Home Rule in South Dakota

Informational Packet Compiled by the
South Dakota Municipal League

June 2002

Municipalities governed by Home Rule Charters as of Date of Publication (9):

Beresford	Faith	Sioux Falls
Brookings	Fort Pierre	Springfield
Elk Point	Pierre	Watertown

Contents

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Purpose of Home-rule Constitutional Provisions

The purpose of home-rule constitutional provisions is to eliminate to some extent the authority of the legislature of the municipality, and to bestow on the municipalities coming thereunder full power of local self-government as to all subjects which are strictly of municipal concern, and not in conflict with the constitution of general laws applicable thereto. Depending upon applicable constitutional provisions, a charter adopted thereunder may become the organic law of the municipality and supersede all general state laws in conflict with it relating to purely municipal affairs.

McQuillian on Municipal Corporations

EXPLORING, ESTABLISHING, AND WORKING UNDER HOME RULE

I. CONSTITUTIONAL

The South Dakota Constitution, article IX, section 2, provides:

> Any county or city or combinations thereof may provide for the adoption or amendment of a charter. Such charter shall be adopted or amended if approved at an election by a majority of the votes cast thereon. Not less than ten per cent of those voting in the last preceding gubernatorial election in the affected jurisdiction may by petition initiate the question of whether to adopt or amend a charter.
>
> A chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state. The charter may provide for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that the administrative proceedings be subject to judicial review.
>
> Powers and functions of home rule units shall be construed liberally.

II. STATUTES

A. SDCL ch. 6-12, attached hereto as **Exhibit A**, sets forth the statutes which allow a municipality to organize a home rule charter.

B. A home rule charter is voted on by the municipality as set out by SDCL 6-12-1 through SDCL 6-12-3, hereto attached as **Exhibit A**.

C. SDCL 6-12-6, attached hereto as **Exhibit A**, sets out the restrictions on the power of a municipality with a home rule charter.

D. SDCL 6-12-6 states:

> The power of a home rule unit does not include the power to:
>
> (1) Enact private or civil law governing civil relationships except as incident to the exercise of an independent county or municipal power;
>
> (2) Define and provide for the punishment of a crime, but this limitation shall not abridge the power of a home rule unit to provide punishment for the violation of ordinances or charter

provisions by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both such fine and imprisonment;

(3) Abridge laws relating to elementary and secondary education;

(4) Change assessment practices and procedures relating to ad valorem taxation of property;

(5) Exempt itself from providing the necessary personnel and facilities to perform services required by general law to be performed by a like unit or units of local government;

(6) Deny referendum on ordinances or bylaws provided by chapter 9-19;

(7) Regulate rates or conditions of service of any public utility regulated by the South Dakota public utilities commission.

III. HISTORY

A. In *McQuillin Municipal Corporation*, § .40, History of Home Rule Charters, it found that constitutional charters began to appear in the 1890's for the following reasons:

1. These constitutional provisions allowed citizens and their towns to write and follow their own municipal charters, subject to state law and policy.

2. The provisions also allowed local towns to address problems of local concern which affected the community members, but did not have any affect on the citizens of the rest of the state.

3. Home rule also freed the legislature from dealing with matters of concern to an individual municipality and thus allowing it more freedom to concentrate on statewide issues.

4. After the enactment of home rule charters, the state realized that "local problems required more attention and comprehensive knowledge than the state could exercise." § 1.40, p. 54.

B. Definition.

1. The rights of home rule have not been defined by the courts. There are two distinct concepts.

a. Selection by the city of town of its charter and what it decides to use for meeting the goals of its existence.

b. The power which allows the town to meet its goals. § 1.41, p. 54.

2. In *Erickson v. City of Sioux Falls*, 70 SD40, 14 NW2d 89, hereto attached as **Exhibit B**, the South Dakota Supreme Court stated:

> A municipal corporation is a creature of the Constitution and statutes of the state. It possesses only such powers, great or small, as these laws give to it, together with only those incidental or implied powers as are necessary to enable it to perform designated and authorized functions. A city, as such, has no inherent powers and none of the attributes of sovereignty.

3. In *McQuillin*, id., § 1.42 states that it is a generally accepted theory that "accordingly unlimited legislative control is generally affirmed, except as restricted by constitution" which is the same theory which was set out in Erickson, supra.

IV. ADVANTAGES AND DISADVANTAGES

A. ADVANTAGES.

In McQuillin, id., § 1.43, the following advantages of home rule are set forth.

1. It leaves each community free to choose the kind of local government, both as to structure and function, best suited to its needs and conveniences and adapted to municipal.

2. With full responsibility resting upon the citizens, they have an opportunity to become educated in the principles and methods of municipal government and to develop common interest in community affairs.

3. Unhampered local control permits prompt action in dealing with fresh municipal problems as they arise.

4. It relieves the state legislature of details of local government and avoids uncertain and conflicting legislation relating to what the community can or cannot do and the method thereof.

5. It tends to the simplification of local organization and function, resulting in a consistent workable machinery of government resting upon a sound fundamental basis at once sensible and scientific, not subject to constant change by the state legislature to satisfy the whims of certain aggressive local citizens, or at the instance of political or economic interests.

6. It removes from the state legislature the temptation to interfere with city affairs for reasons of partisan politics, spoils, or corruption.

B. **DISADVANTAGES.**

1. Home rule has not worked well in larger cities whose populations consist of many diverse elements.

2. Home rule has tended to not work well in cities where the citizens are indifferent, apathetic, or uninformed.

3. In some cases, home rule has degenerated into a rule by oligarchy.

4. There is difficulty in determining what functions belong to the municipality, to the state, or to both.

5. There are no well-defined rules or principles to determine what are local affairs and which are state affairs.

6. The Wisconsin Supreme Court, in *State v. Thompson*, 149 Wis 488, 137 NW 20, hereto attached as **Exhibit C**; and *Van Gilder v. Madison*, 222 Wis 58, 267 NW 25, 268 NW 108, hereto attached as **Exhibit D**; reviewed the home rule charters as being an experiment which was not as successful as the advocate's for home rule in the state of Wisconsin wanted. It appears that the Wisconsin Supreme Court set out the disadvantages of the municipal home rule charters in the opinions cites in these two cases.

V. **CONCLUSION**

A. There are advantages to allowing a municipality the right to govern itself and determining how the city will meets its goals.

B. South Dakota, through its constitution and through SDCL ch. 6-12, § 1-15, hereto attached as **Exhibit A**, allows a municipality to adopt a home rule charter by a municipal vote.

C. South Dakota case law still finds that a municipality is a creature of the constitution and statutes of the state. Although, a home rule charter allows a

municipality more freedom in determining how it will reach its goals when the issue involved relates to local concern, the city is still controlled by South Dakota's constitution and statutes. SDCL 6-12-6, attached hereto as **Exhibit A**, sets forth restrictions on the municipal power under a home rule charter.

D. The theory of home rule charters has its roots in history back to the mid-1800's when state legislatures started to add or amend their constitutions to include a municipality's right to implement a home rule charter.

E. According to McQuillin, supra, § 1.40 through § 1.43, there is no clear definition of home rule.

F. There are many areas where municipal and state issues overlap so in many cases it is difficult for a court to clearly define an issue as being clearly municipal or state.

Chapter 6-12.

*HOME RULE CHARTERS

6-12-1. *Expenses and cost of charter - Election.

Whether initiated by the voters or provided by the governing boards, counties and first and second class municipalities are authorized to expend from their general funds expenses in connection with the preparation and sponsorship of a charter proposal and shall pay the cost of election conducted on the question of adoption or amendment of a charter.

Source:(1)

Commission Note:(2)

6-12-2. *Vote - Alternatives.

When a governing board or a combination of governing boards propose to provide a home rule charter they may either initially submit the proposed charter to a vote or may submit to a vote the question of whether a charter should be initiated and present alternatives as issues upon the same ballot as to the composition and selection of a charter commission to draft the proposed charter.

Source:(3)

6-12-3. *Alternatives on initiated petition.

The governing board or boards to whom an initiated petition is presented and to which a proposed charter is not attached, in addition to the question of whether or not a charter should be adopted, shall, unless the petition contains a general statement as to the petitioner's choice as to the composition and the manner of selection of a charter commission, propose alternatives as provided by §6-12-2.

Source:(4)

6-12-4. *Governmental structure established in charter.

A charter, to be valid, must establish therein the form of governmental structure under which the home rule unit will function.

Source:(5)

6-12-5. *Standards as stringent as state law.

Neither charter nor ordinances adopted thereunder may set standards and requirements which are lower or less stringent than those imposed by state law, but they may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

Source:(6)

6-12-6. *Restrictions on powers.

The power of a home rule unit does not include the power to:

(1) Enact private or civil law governing civil relationships except as incident to the exercise of an independent county or municipal power;

(2) Define and provide for the punishment of a crime, but this limitation shall not abridge the power of a home rule unit to provide punishment for the violation of ordinances or charter provisions by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both such fine and imprisonment;

(3) Abridge laws relating to elementary and secondary education;

(4) Change assessment practices and procedures relating to ad valorem taxation of property;
(5) Exempt itself from providing the necessary personnel and facilities to perform services required by general law to be performed by a like unit or units of local government;
(6) Deny referendum on ordinances or bylaws provided by chapter 9-19;
(7) Regulate rates or conditions of service of any public utility regulated by the South Dakota public utilities commission.

Source:(7)

6-12-7. *Time of election on charter.

When a commission has been selected or appointed to draft a proposed charter or an amendment to a charter, an election on the question must be held within one year after initiation of the proposed action.

Source:(8)

6-12-8. *Special election - Exception.

In all cases a special election shall be called on any question involving a home rule charter unless there is an already scheduled election other than the general and annual election in a municipality within one hundred twenty days of the initiation of the action.

Source:(9)

6-12-9. *Preparation - Notice.

If there is no scheduled election qualifying under §6-12-8, elections will be noticed and ballots will be prepared to accommodate absentee voting under the general election law, and if it is on the question of adopting of a charter or an amendment which has been drafted and approved by the initiators, such election shall be held within sixty days after its filing.

Source:(10)

6-12-10. *Application of general election laws.

Except as provided in §§6-12-7 to 6-12-9, inclusive, general election laws shall govern elections on questions of adoption, amendment or repeal of a charter.

Source:(11)

6-12-11. *Filing charter with secretary of state - Violation - Effect.

The person charged with the conduct of an election concerning a question on adoption of a charter or amendment thereto shall, within thirty days after the canvass and return thereon, file with the secretary of state a certified copy of a charter or amendment adopted. Any person violating the provisions of this section is guilty of a Class 2 misdemeanor, but the failure of such person to so file shall not invalidate any election on such a question or a charter or amendment adopted pursuant thereto.

Source:(12)

6-12-12. *Prior proceedings.

Nothing in this chapter shall be construed to invalidate any proceedings had before July 1, 1974 in connection with the formation or submission of any charter provision instituted prior to July 1, 1974.

Source:(13)

6-12-13. *Limitation on taxing power and fees.

[Repealed by SL 1997, ch 42, § 2.]

Source:(14)

Amendments - 1997:(15)

6-12-14. *Taxing power limited.

No county, city, or other governmental unit, including governmental units chartered under S.D. Const., Art. IX § 2, unless otherwise specifically provided by statute, may, enact or increase, in any form a tax, fee, or charge that is: related to the state lottery; similar to a tax which provides revenues to the state; or similar to state licensing or regulatory fees enacted by statute or adopted by rule. The provisions of this section do not prohibit any tax or fee enacted and imposed on or before March 1, 1996.

Source:

(16)

6-12-15. *Scope of section 6-12-14.

Nothing in § 6-12-14 is intended to authorize any county, city, or other governmental unit chartered under S.D. Const., Art. IX § 2, to enact or increase a tax, fee, or other charge that is denied by its charter, the Constitution, or the general laws of the state.

Source:

(17)

2.650 HOME RULE

2.660 Powers Under Home Rule

The South Dakota Constitution provides that any county or city or combination of the two may provide for the adoption or amendment of a home rule charter. If approved, the charter must be adopted or amended by a majority vote at an election. A home rule charter may also be initiated by the people, by petition of not less than ten percent of those voting in the last preceding gubernatorial election in the affected jurisdiction.

Under a home rule charter, a municipality may exercise any legislative power or perform any function not denied by its charter, the Constitution, or the general laws of the state. The charter may provide for any form of executive, legislative, and administrative structure which is superior to statute, provided that the legislative body so established is chosen by popular election and that the administrative proceedings are subject to judicial review.

The powers and functions of home rule units are to be construed liberally.

2.665 Restrictions Under Home Rule

In an attempt to establish guidelines for home rule charters, the 1974 Legislative Session added Chapter 6-12 of the SDCL which provides, among other things, for the expenditure of funds out of the general fund to cover the cost of the election on the question of adoption or the amendment of a charter. (SDCL 6-12-1)

In addition this chapter establishes two requirements that a charter must meet. They are:

1) The charter must establish the form of governmental structure under which the municipality will function. (SDCL 6-12-4)
2) Neither the charter nor ordinances adopted pursuant to the charter can set standards which are lower or less stringent than those imposed by state law. However, the standards can be higher than state law unless state law provides otherwise. (SDCL 6-12-5)

The purpose of this is to insure that minimum state standards are met, and that in cases where maximum standards are established, the local option of control will not go beyond those standards. Hypothetical examples can be found in the area of pollution control.

The power of a home rule charter does not include the power to:

1) Enact private or civil law governing civil relationships except as incident to the exercise of an independent county or municipality;
2) Define and provide for the punishment of a crime, but this limitation shall not abridge the power of a home rule unit to provide punishment for the violation of ordinances or charter provisions by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both such fine and imprisonment;
3) Abridge laws relating to elementary and secondary education;

4) Change assessment practices and procedures relating to ad valorem taxation of property;
5) Exempt itself from providing the necessary personnel and facilities to perform services required by general law to be performed by a like unit or units of local government;
6) Deny referendum or ordinances or by laws provided by Chapter 9-19 of the SDCL.
7) Regulate rates, or conditions of service of any public utility regulated by the South Dakota Public Utilities Commission. (SDCL 6-12-6)

The 1997 Legislature moved to further restrict a home-rule entity's power to tax. Under the 1997 Act, no city, county, or other governmental unit, including one operating under a home-rule charter, may enact or increase any tax, fee, or charge that is: related to the state lottery; similar to a tax which provides revenue to the state; or similar to state licensing or regulatory fees enacted by statute or adopted by rule. This restriction does not affect any tax or fee enacted and imposed on or before March 1, 1996. (SDCL 6-12-14)

Chapter 6-12 of the SDCL also contains some important election requirements which any governing body considering the adoption of a home rule charter must meet. Statute requires that "(w)hen a commission has been selected or appointed to draft a proposed charter or an amendment to a charter, an election on the question must be held within one year after initiation of the proposed action." (SDCL 6-12-7)

Unless an election, other than the general and annual elections, is already scheduled to be held within one hundred twenty days of the initiation of the action, a special election must be held. (SDCL 6-12-8; See Hdbk., sec. 7.700) The notice of the election and the ballots to be used must conform to the general election law. The election must be held within sixty days after the charter or an amendment to it has been drafted and approved by its initiators. (SDCL 6-12-9; 6-12-10) The person charged with the conduct of the election shall, within thirty days after the canvass and return, file with the secretary of state a certified copy of a charter or amendment adopted. (SDCL 6-12-11)

2. **Municipal Corporations.**
The statutory provision that any citizen and taxpayer residing within municipality may maintain action to prevent violation of any provision of "this title," which embraces whole field of municipal government, authorizes resident citizen and taxpayer of city to test in court any ordinance, resolution or contract executed by municipal authorities in any case wherein validity of such action is challenged. SDC 45.0112.

3. **Municipal Corporations.**
The statute conferring on city power to regulate use of its sewers, without defining limits of such power or prescribing manner of its exercise, vests city with power to exercise discretion, and courts will not interfere with city's action unless it appears to be unreasonable or arbitrary. SDC 45.0201 (24), (35), (84), (85), (89), (90); 45.1801 et seq., 45.1811, 45.1814, 45.1817.

4. **Municipal Corporations.**
The courts will interfere to keep municipal authorities within law and interpose to prevent any action thereof which is ultra virus because of lack of antecedent legislative authority.

5. **Municipal Corporations.**
A municipal corporation is creature of State Constitution and statutes and has only powers which such laws give it, together with incidental or implied powers necessary to enable it to perform its designated and authorized functions.

6. **Municipal Corporations.**
A city, as such, has no inherent powers and none of attributes of sovereignty.

7. **Municipal Corporations.**
The policy of law is to require of municipal corporations a reasonably strict observance of their powers.

8 **Municipal Corporations.**
The only privilege which a city can grant to a person or firm within its limits with respect to sewage disposal is a license or permit to make proper connection with, and empty sewage into, city's sewage system for such treatment and disposal as city may provide, and it has no power to guarantee its successful operation of sewage disposal plant or adequate sewage system.

9. **Municipal Corporations.**
Where city's sewage system or disposal plant must be closed for repairs or fails for any reason to receive or adequately purify sewage emptied into it, city cannot be held liable for resulting damages to any person whose sewage is thereby inadequately treated or excluded and hence cannot, by contract, assume any such liability or bind itself to receive and

dispose of all sewage which patrons may attempt to empty into sewers.

10. **Municipal Corporations.**
The supervision and regulation of sewers is police function of city, which, therefore, in granting permission to use its sewers or continue use thereof, must retain control of them at all times, and any attempt, by way of contract, to deprive city of such control, is void.

11. **Municipal Corporations.**
A city's police power cannot be bargained away by contract, but must be available at all times for use to meet such public needs as may arise.

12. **Municipal Corporations.**
Any license or permit to connect with city sewers must be contingent on ability of city sewage system and disposal plant to digest and dispose of licensee's or permittee's sewage.

13. **Municipal Corporations.**
No one has any vested rights in use of city sewers, nor can city grant such rights.

14. **Municipal Corporations.**
Where city sewage system or disposal plant will not handle sewage from particular source, because of its nature or quantity, or such sewage is of such character as to prevent disposal plant from functioning, city has power and may owe duty to require discontinuance of such sewer connection.

15. **Municipal Corporations.**
A permit or license granted by city to make sewer connection means only that licensee is permitted to empty sewage into city sewage system so long as it will take care of such sewage and city authorities permit.

16. **Municipal Corporations.**
A city's governing board, in exercise of its discretion, with which courts will not interfere unless action taken is clearly unreasonable and arbitrary, may grant and revoke licenses or permits to make connections with city sewers as may be warranted by capacity and ability of such sewers and city's disposal plant to dispose of sewage and as public interests may require.

17. **Municipal Corporations.**
A contract whereby city board of commissioners granted private corporation, operating meat packing plant in city, right to empty all of corporation's industrial sewage into city sewers, without limitation as to character or volume of such sewage, for 15 years, was invalid as exceeding city's authority. SDC 45.0201, 45.1801 et seq.

18. **Municipal Corporations.**
A private corporation, in dealing with city under contract beyond city's authority for disposal of all industrial sewage from such corporation's meat packing plant, acquired no rights. SDC 45.0201, 45.1801 et seq.

19. **Municipal Corporations.**
A city may accept voluntary contributions from private corporation for use of city sewage system and disposal plant in disposition of corporation's industrial sewage, but such payments neither impose any liability on city nor confer vested rights or supervisory control on corporation.

20. **Municipal Corporations.**
An injunction requested by resident taxpayer of city, against further use of city sewage system and disposal plant for disposal of meat packing corporation's industrial sewage under invalid contract between city's governing board and such corporation was properly denied, as injunction, if granted, could be promptly nullified by issuance of new permit to corporation to use sewers, and discontinuance of its sewage outlet through disposal plant might jeopardize public health or greatly injure public interests.

Appeal from Circuit Court, Minnehaha County; Hon L. L. Fleeger, Judge.

Action by O. Charles Ericksen against the City of Sioux Falls, the members of its Board of Commissioners, and John Morrell & Co, a corporation, to have an industrial sewage disposal contract between the board and defendant corporation declared invalid and enjoin further use of the city's sewage system and disposal plant for disposal of the corporations industrial sewage. Judgment for defendants, and plaintiff appeals.

Reversed in part, and affirmed in part.

Parliman & Parliman, Danforth & Danforth, and **Raymond E. Dana,** all of Sioux Falls, S. D., for Appellant.

Roy D. Burns and **Claude A. Hamilton,** both of Sioux Falls, S. D., for Respondents City of Sioux Falls and others.

Boyce, Warren & Fairbank and **John S. Murphy,** all of Sioux Falls, S. D., for respondent John Morrell & Co.

VAN BUREN PERRY, Circuit Judge. This action is brought by the plaintiff as a citizen, resident and taxpayer of

the City of Sioux Falls against the City of Sioux Falls and its governing board of commissioners, and against John Morrell & Company, a corporation owning and operating a packing plant in said city. The purpose of the action is to have declared invalid a certain contract entered into in 1926 and amended in 1940 between the governing board of the city and John Morrell & Company relating to the disposition of the industrial sewage from said packing plant through the sewage system and disposal plant owned by the city, and to procure an injunction restraining the further use of the city sewage system and plant for the disposal of the company's industrial sewage. The trial court denied injunction and held the contract valid, from which the plaintiff appeals.

The findings of fact and conclusions of law by the trial court were as follows:

"1. That the plaintiff at the times mentioned in the Complaint was and now is a citizen and taxpayer and resident of the City of Sioux Falls, wherein he has been engaged in the practice of his profession of medicine and surgery.

"2. That the defendant City of Sioux Falls at the times mentioned herein was and now is a municipal corporation of the first class of the State of South Dakota governed by a Board of Commissioners consisting of a Mayor and two Commissioners, and that the defendant John T. McKee is the Mayor and the defendants Bert T. Yeager and Joseph S. Nelson are Commissioners of the City of Sioux Falls and were such officers at all times mentioned in the Complaint.

"3. That the defendant John Morrell & Company at all times mentioned in the Complaint was and is a corporation duly organized and existing according to law with its place of business located in the City of Sioux Falls and was and is a taxpayer of the City of Sioux Falls.

"4. That the defendant John Morrell & Company in the year 1911 built within the City of Sioux Falls a meat packing plant and since such time has operated said packing plant within the City of Sioux Falls.

"5. That prior to the year 1927 the sewage originating within the City of Sioux Falls including both domestic and

industrial sewage was discharged into the Big Sioux River: that in the year 1927 the City of Sioux Falls completed the construction of and placed in operation a sewage disposal plant for the treatment and disposal of all domestic and industrial sewage originating within the City of Sioux Falls; that since such sewage disposal plant was put in operation, all sewage entering the Sioux Falls disposal plant from the plant of John Morrell & Company has originated within the limits of the City of Sioux Falls.

"6. That such sewage disposal plant was designed and constructed for the purpose of receiving the industrial sewage from the packing plant of John Morrell & Company, together with other industrial sewage originating within the City of Sioux Falls, and that on the 13th day of September, 1926, the City of Sioux Falls and John Morrell & Company duly and regularly entered into a written contract relating to certain pre-treatment to be given the sewage from the John Morrell & Company plant and sewage pumping costs to be paid by said John Morrell & Company, which written contract was received in evidence as Exhibit 59, a true copy of which is attached hereto and made a part of this Finding.

"7. That the City of Sioux Falls and John Morrell & Company operated under and carried out the terms of said contract, Exhibit 59, until March 1, 1940, when such contract of September 13, 1926, was amended by an agreement between said parties, duly and regularly entered into on March 1, 1940, which was received in evidence as Exhibit 58, a true copy of which is attached hereto and made a part of this Finding.

"8. That John Morrell & Company and the City of Sioux Falls have fully performed and carried out the terms of said contract, Exhibit 58, and that pursuant thereto John Morrell & Company has paid for additions and improvements to the sewage disposal plant of the City of Sioux Falls in the sum of approximately $70,549.65.

"From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

"1. That the defendants are entitled to Judgment dis-

missing the Complaint of the plaintiff on its merits and to judgment for costs."

Except as to the legal effect of the contracts, the evidence supports the findings of the court.

The contracts between the city and the company referred to in the findings were as follows:

Exhibit 59 was a contract dated September 13, 1926, between the City of Sioux Falls (hereinafter referred to as the city), John Morrell & Company (hereinafter referred to as the company) and the Kittery Realty Co. It recited that the city desired to build a sewage pumping station and mains upon and over certain land belonging to the Realty Co.; that the Realty Co. owned the packing house and other lands leased by Morrell & Company; that Morrell & Company desired to have the sewage from the packing plant disposed of through the city main and pumping station, and it was agreed that the city should construct certain mains from the end of the trunk sewer of the city to the pumping plant; that upon completion of such mains, pumping station and disposal plant the company might connect with said main; that the company should install certain suitable equipment for the fine screening, sedimentation and grease skimming of all the company sewage before it entered the mains; that the company should pay to the city its pro rata share of the cost of pumping its sewage and a part of certain fixed and operating charges.

The contract had no time limit. Either party could cancel it at will. The parties operated under it until March 1, 1940 when a contract was entered into as hereinafter set forth.

In the meantime, the record shows, in November 1939 the sewage disposal plant had ceased to function and from then until August 1940, while repairs were being made, the raw or untreated sewage, of the city, including that of Morrell & Company was poured into the Big Sioux River. The city and the company had jointly engaged the firm of sanitary engineers who originally planned the disposal plant and again hired them to survey the situation and make recommendations and plans for the repair and improvement of the

plant. This firm had reported that the filter beds were clogged, due to the presence of too much fine stone in the filter bed and the presence of grease in the sewage which had coated and clogged the filter beds, which grease was due to the industrial wastes. Other serious problems had also developed. Both the city and the company had expanded. A large program of corrective measures and improvements was laid out. The city and company were at the time threatened with suits for the pollution of the river. See Ericksen v. Morrell & Co. et al., 70 S. D. 38, 14 N. W.2d 88.

Exhibit 58, referred to in the findings of the trial court as a contract "duly and regularly entered into" is a contract between the city and the company "amending" the former contract. It is dated March 1, 1940 and reads:

"Whereas, the City of Sioux Falls, in its municipal capacity, has constructed a sewer system and sewage disposal plant, which said sewage disposal plant is in need of improvements and betterments, and

"Whereas, the sewage originating in the John Morrell & Company packing plant in the City of Sioux Falls has been for many years last past handled through the sewage disposal system of the City of Sioux Falls by virtue of the legal rights of the parties, and an agreement entered into between the City of Sioux Falls and John Morrell & Company, on September 13th, 1926, and

"Whereas, the parties hereto are desirous of amending said agreemnt of September 13th, 1926, to read as follows:

"Now, Therefore, It Is Hereby Agreed that the sewage originating in the John Morrell & Company plant shall hereafter pass from the said John Morrell & Company into the sewage system of the City of Sioux Falls, through connections now established, and that whereas John Morrell & Company has installed, at its own plant, suitable dual equipment of the continuous type fine-screening, John Morrell & Company agrees that all of the sewer water that is to be delivered to the city sewer system from John Morrell & Company shall be fine-screened through said fine-screening equipment at the expense of John Morrell & Company.

"It Is Agreed, in consideration of the payments and

expenditures to be made by John Morrell & Company, as hereinafter specified, that the said John Morrell & Company may send into the sewer system of the City of Sioux Falls, and into the disposal plant of the City of Sioux Falls, all of the sewage of John Morrell & Company for a period of fifteen (15) years from and after March first, 1940.

"John Morrell & Company agrees to pay seventy-five per cent (75%) of the total cost of rehabilitation of filters in the Sioux Falls Disposal Plant, which said rehabilitation is now in progress under contract between the City of Sioux Falls and Abraham Ogdie, which said 75% of the total cost is estimated to be Eleven thousand two hundred fifty Dollars, ($11,250.00).

"Further, John Morrell & Company agrees to install degreasing equipment, in the disposal plant of the City of Sioux Falls at its own expense, which said degreasing equipment is now being installed by the Norlin Company in pursuance of a contract made between said John Morrell & Company, and the said Norlin Company, at a total estimated cost of Thirty-six hundred twenty-five dollars, ($3625.00).

"Further, John Morrell & Company agrees to pay eighty-five per cent (85%) of the total cost of purchasing and installing an equalizing tank, which said 85% of the total cost of purchasing and installing is estimated to be Ten Thousand six hundred twenty-five Dollars ($10,625.00).

"Said Morrell & Company further agrees to purchase for installation in the sewage disposal plant of the City of Sioux Falls and to deliver f. o. b. cars, Sioux Falls, South Dakota a certain gas engine-driven blower and generating equipment and appurtenances, in accordance with specifications on file in the City Engineer's Office, at a total cost of not to exceed Forty-six thousand nine hundred dollars ($46,900.00).

"It Is Agreed that all of the purchases and expenditures agreed to be made by John Morrell & Company in the four preceding paragraphs, be made in pursuance of specifications prepared by Greeley & Hansen, Hydraulic and Sanitary Engineers of Chicago, Illinois, and that said purchases and expenditures shall not exceed the aggregate sum of Seventy-thousand Six Hundred Dollars, ($70,600).

"Commencing on March first, 1943, and continuing on the first day of the months of every March, June, September and December, subsequent to the first day of March, 1943, during the term of this contract, said John Morrell & Company agrees to pay to the City of Sioux Falls, as part of the operating expense of the Sewage Disposal Plant, the sum of Twenty-five hundred Dollars ($2500.00).

"The City of Sioux Falls agrees to maintain and keep in operation the said Sewage Disposal Plant during the entire term of this Contract at its own expense, provided, however, that should improvements and betterments to said plant be required and recommended by Greeley & Hansen, Hydraulic & Sanitary Engineers of Chicago, Illinois, or some other reputable engineer agreed up between the parties, that the said John Morrell & Company agrees to pay twenty-five per cent (25%) of the cost of any new construction or betterments to the plant, provided that the said 25% of said cost shall not exceed the sum of Forty-five thousand dollars ($45,000.00), provided further, that should mechanical replacements become necessary in the opinion of said engineers, or in the opinion of some other reputable engineer agreeable to the parties, or should the parties hereto mutually agree that mechanical replacements are necessary during the term of this contract, then and in that event, John Morrell & Company agrees to contribute fifty per cent (50%) of the yearly cost of such replacements, provided however, that the said 50% of the average yearly cost of such replacements shall not exceed the sum of Seven Hundred thirty-five Dollars ($735.00)."

It was further agreed that the parties, by agreement, might substitute a different firm of engineers.

[1] (1) The first question presented by this appeal is the right of the plaintiff as a resident and taxpayer to maintain this action. In the argument and briefs the defendants and respondents assume the position that the terms of the contract between the city and the company are none of the plaintiff's business, and both strenuously assert that the validity of the contract is not involved in this litigation. We think otherwise.

[2] SDC 45.0112 provides "Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title." The title referred to embraces the whole field of municipal government. By reason of this statute, a resident citizen and taxpayer is authorized to test in court any ordinance, resolution or contract executed by the municipal authorities in any case where the validity of such action is challenged. Haines v. City of Rapid City, 59 S. D. 58, 238 N. W. 145; Cralle v. American-News Co., 51 S. D. 176, 212 N. W. 913; Lang v. City of Cavalier et al., 59 N. D. 75, 228 N. W. 819.

(2) We are next confronted with the question whether, under the laws of this state, the city had the power to enter into the contract involved herein.

By SDC 45.0201, every municipality is vested with certain powers which include the power (1) to control its finances and property; (2) to levy and collect taxes for general and special purposes within the limits allowed by law; (3) to appropriate money for authorized purposes and provide for the payment of debts and expenses of the municipality; (13) to acquire by lease, purchase, or other designated means and hold in its corporate name or use and control as provided by law both real and personal property and easements and rights of way within or without the corporate limits for all purposes authorized by law or necessary to the exercise of any power granted; (19) to enact, make, amend, revise or repeal such ordinances, resolutions, and regulations as may be proper and necessary to carry into effect the powers granted to the city; (24) to exercise jurisdiction for all authorized purposes over all territory within the corporate limits (and certain other territory) for the purpose of promoting the health, safety, morals, and general welfare of the community; (34) to declare what shall constitute a nuisance and prevent, abate and remove the same; (35) to do what may be necessary or expedient for the promotion of health or the suppression of disease; (36) to compel the owner of any unwholesome or nauseous thing or place to cleanse, abate or remove the same; (37) to prevent the pollution of or injury

to any public water supply within or within one mile of the limits of the municipality; (38) to regulate and prevent the placing of garbage or any offensive matter in any body or stream of water within the municipality; (39) to control the location and regulate the management of packing houses within or within one mile of the corporate limits; (84) to establish and construct main, trunk, and service sewers, and septic or sewage treatment plants, drains and manholes; (85) to regulate and provide for the laying of water and sewer connections from the city water mains, trunk or service sewers; (89) to construct, maintain, or to authorize the construction and maintenance of sewer pipers on private property or in or along any stream of water, or to empty or discharge the sewage of the municipality into any stream of water within or without its limits if such can be done without creating any foul or noxious odors in the air over or along such stream; (90) to regulate the construction, repair and use of sewers.

The whole of Chapter 45.18 is devoted, specifically to the subject of sewer improvements by municipalities. It specifically empowers the governing board of any municipality to construct systems or parts of systems of sewerage and septic plants. By SDC 45.1811 "A municipality wherein a sewage treatment or septic plant is maintained shall have power to contract for the privilege of connecting to said plant for the purpose of treating or disposing of private sewage or industrial waste originating within one mile of the corporate limits, provided said plant has capacity over the the requirements of the municipality for handling such sewage or industrial waste." SDC 45.1811 relates only to industrial sewage originating outside of the city but within one mile of its limits.

SDC 45.1814 provides, in substance, that whenever any municipality shall have constructed a main or trunk sewer and paid for the same out of its general fund or by a bond issue, and thereafter constructs a system of service sewers and assessed the cost of the service sewers against the abutting property, the governing body may grant to the owners of abutting property the privilege of connecting to the main and to assess the benefits of such privileges against such

abutting property. The granting of the privilege of connection and the assessment of benefits must be done by resolution, and the benefits must be apportioned as provided for the original construction of service sewers. Service sewers are defined by SDC 45.1801 as those designed to carry sewage from the abutting property into the trunk or main sewer or into the sewer outlet, septic or disposal plant.

SDC 45.1817 authorizes the governing body of every municipality at the time of making its annual tax levy to levy a special assessment for the purpose of maintaining its main, trunk, or service sewers and its septic or sewage treatment plant but limits such assessment to 4¢ per front foot against the abutting property..

There is no specific provision in our statute authorizing a city to receive and dispose of or to make a charge for receiving or disposing of industrial sewage, as distinguished from sanitary sewage. In this connection the city and company, in their respective briefs repeatedly state that Morrell & Company has the same right to use the sewers and the disposal plant as does any other industrial concern, but counsel wholly refrain from pointing out the rights of any industrial user. The plaintiff asserts that an industry has no right to use the sewers at all and denies the authority of the city to grant it such a right.

The City of Sioux Falls is the largest city in this state, with a population (1940) of more than 40,000. The sewage of such a city is a large volume, and its proper disposition is an important problem. The sewage from Morrell & Company constitutes the greater part of the industrial sewage, and its disposition requires a large part of the total capacity of the disposal plant. This case involves no ordinary situation.

[3] By the statutes hereinbefore quoted the governing body of the city is vested with the police power to preserve the public health and welfare and the proper disposition of sewage is essential to this public health and welfare. Where, as here, the statute expressly confers upon the city the power to regulate the use of sewers, and neither defines the limits of that power nor prescribes the manner of its exercise, the

city is necessarily invested with power to exercise its discretion, and the courts will not interfere with such action unless it appears to be unreasonable or arbitrary. Town of Colton v. South Dakota Central Land Co., 25 S. D. 309, 126 N. W. 507, 28 L. R. A. N. S., 122; City of Mobridge v. Brown, 39 S. D. 270, 164 N. W. 94.

[4] However, the courts will always interfere to keep municipal authorities within the law and will interpose to prevent any action which is ultra vires because of some lack of antecedent legislative authority. 1 McQuillin, Municipal Corporations, 2d Ed. Rev. § 391, at p. 1087.

[5, 6] A municipal corporation is a creature of the Constitution and statutes of the state. It possesses only such powers, great or small, as these laws give to it, together with only those incidental or implied powers as are necessary to enable it to perform designated and authorized functions. A city, as such, has no inherent powers and none of the attributes of sovereignity.

[7] The policy of the law is to require of municipal corporations a reasonably strict observance of their powers. 1 McQuillin, Municipal Corporations, 2d Ed. Rev., § 368.

[8, 9] The only privilege which a city can grant to a person or a firm within the city limits is a license or permit to make proper connection and empty sewage into the system, there to receive such treatment and disposal as the city may from time to time provide. It is not within the power of a city to guarantee that it will successfully operate a sewage disposal plant or an adequate system. If the system or disposal plant must be closed for repairs or fails for any reason to receive or adequately purify the sewage emptied into it, the city cannot be held liable for resulting damages to any person whose sewage is thereby inadequately treated or excluded. It follows that a city cannot by contract assume any such liability, or bind itself to receive and dispose of all the sewage which patrons may attempt to empty into it.

[10, 11] The supervision and regulation of the sewers is a police function of the city. Therefore, in granting permission for the use of the sewers in the first instance and for the continuing use thereof, the city must at all times

retain control, and any attempt by way of contract to deprive the city of that control is void. The police power of the city cannot be bargained away by contract, but must at all times be available for use to meet such public needs as may arise. McQuillin, Municipal Corporations, 2d Ed. Rev., §§ 393, 1564.

[12] Any license or permit to connect with the city sewers must necessarily at all times be contingent upon the ability of the sewage system and disposal plant to digest and dispose of the same.

[13] No one has any vested rights in the use of the sewers, nor can the city grant such a vested right. Idem, § 1566.

[14] If for any reason the system or plant will not handle sewage from a particular source, by reason of its nature or quantity, or if such sewage is of such character that it prevents the disposal plant from functioning, it is within the power of the city to require such sewer connection to be discontinued and it may be the duty of the city to do so. Idem. § 1566. It may be necessary for the city to do so to protect itself against possible damage suits for the creation of a nuisance.

[15, 16] In short, a permit or license to make a sewer connection granted by a city means only that the licensee is permitted to empty its sewage into the system so long as the system will take care of it and the city authorities permit. In the exercise of its discretion, which the courts will not interfere with unless the action is clearly unreasonable and arbitrary, the governing board of the city may grant and revoke licenses or permits as may be warranted by the capacity and ability of the sewers and disposal plant to dispose of the same, and as the public interests may require.

[17] By the contract as amended in 1940 the city authorities undertake to grant to Morrell & Company the right to empty all of their sewage without limitation as to character or volume, into the city system for the period of 15 years. The city does not grant to an individual householder any such contract for a period of years, nor does it assume any obligation or possible liability, but merely grants the privilege of connecting to the sewers, and it is a license which

may be revoked for sufficient cause at any time. The contract purports to grant far more than is embraced in the license or permit which the city is authorized to grant. Were it valid, it might form the basis for a damage suit against the city for non-performance. It attempts to grant a vested right for the 15-year term. The city cannot assume such liabilities, nor grant such rights.

[18] The mere fact that one has expended considerable money to make the connection gives him no vested right to retain the connection. 4 McQuillin, Municipal Corporations, 2d Ed. Rev., § 1566.

The contract between the city and the company seems to treat the sewage disposal plant as property subject to joint control, a sort of partnership affair, to be supervised by engineers paid by and owing allegiance to both parties. The law does not authorize such. The plant belongs to the city. The city cannot part with any of its control thereof, nor should it share the allegiance of any of its employees. The company is not compelled to use it. It may use it only by permit from the governing board of the city. If the company wishes to use the city plant, it must conform to the requirements which the governing board may lawfully impose.

[19] In dealing with the city as it has in the past, beyond its authority to contract, the company acquired no rights. Williams v. City of Fargo, 63 N. D. 183, 247 N. W. 46 at 53. The city suggests in its briefs that the money it has received from John Morrell & Company may be justified as voluntary contributions. The city may accept them as such. See 38 Am. Jur. 249, § 561. It should be clearly understood, however, that any such past or future payments neither impose liability upon the city nor confer vested rights or supervisory control upon the company.

In the present state of our statutes we are compelled to hold that the amended contract of March 1, 1940 between the City of Sioux Falls and John Morrell & Company is wholly unauthorized and void.

[20] We do not think that it follows as a necessary consequence that injunction must issue to restrain further use of the sewers by the defendant company. While the

contract before us did not confer the vested rights nor impose the obligations and liabilities which it sought to do, the governing board did authorize the making of the sewer connections which have now been in use for over 15 years. The very existence of the connections implies the existence of a permit, which, as we have said, can be revoked by the governing board in the exercise of its sound discretion at any time. Or, the city can grant a new permit at any time. The duty of seeing to it that the sewage originating within the city is disposed of in a proper manner rests upon the governing board. The issuance of the injunction prayed for herein might deprive the city, at least temporarily, of its power to discharge this duty. Where, as here, the injunction prayed for could be promptly nullified by the issuance of a new permit; where a discontinuance of the sewage outlet through the disposal plant, if continued in force, might either jeopardize the public health or greatly injure the public interests, we think the issuance of the requested injunction is properly denied.

In so far as the judgment below is inconsistent with this opinion, the same is reversed, but in denying injunction, is affirmed.

No costs are to be taxed in this court.

POLLEY, J., not sitting.

VAN BUREN PERRY, Circuit Judge, sitting for POLLEY, J.

All the Judges concur.

PETERSON, Respondent, v. McMILLAN, et al. Appellants

(14 N. W.2d 97.)

(File No. 8640. Opinion filed April 14, 1944.)

Appearance—Judgment.

A written stipulation extending time for answer, which was entered into by plaintiff's counsel and defendants after summons and complaint had been served on defendants, amounted to a "general appearance," and hence a default judgment issued without giving defendants 6 days' statutory notice was voidable. SDC 33.1707(2).

Appeal from Circuit Court, Brown County; Hon. Howard L. Babcock, Judge.

South Dakota Legislative Research Council

Issue Memorandum 96-1

HOME RULE IN SOUTH DAKOTA -- AN UPDATE

Home rule, essentially the freedom for local governments to do anything not prohibited by the state rather than only those things authorized by the state, is a concept that has been around for a long time but has not been used extensively in South Dakota. Since the adoption of home rule in 1994 by the city of Sioux Falls, however, controversy over the extent of the city's home rule powers has led to attempts by the Legislature to limit certain powers of home rule local governments and to subsequent litigation challenging that legislation. While the concept of "local control" has received much attention in and out of the Legislature in recent years, the small number of home rule governments in this state and the controversy associated with attempts to establish home rule and to govern under home rule indicate that the appropriate role of local governments and the appropriate degree of control over local governments exercised by the Legislature are issues that are far from settled.

History and General Concepts

Much of the legal framework for government in the United States is based upon state sovereignty, with the United States Constitution ratified by the states and all powers not granted to the federal government reserved to the states. The Constitution does not mention local governments, and local governments have traditionally been creatures of the state, able to do only the things that are specifically authorized by state law. Known as the "Dillon Rule" after the nineteenth century Iowa judge who articulated it, this principle specified that municipalities were "the mere tenants at will of the Legislature," and that whenever a local versus statewide concern was in doubt, the state would prevail. In South Dakota, units of local government are known as "political subdivisions of the state" and were created within this tradition of state control.

With increasing control of local affairs by state governments, the demand arose for "home rule" or some form of increased freedom for local governments in carrying out their duties and responsibilities. Home rule originated in the United States during the nineteenth century, with statutory home rule provided in Iowa in 1851 and a Missouri constitutional provision granting home rule to the city of St. Louis in 1875. Movements for the reform of urban governments and the general governmental reform efforts of the "Progressive Era" during the late nineteenth and early twentieth centuries also coincided with increased use of home rule for municipalities and counties. In 1911 California adopted a constitutional amendment authorizing home rule for counties, with three additional states authorizing home rule by 1933. Interest in home rule has grown during the twentieth century, particularly during the 1950s, 1960s, and 1970s. By 1990, 48 states authorized home rule for municipalities, by constitutional or statutory provisions or both, and 36 states authorized home rule for counties, again by constitutional or statutory provisions or a combination of both.

Constitutional or statutory authorization for home rule does not mean that all counties and

municipalities in a state will operate under home rule. Generally, the county or municipal government and its voters must propose and approve the adoption of a home rule charter before the provisions of home rule take effect for the individual local government unit. Even though most states allow city and county home rule in some form, only 63 of the nation's 3100 counties had adopted home rule by the mid-1980s. A larger number of municipalities use home rule, but as a percentage of all municipalities, those with home rule is still quite small. In South Dakota, Shannon and Todd counties and the municipalities of Sioux Falls and Springfield have adopted home rule.

Characteristics of Home Rule in South Dakota

Home rule in South Dakota was proposed by the Legislature in 1957 as a constitutional amendment, but the proposal was rejected by the voters in 1958. The 1961 Legislature proposed an identical measure, which was approved by the voters in 1962 as an amendment to the state constitution. The 1962 amendment authorized home rule for municipalities (but not counties) and specified the methods to be used in adopting a municipal home rule charter. The adoption, amendment, or repeal of a home rule charter could be proposed either by the governing body of the municipality or by a seven-member charter commission that was formed by a petition and election of the voters. The governing body or the charter commission would then submit the proposal to the voters. The constitutional provision also allowed separate or alternative portions of a charter to be submitted to the voters. The 1962 provision allowed home rule municipalities to perform any function that the Legislature would otherwise have had to grant to non-home rule municipalities unless that power was denied by the constitution or by statute. In addition, home rule municipalities were free to determine their own organizational and administrative structures and procedures so long as the governing body was chosen by popular election and administrative proceedings were subject to judicial review. No South Dakota municipality adopted home rule under the 1962 constitutional amendment; the voters in Rapid City rejected the formation of a home rule charter commission in 1965.

South Dakota's home rule provisions were revised by the 1972 Legislature and ratified by the voters in the 1972 general election. The 1972 provision, which is still in force at the present time, rewrote the local government article of the South Dakota Constitution (Article IX), including its home rule provisions. The most important home rule change made by the 1972 amendment was to allow counties or combinations of counties and municipalities to adopt home rule charters. The 1962 provision limited home rule to municipalities. The 1972 amendment also simplified the procedures for adopting home rule charters and eliminated the provisions relating to charter commissions.

Under South Dakota's present home rule provision (Article IX, Section 2; 1972), any municipality, county, or combination may provide for the adoption or amendment of a home rule charter. Also, a charter may be initiated by a petition of at least ten percent of the number of voters voting in the most recent gubernatorial election in the affected municipality or county. In either case, the question of adoption of the charter must be submitted to the voters of the affected municipality or county, with a majority vote needed to approve the charter.

A South Dakota county or municipality that has adopted a home rule charter may exercise "any legislative power or perform any function not denied by its charter, the Constitution, or the general laws of the state." Home rule governments may choose any form of executive, legislative, or administrative structure, subject to the requirements that the local legislative body is chosen by popular election and that administrative proceedings be subject to judicial review. The constitution directs that the powers and functions of home rule governments are to be "construed liberally."

In 1974, the South Dakota Legislature enacted SDCL chapter 6-12, which specifies additional procedures and requirements related to home rule and home rule charters, based on the 1972 constitutional amendment. Chapter 6-12 specifies that local governments are to pay for elections on the question of adopting or amending a home rule charter. The chapter requires that the form or structure of the proposed home rule government be spelled out in the charter. SDCL 6-12-5 prohibits a home rule local government from adopting a charter or any ordinance that establishes standards that are less stringent than standards imposed by state law, although the local standards may be more stringent than state standards unless otherwise prohibited. Chapter 6-12 also establishes various election and filing requirements related to home rule units of government. SDCL 6-12-6 imposes general limitations and restrictions on home rule governments:

"§ 6-12-6. The power of a home rule unit does not include the power to:

(1) Enact private or civil law governing civil relationships except as incident to the exercise of an independent county or municipal power;

(2) Define and provide for the punishment of a crime, but this limitation shall not abridge the power of a home rule unit to provide punishment for the violation of ordinances or charter provisions by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both such fine and imprisonment;

(3) Abridge laws relating to elementary and secondary education;

(4) Change assessment practices and procedures relating to ad valorem taxation of property;

(5) Exempt itself from providing the necessary personnel and facilities to perform services required by general law to be performed by a like unit or units of local government;

(6) Deny referendum on ordinances or bylaws provided by chapter 9-19;

(7) Regulate rates or conditions of service of any public utility regulated by the South Dakota public utilities commission."

The Record of Home Rule in South Dakota

Since the authorization of home rule in 1962, there has been relatively little activity in terms of local governments attempting to adopt home rule. A complete record of all attempts by local governments to study or adopt home rule is not readily available, but the issue actually

came to a vote in the following counties and municipalities:

Rapid City	1965	Failed
Clay County	1974	Failed
Yankton	1975	Failed
Pennington County	1976	Failed
Shannon County	1982	Passed
Todd County	1982	Passed
Springfield	1984	Passed
Sioux Falls	1994	Passed

Given the frequently expressed desire by local governments for more local control and freedom from state mandates, as well as the theoretical advantages that a flexible home rule government would give a locality in tailoring its government to its particular needs, the failure to make use of home rule is puzzling at first glance. Basically, home rule is not a panacea. Home rule offers additional freedom to local governments, but not complete freedom, and it cannot be expected to work miracles in solving local problems. This is especially true when local problems may have their roots in other areas, such as conflicting municipal and county jurisdictions, or cases in which local government structure or the lack of local government flexibility and freedom to innovate are not necessarily the basic cause of the problem. There are situations and communities in which home rule is an appropriate and valuable mechanism, but it is not the answer to all local government problems, and it is not in every case an improvement of sufficient value to warrant the expense and effort involved in establishing it.

Home rule charters appear to be more palatable to voters if the proponents intend to use home rule as a tool to achieve a specific goal or accomplish a specific project, rather than as a theoretical device to increase local government powers or flexibility. For example, the voters in Springfield approved their home rule charter in 1984 in the midst of the intense controversy over the proposal to convert the University of South Dakota/Springfield into a prison. Springfield's home rule charter would have allowed the municipality to acquire and operate the university rather than see it become a prison. Although Springfield's university proposal did not succeed, the voters did approve the home rule charter, and the charter remains in effect.

Voters seem to fear local governments acquiring too much power through home rule or using home rule to raise taxes or establish new requirements for local citizens. Any community attempting to adopt home rule faces a difficult education and public relations task, and several South Dakota cities and counties have appointed committees to study the issue of home rule only to have the committee recommend against pursuing home rule on the grounds that the benefits would not offset the expense and effort. Again, home rule can be extremely beneficial for certain communities and somewhat beneficial for most communities, but a local government that is considering home rule should analyze its situation carefully to determine the real nature of its problems, needs, and goals.

Recent Home Rule Issues in South Dakota

As noted above, South Dakota's constitution allows home rule governments to exercise any function not prohibited by the state constitution, the general laws of the state, or the charter of the home rule government. Recently, controversy has arisen over attempts by the Legislature to prohibit certain actions by home rule jurisdictions and whether such legislation is a part of the state's body of

general law or an unconstitutional special act that singles out specific municipalities without general statewide application. One complicating factor in making this determination is that most state law dealing with local governments is written in the Dillon Rule tradition. The statutes were intended for non-home rule entities and specify what local governments are allowed to do, rather than what they are prohibited from doing. However, if new legislation prohibiting an action is adopted, it has the appearance of targeting a specific home rule community and not meeting the general application requirement. Two recent legislative acts in South Dakota have been or will be challenged in court on this basis, and the distinction between special and general legislation is not clear-cut.

In 1994, Sioux Falls adopted a home rule charter, but actions by the city under its home rule charter have led to legislation in both the 1995 and 1996 legislative sessions to restrict such actions by home rule jurisdictions. In 1995, SB 125 prohibited any home rule municipality from imposing "any permit or inspection fee, beyond the actual cost of the inspection, on any property which is owned by a unit of government . . . ." SB 125 was drafted in response to a Sioux Falls ordinance that established such fees. In April of 1996, the circuit court in the Second Judicial Circuit declared SB 125 (codified as SDCL 9-12-19) to be an unconstitutional special act that singled out the city of Sioux Falls. The court found the act to not be a part of the general laws of the state even though the act was drafted to apply to all home rule local governments. The court ruled that the act was an unconstitutional infringement on the city's powers under the home rule provisions of the state constitution. The distinction between general laws and unconstitutional special acts is a matter of judicial interpretation and can be expected to be an issue in future disputes related to legislative limitations on home rule powers.

The 1996 Legislature enacted HB 1291, which prohibits any home rule local government from establishing or increasing "any tax or fee that is not allowed to be enacted or increased by any county, city, or combination thereof that has not adopted a home rule charter." HB 1291 does not apply to such actions made before March 1, 1996. HB 1291 was introduced in response to an additional one cent sales tax on hotel rooms that was adopted by the city of Sioux Falls to fund a visitor and convention bureau. This "fourth penny" sales tax is not available to non-home rule municipalities and generated controversy in the Legislature because the extra tax affects people from other parts of the state who travel to Sioux Falls. It is likely that HB 1291 will also be challenged in court when it takes effect on July 1.

The state constitution clearly contemplates the ability of the Legislature to restrict the powers of home rule governments. On the other hand, the constitution also clearly establishes the policy that home rule exists to provide more freedom and flexibility to local governments that have chosen to adopt home rule, and the constitution states that home rule powers are to be "construed liberally." Both of these general policies are necessary for home rule to function, but the inherent conflict between the two will ensure controversy in future home rule situations.

Summary

South Dakota's home rule provisions are not markedly different than those found in other

states. South Dakota provides for home rule by both constitutional and statutory means, and South Dakota has not enacted any significant amount of legislation restricting the exercise of home rule powers. However, more than thirty years after home rule was authorized, only two municipalities and two counties in South Dakota have adopted home rule charters; and in some of these instances, special circumstances led to the decision to pursue home rule. Also, recent legislation has attempted to prohibit certain actions undertaken by home rule governments. Given the commonly expressed desire for local control and for reduction of state mandates on local governments, the lack of activity in the area of home rule raises questions as to the appropriate roles of state and local governments and the degree of local control that is genuinely desired or feasible. As is often the case, the situation is more complex than it would appear, and home rule is an option that depends primarily on individual situations and local needs.

This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.

The trial court expressly found that plaintiff failed to comply with the conditions of the contract in this respect, but further found that defendant waived the same. The finding of a waiver is assigned as error, and whether the court erred in so finding presents the only question in the case.

[1] The only notice plaintiff ever gave of its claim, so far as shown by the record, was in the form of a letter written by its attorneys to the defendant's claim agent on July 1, 1910. This letter made reference to the shipment of the apples, stated that they were damaged by freezing by reason of defendant's delay in the movement of the car, and requested a settlement of the claim. The letter was not replied to by the claim agent, and on July 21st the attorneys again wrote, calling attention to the former letter and the failure of the agent to reply, and again requested that the matter receive his attention. In response the claim agent wrote the attorneys on July 30, 1910, the following letter: "In reply to your letter of the 21st, I return papers submitted in support of your claim 5556 with advice that, if your clients have explained to you the conditions and facts as they really exist, you know there is no liability with this company, and we cannot entertain the claim." The matter rested here until December 7, 1910, when the attorneys again wrote the claim agent, asking for an explanation of his letter of July 30th, quoted above, to which the agent replied on December 9th, the following: "Replying to your letter of the 7th, your file 5556, would advise that we find there is no liability with this company."

This constitutes all the evidence bearing directly or indirectly upon the question of the waiver, and we hold it insufficient to support the findings of the court below. In determining what acts or conduct on the part of a person entitled to notice of claim, under a contract stipulation like that here in question, will constitute a waiver of the notice, a distinction is to be observed between those cases where the alleged waiver occurred before the expiration of the time fixed by the contract for the service of the notice and those cases where the acts and conduct relied upon occurred after that date. Acts and conduct occurring at a time when the notice could properly be served, having a tendency to lead to the belief that formal notice will not be insisted upon, or which are inconsistent with an intention to rely upon a compliance with the contract in that respect, constitute a waiver, which on the theory of equitable estoppel the party will not be permitted to repudiate. But where, as in the case at bar, the conduct relied upon as a waiver occurs after the expiration of the time limited for the notice, the situation is entirely different. The failure to give the required notice vests in the party entitled to it a complete defense to an action upon the asserted claim, and the conduct relied upon as a waiver of the defense should with reasonable certainty justify the conclusion that it was intentionally waived, or be so inconsistent with an intention to insist upon the defense that the conclusion of waiver would follow as a matter of law. A waiver might arise as a matter of implication, depending upon the facts in a particular case where the party entitled to notice, subsequently to the time when it should have been given, voluntarily enters into negotiations for the settlement of the claim, makes an offer of compromise, or from other conduct clearly recognizing the existence of the claim on its merits.

[2] The evidence in the case at bar presents no such case. The liability of the company was expressly repudiated in both the letters relied upon as showing a waiver, and the company "declined to entertain the claim." There were no negotiations looking to a settlement, and the action of the claim agent amounted, at most, to a denial of liability on the part of his company. This assertion of nonliability was well founded in fact, for plaintiff had lost its right by failing to give the requisite notice. For aught that appears, that fact may have been the basis for the refusal of the agent to consider the claim. It seems clear that the waiver of a vested defense cannot be predicated upon conduct such as here presented, amounting to nothing more than a denial of liability. Parsons, Rich & Co. v. Lane, 97 Minn. 98, 7 Ann. Cas. 1144.† The case of Banks v. Railway Co., 111 Minn. 48, 126 N. W. 410, is not in point. In that case it appeared that the claim, made long after the time fixed for the contract, was taken up by the defendant, considered upon its merits, and rejected on the ground that the facts did not show liability.

It follows that the court below erred in finding a waiver of the conditions of the contract requiring notice of the claim to be presented within four months, and there must be a new trial. The contention of plaintiff that the shipment was not in fact made under the terms of the bill of lading but under an oral arrangement, is not covered by the findings, and is not, therefore considered.

Judgment reversed, and new trial granted.

STATE ex rel. MUELLER v. THOMPSON, City Clerk.

(Supreme Court of Wisconsin. May 14, 1912.)

(Syllabus by the Judge.)

1. CONSTITUTIONAL LAW (§ ½,* New, vol. 3 Key-No. Series)—NATURE AND OPERATION.
The fundamental law embodies those principles, some in form of declaration, others by way of implied or express prohibition, and some in the form of grant, supposed to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† 106 N. W. 485, 4 L. R. A. (N. S.) 231.

limitations essential to conserve human liberty, security, equality and happiness, and not to be subject to change except in a way calculated to arouse the highest judgment and most efficient deliberate considerate choice.

2. CONSTITUTIONAL LAW (§ 67*)—DISTRIBUTION OF POWERS OF GOVERNMENT—JUDICIAL POWER.

Each of the three distinct departments of government.—executive, legislative and judicial,—is supreme in its sphere; outside thereof is usurpatious, and that of the judiciary includes power to dominate, efficiently, as regards marking the precise boundaries of each and remedying invasions by either of the territory of the other.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 123; Dec. Dig. § 67.*]

3. CONSTITUTIONAL LAW (§ 65*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWER—LOCAL OPTION.

The sole power to make law is lodged in the Legislature with competency, however, to exercise it, by adopting an enactment, complete in itself, and prescribing the conditions under which it shall be vitalized, as by a vote of the people at large or those of a particular district, according to circumstances.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65.*]

4. MUNICIPAL CORPORATIONS (§ 3*)—CHARTER—POWER OF LEGISLATURE.

The power to grant municipal charters is an attribute of sovereignty, exercisable, anciently, solely by the personal sovereign, then by his legislative body by his consent. Here the people succeeded to that prerogative power and, by the fundamental law, made the Legislature the repository thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2; Dec. Dig. § 3.*]

5. CONSTITUTIONAL LAW (§ 24*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWER—MUNICIPAL CHARTERS.

The power to make, change or repeal municipal charters was legislative in character by the common law in force when the state was admitted into the Union and so expressly retained by section 13, art. 14, in the general retention of our common law system, as a whole, to remain in force till changed by the Legislature in the constitutional way.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21–29; Dec. Dig. § 24.*]

6. CONSTITUTIONAL LAW (§ 26*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWER—MUNICIPAL CHARTERS.

Power of the Legislature to change the common law, in force in this state when the Constitution was adopted, is limited, respecting municipal charters, by section 1, art. 11, which, in form, grants thereto power to form municipal corporations, which, by necessary implication, includes power to grant municipal charters, fixing all fundamentals with reference to the special city government and prohibits exercise of such power otherwise, under the rule Expressio unius exclusio alterius.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

7. CONSTITUTIONAL LAW (§ 65*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWER—DELEGATION.

Section 32, art. 4, of the Constitution commanding legislative provision for the transaction of any business, the doing of which by special legislation is prohibited by section 31 of such article, contemplates a legislative effort in general, such as by the enactment of a law to be passive until made active by a vote of the people of any district authorized to act on the question,—not delegation of power to the people at large or of districts, or a district, according to circumstances, to do the business.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65.*]

8. STATUTES (§ 90*)—GENERAL AND SPECIAL LAWS—CITY CHARTERS.

The idea embodied in section 31, art. 4, of the Constitution, as to city charters, is that they shall be uniform throughout the state, as near as practicable, which would be violated by affording cities capacity to create want of uniformity by the exercise of authority, in severalty, to make, change and repeal their charters.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98–100; Dec. Dig. § 90.*]

9. STATUTES (§ 64*)—ENACTMENT—EFFECT OF PARTIAL INVALIDITY.

The power, in form, delegated by chapter 476, Laws of 1911, by the language, "Every city, in addition to the power now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter," is such dominating feature thereof as to render all others subsidiary thereto and dependable thereon.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

10. MUNICIPAL CORPORATIONS (§ 44*)—MUNICIPAL CHARTERS—POWER TO AMEND.

The power so, in form, delegated is one which was within the exclusive legislative field before the Constitution and confined thereto thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 122; Dec. Dig. § 44.*]

11. STATUTES (§ 64*)—ENACTMENT—EFFECT OF PARTIAL INVALIDITY.

The ruling feature of chapter 476, Laws of 1911, being unconstitutional, the others, forming an inseparable whole, take the cast thereof and fall therewith as invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Mandamus by the State, on the relation of Carl T. Mueller, against Carl D. Thompson, City Clerk of the City of Milwaukee. From a judgment refusing to quash the alternative writ, the respondent appeals. Reversed and remanded, with directions to sustain the motion to quash the alternative writ, and to dismiss the mandamus action.

Mandamus proceeding to coerce the clerk of the city of Milwaukee to submit to its electors, under chapter 476, Laws of 1911, a proposed alteration of the city charter. The purpose of such alteration was to allow the city to conduct the business of furnishing its citizens with ice.

All conditions precedent in the law to calling a special election in respect to the matter of the proposed change were satisfied, but the clerk refused to make the call. Whereupon an alternative writ of mandamus was sued out to coerce him to do so. Such proceedings were thereafter had that appellant moved the court to quash such writ, which was overruled. This appeal followed to test the validity of such law.

Daniel W. Hoan, City Atty., for appellant. Nohl & Nohl, L. H. Bancroft, Atty. Gen., and Russell Jackson, Deputy Atty. Gen., for respondent. F. C. Winkler, Erich C. Stern, and Stern & Williams, amicus curiæ.

MARSHALL, J. As indicated in the foregoing, the motion raised the issue of whether chapter 476, Laws of 1911, commonly called the "Home Rule" act, is constitutional. The trial court decided in the affirmative.

[1] When our state government was formed, the people adopted for the paramount law, a declaration of principles modeled after the prevailing Constitutions in this country. It was intended to be exact in its limitations of power, not to be open to change except in such particular and deliberate way as to render as certain as practicable that the electors desired it, evidenced by an expression of judgment after ample time and facility for investigation and maturity of thought on the subject, not to be subject to violation at all, and to create an instrumentality,—a court,—to efficiently guard it in that respect. One might exhaust his capability of using the great resources of our language in portraying the necessity for such a foundation for a people's government to rest upon,—in picturing the dignity which should be accorded to it by every department of affairs and by the people in their individual capacities, and yet leave the matter incomplete. One might do likewise as to the particular duty resting here to hold up the Constitution safely above every act of law-making power which would otherwise violate it, without exaggerating the importance to the people of its faithful performance. Such performance is a judicial function, over-shadowing in its significance. That it is sometimes viewed with impatience by those called to face constitutional restraints, cannot have any weight whatever as to whether the duty should be performed or not. History shows, to the great credit of average intelligent comprehension of our system of government, that firm, conservative judicial administration in the field of testing legislative enactments by the Constitution, is quite sure to be approved in general by the deliberate judgment of the people. In no field have the people, under our form of government, won more distinction than in loyalty, in the ultimate, to their courts.

[2] In our constitutional scheme there are three co-ordinate substantially independent branches, namely, executive, legislative and judicial. Each, so long as operating within its legitimate field, is supreme. It is for the court, in the ultimate, to determine whether the boundaries of a particular field have been overstepped and, if so, to nullify or stay the transgression.

[3] The power to make law, commonly called legislative power, is dealt with by section 1, art. 4 of the Constitution in these words: "The legislative power shall be vested in a Senate and Assembly." In thus limiting power to make law to the representative bodies the people, by necessary implication, parted with authority to do so directly; as the court has held, though not to determine by legislative permission whether a law, enacted in the constitutional way, shall be put into operation. State ex rel. Boycott v. Mayor, etc., of La Crosse, 107 Wis. 654, 84 N. W. 242; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

So, it is plain that, power to make law,—to exercise the function contemplated by that part of the Constitution under consideration,—was reserved exclusively to the Legislature, and any attempt to abdicate it in any particular field, though valid in form, must, necessarily, be held void. Just what falls within the scope of this power is not always easy to determine; but, as to a particular subject plainly recognized by the Constitution as within such field, there is no room for doubt. Such is the case as to granting corporate charters to cities, as we shall see.

[4, 6] Section 1, art. 11, of the Constitution vests in the Legislature power to form municipal corporations by either general or special laws. Section 3 of such article provides that "it shall be the duty of the Legislature, and they are hereby empowered, to provide for the organization of cities * * * and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting by such municipal corporations."

Those provisions have always been treated, and unavoidably so, as embodying the fundamental law as regards the granting of corporate charters to cities. Such a municipal corporation can only be created by a legislative act; that is by legislative charter, determining its form of government and its powers. No attempt has ever, before the act in question, been made to grant or change a municipal corporate charter, except by general or special act of the Legislature, particularly covering the subject. Such has been a feature of civil government from time immemorial. Such charters, anciently, emanated from the crown as a prerogative function and went into force by consent of the community afforded the grant. Later such grants were made by legislative power by sovereign permission and went into operation with or without the assent of the community affected according to legislative purpose. The later method became, by adoption, a part of the common law of this country,—the prerogative power in the matter being regarded as vested in the people's representatives. [5] At the time of the adoption of our Constitution there was no way of forming a city corporation, except by act of the Legislature, specifying its form of government and powers. That was entrenched

in the fundamental law by section 13, art. 14, providing that "such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this Constitution shall be and continue part of the law of this state until altered or suspended by the Legislature."

[10] Thus it will be seen power to grant corporate charters for cities, to change and repeal the same, was a legislative function at common law, and made exclusively such by our Constitution. While power, in general, was reserved to the Legislature to change the common law it was withheld in case of reservation to the Legislature of exclusive authority in a particular field, as that of granting, amending and repealing municipal charters.

In view of the foregoing, very little need be said in testing the act in question by constitutional restrictions. As we have seen, determination of the form of government and everything appertaining to the fundamentals of a city charter are essentially legislative functions. Power in that respect was so universally regarded before the Constitution and thereby the Legislature was disabled from delegating it. Can one read the act under consideration and doubt that, in terms and effect, it involves an attempt at legislative abdication of that power, to a large extent? In answering that we need look but to the first section, which we quote. All which follows is subsidiary thereto and must, necessarily, fall if the substructure cannot stand the constitutional test.

"Every city, in addition to the powers now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the Constitution or laws, operative generally throughout the state."

Note the two distinct grants of power: First, to alter or amend an existing charter or adopt an entirely new one; second, to exercise all powers in relation to the form of government and conduct of municipal affairs not conflicting with the fundamental or any general law. The second is subsidiary to and in aid of the first and a limitation thereof in some respects. The first is broad, with unmistakable purpose to enable any city in this state to make its organic law to suit the pleasure of its people,—to change its existing charter or make a new one without any legislative interference. The second is in the nature of a proviso to the first; that as to the mere form of government and the conduct of municipal business, the exercise of the latter shall be within the designated limitations, leaving the fundamentals of the charter, in general, to local discretion.

It seems plain that, by the first clause of the section, there is indicated, with great clearness, a purpose to delegate power to make law of the nature which was clearly reserved to the Legislature, and that in the means attempted to be afforded in aid thereof, there is likewise a manifest purpose to delegate authority which the Constitution so reserved. The form of a city government is of vital importance,—the very foundation stone of the creation.

It is not intended to suggest that there was any intent on the part of those responsible for placing the enactment on the statute book to violate the Constitution. It is one thing to misconceive or fail to appreciate constitutional limitations, and quite another to intentionally act in violation thereof. One may do the former in the utmost of good faith and intended fidelity to his oath of office. Unconstitutional enactments have occurred from time to time, attributable to the former cause, but rarely, if ever, rightly attributable to the latter. So it happens, as we venture to say, that the good faith, characterizing a legislative enactment such as we have under consideration, which it is our duty and pleasure to accord to a co-ordinate branch of the state government, in general, invites, as it were, and approves careful, firm performance of duty here to test such enactments by constitutional safeguards and guarantees willing submission to the result. It is only through such deference by each co-ordinate branch of our system to the other, and submission to and commendation of conscientious, firm, full performance of duty, that the people may enjoy the blessings intended to be secured by our constitutional system.

[7] The only room, it seems, there could be, as an original matter, for fair doubt as to the illegitimacy of a delegation of power to create, amend or repeal corporate charters, is in the fact that, accompanying section 31, art. 4, of the Constitution,—adopted in 1871, except the ninth subdivision relating to towns, cities and villages added in 1891, prohibiting the incorporation of any city, town or village or amending the charter thereof by special laws,—section 32 of such article was adopted declaring that "The Legislature shall provide general laws for the transaction of any business" within the prohibition of section thirty-one, such laws to "be uniform in their operation throughout the state." Whether it was intended thereby to authorize the Legislature, by a general law to delegate the power theretofore exercised by the Legislature in regard to granting corporate charters by special act to some local body or the people themselves; or whether the intent was that the constitutional mandate should be exercised by the Legislature making a law complete in itself, forming the

whole or part of a general charter system and leaving it with the community desiring to be a city corporation to adopt the general charter law and with an existing city to adopt it or any complete part thereof in place of its charter or portion of it,—was a subject for thought in State ex rel. Boycott v. Mayor, etc., of La Crosse, 107 Wis. 654, 84 N. W. 242. The conclusion was that the change in the Constitution did not take the function of making the fundamental law for cities from the Legislature, or give authority to delegate it; that "transaction of any business" prohibited, within the meaning of the language used, goes no further than some method of adopting a law formulated and enacted by the Legislature. The idea that the amendment contemplated delegating authority to do the business in the sense of making the law itself, was, by necessary implication at least, repudiated. The court said, in effect, that any exercise of power in the matter by an existing municipal corporation further removed from direct legislative interference than by adopting a corporate charter or a complete subpart thereof covering a subject, as formulated by the law-making power, would be legislation by the corporation and not by the Legislature, and so inhibited by the Constitution.

True, the precise question here was not discussed or treated in the opinion of the court in the case mentioned; but the plain logic of the decision is that a legislative delegation of authority to make a city charter, or any part of it,—a power other than to adopt a legislative creation,—would be a delegation of legislative power and so void. The writer deemed a contrary view, at least as to special city charters, of sufficient merit to warrant discussing it at length to aid in reserving the question for future consideration in case of a situation being presented in which it might be vital. The case then in hand was not thought to be such. In the years which have since elapsed the writer has come to the conclusion that the logic of the court's decision, carried to its fullest extent, is right. So while, if the question were open as to whether the Legislature can properly delegate power to make or change a city charter, in the sense of determining the form of government and the fundamentals, in short, except by the option law method, it would have to be answered in the negative. It should be regarded as thus ruled by State ex rel., etc., v. Mayor, etc., supra, and subsequent cases.

[8] The foregoing is reinforced by the plain intent of the Constitution that city charters shall be uniform, throughout the state, as nearly as practicable. Before subdivision nine of section 31, art. 4, was adopted the general charter law was enacted. The scheme of it was to classify existing cities for general legislation and to afford opportunity, without legislative interference, to adopt an entire charter, or any portion thereof, covering any particular subject, in place of an existing special charter or portion thereof. The general law and the new subdivision of section 31, art. 4, were companion laws to effect uniformity in city charters. The enactment in question is plainly in violation thereof. Under it facilities for changes in city charters, in number, character and frequency, regardless of uniformity, would be immeasurably greater than under the system prior to 1891.

[11] We thus reach a very satisfactory conclusion that the law in question is unconstitutional and so did not impose any duty upon appellant to perform that which he refused to do. We have reached that conclusion from the plain purpose of the several constitutional provisions referred to, and the likewise plain violation thereof which the enactment in question, if sustained, would accomplish. We have not found it necessary or advisable to go outside of the very narrow field indicated in order to obtain aids in reaching such conclusion, or illustrations to support its correctness. That will explain why no reference had been made to many features of the arguments of counsel who favored the court with the results of their efforts to assist.

It is correctly claimed on the one side, and not effectually, if at all, denied upon the other, that in most cases where legislation of the nature of that in question has been adopted it was preceded by a constitutional amendment expressly authorizing it, while in those not so preceded the legislation was condemned as unconstitutional. The most striking instance of that is found in Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820. The court's disapproval of such attempted delegation of authority as we have here was expressed very emphatically and without qualification. Such an enactment, as there indicated, has no support whatever in the competency of the Legislature to delegate limited powers of local legislation of an administrative character, to cities. All such regulations are, in a broad sense, within the fundamental lines of the legislative charter. The difficulty here is in the attempted delegation of power to make, change or repeal the charter itself. The distinction between such a power and authority universally exercised by cities before the Constitution and preserved under it,—to enact by-laws or ordinances in the administration of specific charter powers, is quite marked and commonly understood.

The result of the foregoing is that the order appealed from must be reversed and the cause remanded with directions to sustain the motion to quash the alternative writ and to dismiss the mandamus action with costs.

So ordered.

TIMLIN, J. (concurring). The order does not prevent a judgment from which an ap-

peal might be taken, nor is it the final order in a special proceeding; but it may, I think, be considered an order overruling a demurrer. Section 3069, St. 1898; State v. Supervisors of Wood County, 41 Wis. 28; Flannigan v. Lindgren, 122 Wis. 445, 100 N. W. 818. Attempting to act under chapter 476, Laws of 1911, the common council of the city of Milwaukee by a two-thirds vote of its members adopted a resolution that: "The charter of the city of Milwaukee is hereby altered and amended by adding to chapter 4 thereof a new subdivision which shall read: 'Section 1. The city of Milwaukee is hereby authorized and empowered to establish, maintain and operate a plant for the manufacture, purchase and sale of ice and the distribution thereof to its citizens under such terms and pursuant to such regulations as may be prescribed by the common council of said city. The common council of said city is hereby authorized to prescribe such terms and to formulate and adopt such regulations concerning the manufacture, purchase and sale of ice and the distribution thereof to its citizens as it may deem just and proper. Sec. 2. The said city of Milwaukee is hereby authorized and empowered to acquire by gift, grant or purchase for the purposes aforesaid suitable lands, buildings, machinery and equipment to operate and maintain an ice plant and for the keeping, transportation and distribution of ice under such terms and pursuant to such regulations as may be adopted by the said common council. Sec. 3. The said common council is hereby authorized to raise and provide all necessary money and other means for all the purposes aforesaid. Such purpose is declared to be a public purpose. Sec. 4. All provisions of the charter and ordinances of the said city of Milwaukee conflicting herewith are hereby modified and repealed so as to give full force and effect hereto.'"

Chapter 476, Laws of 1911, as amended and corrected by section 95, c. 664, Laws of 1911, is a statute which attempts to put in force that condition of city government popularly and vaguely described as "home rule." This subject of home rule for cities is new in Wisconsin. Statutes on the subject have been enacted in Louisiana and Michigan in advance of any amendment to their state Constitutions, and several state Constitutions have been amended for the purpose of enabling the Legislature to confer this power upon cities. Among the states which have adopted such constitutional amendments are California, Michigan, Minnesota, Missouri, Oklahoma, Oregon, and Washington. The reasons urged by the advocates of this plan of city government are: (1) That it will obviate the evil of unwise legislative intermeddling with the local affairs of cities; (2) that it will foster and develop among the electors of the city a sense of responsibility and a knowledge of local municipal affairs; and (3) that such electors have a better knowledge than legislators selected from the entire state concerning local affairs and local conveniences or necessities. About 20 years ago in this state it was thought the Legislature interfered too frequently by special laws in the government of cities, and the state Constitution was amended so as to forbid the Legislature to enact any special or private law for incorporating a city or to amend its charter. The Legislature was thus powerless to act in such matters except by general legislation. But such classification of cities was of necessity and by decisions of this court permitted that there was with reference to the largest city in the state about the same freedom of legislation as formerly. The acts of the Legislature merely took the form of general legislation for a class of cities. It is said that in Minnesota a like constitutional restriction upon the enactment of special laws produced an opposite result. State v. O'Connor, 81 Minn. 84, 83 N. W. 498. But too little legislative power in Minnesota and too much in Wisconsin alike begot a desire for "home rule." Thus either too little or too much legislative power in this respect would appear to be inconvenient or undesirable, as certain disorders of the stomach may be caused either by surfeit or by famine. Much crude and ill digested information on this subject is printed and published by advocates and antagonists more enthusiastic than thoughtful, and considerable pseudo-scientific exposition of the subject may be found in pamphlets, addresses, and books.

We must expect to have many new theories of government and some experiments made in a country which attempts to give a partial education to all its citizens and in which practically unlimited suffrage prevails and whose people are active, alert, and progressive. The theories advanced may have been investigated and rejected or even experimented with and rejected centuries ago, but they are new to most of the electors, and the enthusiastic propagandist obtains an audience and a following. This is very irritating to the citizen who is disposed to sleep at his post of citizenship, to the citizen whose profits are threatened thereby, and to the citizen who reveres old things merely because they are old. Hence the ever recurring and irrepressible conflict. But those can look on, impartial and entertained, who know that in all things, old and new, good and evil are combined; that the law of this world is struggle; that balance is preserved only by action of opposing forces; that no legal rule or institution exists without having had at its origin a cause for its existence; that if that cause has passed away the institution cannot be upheld; and that if that cause still exists it will bend and warp all innovation to harmonize with it and vindicate itself through the same force that

brought the ancient rule into being in the first instance.

It is obvious and elementary that there can be but one sovereign power in the government of a state. As well might we speak of two centers in a circle as two sovereign powers in a state. Sovereignty, however, may be so divided or distributed that several officers or departments of government must each act in its full exercise. This division of power is at the basis of the check and balance theory of government. It is essential to liberty, and it obtains with modifications in detail in all enlightened governments. Or sovereignty may be otherwise divided so that there is a dual government each supreme in the same territory, but in certain separable and specified matters, and of this the mediæval governments, where the church was sovereign in ecclesiastical and the state in secular matters, constitute examples. Or sovereign power may be divided with reference to the subject to be acted upon, so that there are two sovereigns in the same territory, but each over different subjects, and in each of these sovereignties there may exist the division or distribution of sovereign power into separate departments which must all join in its full exercise. And of this most federal forms like that of the states and the United States, Canada, and to some extent Germany, constitute examples. Where sovereign power is distributed among officers or departments, there may be some encroachment of one department upon another, or there may result an impasse; action is slow, efficiency is not great, but there is liberty. Where the division of power is with reference to subjects of regulation, a clash is inevitable unless there is some authority or overlord empowered to determine what subjects belong under the jurisdiction of each sovereign, because it is impossible to specify in advance the unknown or unforeseen. That government possessing this power is the real sovereign. Two opposing theories of the origin of this sovereign power prevail and appear in written Constitutions. One is that the full sovereign power was originally vested in an autocrat, and he has granted to the people a Constitution but still retains all sovereign power not thus granted. This is the theory of the Constitutions of Prussia, and I think of most of the other states of Germany, and its result with reference to cities which are not states is that the administrative department of the government, which is a branch of the executive, interferes with the local government of cities promptly and efficiently by disapproval of their choice of city officers and veto upon their exercise of any power not granted away by the autocrat when he gave his people the Constitution or given by anterior executive grant to the city or long user presupposing a grant. The other theory is that sovereign power resides in the people, who form their own Constitutions, limiting as therein provided and to a greater or less extent the power of all their officers and their own power to change the Constitution except in the manner provided therein. All persons and institutions in a state of this kind are subject to laws made conformably to the Constitution, and the consequence is that, under such conditions, the Legislature, representing the people, has the power to interfere in the government of cities as the executive may in Prussia and other German states. To some this executive interference by one autocrat seems infinitely better than the legislative interference by the majority voice of 133 autocrats; but I think it will be found that the basic difference between municipal government in Europe and that in this country rests upon the fact that here the man who pays no taxes and he who would be considered in continental Europe a temporary sojourner or a transient is permitted to vote and control the fiscal affairs of the municipality, while there such persons are not electors of the city and have no voice in such affairs. There also the law frequently prescribes necessary qualifications or conditions of eligibility to city offices; here there is no such thing. There may exist a city-state possessing many of the powers of sovereignty, and that state may have its local government include a small adjoining rural area and be a member of a confederacy with other states and represented in the federal or national congress like Lubeck, Bremen, and Hamburg in the German federation. Or the city may be the sole and absolute sovereign within its boundaries and over its dependencies like the old city-states of Rome, Carthage, or Venice. But neither of these forms of city government is possible in this country under our national and state organizations. Here a city is only possible as an administrative agency of the state having a measure of local legislative or ordinance power and a limited proprietary capacity. There is no instance, I think, in history where such civil divisions have been authorized to exercise absolute home rule, except that of the communal law of France of A. D. 1789, which was attended with disastrous results. All laws relating to the autonomous government of cities in this country, in order to be valid, must fit into our fundamental conditions of government, and, in order to be successful, must not only be valid, but also appropriate to sociological and political conditions existing here, not to those existing elsewhere, and they must respond to our changing conditions and to constitutional rights of the citizens affected thereby.

In Straw v. Harris, 54 Or. 424, 103 Pac. 707, the court considered section 2, art. 11, of the Constitution of Oregon as amended in 1906. That reads as follows: "Section 2. Corporations may be formed under general

laws, but shall not be created by legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the state of Oregon." This seems to exclude all state laws except the criminal laws. The court said: "The language used in the amendments considered would appear to give incorporated cities the exclusive control and management of their own affairs, even to the extent, if desired, of legislating within their borders without limit, to the exclusion of the state. But, as stated, these provisions must be construed in connection with others of our fundamental laws, which can but lead to the conclusion above announced; and whatever may be the literal import of the amendments, it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them. This no state can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a state's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of states within the state, and eventually in the surrender of all state sovereignty—all of which is expressly inhibited by article 4, § 3, of our national Constitution. Power to enact local legislation may be delegated; but this, of necessity, whether stated or not, is always limited to matters consonant with, and germane to, the general purpose and object of the municipalities to which such prerogatives may be granted. Municipalities are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject always to its control. The state, therefore, regardless of any declarations in its Constitution to the contrary, may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental law." I think this is a correct statement of the law as it is and as it must finally prevail. It can in no way be avoided, so long as our present system of federal and state governments obtain, and so long as those underlying forces operate which always tend to lodge ultimate authority and sovereign power with him best able to exercise it and whose position makes him the final arbiter of his own claim to such power. This is the state, not the city. There can be no absolute autonomy in American cities, no matter how limited as to subject. We may now leave for a space these larger observations, and come down to the details of the legislation of several states upon this subject, the questions which arose, and the disposition which was made of them. These instances will serve to draw away the mind from mere theorizing and disclose some of the points of friction, as well as some of the impending or threatened effects of such laws.

The experience of California in this respect is instructive. The Constitution in force in that state in 1880 authorized any city containing a population of more than 100,000 to frame a charter for its own government consistent with and subject to the Constitution and laws of the state, by causing a board of 15 freeholders to be elected, who should prepare and propose a charter, which must be submitted to the qualified electors of said city, and, if a majority of the latter ratify the same, submit it to the Legislature for its approval or rejection as a whole, and if approved by a majority vote of the members elected to each house, it should become the organic law of the city and supersede any existing charter and all amendments thereof and all special laws inconsistent with such charter. It was decided that the purpose of this section was to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature (People v. Hoge, 55 Cal. 612); that the Legislature could not abridge the right given by these provisions to cities (People v. Bagley, 85 Cal. 343, 24 Pac. 716); that a city might provide in its charter for taxation for municipal purposes (Security Savings & Trust Co. v. Hinton, 97 Cal. 214, 32 Pac. 3). This Constitution apparently proved unsatisfactory, and it was amended in 1887, by providing that such charter or amendment thereto or any alternative article or proposition might be presented for the choice of the voters and voted on separately; by including a consolidated city and county having a population of more than 10,000 and not more than 100,000; and in other respects. This Constitution was again amended in 1902 so as to include cities containing a population of more than 3,500 and permitting 15 per cent. of the qualified voters of the city to petition the legislative authority of the city to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval. This Constitution was again amended in 1906 in this respect. All these amendments retained the feature of the first California Constitution, requiring the election of a board of 15 freeholders, whose duty it should be to prepare and propose a charter for the city, and requiring the submission of the charter to the Legislature for approval after its approval by the electors of the city.

Considerable difficulty was experienced, and some confusion occasioned, by a constitutional amendment to section 6, art. 11, adopted in 1896, which read: "All charters thereof framed or adopted by authority of

this Constitution *except in municipal affairs* shall be subject to and controlled by general laws." A "municipal affair" was defined, in Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923, as one which related to the internal business affairs of the municipality, and that the election of the freeholders for framing of the charter was not a municipal affair. Salaries of officers of the police and fire departments of a city are municipal affairs. Popper v. Broderick, 123 Cal. 456, 56 Pac. 53. The control of the almshouse of San Francisco is a municipal affair. Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683. The functions of the board of health are municipal affairs. People v. Williamson, 135 Cal. 415, 67 Pac. 504. A statute forbidding the imposition of a license tax for the purpose of revenue deals with a municipal affair. Ex parte Helm, 143 Cal. 553, 77 Pac. 453. The registration of voters for a municipal election is a municipal affair. People v. Worswick, 142 Cal. 71, 75 Pac. 663. A section in a city charter conferring upon the city power to impose license taxes for the purpose of revenue relates to a municipal affair, and is paramount to a general statute forbidding such taxes. Ex parte Braun, 141 Cal. 204, 74 Pac. 780. In this case it appears that the city of Los Angeles under this constitutional power imposed a license tax upon the great majority of callings and occupations in the city, including callings or occupations in no degree subject to police regulation, sometimes basing the amount of tax upon the amount of business transacted. Braun was a wholesale liquor dealer, and it imposed upon him a tax of $60 per month. These occupation taxes were upheld; Justices Beatty and Lorigan dissenting. Justice McFarland says: "The section of the Constitution in question uses the loose, indefinable wild words, 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean." Chief Justice Beatty, discussing the statement in the opinion of Justice Angellotti that, "when a power is conferred upon a municipality for municipal purposes, that power becomes a municipal affair," calls attention to the fact that the definition does not define or render any more definite or understandable the words of the Constitution. Justice McFarland said: "It is difficult to realize that the people of the state, through their Legislature, have no longer the power to say that a license tax—a tax upon the right to do business, a tax upon capacity—is unjust, unequal, and oppressive, and should not be tolerated anywhere within the state; but we think such is now the law." This case shows what may take place under a constitutional grant of this kind. The school system is a matter of general concern and not a municipal affair. Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44. The payment of fees to jurors in criminal actions is not. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167. A county affair is not a municipal affair. Popper v. Broderick, supra. The opening of streets in a city is a municipal affair. Bryne v. Drain, 127 Cal. 663, 60 Pac. 433. The issuance of bonds for the repair of existing schoolhouses and for a new schoolhouse is a municipal affair. Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014. The collection of fines for misdemeanors punishable under state law is not a municipal affair. Marysville v. County of Yuba, 1 Cal. App. 628, 82 Pac. 975. The fixing of the boundaries of a territory to be annexed to a city or town is not a municipal affair. People v. Ontario, 148 Cal. 625, 84 Pac. 205. Nor the trial and punishment of offenses defined by the laws of the state. Robert v. Police Court, 148 Cal. 131, 82 Pac. 838.

These words are not as ambiguous in the California Constitution as they are in chapter 476, Laws of 1911, for the reason that the California Constitution, art. 11, § 8½, by expressly conferring upon the municipality certain designated powers, unmistakably makes these subjects municipal affairs. One is the constitutional regulation governing the manner of selection and the compensation of police court judges and their clerks and attachés; another the manner, times at which, and terms for which members of the boards of education shall be elected or appointed and the number of such members; and another confers similar powers with reference to boards of police commissioners. There is also enumerated government of the municipal police force and the selection, compensation, regulation, etc., of boards of election and clerks and their attachés. These, together with some other constitutional provisions and the existing powers conferred by general statutes upon municipal corporations, cover the subjects described as "municipal affairs" to a considerable extent. It is said in Security Savings Co. v. Hinton, 97 Cal. 214, 32 Pac. 3, quoting from U. S. v. New Orleans, 98 U. S. 393, 25 L. Ed. 225: "When such a corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise be in express terms prohibited." Where the Legislature controls the city, this subject is regulated by express delegation of power supplemented by a rule of the common law that the city possesses no power not thus delegated or necessarily implied from the delegated power. Licensing horse races may be a municipal affair if the municipality has power from the state to tax and regulate that sport. Alexander v. City of Elizabeth, 56 N. J. Law, 71, 28 Atl. 51, 23 L. R. A. 525. So licensing all occupations would include the licensing of the retail sale of liquors. Full power to tax for municipal purposes or for municipal affairs, together with the power to determine what affairs were municipal

affairs, would include the power to destroy property or make the license fee burdensome to the point of suppression upon some or all professions or occupations. Those Californians who sought refuge from legislative meddling with city charters in a constitutional amendment must have since experienced a good deal of constitutional intermeddling, judging from the frequent changes in the state Constitution. No doubt the words "municipal affairs," "municipal concerns," or "municipal purposes" in a Constitution could be handled by a slow process of inclusion and exclusion until some workable theory of local government could be developed; but this promises a long period of uncertainty and a multiplication of legal questions and local quarrels, and does not seem to possess much advantage over the older system. If, on the other hand, the Constitution is so framed as to prevent the Legislature from interfering with the city charter (assuming that could be done), the consequence must be that, instead of executive interference, as in Germany, or legislative interference, as heretofore in the United States, we will develop a system of judicial interference because of the constantly recurring necessity for construction to determine what subjects are within and what without the local power. There also must be a great variety of city charters, if each charter is to be made and enacted by the electors of each municipality according to their different notions, and, unless the restriction is contained in the Constitution, any provision of statute by which the so-called "home rule charter" is made subject to the laws of the state will not prevent local differences, appeals to the paramount Legislature, nor prevent legislation by the latter changing and undoing what has been done by the locally adopted charter; for no Legislature can tie the hands of succeeding Legislatures.

The Missouri Constitution of 1875 is perhaps the first and typical to some extent of other home rule constitutional provisions. The city "may frame a charter for its own government consistent with and subject to the Constitution and laws of this state. * * * But such charter shall always be in harmony with and subject to the Constitution and laws of the state." Section 16, art. 9. When conflict as to mere municipal regulations, such as assessment of benefits and damages arising from grading streets, exists between such charter and the general laws of the state, the former supersedes the general laws on that subject (Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943); but not in police matters (State v. Police Commissioners, 184 Mo. 109, 71 S. W. 215, 88 S. W. 27); nor as to occupation licenses (Kansas City v. Lorber, 64 Mo. App. 604); nor to the regulations of telephone rates (State v. Telephone Co., 189 Mo. 83, 88 S. W. 41); nor to create a right of civil action between citizens inter sese (Sluder v. Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. [N. S.] 186). Such charter is subject to legislative control. Ewing v. Hoblitzelle, 85 Mo. 64; State v. Field, 99 Mo. 352, 12 S. W. 802. The charter can contain only provisions essential to a city government. Within that scope the charter so adopted has the force of an act of the state Legislature. State v. Gates, 190 Mo. 548, 89 S. W. 881, 2 L. R. A. (N. S.) 152. But the charter may authorize the local legislative body of the city government to compel the attendance of witnesses and the production of books and other documents relating to any subject under investigation in which the interests of the city are involved, and an ordinance enacted under such charter power may authorize the city council to imprison for contempt for failure to attend and produce books of account. In re Dunn, 9 Mo. App. 255. It is also ruled in Missouri that, if the Constitution confers upon a city the power of eminent domain, the city by adoption of a home rule charter may regulate the exercise of such power, but it could not by such charter confer this power upon itself. Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943. The Constitution merely transfers to the people of the city power to legislate in purely municipal affairs. Morrow v. Kansas City, 186 Mo. 675, 85 S. W. 572. The power to require the production of documents under such vague general issues and the power to imprison for contempt seem extraordinary and liable to abuse, while the ruling relating to occupation licenses seems to conflict to some extent with the California rulings on the same subject hereinbefore noticed. But on the whole it seems that the government of Missouri cities has not been much changed or benefited by this change of the state Constitution.

The Constitution of the state of Washington authorizes certain cities to adopt their own charters consistent with and subject to the Constitution and laws of the state. Article 11, § 10. General laws cannot be affected by such charter. Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077. Nor can the city under this power provide a tribunal and clothe it with authority to try contested election cases. State v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674. Nor can the city under such charter fix the price of gas to be furnished its citizens or inhabitants. Tacoma Gas Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655. The state may nevertheless pass laws relating to the assessment and collection of taxes in such city, because the state has an interest and duty in the collection of a tax levied by the city. State v. Carson, 6 Wash. 250, 33 Pac. 428. But a city may not confer upon itself power to extend its boundaries, but must do so under existing general laws. State v. Warner, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263.

The Constitution of Minnesota, as amended in 1898, authorizes cities to frame their own charters, which must be consistent with

and subject to the laws of the state. Section 36, art. 4. "Such charter shall be in harmony with and subject to the Constitution and laws of the state of Minnesota." Id. An amendment to this part of the Constitution was proposed by the Minnesota Legislature of 1911. The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs. State v. District Court, 90 Minn. 457, 97 N. W. 132. Under this power the city may enact ordinances relating to the bonds of contractors and payment of laborers and materialmen, including the contents of the bonds and conditions and limitations as to their enforcement differing in detail from the requirements of existing general laws. Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133. The city may also regulate the manner of presenting claims against itself auditing and allowing the same and regulate the proceedings for reviewing the same upon appeal. It is said that these are "municipal affairs." State v. Dist. Court, 90 Minn. 457, 97 N. W. 132. I should regard this case as going very far if it includes the regulation of the appeal procedure. If such cities have the power of eminent domain, the home rule charter may prescribe means for its exercise and impose duties on the courts of the state in the condemnation of property. State v. Dist. Court, 87 Minn. 146, 91 N. W. 300. Notwithstanding the home rule charter, a general law restricting the municipalities from contracting indebtedness in excess of 5 per cent. of the value of the taxable property of the city remains in force. Beck v. St. Paul, 37 Minn. 381, 92 N. W. 328. Under such charter the city council may supersede the general laws of the state relative to local assessments for street improvements (Turner v. Snyder, 101 Minn. 481, 112 N. W. 868), and may regulate the manner of filing claims against the city before bringing action thereon (Peterson v. Red Wing, 101 Minn. 62, 111 N. W. 840).

In Michigan the Legislature attempted to delegate to cities by legislation resembling chapter 476, Laws of 1911, containing somewhat similar vague general words power to amend their charters; but the Supreme Court of that state held the act unconstitutional as an attempt to delegate wholesale, unqualified and undefined authority to the mayor and electors of the city. It was considered that the Legislature must itself determine what powers the municipality shall have, and not leave it to the electors residing in the municipality to determine what legal power the latter should have. Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820. The state Constitution was then amended (art. 8, §§ 20–25) so as to require the Legislature to provide by a general law for the incorporation of cities and by another general law for the incorporation of villages, and such general laws must limit their rate of taxation for municipal purposes and restrict their powers of borrowing money and contracting debts. "Under such general laws the electors of each city shall have power and authority to frame, adopt and amend its charter, and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the Constitution and general laws of this state." Section 21. The next section of the Michigan Constitution expressly confers upon cities certain powers relating to parks, boulevards, cemeteries, hospitals, almshouses, and all works which involve the public health or safety. The next two sections confer power to acquire, own, and operate public utilities for supplying water, light, heat, power, and transportation, with certain limitations not relevant here. The next confers the power to incur debts for the acquisition or operation of public utilities with certain restrictions and limitations. The next is negative and forbids the city to abridge the elective franchise, to loan its credit, to lay a tax for other than a public purpose, etc. It will be observed that the constitutional grant is hedged in by certain safeguards, and that while the vague words "municipal concerns" are used, still these things, or the most important of them, are specified in the Constitution, and these specifications furnish something definite to which the words "municipal concerns" may be applied and from which they may be extended noscitur a sociis. In this way a home rule charter properly limited may be made intelligible and effective. The statement, in general terms at least, of what are municipal affairs or municipal concerns, is indispensable to intelligibility wherever the limitation "subject to the Constitution and laws of this state" occurs. For otherwise we move around to our starting point.

Under home rule amendments to the Constitution thus guarded, the city of Detroit undertook to amend its charter so as to authorize it to own and operate the street railways. The Attorney General attempted to restrain by mandamus the submission of such amendment to the electors of the city, and prevailed on the ground that a revision of the charter so as to make it contain the restrictions and limitations found in sections 3 and 5 of chapter 279, Public Acts of Michigan for 1909, should precede such submission. The court upholds the law, but the city in attempting to amend its charter failed to proceed properly so as to take on with the enlarged power the legislative and constitutional limitations restricting the rate of taxation, etc. In upholding the law the court said: "It should also be remembered constantly that 'home rule' is the fundamental purpose of the amendments, and that cities can only become financially ruined by accomplishing such ruin themselves." Attorney General v. Common Council, 164 Mich. 369, 380, 129 N. W. 879. To me this is a surprising sentiment, a most unusual conso-

lation to the court. What of the citizens whose property is swept away by such ruin accomplished by the votes of perhaps an irresponsible and nontaxpaying majority? Home rule, even with reference to local matters and universal suffrage in industrial cities where the nontaxpaying electors are in a majority cannot, I think, exist together without legislative interference, or at least without judicial interference, which will be found quite as frequent and quite as objectionable to the defeated party as the old legislative interference from which he sought to escape. So long as the paramount law charges the courts with the duty of protecting personal and property rights, and so long as there will exist under such home rule charter a tendency to encroach upon these rights, there will be judicial interference either of the state or federal judiciary, or both. So we have of interference in municipal regulations this progress, executive interference, legislative interference, judicial interference. But there always is, and must be, interference of some kind, unless the city is sovereign. We may indulge in vague generalities about home rule in "municipal affairs"; but reflection and analysis must disclose that, in so far as the city is engaged in the exercise of the taxing power or in the power of incurring obligations which must be met by taxation so far as it may deny the equal protection of the laws, unreasonably restrain liberty, or proceed without due process, the sovereign power must always in some form or through some department of the government interfere with and restrain the city. The numerous instances referred to tend to illustrate at what points and upon what subjects the authority of the city in the exercise of its purely local or corporate powers will conflict with personal or property rights of others. Each citizen has, under the United States and the state Constitution, a bill of rights for his protection. These may be infringed as well by local regulations as by state-wide regulation. The area in which the regulation is in force has nothing to do with this. Neither has the fact that the regulation relates to a city obligation or duty, rather than to a state obligation or duty. There can be no home rule which is worth considering without the power of taxation on the part of the city for city purposes, and there can be no taxation under our system without getting into the field of general law and constitutional rights. Neither can there be any taxation not subject to regulation by the master hand of the state Legislature.

Where "sovereignty" or even "control" is by Constitution or statute distributed between the state and the city with reference to the subjects of regulation by each, if the city were sovereign in all "municipal affairs" and the state in all other affairs, still the city could not conclusively determine what affairs are "municipal," for to permit it to do so would be to confer upon the city an overlordship which would finally draw all power to the city. But in such case either one must have this power, and that one is the state. Under our American theory of the origin and office of Constitutions, the state may do this through its Legislature and judiciary. The former can create legal conditions, can make "affairs" municipal or state, as it deems wisest or most expedient. The latter can apply these laws to concrete cases, and in attempting to do this can interpret the laws only so far as is necessary to apply it to the instance or cause before the court. For illustration: The subjects of public health and quarantine regulations, highways, education, taxation, liquor or other licenses, hours of labor, street railway or gaslight rates, etc., within city boundaries, might by one Legislature be placed under the regulatory power of the city, and thus become "municipal affairs." The next Legislature might think it better that the state resume its exclusive authority over some or all of these and thus make them "state affairs." It would be impossible, both on account of changing conditions and because the state could not wholly abdicate its sovereign functions over such and similar subjects, to hold that which a Legislature had once made a "municipal affair" must always thereafter remain such. So it is apparent that such "home rule" tends to invite, rather than prevent, interference by the state in the government of cities. Whether this interference on its own initiative or on request of the city electors be direct and plain, or whether it be accomplished by legislative shifting of subjects in and out of the class called "municipal affairs," seems to be matter of form rather than substance.

Again, considering the foregoing instances which are part only of a greater number which have occurred, the home rule law would seem to promise neither peace nor uniformity in city government. So long as the home rule charter must be subject to legislative authority in all matters, the power of the Legislature to interfere in city government is not changed, nor is there anything in the situation to lessen the disposition of the legislative body to so interfere. The dissatisfied faction in the city will come to the Legislature for relief after this charter is adopted as freely as before. General laws will be enacted from time to time continually conflicting with the local charter at unexpected points and creating doubt and uncertainty, and each city will by original adoption or subsequent amendment produce a charter differing in detail from that of any other city. On the other hand, if the Legislature could be constantly prohibited from any interference with the so-called home rule charter adopted by the city, so far as the same related to municipal affairs, this would substitute the interference of the judicial department of government for that of the

legislative department, and every section of the charter and every ordinance must in time come before the courts in order to ascertain whether it related to a municipal affair only, and so whether subject to repeal or amendment by the state Legislature. Municipal affairs, however, change from time to time. The telephone was a short time ago a matter of local accommodation. Now it extends beyond the boundaries of the city, and even beyond those of the state. Electric light and power plants were local utilities but a short time ago. With the development of water power and the transmission of electric current to distant points, their character is changed. So has that of the street railway. 2 Wilcox, Mun. Fran. § 509. There is also a tendency in the other direction. The state may authorize a city to maintain and operate an ice plant or garbage crematory or an opera house, and immediately the maintenance and operation of these become municipal affairs. But they were not such before. As the powers of a city broaden in consequence of the Constitution or the statute conferring additional powers and duties, so does the meaning of the words "municipal affairs." As the legal powers of the city narrow, so does the meaning of this phrase. But there is this difference: They can never broaden to include sovereign power in an American city, although they may narrow to zero. So far we have dealt with constitutional law, which is, of course, paramount to the statute, and which may itself create certain things municipal affairs, or may recognize existing municipal authority under statutes as constituting what the Constitution terms "municipal affairs." This, as we have seen, will present a number of difficult legal questions; but we have to do with a somewhat different situation where there is no constitutional provision and the whole question rests upon statute as in the present case. It is perhaps worthy of remark that the same Legislature, which enacted the statute in question here, proposed by resolution No. 73 (Sess. Laws 1911, p. 1142) an amendment to the Constitution of this state, as follows: "Cities and villages shall have power and authority to amend their charters and to frame and adopt new charters and to enact all laws and ordinances relating to their municipal affairs subject to the constitution and general laws of the state."

Chapter 476, Laws of 1911, as amended and corrected by section 95, c. 664, Laws of 1911, provides that every city shall have authority to alter or amend its charter or adopt a new charter in the manner there specified, and for that purpose it "is hereby granted and declared to have all powers in relation to the form of its government and to the conduct of its municipal affairs not in contravention of or withheld by the Constitution or laws operative generally throughout the state." Section 2. "When a new charter shall have been adopted or the old charter altered or amended by any city in the manner provided in this act such new charter or alterations or amendments shall supersede any existing charter or statutory provision inconsistent therewith and the same is in that event hereby repealed; two copies of such new charter or alterations or amendments duly certified by the city clerk shall be filed in the office of the Secretary of State." The remaining portions of the act authorize and regulate the procedure for making and amending charters and are not especially important in the instant case. It is sufficient to say that the alterations or amendments may originate with the common council or with a stated number of electors, and they shall be adopted by the common council and by the voters at an election or rejected by the common council and adopted by a vote of the electors, or the question of holding a charter convention for framing a new charter may in a somewhat similar manner be submitted to a vote of the electors. Delegates are chosen to frame a new charter, which becomes effective when approved by a popular vote of the electors of the city. It will be observed that the city is in the first section granted, for the purpose of amending its charter or adopting a new one, "all powers in relation to the form of its government and in relation to the conduct of its municipal affairs not in contravention of or withheld by the Constitution or laws operative generally throughout the state."

In relation either to (1) the form of government, or (2) the conduct of its municipal affairs, the city has by this statute all power not withheld (a) by the Constitution, or (b) by laws operative generally throughout the state, and not in contravention (a) of the Constitution, or (b) of laws operative generally throughout the state. Constitution here mentioned is the Constitution of Wisconsin, and laws generally operative throughout the state must mean (1) the federal Constitution, treaties, and statutes of the United States according to their true meaning as settled by judicial interpretation; (2) the statutes of the state of Wisconsin according to their true meaning as settled by judicial interpretation; (3) such parts of the common law as were in force in the territory of Wisconsin at the time of the adoption of the state Constitution and which were not inconsistent with that instrument. Const. § 13, art. 14. This common law is evidenced by the decisions of the courts involving common-law questions. Powers not *withheld* by either of these comprehensive bodies of law is perhaps not such a sweeping exception as powers not in *contravention* thereof. Contravention means "transgression" or "violation." So that we have a statute which gives to the city power in two fields of operation, namely, (1) in relation to the form of city government, and (2) in relation to the conduct of its municipal af-

fairs, excepting, however, from each such powers as are in violation of existing law. The exception seems to take away about all that is given by the granting clause of the sentence. Among the rules of law operative generally throughout the state, and referable to that part of the common law continued in force by our state Constitution, is one to the effect that municipal corporations possess no powers not expressly granted to them by the Legislature or included within those granted by reasonable implication. Hasbrouck v. Milwaukee, 13 Wis. 37, 80 Am. Dec. 718; Madison, etc., Co. v. Watertown, etc., Co., 7 Wis. 59; Trester v. Sheboygan, 87 Wis. 496, 58 N. W. 747, and authorities cited. We have no statute purporting to repeal or change this rule.

It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint; under a statute authorizing a city to buy coal, it probably could not buy diamonds, although it is said they are chemically identical. Neither is atmospheric gas passed through a varying aperture and articulated by varying contacts always equivalent to argument. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management. The Legislature has expressly authorized the first and has not expressly authorized the latter. If the manufacture, sale, and distribution of ice is included in the existing grants of power to cities by reasonable implication, then it was not necessary to amend the Milwaukee charter in this respect. If it is not by reasonable or necessary implication included, then such action by the municipality is in contravention of a law operative generally throughout the state, hence forbidden by the very statute under which the relator proposes to act.

There is also this further difficulty inherent in the words "municipal affairs." What are municipal affairs? The first impression is that they are the legal affairs of the city. If we wish to escape from this impression, we must recast the phrase so as to describe the city by reference to its physical peculiarities. But aside from artificial changes made by authority of law, such as streets, sewers, water pipes, wire conduits and such like, the only distinctive physical feature of a city consists in an area of congested population. If we substitute, for the expression "municipal affairs," "affairs of areas of congested population," we are able to get away from the legal view; but we encounter other difficulties. If a mere congested area can be given by the Legislature power to provide for its own local government, so far as such provisions are not in contravention of the Constitution or laws generally in force throughout the state, the powers thus conferred would be few, feeble, and ineffective. The state laws relative to highways, taxes, police powers, licenses, and other like subjects would be in force, but the corporate entity, the juristic personality, would be lacking and must be conferred by some higher power, or else a new state must emerge. The congested area could not confer political and legal existence upon itself. But the words "municipal affairs" assume the pre-existence of a corporate entity having affairs. Such juristic person exists only in the law, and consequently its affairs are legal affairs, namely, the exercise of the powers conferred upon it by law. The manufacture, sale, and distribution of ice was not a municipal affair because the municipality had never been by statute authorized to embark in, conduct, or carry on such business. It could amend its charter relative to the conduct of its municipal affairs only, and this is not such an affair. The city could not make that a municipal affair which the state Legislature had not made so. This statute purports to confer no new or additional power on the city so as to make that a municipal affair which was not so before the enactment.

Scanning the statute still further, it appears to relate only to the *form* of the city government and the *conduct* of its municipal affairs. Making, selling, and delivering ice do not relate to the *form* of the city government. "Conduct" means "to carry on," "to manage," "to regulate," "to direct the course of," and "municipal affairs" means, as we have seen, those affairs or concerns of the city which fall within its statutory and common-law powers and duties. The establishment and operation of this municipal ice plant relates, therefore, neither to the *form* of the city government, nor to the *conduct* of its municipal affairs. The city cannot confer corporate existence or power upon itself because this would be an exercise of sovereign power. Such power comes from the state. All municipal affairs, according to the definition above given, whether made such by existing law or made such by future statutes, are the subjects of municipal regulation. The city may by amendment to its charter or adoption of a new charter provide for the "conduct" of such affairs, and nothing more under this statute. This being the scope of the power granted, the effect given to the exercise of that power, viz., "to supersede any existing charter or statutory provision inconsistent therewith," must refer, not to general rules of statutory law, but to local statutes of the same or similar legal nature as special city charters. It could not at the same time be subject to the laws operative generally

throughout the state and supersede these laws. If this statute could be construed to be an attempt to confer upon the city general legislative power not only to enact laws creating municipal corporations, but also to extend its own corporate powers to new subjects so as to make that a "municipal affair" which was not so under state laws, therefore, to exercise full legislative power, the act would I think be invalid as an unconstitutional delegation of legislative power. Const. § 3, art. 11.

While I would not carry criticism of this statute to the extent to which it was carried by the Supreme Court of California when it described the words "municipal affairs" as "loose, indefinable wild words," I do think the expression lacks clearness and definiteness; but this is in all probability due, not so much to poverty of expression, as it is to the fact that the writer had no very definite knowledge upon the subject. The statute appears to be a very fair reflection of such mental condition. However that may be, we must derive the intention of the Legislature from the words of the statute. Weighing these words with reference to the subject-matter concerning which they were written, I think they will admit of no other reasonable interpretation than that here suggested. If the statute in question attempted to confer upon the city or its electors power or authority to make laws conferring power upon itself or themselves not otherwise conferred, it would also be invalid as in conflict with the sovereignty of the state. I think the proposed amendment to the Milwaukee charter is not within the purview of the statute in question, and, if it were, the act would also be unconstitutional as a delegation of legislative power to an extent not warranted even by the most liberal interpretation of the Constitution.

It follows that the order of the court below should be reversed, and the cause remanded, with directions to quash the writ.

BISMARCK WATER SUPPLY CO. v. CITY OF BISMARCK.

(Supreme Court of North Dakota. June 14, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 393*) — CHANGE OF STREET GRADE—DAMAGE—WATER COMPANIES—FRANCHISE.

The city of Bismarck in May, 1886, passed an ordinance granting to the Bismarck Water Company, its successors and assigns, a license to lay and maintain water mains and pipes in the streets of such city for the period of 20 years for the purpose of distributing water throughout the city for sale to such city and its inhabitants. Pursuant thereto such water company constructed and established a water system and waterworks and maintained the same until the year 1898, at which time it sold and assigned its franchise, together with its water plant, mains, pipes, etc., to the plaintiff, and the latter has maintained such plant at all times since such date.

Prior to the expiration of such franchise and in May, 1905, defendant city passed an ordinance granting to plaintiff a new franchise for the period of 20 years to take effect at the expiration of the old franchise, and which ordinance expressly provided that, in case of a change of grade of any street, the city should reimburse plaintiff for the expenses incurred by it in changing and relaying its mains and pipes necessitated by a change of such grade, and pursuant to such ordinance an express contract was entered into between said parties embracing, among other things, an express stipulation to the like effect.

Held: That such ordinance and contract are valid and enforceable, and the city did not exceed its powers in obligating itself to reimburse plaintiff for such expenses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 937; Dec. Dig. § 393.*]

2. CONSTITUTIONAL LAW (§§ 92, 121*)—VESTED RIGHTS—CONTRACTS—ORDINANCES—RETROACTIVE OPERATION.

That such ordinance in this respect is not retroactive but prospective in its operation, although it applies to mains and pipes which were laid during the life of the old franchise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178–180, 207, 225–227, 237, 285, 304–311, 342–348; Dec. Dig. §§ 92, 121.*]

3. MUNICIPAL CORPORATIONS (§ 385*)—IMPROVEMENTS—DAMAGES—WATER COMPANY—CONTRACT WITH.

That under the provisions of such ordinance and contract the city is liable to the plaintiff for such expenses whether the change of grade is from a grade already established by ordinance, or merely from a natural grade.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 925–928; Dec. Dig. § 385.*]

4. MUNICIPAL CORPORATIONS (§ 864*) — INDEBTEDNESS—LIMITATION.

That the obligations thus assumed by the city do not create an indebtedness in excess of the constitutional debt limit. Such stipulation created no indebtedness, but merely a contingent future liability.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828–1835; Dec. Dig. § 864.*]

Appeal from District Court, Burleigh County; S. L. Nuchols, Special Judge.

Action by the Bismarck Water Supply Company against the City of Bismarck. From a judgment for plaintiff on the pleadings, defendant appeals. Affirmed.

F. H. Register, of Bismarck, for appellant. Newton, Dullam & Young, of Bismarck, for respondent.

FISK, J. Plaintiff was awarded judgment on the pleadings in the court below, and the defendant has appealed therefrom. The action is for the recovery of moneys necessarily expended by plaintiff in lowering its water main in Second street between Avenues A and B, in the city of Bismarck, necessitated by reason of a change of grade of such street by defendant city.

the time it made the same, and that the service pursuant thereto was valid and gave the circuit court jurisdiction for the purposes of the contest.

We are therefore of the opinion that the peremptory writ should be denied, and that the alternative writ heretofore issued should be quashed and this proceeding dismissed.

ROBERTS and RUDOLPH, JJ., concur.

POLLEY, P. J., and WARREN, J., having been absent from the oral argument, not sitting.

McCARTHY v. TIMM et al.

No. 7919.

Supreme Court of South Dakota.

June 29, 1936.

Appeal and error ⇐773(2)

Where certified copies of notice of appeal and undertaking on appeal were filed with clerk of Supreme Court and appellant after more than five months thereafter had not filed brief nor taken any other steps to prosecute appeal, appeal was dismissed as "abandoned."

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

Appeal from Circuit Court, Moody County; John T. Medin, Judge.

Action by John H. McCarthy against Herman Timm and another. From an adverse order, the plaintiff appeals.

Affirmed.

D. H. Lloyd, of Flandreau, for appellant.

Louis H. Smith, of Sioux Falls, for appellees.

PER CURIAM.

Certified copies of notice of appeal and undertaking on appeal in the above-entitled cause were filed with the clerk of this court on the 24th day of January, 1936. Since said date, the appellant has not filed his brief nor taken any other steps whatever to prosecute such appeal. This being the case, such appeal is deemed to have been abandoned, and the orders from which the appeal is attempted to be taken are affirmed.

All the Judges concur.

VAN GILDER v. CITY OF MADISON.

Supreme Court of Wisconsin.

June 22, 1936.

1. Municipal corporations ⇐57, 59

Municipal corporations have only powers conferred on them by statute or necessarily implied from statute.

2. Municipal corporations ⇐64

Municipal corporations possess no inherent powers of local self-government independent of legislative control.

3. Municipal corporations ⇐67(1)

Section of Constitution giving municipalities the right to elect officers confers no powers on municipalities, and leaves the definition of officials' functions to the Legislature (Const. art. 13, § 9).

4. Municipal corporations ⇐78

Statute prohibiting decrease of policemen's salaries by council without previous recommendation of city police and fire commission *held* not unconstitutional as an interference with appointment of local police and fire officers (St.1933, § 62.13(7); Const. art. 13, § 9).

5. Municipal corporations ⇐64

Though municipalities serve their localities in the protection of life and property, the discharge of these functions is not a matter of local but of state government.

6. Municipal corporations ⇐67(5)

State was not deprived of its right to prohibit decrease of policemen's salaries by city council without previous recommendation of city police and fire commission, merely because it vested power in localities to fix salaries (St.1933, § 62.13(7).

Appeal from a judgment of the Circuit Court for Dane County; A. G. Zimmerman, Judge.

Affirmed in part; reversed in part.

On motion for rehearing.—[By Editorial Staff.]

Motion denied.

For former opinion, see 267 N.W. 25.

Darrell MacIntyre, of Madison (Lester C. Lee, of Madison, of counsel), for appellant.

Francis Lamb, City Atty., of Madison, for respondent.

PER CURIAM.

On motion for rehearing. A motion for rehearing was made in this case and supported by briefs which have received our careful attention. Among other things it is argued that in the decision in this case the court overlooked the provisions of article 13, § 9, of the Constitution of the state of Wisconsin, which provides: "All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

[1] On the strength of the decision in O'Connor v. City of Fond du Lac (1901) 109 Wis. 253, 85 N.W. 327, 53 L.R.A. 831, the cases there cited, and People ex rel. Le Roy v. Hurlbut (1871) 24 Mich. 44, 9 Am.Rep. 103, it is argued that municipal corporations in the state of Wisconsin have certain so-called inherent powers particularly those relating to local self-government. The position of counsel would be more tenable if the question were an open one in this state. From Butler v. City of Milwaukee (1862) 15 Wis. 493, to City of Milwaukee v. Raulf (1916) 164 Wis. 172, 159 N.W. 819, it has been consistently held that municipal corporations have only such powers as were conferred upon them by statute or those necessarily implied therefrom. In Butler v. City of Milwaukee, the court said: "Implications of authority in bodies corporate, more especially those created for municipal purposes, should be clear and undoubted, and the party claiming through them should be able to point them out with certainty and precision. The fact that he cannot, is conclusive that they do not exist. Mere general arguments drawn from the convenience of possessing a power under certain circumstances in case of emergency—conclusions that, if possessed, it might be beneficially exercised, are very dangerous sources of corporate authority. * * * Implications spring from the necessities of some power actually conferred, and not from notions of what would be convenient or expedient under particular circumstances."

In Sutter v. Milwaukee Board of Fire Underwriters (1915) 161 Wis. 615, 155 N. W. 127, Ann.Cas.1917E, 682, the court said: "A municipal corporation in Wisconsin today is of the kind mentioned in article 11 of our Constitution. The words now mean a body corporate consisting of the inhabitants of a designated area created by the Legislature with or without the consent of such inhabitants for governmental purposes possessing local legislative and administrative power, also power to exercise within such area so much of the administrative power of the state as may be delegated to it and possessing limited capacity to own and hold property, and to act in purveyance of public conveniences."

[2, 3] In this connection it is to be remembered that the clause of the charter of the city of Milwaukee, which was construed in Butler v. City of Milwaukee, supra, was very broad. In addition to those powers expressly granted, the charter provided that the municipality should have "the general powers of municipal corporations at common law." Whatever the law may be in other jurisdictions, it has never been the law in Wisconsin that municipal corporations possessed inherent powers of local self-government independent of legislative control. If they now possess such powers, it is due to the adoption of the home rule amendment. It is true, as was held in O'Connor v. City of Fond du Lac, supra, that the power of the Legislature to deprive municipalities of the right to elect their officers is protected by article 13, § 9, of the Constitution. That section, however, does not attempt to confer powers, but prescribes how the officers therein specified shall be chosen, and leaves the definition of their functions to the Legislature. While there is some language in O'Connor v. City of Fond du Lac, supra,

that lends color to the argument made here, the question there under consideration was the power of the Legislature to deprive the municipality of the right to choose its own police officers.

[4] In the case under consideration, the Legislature in no way attempted to interfere with the appointment of local police and fire officers. Under the law as it now exists and declared in this case, not only the choice of officers but to a considerable extent their duties are left wholly to local authority. The board of police and fire commissioners is just as local as the common council.

The whole controversy comes back to the question of what was meant by "local affairs and government." It is said that the fixing of salaries of policemen is a local affair. In a certain sense that is true, and it is so regarded by the Legislature, because the power to fix salaries is lodged with local authorities. It is argued that the case of State ex rel. Harbach v. Mayor, etc., of Milwaukee (1925) 189 Wis. 84, 206 N.W. 210, is not in point because it deals with the matter of education, which by the terms of the Constitution (article 10) is vested in the state superintendent and such other officers as the Legislature shall direct. The difficulty with this argument is that it proves too much.

The end sought to be attained by the provisions of article 10 of the Constitution was to require the state to assume the duty of providing for the establishment of free schools. Article 10, § 3, provides: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

[5] At the time the Constitution was adopted, some states did not consider the furnishing of free education a state function. Where it was a state function it was one which had been assumed within comparatively recent times. In order that there might be no doubt as to where the responsibility lay, the Constitution made it the duty of the Legislature to provide free education. It is true that the Constitution nowhere specifically provides that it shall be the duty of the state to preserve order and protect life and property unless it is to be found in the preamble, and if there it is expressed in very general terms. The reason why it was not expressed was because the preservation of order and the protection of life and property, in the language of the Declaration of Independence, the right to "life, liberty and the pursuit of happiness," are of the very essence of government and an essential function of a state. States have been organized for that express purpose, from time immemorial. Education especially two hundred years ago stood upon a different basis. It was considered that the furnishing of free education was a duty which a state might or might not assume. What was said, therefore, in State ex rel. Harbach v. Mayor, etc., of Milwaukee, supra, about the field of legislation relating to education, applies with greater instead of less force when we come to consider the duty of the state with respect to the preservation of order and the protection of life and property. To carry out its functions, the Constitution provides for the creation of municipal corporations by the state. These from the beginning have been held to be agencies of the state with respect to these primary functions. While they may in many respects serve the locality in these highly important respects, they also discharge state functions, and the discharge of these functions is not a local affair or a matter of local government, but is a matter of state-wide concern and of state government.

[6] There is a great deal of confused thinking upon the subject because of the failure to recognize the fact that many of the things which municipalities do seem to be local when they are in fact part of the obligations imposed upon the state by the Constitution itself. It is said that certainly salaries of policemen are a local affair. As already pointed out, the Legislature so considers them, and they are fixed by local authority. Because the state has vested the power in localities to fix these salaries, it has not made it a matter of local affair in the sense that it can be deprived of its right to see that an efficient, dependable police force is functioning in all parts of the state.

After a reconsideration of the entire matter, we adhere to our former determination. The motion for rehearing is denied, with $25 costs.