Jersey to and with all and every the Adventurers and all such as shall settle or plant there," dated in 1664, the Proprietors, Berkley and Carteret, provide for a council of, at least, six, chosen by the Governor, and a body of representatives, twelve in number, chosen by the inhabitants being freeman or chief agents, who being chosen are to join with the Governor and council for "the making of such laws, ordinances and constitution as shall be necessary for the present good and welfare of the said Province." But so soon as "parishes, tribes, divisions and other distinctions are made," then the inhabitants under the writs of the Proprietors are to choose annually freeholders for each division, etc., to be deputies or representatives of the same; which body of representatives shall with the Governor and council be the Gen-

eral Assembly of said Province. This assembly is given power "to enact and make all such laws, acts and constitutions as shall be necessary for the well government of the said Province and them to repeal; provided, that the same be consonant to reason and as near as may be conveniently agreeable to the laws and customs of his majesty's Kingdom of England."

Leam & Spic, p. p. 12-15.

This seems to have remained the governing instrument of the Province until 1702, when, as is well known, the Proprietors surrendered to and the Crown accepted all rights of government in the Province.

Leam & Spic., p. 609.

The "Instructions to Lord Cornbury," dated, November 16, 1702, (Leam. & Spic., p. 619). provide for a council appointed by the Governor and a general assembly of twenty-four, twelve from each division, for the enacting of laws "for the joint and mutual good of the whole, and (p. 650) that, "he (the Governor) with the advice and consent of the council and assembly, or a major part of them, respectively should have power to make laws."

It does not appear that this wide authority thus conferred was in anywise limited or trammelled up to the time of the Revolution. The general assembly was elected from the Counties, but few changes were made in the mode of government. Assemblies were called by writs of election issued by the Governor from time to time. In all respects the assembly was modeled upon and represented the House of Commons.

As Justice Depue points out in his opinion in the case, in this Court, of Township of Bernards, v.

Allen, 32 Vroom, 228. (see p. 234.); by various grants and concessions of the Crown from Magna Carta down, the right of taxation was vested in the people, but a legislative power was essential to a grant of money and for providing the means by which moneys should be raised by taxation. The House of Commons, as representatives of the people, possessed the sole right to originate money bills, or bills for taxation; and it is very significant of the powers claimed, and successfully, by our colonial legislature, that, as early as 1748, it asserted this power, and after a struggle with the Governor and council, lasting four years, this right was admitted and thereafter conceded.

It is illustrative of the nature of the lower house and of its rights and powers, and its exact conformity in all respects to the House of Commons that it should thus early have successfully asserted this most important and perhaps most jealously guarded of all the special rights of the Commons of England.

When Franklin, Governor of the Colony of New Jersey, left the Colony in 1776, he left it without a law-making body. Without the Governor there could be no legislature, and as the assembly was called, (like the Commons House of England by the Sovereign), by writs of election issued by him, the situation was analogous to that of England upon the abdication of James II. Following, perhaps, the precedent set upon that occasion, a provincial congress was called, similar to the convention which proclaimed William and Mary, King and Queen, and which provided for the calling of a parliament. This provincial congress, representing the people, adopted a charter, not intended necessarily to be a complete and final instrument of government, but expressly providing, "that if a reconciliation between Great Britain

and these colonies should take place and the latter be again taken under the protection and care of the Crown of Great Britain, this charter shall be null and void, otherwise to remain firm and inviolable." This charter, as it is expressly called, does not pretend to create a new government. It leaves the old colonial government as it found it, with some important changes rendered necessary by changed conditions. The members of the council and assembly are to be chosen each year by the electors of the counties, one member of council and three members of assembly from each county. The council and assembly are to choose the Governor, but the powers of the legislature thus constituted remain the powers of the old colonial assembly. The legislature thus provided for is the successor of the colonial legislature and succeeds to all of its powers.

This charter of 1776, remained the supreme law up to the adoption of the Constitution of 1844 without change or modification. And the State legislature remained the colonial legislature so far as its powers were concerned up to the adoption of that instrument.

This is the view held by the late Chief Justice Beasley, in *Maxwell v. Goetschins*. He says, in that case; "Looking at this untrammelled authority, and at its earliest manifestations in forms of government, it is evident, that our earliest legislature was a copy as near as may be, both in structure and function of the English parliament; and there seems no reason for believing that it did not claim all the powers of its illustrious prototype. The parliament of England was not invested merely with authority to legislate; but its functions were composite, partly legislative, partly administrative and partly judicial; and it was this

body that was imitated in the establishment of the legislature in this State."

Maxwell, v. Goetchins, 11 Vroom, 383-387.

And again (p. 388.) the learned Chief Justice says, "it has often been said and, with certain necessary reservations said with truth, that parliament is omnipotent; and I do not know upon what ground it would be that such an amplitude of power could have been denied, to belong to the legislative department of this government, as it was primarily organized. Manifestly it exercised without challenge, a judicial function in granting divorces; and an examination of Allison's laws will show that it took upon itself to deal, by means of special laws, with the rights of property in a mode that is quite incompatible with the theory that it was possessed of no prerogative but that of legislation. It is true that, according to this body, all the power thus claimed for it, there is just reason for the opinion that there were certain bounds that it could not overstep, for there are some rights so fundamental, that the existence of any power in the body politic which in its legitimate exercise would be capable of destroying them, would be fatal to the very purpose and end for which all rational government is established. Thus it has frequently, in speculation at least, been predicated of the parliament of England, that it had not the competency of making a man a judge in his own case, and in like manner of many of the governments in this Country, that they could not, by an edict, take the property of one citizen, and, without compensation or just cause, vest it in another; but irrespective of such fundamentals as these, it is it seems to me, altogether impossible to lay the line beyond which the legislative power in question was forbidden to go."

In this case the legislature had passed an act purporting to validate a sale on partition proceedings by commissioners in a court having no jurisdiction either over the property or owners, and the Chief Justice says (p. 388), "I have failed to find, therefore either in the constitution of the legislature of this State in its ancient form, or in its history, anything that would lead me to the conclusion that it was not possessed of an ability to enact such a statute as this now challenged."

(See, *Wilkinson, v. Leland*, 2. Peters. 627.)

The statute in question was held void on the ground that it was the exercise of a judicial function and under the Constitution of 1844, the legislative is the only power vested in the legislature.

This historical review demonstrates, we submit, that up to the adoption of the constitution of 1844, at least, the legislature of the State of New Jersey, speaking broadly, possessed and freely exercised, all the powers of "its illustrious prototype," the parliament of Great Britain.

It should be noticed in this connection, that the principle that "all political power is inherrent in the people" is first asserted, in the constitution of 1844. It is not asserted in direct language in the charter of 1776. But we presume that the language of the first preamble to the charter of 1776, viz; "whereas all constitutional authority ever possessed by the Kings of Great Britain over these colonies, or their other dominions, was, by compact, derived from the people, and held of them for the common interest of the whole society"; is an assertion, in other language, of this great fundamental principle of all popular government.

"All political power is inherrent in the people." But the people of New Jersey, in colonial times

granted this power, through the Crown of Great Britain, its then representative, to the legislature of the State. This inherent political power remains dormant in the people and may be resumed by them at any time in a constitutional manner; but, until resumed, it remains in their representatives, the legislature, *and cannot be directly exercised by the people.*

This "political power" is in the people of the whole State and not in (the people of) any subdivision thereof. It is the "political power", which, save as limited, is now in the legislature of the State. The constitution of 1844, and the above quoted preamble to the charter of 1776, only refer to the primary and ultimate political power, by our system of government, vested in the people of the whole State acting in their sovereign capacity.

It will be admitted that the parliament of Great Britain had, in its omnipotence, the power to erect designated territories into municipalities for the purpose of local government, and to provide for the government of such municipalities as it saw fit.

Its power over these municipalities was absolute and it could provide such government as it saw fit. The legislature of New Jersey possessed the power of parliament and all its powers over municipalities and as to the government to be provided for municipalities.

The only powers of local government which the charter of 1776, in expressed words, seem to have reserved, were the rights to the inhabitants of the counties to elect representatives in council and assembly, and to elect sheriffs and coroners of the several counties; and to the inhabitants of the townships to choose Commissioners of Appeal in case of taxation.

Charter, 1776. Pars., XIII-XIV.

So that up to the adoption of the Constitution of 1844, the legislature of New Jersey, (both of the colony and of the State) did freely exercise powers co-extensive with those of the parliament of England. Its powers to create municipalities and to provide for the government of municipalities so created seems to have been co-extensive in this respect with the powers of the parliament of England.

The Constitution of 1844, now in force in this State, does not create the government of the State. The power of the government, of the executive, and the judiciary, and of the legislature existed long before this Constitution of 1844 was adopted by the people. To ascertain the powers of the courts and of the executive, we go back of the Constitution of 1844. The Supreme Court does not derive its powers from the Constitution of 1844, but finds the source of its powers in colonial times, and in its "*illustrious prototype*" the King's Bench of England. So the legislature of this State goes back for the source of its power not to the Constitution of 1844, but to colonial times and to its "*illustrious prototype*" the parliament of England.

The Constitution of 1844, then, is not the source of the powers of the legislature any more than it is the source of the powers of the Supreme Court of the State.

Prior to the Constitution of 1844, the legislature seems to have exercised unlimited powers relative to municipal corporations, their creation, the powers of government given to them and the manner in which local governmental powers should be exercised. The legislature possessed and exercised freely the power to erect a particular territory into a municipality and to clothe it with such powers of government, and to be exercised in such manner

as the legislature thought proper. This power was very little if at all modified by the Constitution of 1844, and the statute books down to the amendments of 1876 are full of special acts of legislation creating municipalities with varying powers. The amendments of 1876 only prohibited the exercise of these powers *by special laws* as to *particular localities*. The complete and absolute power of the legislature over municipalities by *general laws* was not in anywise interfered with. We respectfully submit that from the history of the legislature of the Colony and the State, and of its powers and the unbroken practice of the legislature down to the present time, it is apparent that the legislature as to municipalities possesses practically the same absolute powers "as did its prototype the English parliament."

But the argument seems to be that the right of home rule in local matters prevails in this State.

That while the legislature may create a municipality with such powers of government as it pleases, the powers delegated to the locality must be exercised, either directly or indirectly, by the people of the locality.

There is no such right of home rule in this State.

It cannot be found in the Constitution either in express language or inferentially, and it is contrary to the powers originally given to and frequently exercised by the legislature.

Says Hooker, C. J. in *Atty. G. v. Lowrey*, 92, N. W. Rep. 289. (Mich. 1902.).

"It (the alleged right of local self government) is often alluded to under the name of "home rule." As descriptive of a policy "Home Rule" is a significant and an appropriate term, but as descriptive of a right, it is indefinite for it is co-existent

with the right of local regulation or control and its extent must always be tested by the Constitution.

Says Mr. Justice Cooley in *People, vs. Detroit* 28 Mich. 228, "In all matters of general concern there is no local right to act independently of the State.....Upon all such subjects the State may exercise compulsory authority and may enforce the performance of local duties either employing local officers for the purpose or *through agents or officers of its own appointment*.

In *Van Cleve, v. Passaic Valley Sewerage Commissioners*, 42 Vroom, 183. (Supreme Court) Pitney, J., said (p. 197.) "self government in municipal affairs is so well-nigh universal in this Country that it is some times thought of as a Constitutional right, *but, perhaps it is not, in the absence of express Constitutional provisions*..... Our own Constitution now contains an express prohibition against *special or local laws* for "appointing local offices, (sic.) or commissioners to regulate municipal affairs," which seems to imply the legislative power to enact *general laws* for these purposes."

In *Cleveland vs. Board of Finance*, 9 Vroom, 259, Mr. Justice Scudder, in the Supreme Court says, p. 264 "it is important to notice the difference of the legislative control over municipal corporations and individuals. In case of the latter, the law is defined and the Constitutional limitations are well understood. But with the former, Judge Dillon says (Mun. Corp. sec. 40.) "it is impossible to state with confidence what limitations exist upon the powers of the legislature over municipal corporations, as ordinarily constituted. The legislatures make, control, alter and abolish municipal charters at their will,

and the only conceded limitations of their power to be found in the cases are such as clearly belong to and directly effect the individual citizens under the national or State Constitutions."

In *Gilhooly v. Elizabeth*, 37 Vroom, 484, (Supreme Court), Mr. Justice Van Syckel seems to admit as does Justice Pitney, in *Van Cleve, v. Passaic Valley Sewerage Commissioners*, *supra*, the power of the legislature to provide by *general laws*, for the government of municipalities, by Commissions. The particular law under review is held unconstitutional on three grounds. That it is a delegation of legislative powers to the Governor. That it is a private, local and special law. And that it is a return to the regulation of municipal affairs by commissioners. The act while in terms general was in fact special. It was an attempt by a special or local law to appoint "local officers or commissioners to regulate municipal affairs," which the amendments of 1876, prohibited to the legislature. The justice says, (p. 487) "By this scheme, the entire field of local government could be occupied by a commission, to the exclusion of its self government, and the barrier which the people believed they had securely erected against such pernicious legislation would be swept away." But the only barrier erected by the people was the constitutional amendment of 1876. This did not prohibit *general legislation* of this character, but only *special legislation* applying to a particular locality.

The opinion we think must be taken as admitting that before this constitutional inhibition, the legislature had and freely exercised this power of *special legislation*; so freely, as, in the language of the Judge to call forth "unmeasured condemnation throughout the State, and to lead to the provision of the present constitution prohibiting it." If it had and so freely exercised this power of

special legislation, by *special laws as to particular localities*, it certainly had the power, by *general laws*, to legislate, in this manner as to *all municipalities*, or, as to *all of a particular class*. The inhibition against *particular, local legislation of this kind*, applying to *one particular locality*, does not apply to or deprive the legislature of its power to legislate generally in this manner.

In *Township of Bernards v. Allen*, 32 Vroom, 228, this Court sustained this power of the legislature.

Says Justice Depue, in that case, (p. 238.) "It (the legislature) "may provide for the appointment of officers and other persons to assess and collect taxes, but the essential power of taxation, which is the power to levy a tax, is incapable of being delegated by the legislature." And again on the same page, the learned Judge says:

"Whether taxes shall be assessed and collected by officers elected by the people called assessors and collectors, or by officers holding office under some other authority, is left to legislative authority."

And it is very apparent from page 242, that the Court was disposed to uphold the validity of the act so far as it vested ministerial duties, the assessment and collection of taxes in the board thus appointed, if these provisions could be separated from the main provisions of the act.

In *Metropolitan Board of Health v. Heistet*, 37, N. Y. 661, the statute under review provided for a metropolitan sanitary district comprising the counties of New York, Kings, Westchester and Richmond. It conferred full sanitary powers in this district upon a board appointed by the Governor and senate. The act was sustained as constitutional.

In *People v. McDonald*, 69 N. Y. 362, the New York Court of Appeals sustained, as constitutional, an act naming commissioners to widen the public highways and avenues in the town of Saratoga Springs.

In *Astor v. Mayor, etc.*, 62 N. Y. 567, The Commissioners of Central Park in New York City were named in the act and they were given power to fill their own vacancies, to control the Central Park, and the exclusive care, management and control of Sixth Avenue and other streets in said City. The act was held constitutional.

In *People v. Pinckney*, 32 N. Y. 377, there was before the Court a statute uniting the cities of New York and Brooklyn into a metropolitan fire district and directing the Governor with the consent of the senate to appoint four citizens, residents of the district metropolitan fire commissioners, with full powers. This act was held constitutional.

A statute constituting a board of fire and police commissioners for cities of the metropolitan class and vesting the appointment in the Governor was sustained by the Courts of Nebraska, in *Redell v. Moore* 63, Neb. 219. overruling, *Atty. Gen. v. Moore*, 55 Neb. 480, and adopting the doctrine laid down in *State v. Seavey*, 22, Neb. 454.

So in *King v. Reed*, 14, Vroom, 186, the Supreme Court of this State sustained an act which appointed by name three commissioners to improve "Bull's Ferry Road" in Hudson Co., by the construction of a sewer and providing for the appointment by the Supreme Court of three commissioners to assess the benefits who should be non-residents and should hold no property in the townships affected.

To this general rule that in matters of local government there is, as pointed out in *Township of Bernards vs. Allen*, one very important exception, viz: the right of self taxation in local affairs.

This was a right inherent in the people of the locality from earliest times. It may be regarded as reserved by the people to the several localities and never granted to the legislature. But it is we think more especially a personal right of which the individual could not be deprived, founded upon the fundamental principle of *no taxation without representation*. It is the inherrent birthright of every American that he shall not be taxed without being represented, and to tax the citizens of a particular locality for purely local purposes through a body not chosen by them and in the constitution of which they have no voice, is *taxation without representation*.

Says the Supreme Court of Illinois, discussing this very question. (*Harward v. St. Clair*, 51 Ill. 130.)

"If it be a tax as in the present instance to which the persons who are to pay it have never given their consent and imposed by persons acting under no responsibility of official position and clothed with no authority of any kind by those whom they propose to tax it is to the extent of such tax misgovernment of the same character which our forefathers thought just cause of revolution."

And this we conceive, is the essential principle governing the decision of this Court, in *Township of Barnards vs. Allen*.

But this principle applies only to the essential, the fundamentals of taxation.

As Justice Depue says in this very case, "Every system of taxation consists of two parts—one the

levying of the tax, the imposition of taxes on persons and property; the other the assessment and collection of taxes. The first is a legislative function controlled by constitutional prescriptions; the other, the assessment and collection of taxes, is mere machinery by which the legislative purposes is effected."

The *essential*, the levying of the tax is constitutionally inherrent in the people. The mere machinery for effecting the purpose is in the legislature and may be exercised in such manner as it sees fit.

It is clear from this case that the ministerial duties conferred upon this board as to the collection and assessment of taxes were not unconstitutionally conferred. (p. 242.)

The legislature, then, we submit is not by any constitutional inhibition or by any fundamental constitutional principle, prevented from exercising in the most absolute manner the direction of ministerial duties in local affairs. It may provide in any manner, its wisdom dictates for the exercise of ministerial duties and functions in particular municipalities.

Of course under the constitutional amendment of 1876, prohibiting local and special acts, this power must be exercised by general laws, but there is nothing, we conceive, to prevent the legislature from providing for the administration of the government of townships, or other classes of municipalities by commissions appointed by the Governor.

If we have established the right of the legislature to delegate municipal governmental powers to a commission we have at the same time established that the members of a commission to whom such powers are delegated need not be selected from

among the citizens of the municipality, for the argument by which that right is established denies the existence of a right to local self-government, except in the matter of taxation.

Where power to elect or appoint municipal officers is conferred upon the electors of a municipality or their representatives and neither the constitution nor the statute prohibits the election or appointment of a non-resident of the municipality, such officers may be elected or appointed from non-residents.

State v. Swearingen, 12, Ga. 23.

State v. George, 23, Fla. 585, 3 So. 81.

State v. Blanchard, 6, La. Ann. 515.

If the power so delegated to the electors of a municipality or their representatives is not, in the absence of constitutional or statutory prohibition, confined to selection from among the residents of the municipality, then in the absence of a constitutional prohibition the power of appointment when exercised by the legislature directly, or when conferred by it upon the Governor or a member of the judiciary without restriction is likewise not so confined.

The so-call "Park Act," providing for the appointment of a board of Park Commissioners in counties of over 200,000 inhabitants by a justice of the Supreme Court was declared by this Court to be constitutional.

Ross v. Freeholders of Essex, 40 Vroom, 241.

But this act does not contain any qualification as to the residence of the commissioners to be appointed. It would be not contrary to the act if all the com-

missioners were appointed from another county. Yet, if residence or citizenship in the municipality is constitutionally necessary as a qualification for membership on a commission exercising governmental functions therein, it is difficult to see how that act can be constitutional.

If the right of local self-government is inherent in the people of a locality even in administrative matters, yet, the referendum may fairly be regarded as an exercise of that right.

The right is only the right to choose directly or indirectly the officers who shall perform certain duties. The act becomes effective when the people of the locality, themselves or through their elected representatives adopt it. It is not a personal right, but a collective one, and why may not the people, acting collectively, exercise this right through Governor as their representative?

We have added to this brief a collection of the authorities bearing upon the various questions considered herein, some of which we have heretofore cited.

Respectfully submitted,

FRANK H. SOMMER,

HERBERT BOGGS.

COLLECTION OF AUTHORITIES REFERRED
TO IN BRIEF.

United States vs. Railroad Company, 17 Wallace 322. (1872).

At 329, Hunt, J., delivered the opinion of the Court, says: "A municipal corporation like the City of Baltimore is a representative not only of the State but is a portion of its governmental powers. *It is one of its creatures made for a specific purpose to exercise within a limited sphere the powers of the State. The State may withdraw these powers of local government at pleasure and may through its Legislature or other appointed channels govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence.*"

Laramie County vs. Albany County, 92 U. S. 307 (1875).

Clifford, J., at page 308, says, delivering the opinion of the Court: "They (municipal corporations) are under the entire control of the Legislature from which their powers are derived." Again at page 312 says: "Such corporations are the mere creatures of the legislative will; and in as much as all their powers are derived from that source it follows that those powers may be enlarged, modified or diminished at any time without their consent or even without notice. They are but sub-divisions of the State, deriving even their existence from the Legislature, *their officers are nothing more than the local agents of the State and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority so long as private rights are not thereby violated.*"

Barnes vs. District of Columbia, 91 U. S. 540 (1875).

"A municipal corporation in the exercise of all its duties including those *most strictly local or internal* is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making a miniature state within its locality. Again it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses or it may *itself exercise directly within the locality any or all of the powers usually committed to a municipality*. We do not regard its acts as sometimes those of an agency of a State and at others those of a municipality; but that its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

Mt. Pleasant vs. Beckwith, 100 U. S. 514 (1879).

Stands as authority for the proposition that a municipality is the creature of the State and is subject to its will and holds *that where no constitutional restriction is imposed* the corporate existence and powers of counties, cities and towns are subject to the legislative control of the State creating them.

Merrewether vs. Garrett, 102 U. S. 472 (1880).

In this case the question arose upon the dissolution of a municipal corporation by the Legislature and as to what property of the defunct corporation was liable for its debts and how it should be reached. The Court said at 511 "the right of the State to repeal the charter of Memphis cannot be

questioned. *Municipal corporations are mere instruments of the State for the more convenient administration of local government; their powers are such as the Legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure. This is common learning found in all the adjudications on the subject of municipal bodies and repeated by text-writers."*

Metropolitan Railroad Co. vs. District of Columbia, 132 U. S. 1. (1889).

At page 8, "All municipal governments are but agencies of the superior power of the State or government by which they are constituted and are invested with only such subordinate power of local supervision and control as the superior Legislature sees fit to confer upon them."

The reasons underlying the rule which prevents a delegation of the power to tax by the Legislature to any person or persons other than the corporate authorities of the municipality of the district to be taxed or to the people of such municipality themselves are clearly set forth in the case of *Harward vs. St. Clair, &c.*, 51 Ill. 130 where the Court said "The power of taxation is of all the powers of government the one most liable to abuse even when exercised by the direct representatives of the people, and if committed to persons who may exercise it over others without reference to their consent the certainty of its abuse would be simply a question of time. No person or class of persons can be safely entrusted with irresponsible power over the property of others and such a power is essentially despotic in its nature and violative of all just principles of government. It matters not that as in the present instance it is to be professedly exercised for public uses by expending for the public benefit the tax collected. If it be a tax as in the

present instance to which the persons who are to pay it have never given their consent and imposed by persons acting under no responsibility of official positions and clothed with no authority of any kind by those whom they propose to tax, it is to the extent of such tax misgovernment of the same character which our forefathers thought just cause of revolution. We are of the opinion that we do no violation to the language of the clause in the Constitution which we have been considering by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the corporate authorities of the municipality or district to be taxed. These authorities are elected by the people to be taxed or appointed in some mode to which the people have given their assent and to them alone can this power be safely delegated."

In *People vs. Kipley*, 171 Ill. 44; (1897), the Supreme Court of Illinois had before it the Civil Service law of that State and sustained it, saying "In this State when the General Assembly creates a municipal government, it has the power to provide the manner of filling the offices of such government. The Legislature may select any means for the administration of the municipal government which it thinks best adapted to that end. It may provide for the election of municipal officers by the people or may authorize any officers or persons to fill the offices by appointment....."

It has, therefore, the right to enact a law which provides that appointments to municipal offices or positions may be made according to merit and fitness, that such merit and fitness must be ascertained by competitive examination. In most instances before the passage of the Civil Service act the municipal officers having the power to make ap-

pointments to office removed the appointees at their own pleasure. It certainly is not a violation of the organic law to require them to conform to and obey regulations which make merit and fitness the necessary qualifications for office."

In *State vs. Denney*, 118 Indiana 449 the Legislature had assumed to itself the right to name three commissioners by whom city officers might be appointed and might be removed. The act was declared unconstitutional, it is true, but the Court was influenced by the consideration that this power was an executive and not a legislative power. Even under these circumstances the Court intimated strongly that the appointment by commissioners of the police officers of a city as a part of the constabulary force of the State might be upheld. This proposition was afterwards sanctioned in *State vs. Coulson*, 130 Indiana, 434.

In *State vs. Hunter*, 38 Kansas 578 the validity of an act of the Legislature of that State was questioned by quo warranto proceedings. This act authorized the executive council of the State to appoint a Board of Police Commissioners by which board there were required to be appointed a police judge, a marshal, a chief of police and other police officers. The Court sustained the statute and said "The point has been made though not much contended for that police government by commission is illegal. In effect it is said to be opposed to the fundamental theory of self-government and denies to the people of the district the right to select their own officers from their own number. Whatever may be said regarding the policy of placing police administration of cities in a board of commissioners who are chosen by a State officer rather than the city, there can be no doubt that the Legislature has the power to do so. The Constitution imposes no limitation upon the Legislature in re-

spect to the agencies through which the police power shall be exercised. It may be conferred upon the officers of a local municipality chosen by the people resident therein or if deemed expedient it may be vested in officers or persons otherwise selected. Cities are but agencies of the State created to aid in the conduct of public affairs. The functions of cities and their officers are prescribed by the Legislature and it rests in the sovereign discretion of that body to say how much of the police power shall be exerted by the municipality."

In *Diamond vs. Cain*, 21 La. Ann 309, the Court had under consideration an act of the Legislature which created a board of commissioners of the City of New Orleans empowered to remove and appoint the police force of said city. The Mayor to whom had been entrusted the powers which were superseded by the statute before the Court insisted that the statute was unconstitutional and therefore appointed a chief of police. The matter came before the Court on quo warranto proceedings initiated by the claimant to this office by virtue of the Mayor's appointment against the claimant appointed by the said board of commissioners. It was held that the appointee of the Board of Commissioners was entitled to hold the office in dispute.

In *Weymouth, &c. Fire Districts vs. County Commissioners*, 108 Mass. 142, (1871) a statute providing for the dissolution of fire districts formed of portions of more than one town was sustained, the Court of Chapman, C. J., saying: "There can be no doubt that the power to create, change and destroy municipal corporations is in the Legislature; this power has been so long and so frequently exercised in counties, towns and school districts in dividing them, altering their boundary lines, increasing and diminishing their powers and in abolishing some of them that no authorities need

be cited on this point. The constitution does not establish these corporations but vests in the Legislature a general jurisdiction over the subject by its grant of power to make wholesome laws as it shall judge to be for the general good and welfare of the commonwealth. These are not like private corporations, having chartered rights which are in the nature of contracts and cannot be altered without the consent of the grantees unless a right to do so is reserved, but the Legislature may amend their charter, enlarge or diminish their powers, extend or limit their boundary, consolidate two or more into one and abolish them altogether at its discretion."

Hill vs. City of Boston, 112 Mass. 344. (1872).

Gray, C. J. says at page 380: "The doctrine that the purpose of the creation of municipal corporations by the State is to exercise a part of its power of government is a doctrine universally recognized and which has nowhere been more strongly asserted than by the Supreme Court of the United States in the opinions delivered by Mr. Justice Hunt in *United States vs. Railroad Company*, 17 Wallace, 322 at 329 and Mr. Justice Clifford in *Laramie vs. Albany*, 92 U. S. 307 at 308.

In *Commonwealth vs. Plainsted*, Mass. 1889. 2 L. R. A. 142 (148 Mass. 375) the Court sustains a statute placing the police of Boston under the control of a board of police appointed by the Governor and vesting in that board powers previously vested in cities or towns but not by force of any constitutional provisions; said Morton, C. J., "The several towns and cities are agencies of government largely under the control of the Legislature. The powers and duties of all the towns and cities except so far as they are specifically provided for in

the Constitution are created and defined by the Legislature, and we have no doubt that it has the right in its discretion to change the powers and duties created by itself and to vest such powers and duties in officers appointed by the Governor if in its judgment the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities."

In *Baltimore vs. State Board of Police*, 15 Md. 376 the Court had before it a statute providing for a new police system and carrying it into effect, which named certain commissioners upon whom were conferred the necessary powers. The Court sustained the legislation and said, "It is conceded that the Legislature was not under any obligation to confer the power of appointment upon the executive.....but it is said it ought to have delegated to the city or local authorities of the city this power.....In the absence of any such requirement we do not believe they were under any duty to make such delegation of the appointing power. The constitution surely designed to impose some discretionary power on the Legislature both over the mode of appointment and the propriety and necessity of passing any law on the subject to which the exercise of the power might relate. It seems difficult to suppose that the people through the Constitution would entrust to that branch of the government nearest to the source of power the right to create an office and indicate others to appoint the officers and be unwilling to place the appointment with the Legislature itself."

In *People vs. Mahoney*, 13 Mich. 481, the Court sustained an act providing for a metropolitan police board, the act appointing the first board of police for the City of Detroit. It was contended that the act was void as subversive of local self-government. The Court said "The taxation under

the act, it is said, is really in the hands of a police board—a board in the choice of which the people of Detroit have no voice. This argument is one which might be pressed upon a legislative department with great force if it were true in point of fact, but as the people of Detroit are really represented throughout, the difficulty suggested can hardly be regarded as fundamental. They were represented in the Legislature which passed the act and had the same proportionate voice there with other municipalities in the State all of which received from that body their power of local government and such only as its wisdom shall prescribe within the constitutional limitations. They were represented in that body when the present police board was appointed by it, and the Governor, who is hereafter to fill vacancies, will be chosen by the State at large including the city.”

The case of *Le Roy vs. Hurlbut*, 24 Mich. 44 is most often cited as upholding the right of local self-government. This case, however, has been explained by Mr. Justice Cooley in *People vs. Detroit*, 28 Mich. 228, where he says: “In *People vs. Hurlbut*, 24 Mich. 44 we consider at some length the proposition which asserts the amplitude of the legislative control over municipal corporations; and we there conceded that when confined as it should be to such corporations as agencies of the State in its government the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the State Upon all such subjects the State may exercise compulsory authority and may enforce the performance of local duties either by employing local officers for the purpose or through agents or officers of its own appointment.”

In *Atty. General vs. H. Lowrey*, 29 N. W. Rep., 289 (Mich. 1902) the Court sustained a statute

creating a public school district and naming the persons who should constitute the first board of trustees. Hooker, C. J., said "It (the "alleged" right of local self-government) is often alluded to under the name of "home rule". As descriptive of a policy "home rule" is a significant and appropriate term, but as descriptive of a right, it is indefinite for it is co-existent with the right of local regulation or control and its *extent* must always be tested by the constitution."

Daly vs. St. Paul, 7 Minn. 390 was an action in which damages were sought to be recovered for the establishment of a public road by commissioners appointed by the Legislature of the State. The Court held that in the appointment of such commissioners the Legislature had not acted outside the scope of its power and accordingly the city was liable for the damages awarded.

In Cleveland vs. Board of Finance, etc., of Jersey City, 9 Vr. 259, the Supreme Court by Mr. Justice Scudder said: (265) "It is important to notice the difference in the legislative control over municipal corporations and individuals. In case of the latter, the law is defined and the constitutional limitations are well understood. But with former, Judge Dillon, says (Mun. Corp. sec. 40) 'It is impossible to state with confidence what limitations exist upon the power of the legislature over municipal corporations, as ordinarily constituted. The legislatures make, control, alter and abolish municipal charters at their will, and the only conceded limitations of their power to be found in the cases are such as clearly belong to and directly affect the individual citizens under the national or state constitutions.'"

In King vs. Reed, 14 Vr., 186, the Supreme Court sustained an act which appointed by name three

commissioners to improve Bull's Ferry Road, in Hudson County, by the construction of a sewer, and a supplement thereto providing for the appointment by the Supreme Court on application of the commissioners on the completion of the sewer of three persons, non-residents, and holding no property in either of the townships, to be assessors.

In *United R. R. Company vs. Jersey City*, 42 Vr., 80, the Supreme Court had before it the statute authorizing the New Jersey R. R. Co. to lay certain tracks in the streets of Jersey City and sustaining the statute, said: "The legislature, representing the state, has paramount authority over its public ways, including the streets in cities as well as the county roads, and the legislature can at any time resume the power previously granted to municipal subdivisions of the state."

Van Cleve v. Passaic Valley Sewerage Commissioners, 42 Vr., 183 (1904). In this case there was brought before the Court the statutes creating the Passaic Valley Sewerage District comprising portions of four counties and authorizing the appointment by the Governor of five residents of the district as commissioners.

In sustaining the Statutes the Supreme Court, by Pitney, J., said (197) "Self-government in municipal affairs is so well-nigh universal in this country that it is sometimes thought of as constitutional right, but perhaps it is not, in the absence of express constitutional provision. . . . Our own Constitution now contains an express prohibition against *special* or *local* laws for "appointing local offices (sic) or commissions to regulate municipal affairs", which seems to imply the legislative power to enact *general* laws for these purposes."

(198) "Within constitutional limits the peo-

ple of the state, acting through the general legislature, may delegate to the municipalities such portion of political power as they may deem expedient, may withhold other powers and may withdraw any part of that which has been delegated."

People, vs. Draper, 15 N. Y. 582. (1857).

The Court sustained a statute which established a metropolitan police district, joining several counties in such district and providing for the appointment of commissioners by Governor, who with the Mayors of New York and Brooklyn becomes a Board of Police Commissioners for the district. This Board was invested with all the power formerly held by the Board of Commissioners of Police of the City of New York, which consisted of the Mayor, Recorder and City Judge, who were elected by the people of said city, and all the powers of the Mayor of New York and Brooklyn as the heads of the police departments of their several cities. The Board was given the power to appoint all its subordinate officers and policemen, who were to do duty in any part of the district without any regard to residence or other lines. This conclusion was reached and the act sustained notwithstanding the provisions of the Constitution to the effect that 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 Board of Supervisors or other county authorities as the Legislature may 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 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." The Court held that this constitutional provision related to offices instituted and existing under the laws of the State as they were at the time of the adoption of the Constitution. The Court said (545): "It follows that it belongs to the Legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to the local jurisdictions, and retaining other portions to be exercised by officers appointed by the superior power, and changing the arrangement from time to time as convenience, the efficiency of administration and the public good may require."

In *People vs. Pinckney*, 32 N. Y. 377, the Court had before it a statute uniting the cities of New York and Brooklyn into district to be known as the metropolitan fire district of the State of New York, and which directed the Governor by and with the consent of the Senate to appoint four citizens, residents of said district, to be metropolitan fire commissioners. In sustaining the act the Court said, page 393: "The power of the Legislature is supreme over that of all local legislatures except when the Constitution intervenes to restrict it The Legislature may recall to itself and exercise at its pleasure so much of the power it has conferred upon the city corporation as are not secured to it by the Constitution. This necessarily results from the fact that all the legislative power of the people is granted to the Legislature except such as is expressly reserved."

Metropolitan Board of Health vs. Heister,
37 N. Y. 661.

An act of the Legislature of the State of New York had united the counties of New York, Kings,

Westchester and Richmond in a district to be called the metropolitan police district of New York. The act before the Court in this case created the metropolitan sanitary district of the State of New York coextensive with the limits of the metropolitan police district. The statute provided for the vesting of the appointment of the members of this Board in the Governor and Senate. The act was sustained although as early as 1796 and by repeated statutes from that time the duty of attending to the health of the city in cases of infectious diseases, etc., had been given to and exercised by the Mayor of the City of New York, the Mayor, Aldermen and Commonalty, two commissioners of health, health wardens for the city or some other local officer of that city.

People vs. Flagg, 46 N. Y. 401. (1871).

In this case the Court had before it legislation designed to compel the town of Yonkers to incur a debt for certain highway improvements to be made. It was conceded in the argument that the Legislature could direct the improvements to be made and could lawfully impose a tax on the property situated therein to pay the necessary expenses or that it might authorize a town debt to be created with consent of the people of the town or some officer or officers representing the municipality; but it was contended that the Legislature could not directly compel the creation of the debt without the consent of the citizens or town authorities. Passing upon this argument and sustaining the validity of the statute the Court said: "All legislative power is conferred upon the Senate and Assembly and every act is within the legitimate exercise of that power unless some restriction or limitation can be found in the Constitution itself. The distinction between the United States Constitution and our State Constitution is that the

former confers upon the Congress certain specified powers only while the latter confers upon the Legislature *all* legislative powers. In the one case the powers specifically granted can only be exercised; in the other all legislative powers not prohibited may be exercised. It cannot be denied that the subject of the law in question is within the legislative powers..... As a question of power I am unable to find any restriction in the Constitution. It is not within the judicial province to correct all legislative abuses; that local expenditures and improvements should in general be left to the discretion of those immediately interested is manifestly just and in accordance with the theory of our government. But when power is conceded we have no right to inquire into the motives or reasons for doing the particular act."

In *Astor vs. Mayor*, 62 N. Y. 567, an action was brought to restrain the collection of an assessment upon real estate and to vacate and set the same aside. The assessment had been made by the Commissioners of Central Park who were named in the statute creating the board and who were given the power to fill vacancies therein and to whom the exclusive care, management and control of a portion of Sixth Avenue and certain other streets in New York had been given. The act was sustained and it was held that it did not violate the constitutional prohibition that county officers whose election or appointment was not provided for by the Constitution should be elected by the electors or appointed by the county authorities, and it was further held that the Constitution did not prohibit the Legislature from appointing persons to carry out a public improvement although the power to make such improvement was at the time vested in the local officers of the city elected by the people.

In *People vs. McDonald*, 69 N. Y. 362, (1877)

a statute was attacked and sustained in which the Legislature had appointed commissioners to widen the public highways and avenues in the town of Saratoga Springs by proceedings differing from those which could be taken by the commissioners of highways under the general laws of the State.

People, &c. Morrill vs. Supervisors, 112 N. Y. 585, (1889) page 588, "the Legislature unless restricted by constitutional limitations may resume powers delegated to localities and assume the direct control of matters pertaining to local government."

In Rogers vs. Common Council of Buffalo and Others, 123 N. Y. 173, (1890) the Court had before it the civil service act which provided for the appointment by the Governor and the confirmation by the Senate of three persons as civil service commissioners, and which required the regulations prescribed by the Mayor of a city for admission into the civil service to be approved by this State commission before they should go into effect. The act was attacked and sustained as is indicated by the following extract from the opinion of the Court delivered by Mr. Justice Peckham, 186: "Another objection to the validity of the statute is stated by the appellant. He says the statute violates Article 10, Section 2 which provides that 'all city, town and village officers whose election or appointment is not provided for by this Constitution shall be selected by the electors of such cities, towns or villages or of such division thereof as the Legislature shall designate for that purpose.' His argument runs in this manner: The statute provides that the Mayor shall prepare general rules under which city officers are to be selected which shall go into effect when approved by the state civil service commission. The powers of the local authorities to select city officers are, there-

fore, he argues, subordinate to the power of the state authorities. We think the proposition cannot be maintained. The powers of the local authorities to select city officers within the meaning of this section of the Constitution are not subordinate to those of the State authorities by the mere necessity for the submission of the regulations concerning the appointment to the State board. The statute provides that the Mayor shall prescribe such regulations for the admission to the civil service as will best promote the efficiency thereof and ascertain the fitness of candidates in respect to character, knowledge and ability for the branch of the service into which they seek to enter. These regulations are to take effect upon the approval of the State commission. The Mayor has in the first instance the sole right to prescribe regulations but they are such as shall best promote the efficiency of the service and ascertain the fitness of the candidates. The submission of such regulations to a State board before they are to take effect does not interfere with the general powers of the local authorities to appoint to office. The State board cannot itself make the regulations or alter them. The regulations themselves can only be for the purpose of establishing efficiency and establishing the fitness of candidates. The same local authorities are to make the appointments that did so before the statute was passed. Means are simply taken to insure the appointment of fit and capable persons. The general plan provided in the statute would seem to be a fit and appropriate one for the purpose of accomplishing that result."

In *Redell v. Moore*, 63 Neb., 219, a statute creating a board of fire and police commissioners for cities of the metropolitan class and vesting the power of appointment thereto in the Governor, was attacked as involving an unconstitutional depri-

vation of the right of local self government, but was sustained.

This case over-rules *Atty. General v. Moores*, 55 Neb. 480, and re-instates *State v. Seavey*, 22 Neb., 454.

In *Ohio vs. Covington*, 29 Ohio State 102, (1876) the Court had before it and sustained an act providing that in all cities of the first class the police powers and duties should be vested in and exercised by a board of five members to be appointed by the Governor for a term of five years. "Now it is true that the terms in which this grant of power is made to the General Assembly are restricted and limited by many inhibitory provisions contained in the instrument, but we find no express inhibition against such legislation as is contained in this statute. The question, therefore, is, is there an implied inhibition against it?

It is claimed by counsel for the relator, as we understand their arguments, that such inhibition is implied from the provisions quoted above from the bill of rights especially when they are considered in connection with the history and practice of the State then and previous to the adoption of the Constitution.

The circumstances referred to by counsel it is claimed would show that previous to the adoption of the present Constitution in 1851 the police of the several cities and villages within the State had been elected by the electors resident therein or appointed by boards or officers elected by the electors.

And, therefore, it is to be inferred from the above declarations in the bill of rights, to-wit 'and all powers not herein designated remain with the people', that the power to change the mode of election or appointment of the police force of cities and

villages was intended to be withheld from the General Assembly.

To this argument a majority of the Court desires to express their unqualified dissent. By such interpretation of the Constitution the body of laws in force at the time of its adoption would have become as permanent and unchangeable as the Constitution itself. For such argument would apply with equal force to every subject of legislation concerning which no specific direction is contained in the Constitution. Indeed, the true rule for ascertaining the power of the Legislature is to assume its power under the general grant ample for any enactment within the scope of the legislation unless restricted by the terms or by reason of some express inhibition."

In *State vs. Smith*, 44 Ohio State 348 (1886) the Court sustained a statute providing for the establishment of a Board of Public Works in cities of the first class to be appointed by the Governor, and the Court by *Menshall, J.*, at page 372 said: "Ample power is conferred upon the General Assembly for the government and organization of cities by general laws. The legislative power of the State is vested in it by Section 1, Article 2 of the Constitution. It is required by Section 6, Article 13, to exercise this power by the enactment of general laws for the organization of cities and villages, and it is in the exercise of this power by the General Assembly that the entire system of municipal government for cities and villages has been created in this State. The entire details of the system that may be devised and the public agencies that may be employed for administering it, and whether they shall be elected or appointed is left by the constitution to the wisdom of the Legislature."

In *Philadelphia vs. Fox*, 64 Pa. 169 (1870) the Court sustained the statute authorizing judges of the Supreme Court and other judges appointed trustees for the trust to the City of Philadelphia under Girard's will and others. Sharswood, J., said: "The city of Philadelphia is beyond all question a municipal corporation, that is, a public corporation created by the government for political purposes and having subordinate and local power of legislation.....It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency having no vested right to any of its powers or franchises—the charter or act of election being in no sense a contract with the State—and, therefore, fully subject to the control of the Legislature who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement or destroy its very existence with the mere breath of arbitrary discretion.....This much is undeniable and has not been denied.....The sovereign may contain its corporate existence and yet assume or resume the appointment of all its officers and agents into its own hands, for the power which can create and destroy and modify and change. Indeed the Legislature of this commonwealth under the Constitution could not contract to invest any municipal corporation with an irrevocable franchise of government over any part of its territory. It cannot alienate any part of the legislative power which by the Constitution is vested in a General Assembly annually convened. If the Legislature were to attempt to erect a municipality with a specific provisions that its powers should be unchangeable or irrevocable, such a provision would be a nullity."

Edmondson vs. Board of Education of
Memphis, Tennessee, 1902. 58 L. R. A. 170.

The Court in sustaining a statute requiring a Board of Education, vested with title to all school property within the limits of a city and which received State aid in the maintenance of their schools, to admit thereto free of charge all children living within half-mile of the city limits, said: "It is evident this corporation was created for the convenience of the citizens of Memphis upon the theory that the common schools of the City would be more judiciously managed by a local agency selected by and responsible to the citizens than in any other way. It is well settled that such a corporation is under the control of the Legislature so that it may be abolished or its powers may be enlarged or its responsibilities increased any time by that body without the danger of encountering constitutional difficulties."

In *Gilhooly vs. Elizabeth*, 37 Vr., 484, while it is true that the Supreme Court said: "This act is a return to the regulation of municipal affairs by commissions which called forth unmeasured condemnation throughout the state, and led to the provision of the present constitution prohibiting it.

If the Governor can legally exercise the power committed to him in this case, then the legislature, while impotent to act directly, may authorize the Governor, or the secretary of State or A B., at its pleasure, to exercise his discretion, whether he will appoint for any city or other municipality a commission to assess and collect taxes, or to determine what local improvements shall be made, or what franchises shall be granted, or what ordinances passed; in fact, by this scheme, the entire field of local government could be occupied by a commission, to the exclusion of its self-government, and

the barrier which the people believed they had securely erected against such pernicious legislation would be swept away.

The constitution forbids that such legislation shall receive judicial sanction," it must be borne in mind that the court had before making this statement determined that the statute was *private, local and special*.

Mayor of Jersey City v. Jersey City &c., R. Co., 5 C. E. Gr., 360 at 366, the Chancellor: "The complainant so far as its right to regulate the streets is concerned, is merely a municipal corporation, exercising such power as the legislature has delegated to it. It is well settled that the grant of such powers is not a contract, but an exercise of legislative power, and that the legislature may at any time take away, resume, or limit such powers in the same manner as those conferred upon courts, magistrates, sheriffs or other officers, *the machinery* by which government is carried on.

Thieman vs. Belvidere &c. R. R. Co., 2 Dutch, 148 (Supreme Court) at 171: "Public corporations are such as are created for political purposes. They are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good. Their powers are subject to the control of the legislature, and the charter of such incorporations may be altered or repealed at the pleasure of the legislature.

"Over public corporations the legislature have an unlimitel control to create, modify or destroy them at pleasure."

Rader v. Southeasterly Road District of Union, 7 Vr., 273 (Supreme Court) page 276: "The power of the legislature over corporations created for purposes of local government is supreme. From a

grant of this character, no contract arises with the corporators which exempts it from legislative control. The legislature may alter, modify, or repeal the character at any time, in its discretion. The only limitation on the operation of such repeal is as to creditors, that it shall not operate to impair the obligation of existing contracts, or deprive them of any remedy for enforcing such contracts which existed when they were made."

Paterson v. The Society for Establishing Useful Manufacturers, 4 Zab., 385 (Supreme Court) at page 397: "It is not denied that a municipal corporation may be either by the legislature or by the British parliament, by virtue of the plenitude of its powers, imposed upon the corporators without their consent. It doubtless may be done."

In *State vs. Seymour et als*, Comm'rs, 6 Vr. 47 (Sup. Ct.) a statute, which appointed commissioners to map and define streets and avenues in a township was before the court which said: (54) "There are no reasons assigned that are sufficient, against the power of the legislature to appoint these commissioners, with the duties and authority given them. They, in effect, take the places of surveyors of the highways and overseers of roads, and map and lay down many roads at a time, instead of one, in anticipation of future public necessity. It is, in principle, the ordinary delegation of legislative authority to choose public officers, who do these necessary and subordinate acts of administration. They are municipal officers selected by the legislature instead of by the people, which, however questionable the method may be in policy, is frequently exercised, and can hardly be doubted within certain necessary limitations."

NEW JERSEY COURT OF ERRORS AND APPEALS

EDMUND WILSON, Attorney-General, State of New Jersey, RICHARD W. BOOTH, Relator,	}	10
<i>Defendants in Error,</i>		<i>Brief on</i>
<i>vs.</i>		<i>Reargument.</i>
PATRICK J. MCGUINNESS,	}	
<i>Plaintiff in Error,</i>		
<i>Defendant, below.</i>		

FIRST QUESTION.

Is an Act of the Legislature valid, which confers subject to a referendum to the voters of a municipality local governmental powers, to be exercised in the municipality, upon a commission the members of which are not selected from among the citizens of the municipality. In other words, can the Legislature, under such a form of government as ours, delegate municipal governmental powers to a commission, the members of which are not selected from among the citizens of the municipality, even though the exercise of those powers in the municipality by the commission, is made to depend upon the consent of the voters thereof?

This brings before the Court the question as to whether the privilege of local self-government exists in New Jersey, or whether the people by the adoption of the Constitution surrendered to the Legislature every vestige of political right which they had theretofore possessed?

In many States such right is expressly recognized in the written Constitution, and all judicial interpretation is against the interference of State boards in local affairs. Section 2 Article 10 of the New York Constitution provides that municipal officers shall be elected by the electors of the municipality or appointed by the authorities thereof. Therefore all the New York decisions are against State control over municipal government. And doubtless this is
 10 the reason that in New York, even with the principle of civil service established by the Constitution, the civil service of the municipalities is under the control of a municipal civil service board. *Bolton vs. Albertson*, 55 N. Y. 50.

Still another line of decisions distinguishes pure local self-government from such as the State at large has an interest in—for example, the police power which has been held to be a function of local
 20 government coming within State control. *Dillon Municipal Corporations*, Chapter 4, page 78, note 1.

In New Jersey there is no specific provision in the Constitution guaranteeing local self-government. The preamble to that document, however, declares its purpose to be to secure and transmit unimpaired to succeeding generations civil and religious liberty.

30 Cities, townships and counties are recognized throughout the Constitution and may be said therefore to be portions of the constitutional form of government adopted with the Constitution:

Article I.—Sections 19 and 20—

“No county, city, borough, town, township or village shall hereafter give any money or
 40 property, or loan its money or credit, to or in

aid of any individual association or corporation, or become security for or be directly or indirectly the owner of any stock or bonds of any association or corporation.

“No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association or corporation whatever.”

10

Article II.—Section 1—

“Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State for one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all officers that now are, or hereafter may be, elective by the people * * *.”

20

Article IV.—Section 1, Sub-section 2—

“No person shall be a member of the Senate who shall not have attained the age of thirty years, and have been a citizen and inhabitant of the State for four years, and of the county for which he shall be chosen one year, next before his election; and no person shall be a member of the general assembly who shall not have attained the age of twenty-one years, and have been a citizen and inhabitant of the State for two years, and of the county for which he shall be chosen one year next before his election; provided, that no person shall be eligible as a member of either house of the legislature, who shall not be entitled to the right of suffrage.”

30

Section 2, Sub-section 1—

“The Senate shall be composed of one Sena- 40

tor from each county in the State, elected by the legal voters of the counties, respectively, for three years."

Section 3, Sub-section 1—

10 "The General Assembly shall be composed of members annually elected by the legal voters of the counties, respectively, who shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants."

Section 7, Sub-section 10—

20 "The Legislature may vest in the Circuit Courts, or Courts of Common Pleas within the several counties of this State, chancery powers, so far as relates to the foreclosure of mortgages and sale of mortgaged premises."

Sub-section 11—

"The Legislature shall not pass private, local or special laws. * * * Regulating the internal affairs of towns and counties; appointing local offices or commissions to regulate municipal affairs."

30 Article V, Section 12—

"When a vacancy happens in the office of clerk or surrogate of any county, the Governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified."

Article VI, Section 5, Sub-section 2.

40 "The Circuit Courts shall be held in every

county of this State, by one or more of the justices of the Supreme Court, or a judge appointed for that purpose, and shall, in all cases within the county except in those of a criminal nature, have common law jurisdiction, concurrent with the Supreme Court * * *."

Section 6—

"There shall be no more than five judges of 10 the inferior court of common pleas in each of the counties in this State, after the terms of the judges of said court now in office shall terminate. One judge for each county shall be appointed every year, and no more, except to fill vacancies, which shall be for the unexpired term only.

Section 7, Sub-section 1—

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"There may be elected under this constitution two, and not more than five, justices of the peace in each of the townships of the several counties of this State, and in each of the wards, in cities that may vote in wards * * *."

Sub-section 2—

"The population of the townships in the several counties of the State and of the several 30 wards shall be ascertained by the last preceding census of the United States, until the Legislature shall provide, by law, some other mode of ascertaining it."

Article VII—Section 2, Sub-section 6—

"Clerks and surrogates of counties shall be elected by the people of their respective counties, at the annual elections for members of the 40

General Assembly."

Sub-section 7—

"Sheriffs and coroners shall be elected by the people of their respective counties, at the elections for members of the General Assembly, and they shall hold their offices for three years.

10 Sub-section 8—

"Justices of the peace shall be elected by ballot at the annual meetings of the townships in the several counties of the State, and of the wards in cities that may vote in wards, in such manner and under such regulations as may be hereafter provided by law.

20 "They shall be commissioned for the county, and their commissions shall bear date and take effect on the first day of May next after their election.

"They shall hold their offices for five years; but when elected to fill vacancies, they shall hold for the unexpired term only; provided, that the commission of any justice of the peace shall become vacant upon his ceasing to reside in the township in which he was elected.

30 "The first election for justices of the peace shall take place at the next annual town meeting of the townships in the several counties of the State, and of the wards in cities that may vote in wards."

Article X—Section 7—

40 "The election of clerks and surrogates in those counties where the term of office of the

present incumbent shall expire previous to the general election of eighteen hundred and forty-five, shall be held at the general election next ensuing the adoption of this constitution; the result of which election shall be ascertained in the manner now provided by law for the election of sheriffs."

Section 11—

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"Clerks of counties shall be clerks of the inferior courts of common pleas and quarter sessions of the several counties, and perform the duties, and be subject to the regulations now required of them by law, until otherwise ordained by the Legislature."

Attention is also called to Article I, Section 2, which declares that all political power is inherent in the people. Perhaps, however, the most significant statement in the New Jersey Constitution as regards this discussion is Section 19, Article I, the concluding paragraph of the Bill of Rights. It says: 20

"This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."

It is contended, therefore, that the right of local self-government existed in the people of this State from time immemorial; was not surrendered to the Legislature by the adoption of the Constitution and cannot be taken away from the people even though consent be given by popular vote. 30

1st. The right of local self-government is the foundation of our institutions, and has existed for generations in this country and in England, whence our governmental ideas came. 40

"The whole civil policy is based upon two grand ideas as its foundations and supports, the idea of local self-government and the idea of centralization. The first was borrowed from the tribal customs of the Saxons and other Germanic tribes who invaded Western Europe. The second is a heritage from Rome. The one is the safeguard of liberty; the other the source of power."

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Pomeroy Const. Law, Bennett's ed., Section 155, page 100.

By Articles XV and XVI of Magna Charta, which by act of 25 Edw. I became a part of the common law of England, the City of London

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"shall have all the old liberties and customs which it hath been used to have, moreover we will and grant that all other cities, boroughs, towns and barons of the five ports and all other ports shall have their liberties and free customs."

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"The policy of creating local public corporations for the management of matters of local concern runs back to an early period in our colonial history, is exhibited in all our legislation, and expressly or impliedly guaranteed in our State constitutions."

Dillon Municipal Corporations, Chapter 1, page 18.

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"Townships from an early period were accustomed to regulate their local offices and provide means for local purposes by a vote of the inhabitants assembled in town meetings, probably in the first instance without statutory authority."—Depue, J., in *Bernards vs. Allen*,

32 Vroom 288, at p. 236.

The act of January 26, 1716-17, All., p. 35 (cited in defendant's first brief, p. 6) permits the inhabitants of every town, division, precinct and district within the several counties yearly and every year to choose an assessor and collector. By the act of June 28, 1766, Allison, page 287-288, it was expressly declared that no person shall have the privilege to vote in any town meeting for officers or other business, unless the person is a freeholder, tenant for years or householder and resident. The act further declares that all powers given to the inhabitants of this colony at their said meetings by any act of the General Assembly, shall be understood to extend only to freeholders, tenants for years or householders, being residents in such township, and no others. The Act passed on the 21st of February, 1798, Paterson, page 276, defines the powers of the townships, permits the inhabitants of the townships to pass laws and raise revenues for local governmental purposes and expressly provides that no one shall have any voice in township affairs except those who reside in the township. Thus early in the legislative history of New Jersey was the right of local self-government recognized.

In Rathbone vs. Worth, 150 N. Y. 459, Mr. Justice Gray said:

"I refer to the right of local self-government, a right which inheres in a republican government, and with reference to which our Constitution was framed. The habit of local self-government is something which we took over, or rather continued from the English system of government."

Cooley Constitutional Limitations, page 35, remarks:

"If not expressly recognized it is still to be understood that all of these instruments (the State constitutions) are framed with its (local self-government) present existence and anticipated continuance in view."

10 "Local self-government is the school which fits people for self-government. Local self-government is the result and also the most efficient preserver of civil liberty. The principle is one which runs through our entire system of government from the road and school district up to the Federal Government."

Rathbone vs. Wit, 6 App. Div. 277 (N. Y.).

Judge Cooley in *People vs. Hurlbut*, 24 Michigan 44, reviews exhaustively the history of local self-government. He says:

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"Local self-governments universally in this country were either simultaneous with or preceded the more central authority * * * when both were once established they ran parallel to each other as they were meant to do for all time. * * * The whole contest with Andros as well in New England as in New York and New Jersey, was a struggle of the people in defense of the right of local government."

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2nd. This ancient right of local self-government inherent in the people was not surrendered by them to the Legislature, and is impliedly protected by the Constitution. In the constitutional provisions cited above the local governments are expressly recognized, and, it is claimed, protected. It is admitted that the Legislature can control and alter them and can enlarge or diminish their power and authority at pleasure. The Legislature, however, must in all
40 these changes provide the governmental agencies

from among the ranks of the governed. It has been said that the Legislature can even abolish these local governments at pleasure, but how can this be so since the Legislature is dependent for its very existence upon one unit of local government, the county?

Article IV, Section 1, Sub-section 2, requires the members of the Senate and General Assembly to be inhabitants of the county whence chosen. If, therefore, it be true that the Legislature is absolutely supreme, it would follow that it might abolish all county lines, and thereby destroy the entire fabric of our State government, provided for in our Constitution. The leading case on this question is *People vs. Hurlbut*, 24 Mich. 44. In it was involved the validity of an act of the Legislature creating a Board of Public Works in the city of Detroit and providing for the appointment of the officers or members of the board by the Legislature. Section 14, Article XV, of the Constitution of Michigan declares

“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.”

The court held this act invalid as against the constitutional right of local self-government.

Campbell, Chief Justice, in his opinion, said :

“We are therefore compelled to consider the plain question whether the State authorities have a right to assume unlimited control of all municipal appointments. Judicial offices the Constitution has distinctly provided for as elective, and they are local in their action, rather than in their nature. But as to other

offices the power is plenary, or it does not exist at all. It may as well include every office as any less than all. It may put all the power into the hands of one person, as well as divide it among several, and it may continue it for life as well as for a less period. * * * It may create incorporated cities and villages in such numbers as to put the great mass of local administration in the hands of State agents. This is not very likely to happen, but it is just as likely as many other things which it has been thought proper to guard against by constitutional enactment. It is, beyond dispute, directly opposed to the principal design of all our Constitutions; and, if it has not been guarded against, there has been a very great oversight, and the present legislation shows that the danger was not imaginary. But the Constitution is not fairly open to such criticism. We must never forget, in studying its terms, that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages in the abstract—or municipalities which had lost all their old liberties, by central usurpation, but American and Michigan municipalities of common-law origin and having no less than common-law franchises. Our Constitution cannot be understood or carried out at all, except on the theory of local self-government, and the intention to preserve it is quite apparent. * * * This is no mere political theory, but appears in the Constitution as the foundation of all our polity. There is no mid-

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dle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the State may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is that, when the Legislature has designated the time and manner of appointment or election, the local authority shall fill the offices as so ordained."

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Judge Cooley delivered a concurring opinion so full of masterful reasoning and so applicable to the present case that we quote at large from it:

"We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, prop- 20 erty and local conveniences, to make contracts for public works on behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The Legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive govern- 30 ment of the city, and the appointment of all its officers, excepting only the judicial, for which, by the Constitution, other provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this State is or is not a mere privilege, conceded by the Legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwith- 40

standing the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

10 “Now, it must be conceded that the judicial decisions and law writers generally assert that the State creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short, that the corporate entities are mere agencies which the State employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of State constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not strongly expressed, for the reason that its exercise is generally confined within such bounds
20 as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice.

30 “Our Constitution assumes the existence of counties and townships, and evidently contemplates that the State shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the
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State shall have county or township organizations. It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the Legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the State might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent, and for any period of time the State might choose. 10

"The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest some time, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several State Constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either 20 30 40

an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the Legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

“The circumstances from which these implications arise are: First, that the Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system. * * *

“Our traditions, practice and expectations have all been in one direction. And when we go beyond the general view to inquire into the

details of authority, we find it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a State power, have been purely exceptional. * * *

"In view of these historical facts, and of these general principles, the question recurs whether our State Constitutions can be so construed as to confer upon the Legislature the power to appoint for the municipalities the officers who are to manage the property, interests and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the State may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied. it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the Legislature could not be com-

10 pelled to regard the local political sentiment
 in their choice, and would, in fact, be most
 likely to interfere when that sentiment was ad-
 verse to their own, the government of cities
 might be taken to itself by the party for the
 time being in power, and municipal govern-
 ments might easily and naturally become the
 spoils of party, as State and national offices
 unfortunately are now. All these things are
 20 not only possible, but entirely within the range
 of probability, if the positions assumed on be-
 half of the State are tenable. It may be said
 that these would be mere abuses of power, such
 as may creep in under any system of constitu-
 tional freedom; but what is constitutional free-
 dom? Has the administration of equal laws
 by magistrates freely chosen no necessary place
 in it? Constitutional freedom certainly does
 30 not consist in exemption from governmental in-
 terference in the citizen's private affairs; in his
 being unmolested in his family, suffered to
 buy, sell and enjoy property, and generally to
 seek happiness in his own way. All this might
 be permitted by the most arbitrary ruler, even
 though he allowed his subjects no degree of
 political liberty. The government of an oli-
 garchy may be as just, as regardful of private
 rights, and as little burdensome as any other;
 but if it were sought to establish such a gov-
 40 ernment over our cities by law, it would hardly
 do to call upon a protesting people to show
 where in the Constitution the power to estab-
 lish it was prohibited; it would be necessary,
 on the other hand, to point out to them where
 and by what unguarded words the power had
 been conferred. Some things are too plain to
 be written. If this charter of State govern-
 ment which we call a Constitution were all
 there was of constitutional command; if the
 usages, the customs, the maxims, that have

sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or Legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so-called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.

“Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured and guarded; in one’s liberties as a man and a citizen—his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow-citizens; all these guarded and protected, and not held at the mercy and discretion of any one man or of any popular majority.—Story, Miscellaneous Writings, 620.

10 "If these are not now the absolute right of
 the people of Michigan, they may be allowed
 more liberty of action and more privileges, but
 they are little nearer to constitutional freedom
 than Europe was when an imperial city sent
 out consuls to govern it. The men who framed
 our institutions have not so understood the
 facts. With them it has been an axiom, that
 20 our system was one of checks and balances;
 that each department of the government was a
 check upon the others, and each grade of gov-
 ernment upon the rest; and they have never
 questioned or doubted that the corporators in
 each municipality were exercising their fran-
 chises under the protection of certain funda-
 mental principles which no power in the State
 could override or disregard. The State may
 mould local institutions according to its views
 of policy or expediency; but local government
 30 is a matter of absolute right; and the State
 cannot take it away. It would be the boldest
 mockery to speak of a city as possessing muni-
 cipal liberty where the State not only shaped
 its government, but at discretion sent its agents
 to administer it; or to call that system one of
 constitutional freedom under which it should
 be equally admissible to allow the people full
 control of their local affairs, or no control at
 all. * * *

30 "Nevertheless, when the State reaches out
 and draws to itself and appropriates the pow-
 ers which from time immemorial have been lo-
 cally possessed and exercised, and introduces
 into its legislation the centralizing ideas of
 continental Europe, under which despotism,
 whether of monarch or commune, alone has
 flourished, we seem forced back upon and com-
 40 pelled to take up and defend the plainest and
 most primary axioms of free government, as

if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established * * *."

It should be noted in the case before the court that, under the Civil Service Law not only is it possible to have the commission which controls local officers appointed from without the county, but it is perfectly possible to have every single appointee to public office a non-resident. 10

The doctrines thus strongly enunciated by the Supreme Bench of Michigan during the term of office of the great constitutional authority, Cooley, have been upheld and reiterated in the following cases:

28 Mich. 228; 25 Mich. 153; 89 Mich. 50.

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These are all Michigan cases following the leading case above quoted, 24 Mich. 44. The attention of the court is directed also to *Jameson vs. Denny*, 118 Ind. 382. This case involved the constitutionality of an act passed in 1889, purporting to give control of the streets, alleys, sewers, lights, etc., in cities to boards of public works appointed by the Legislature. The act was declared to be void as denying the right of local self-government, although the law contravened no express provision of the Constitution of that State. The decision is planted squarely upon the proposition that the right of the people to govern themselves as to matters local in their nature was not curtailed by the adoption of the Constitution, but is still vested in them, and the Legislature is powerless to take such right away. In the course of his opinion, Coffey, J., said: 30

"It is perhaps true that the General Assem- 40

10 bly may at will pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to that which had been previously given, but we do not think that it can take away from the people of a town or city the rights which they possessed as citizens of the State before their incorporation. The object of granting to the people of a city municipal powers is to give them additional rights and powers to better enable them to govern themselves, and not to take away any rights they possessed before such grant was made. * * *

20 "In this case the Legislature has undertaken to place in the hands of three men the exclusive control of all the streets, alleys, lanes, thoroughfares, bridges and culverts in the city of Indianapolis, without the consent of those to be affected thereby, with full power to improve, alter or change the same in any manner they may choose, with the exclusive power to employ all the assistance they may desire, including legal counsel, and fix their salaries and compensation in such sum as they, in their unrestrained judgment, may think proper, without any accountability to anyone. Not only that, but these three men are given absolute and exclusive control over the construction of all sewers, the water supply, and supply of lights, with no voice in the matter left to the people of the city.

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40 "If the Legislature may put this matter in the hands of three men, why not in the hands of one man; and if they may transfer these matters, why may they not transfer others? In other words, the effort is, by this act, to take from the city all control over the improvements of the city, without the consent of her

people, and place it in the hands of the agents of the State chosen by the Legislature, and charge the people of the city with the whole expense. We do not think that the people have conferred upon the Legislature such power. It is subversive of all local self-government—a right that the people did not surrender when they adopted the Constitution. They still retained, after the adoption of that instrument, the right to select their own local officers, and 10 every effort to deprive them of such right must be held to be beyond the power of the Legislature.”

In a concurring opinion, Olds, J., distinguishes the police power from other local concerns and explains how it can be constitutionally subjected to State control. He says:

“I do not deny that the Legislature has the 20 power to change the form and mode in which municipal corporations shall be governed. On the contrary, I affirm that without the consent of the inhabitants the form of corporate government may at any time be altered, but I do deny that the Legislature has the power to deprive the electors of a municipal corporation of the right to choose their own immediate local officers. By immediate local officers, I mean such as are charged with the control of 30 purely local concerns, as the streets, the fire apparatus, and the like matters. In the class of local officers I do not include the peace-keeping officers, or the constabulary, for such officers are in reality officers of the State, as it is the duty of the State to provide for the personal safety of its citizens on the thronged streets of a great city as well as on the secluded rural highways. What I affirm, in short, is this: That because an elector lives in a city 40

he cannot have the right to vote upon purely local affairs taken from him by any statute. The decisions which declare that the State may appoint peace officers in cities can be sustained only upon the ground that such officers are State officers and not local officers. The principle is one not to be extended, but to be limited."

- 10 The courts of Wisconsin, Iowa and California have construed their Constitutions in the same way. See *O'Connor vs. Fond du Lac*, 109 Wis. 253, *People vs. Lynch*, 51 Cal. 15; *Howe vs. Des Moines*, 103 Iowa 76.

- 3rd. The Legislature cannot take away local self-government even with the consent of the citizens. It should be remembered that in the case before us the consent of the citizens of Essex County
 20 was neither asked nor given to the withdrawal from them of all control over the local governmental offices of the county. The rights of the people were voted away by sixteen men, a political majority of one in the Board of Chosen Freeholders. And it is instructive to note that the political party which did this thing was repudiated at the polls within six months thereafter by a majority of 22,000. It can hardly be said, therefore, that the voice of the people of Essex County has been heard
 30 upon this proposition. Assuming, however, that a majority of the voters had agreed to abrogate the power of local self-government and lodge it with the Legislature. This action it is claimed would be void. The Constitution prevents the surrender of local government as clearly as it protects it from usurpation. The Constitution has divided governmental powers, express and implied, among certain governmental agencies, included in which are towns, cities and counties. It has granted certain
 40 powers and privileges to each of these, or has recog-

nized them as already existing. It has guaranteed in its preamble that civil liberty shall be transmitted unimpaired from one generation to another. With the granting or recognition of these powers and privileges is inseparably coupled the duty to keep and properly discharge them. Local self-government is a principle recognized by our Constitution, and local self-government can no more be surrendered by the voters of a specific municipality to the Legislature that controls it than the Supreme Court can surrender its constitutional rights to the Governor who appoints its members. Moreover, the Constitution of the United States, Article IV, Section 4, guarantees to every State a republican form of government, and the foundation of republican government, as is seen from the citations above, is the right of the citizens of a locality to be governed by officials appointed from among themselves.

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This idea is developed in *Hubbard vs. Springwells*, 25 Mich. 118, wherein the court said:

“In the present case these commissioners and their successors are in no case to be appointed or approved by any town authority. The town officers can have no functions outside of their constitutional or statutory powers; and as they could under no circumstances delegate their trusts to these commissioners, or appoint these men to any such office, or abdicate their own authority, they can give no such rights by acquiescence as they could not give in any other way. The Constitution will not permit a township to give up its vitality. These acts of the commission, and the authority under which they are justified, are completely foreign to any jurisdiction derived from the township. They rest on a claim of sovereign authority above and independent of the town-

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ship, and in hostility to its legal rights. The people themselves could not surrender these, and none of their agents can impair them. The commission cannot exist without destroying the necessary powers of the township."

The attention of the court is also directed to *Bernards vs. Allen*, 32 Vroom 228. In this case the Legislature passed an act authorizing the Governor
 10 to appoint three commissioners of taxation to levy taxes in any township whose officials had failed to perform such duty. The act was declared unconstitutional on the ground that the power to tax cannot be delegated by the Legislature, but is a right conferred from the time of Magna Charta upon the people. It can tax directly or through local instrumentalities, but not otherwise. We can find no decisions in the New Jersey courts which sustain the proposition that the Legislature can
 20 take away the right of local self-government. Many decisions assert the control of the Legislature over the municipality, which we freely admit. The latest dictum is that in *Van Cleve vs. Passaic Valley Sewerage Commission*, 42 Vroom 183. In the course of his opinion Justice Pitney says:

"It is not a constitutional right of the people to have all matters of local concern entrusted to municipal corporations, but within constitutional limits the people acting through the general Legislature may delegate to the municipalities such portion of political power as they may deem expedient, may withhold other powers and may withdraw any part of that which has been delegated."

This statement expressly recognizes that there are constitutional limits beyond which the Legislature may not step in its interference with local government. The municipal corporations may not be
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clothed with all governmental power, commissions may be appointed and municipal affairs confided to their care, but nowhere is it said that the Legislature can take from the people of any municipality all their rights of government and lodge them in the hands of strangers. If it were possible to do so in this case it is possible in every function of local government; and it will hardly be contended that the Legislature could create a government for Essex County composed entirely of citizens of Camden. Allison vs. Corker, 38 Vroom 592, says: 10

“Under our Constitution the power of the Legislature over the *administration* of local government is unlimited.”

This expressly recognizes the existence of local government and states what is freely admitted that its *administration* is entirely dependent on legislative will. Its existence preceded that of the Legislature, and under the Constitution can never be destroyed. While the government is local it can be moulded by the Legislature, but no power can take from the people the inalienable right which lies at the foundation of free government, the right for which our fathers fought and for the protection of which our Constitution was framed, the right to enjoy the inestimable privilege of governing themselves. 20

SECOND QUESTION.

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Assuming that the Legislature has such authority, can it, after creating a commission so composed, and clothed with such powers, delegate to the governing body of such municipality, instead of to the voters thereof, the determination of the question whether the powers conferred upon the commission shall be exercised by it in the municipality, or, to state it in another way, can the Legislature dele- 40

gate to the governing body of a municipality the power to surrender to a commission, so composed, or to retain to itself, as it shall see fit, governmental powers which it has heretofore exercised?

It is contended as to this point, as in the former briefs filed by the defendant in error, that to answer this question in the affirmative would be to say that the Legislature can delegate its legislative discretion. Assuming the first question to have been answered in the affirmative, we find that counties, cities and towns have absolutely surrendered, by constitutional provision, every vestige of power into the hands of the Legislature to be exercised as it may seem wise. Now, to say that the Legislature can redelegate this authority to the discretion of another body, municipal or otherwise, seems so evidently a delegation of legislative power as to be beyond argument. The Civil Service Law was passed by the Legislature with the proviso that it is to go into effect as follows: Sec. 30. "Any municipality *may* adopt the provisions of this act by an ordinance." This language seems clearly to mean that the municipal corporation may or may not adopt its provisions. This is an unconstitutional delegation of legislative power. It being admitted, for the sake of argument, that the people have given control over local concerns to the Legislature by the Constitution, the Legislature alone can exercise it. See cases cited in first brief for defendant in error p. 13 l. 35 *et seq.* In the case of *Bernards vs. Allen*, 32 Vroom 228, at 237, Justice Depue says, "Except as the Legislature of the State may confer upon the political divisions powers to legislate and to provide revenue for defraying the expenses of the local governments, it has no power to delegate the power of taxation to ministerial officers or to another department of the government."

40 In *State vs. Sickles*, 4 Zab. 125, at 126, the court

says, "the power vested in the inhabitants to order money to be raised by tax is in itself a delegated power, and cannot be transferred to the town committee or any other officers." See also *State vs. Korter*, 9 Vroom 308—"assuming the power of the town meeting to raise money for notes, etc., they had no power to delegate that authority to the township committee."

The reasons leading to the conclusions are set out at length by Justice Depue in *Bernards vs. Allen*, *supra*. By *Magna Charta* he declares the right of taxation was given to the people, who alone can delegate it. His words are, "By this charter and others that followed it the renunciation of the right of taxation was given to and the right of taxation conferred upon the people." The people renounced it to the Legislature by the Constitution, and it must be exercised by the Legislature and not surrendered to the discretion of any other body of men. 10 20

This theory applies with equal force to the case at hand. The right of local self-government was a right recognized by *Magna Charta* as clearly and emphatically as the right of taxation. Indeed, taxation is only a part of the broader term. Local self-government was guaranteed to the people by that great landmark of the English Common Law. See page 8 *supra*. If, therefore, it be true that the people have surrendered all local government to the Legislature, the Legislature must exercise it itself, and cannot permit a local municipal corporation to say whether or not certain things shall be done in certain ways. The Legislature can surrender its authority, but only to the people, whence it came. The government of New Jersey exists only on account of the license given by the people. The Legislature can itself govern the State or it can return its governmental powers to the people who gave them. It 30 40

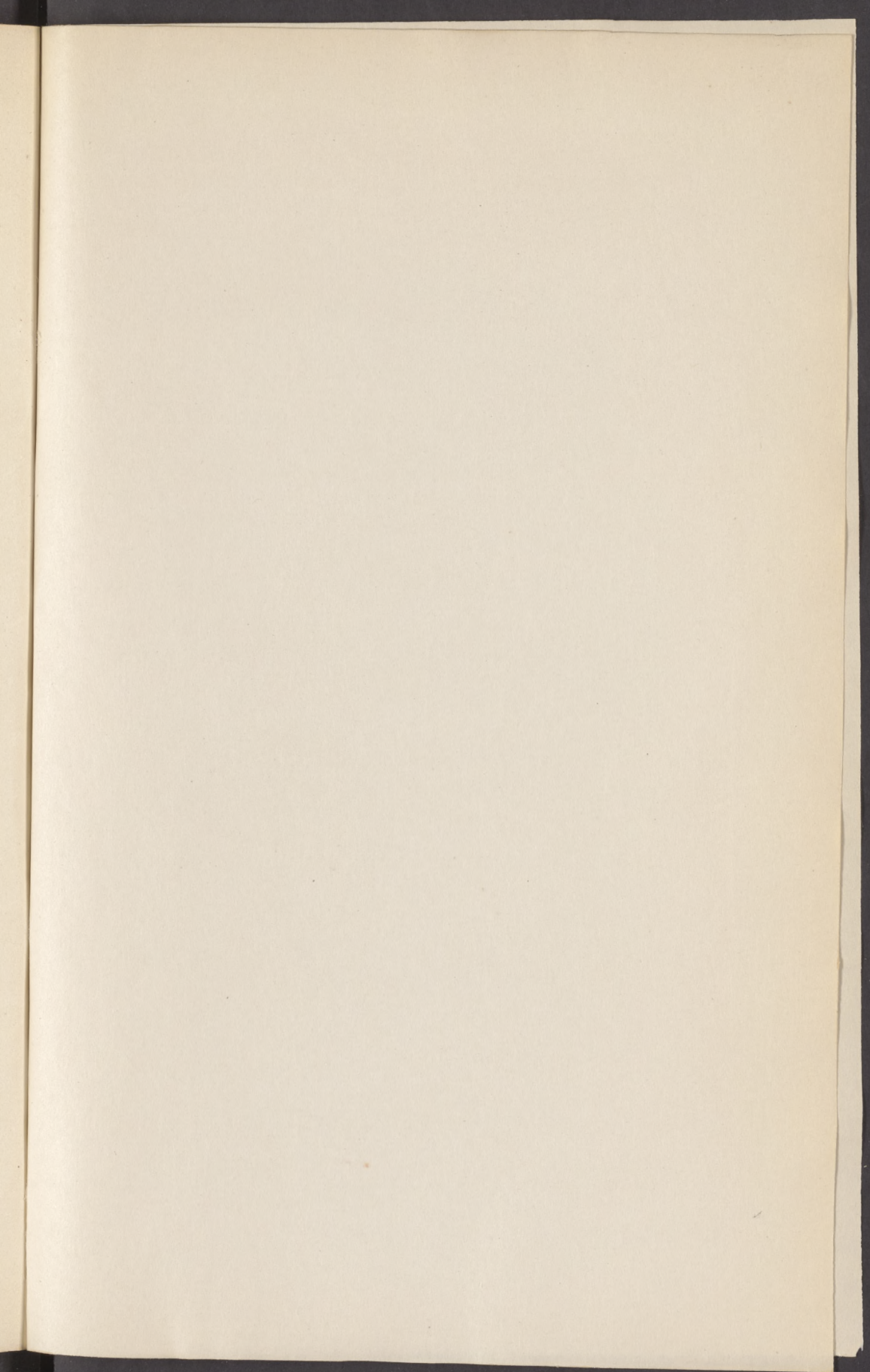
could not, however, authorize the Legislature of Pennsylvania to govern New Jersey. It cannot authorize the Common Council of Philadelphia to govern Trenton. Even the Parliament of England, which is absolutely supreme as to government, is yet not quite supreme, because it cannot permit the Czar of Russia or the King of Spain to govern England.

- 10 If the Legislature desires to take away from Essex County all control over its civil service, the Legislature itself must do so. It cannot pass an act permitting some other body, municipal or otherwise, to decide whether or not the citizens of Camden and Mercer and Sussex shall henceforth run our affairs.

Respectfully submitted,

MUNN & CHURCH,

Defendants in Error.



could not, however, authorize the Legislature
of Maryland to govern New Jersey. It was
decided in the Council of Philadelphia in
1776. Even the Parliament of England
which is absolutely supreme as to government,
is not so in cases of internal security. In
the case of the King of Spain to govern his
kingdom.

10. If the Legislature desires to take away from
the Courts all power to control the execution of
the laws, it is an abuse of power. It is
not to be understood that the Legislature
has the right to control the execution of
the laws, but it has the right to control
the execution of the laws in cases of
internal security.

Respectfully Submitted,

WILLIAM A. NICHOLS

Attorney at Law