THE NEW YORK PROPOSAL FOR MUNICIPAL HOME RULE

I

IN accordance with the procedure required for amending the state constitution, the New York legislature of 1921–22 has referred to the legislature of 1923–24 a proposed amendment conferring home-rule powers upon the cities of the State. If adopted by the legislature in 1923 or 1924, this amendment will be submitted to the voters for approval or rejection in the succeeding November.

There are fifty-nine cities in the state of New York. Eighty per cent of the people of the state live in these cities. Fifty-four per cent of them live in the single city of New York. There are few states in the Union in which the statutory sources of city governments are more chaotic and disorderly than they are in New York. Especially is this true of the laws applicable to the city of New York.[1] It is proper, therefore, that the possible consequences of this proposed gift of home rule should be closely examined. No one is competent to forecast these consequences in full; but since constitutional home rule has had a considerable history in a number of other states some of the probable results of the New York proposal are fairly predictable.

It ought to be said on the threshold of this discussion that the criticism that is here voiced is wholly destructive in character. Home rule is an alluring political catchword. But the drafting of an adequate constitutional provision conferring home rule is an extraordinarily difficult job. In view of its complications, a perfect provision, a litigation-proof provision, is manifestly beyond human capacity. It is relatively easy,

[1] The recently published *Digest of Special Statutes Relating to the City of New York* (J. B. Lyon Company, Albany, 1922) indicates the enormous number of unrepealed statutes that affect the government of New York directly or indirectly.

with a degree of surgical skill, to sever a limb from a body and keep the body alive; it is another matter to sever the limb in part from the body and to keep both the limb and the body alive and happily functioning. On the merits of home rule as an abstract proposition there ought to be little difference of opinion. Differences arise in respect to the kinds and degrees of proposed self-government. It may easily happen that a particular brand of home rule may become in practical operation more a nuisance than a beneficence. There may be a larger measure of peace and comfort in knowing the exact metes of one's prerogatives and powers than in living in a perpetual state of uncertainty. It is open to question whether the cities of New York are better off under their present constitutional status than they will be under the kind of home rule that is proposed by the amendment that has now passed one legislature.

II

If the proposed amendment goes into the constitution the cities of the State will enjoy such self-government as can be extracted from the following pronouncement of the fundamental law: [1]

Sec. 1.[2] It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations; and the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed by the state or by any county, city, town, village or other civil division of the state, or by any contractor or subcontractor performing work, labor or services for the state, or for any county, city, town, village or other civil division thereof.

Sec. 2.[3] The legislature shall not pass any law relating to the prop-

[1] *Laws of New York, 1922,* vol. II, p. 1872, proposing a rewriting of Article XII.

[2] Section 1 not amended.

[3] Section 2 new.

erty, affairs or government of cities, which shall be special or local either in its terms or in its effect, but shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the governor declaring that an emergency exists and the concurrent action of two-thirds of the members of each house of the legislature.

Sec. 3.[1] Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state, relating to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, the wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it, and the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health. The legislature shall, at its next session after this section shall become part of the constitution, provide by general law for carrying into effect the provisions of this section.

Sec. 4.[2] The provisions of this article shall not be deemed to restrict the power of the legislature to enact laws relating to matters other than the property, affairs or government of cities.

Sec. 5.[3] The legislature may by general laws confer on cities such further powers of local legislation and administration as it may, from time to time, deem expedient.

Sec. 6.[4] All elections of city officers, including supervisors and judicial officers of inferior local courts, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year. The terms of office of all such officers elected before the first day of January, one thousand eight hundred and ninety-five, whose successors have not then been elected, which under existing laws would expire

[1] Section 3 new.

[2] Former section 2 materially amended.

[3] Section 5 new.

[4] Former section 3.

with an even-numbered year, or in an odd-numbered year and before the end thereof, are extended to and including the last day of December next following the time when such terms would otherwise expire; the terms of office of all such officers, which under existing laws would expire in an even-numbered year, and before the end thereof, are abridged so as to expire at the end of the preceding year. This section shall not apply[1] to elections of any judicial officer, except judges and justices of inferior local courts.

Sec. 7.[2] The provisions of this article shall not affect any existing provision of law; but all existing charters and other laws shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this article. Nothing in this article contained shall apply to or affect the maintenance, support, or administration of the public school systems in the several cities of the state, as required or provided by article nine of the constitution.

III

On the face of it this proposal is pregnant with uncertainty. "It shall be the duty of the legislature to provide for the organization of cities." This moral injunction has been in the constitution since 1846. For obvious reasons there has been no occasion for any judicial determination of the meaning of the phrase "provide for the organization of cities". But in practice the legislature has fulfilled this "duty" by enacting innumerable special and some general laws that have "provided for the organization of cities" in the most minute and meticulous detail. Manifestly, however, the legislature will be unable to continue this practice. The scope of this legislative duty must now be read in the light of a new context.

The second section of the article prohibits the legislature (except upon an emergency message and by a two-thirds vote) from passing "any law relating to property, affairs or government of cities, which shall be special or local either in its terms or in its effect" and requires the legislature to deal with such matters by "laws which shall in terms and in effect apply alike to all cities". When dealing, therefore, with the "property,

[1] Words "to any city of the third class, or" omitted.

[2] Section 7 new.

affairs or government of cities" the legislature must "provide for their organization" by laws that are applicable alike to New York, with its nearly six million inhabitants, and to the "rural" city of Sherrill, with a population of less than two thousand souls. Indeed the question may well be asked whether the "duty" that is imposed upon the legislature by the first section can possibly be fulfilled in view of the stringent limitation that is imposed by the second section. The phrase "property, affairs or government" may not have a precise connotation.[1] But it certainly comprehends a good deal that is commonly dealt with in providing for the "organization" of a city. The phrase "in terms and in effect" as used in this connection is new to American constitutional law. How the courts may construe it is open to question, but it appears to be fairly tight against legislative dodge or subterfuge.

This raises two questions of importance: (1) Will laws that may be adopted at the option of any city be regarded as laws of general application? (2) Is it possible for the legislature to provide for the organization of cities by mandatory laws of general application?

The question whether an optional city law is general or special in character appears never to have been raised in New York.[2] In a number of other states optional city laws have been held to be general, not special, laws;[3] but in none of these instances did the constitution require that the general law should apply alike to all cities "in terms and in effect". Would a law adopted by Yonkers and rejected by New Rochelle apply "in effect" alike to these two cities? Here at least is room for honest doubt. It may be that the legislature will not

[1] See below, p. 669 ff.

[2] The constitutionality of the optional city government law of 1914 (*Laws of New York, 1914*, ch. 444) applicable to any city of the second or third class was under review in *Cleveland v. City of Watertown*, 222 N. Y. 159 (1917). But the court did not consider whether the law was general or special. The only point decided was that the law, and especially the feature of the referendum, did not involve an unconstitutional delegation of legislative power.

Eckerson v. City of Des Moines, 137 Ia. 452 (1908); *Adams v. Beloit*, 105 Wis. 363 (1900); *People v. Kipley*, 171 Ill. 44 (1898); *Walker v. Spokane*, 62 Wash. 312 (1911).

attempt to "provide for the organization of cities" through the medium of optional laws; but the enactment of optional city laws has been a favorite practice in some states in which the enactment of special city laws has been prohibited. The question, therefore, of the constitutionality of such laws under the proposed amendment is of more than theoretical importance.

Concerning the possibility of providing for the organization of cities by mandatory laws of general application it may be argued that from a practical point of view this is impossible. It may be urged that a garment of government cannot be fashioned that will be uniformly serviceable to a giant and a pigmy. Ohio is the only state in the Union that has ever tried to do this on a thoroughgoing scale. In 1902 [1] a uniform and mandatory charter code was applied to all the cities of that state, ranging in population from five thousand to nearly four hundred thousand inhabitants. The system was not unworkable although it was also far from satisfactory.[2] And needless to say this code extended a considerable measure of self-government in that it was impossible to regulate salaries, numbers of subordinate officers, and numerous other details in such a law. Many matters of this kind (often regulated in special charters) were of necessity turned over to local control.

In the light of this Ohio experience, then, it cannot be said that it is humanly impossible for the legislature to "provide for the organization" of New York and of Sherrill by a charter code applicable alike to both cities. But it is also not likely that the legislature will attempt to enact such a law. Imagine, for example, a division of Sherrill into five administrative boroughs or an application to the New York police force of provisions appropriate to the traffic officer at the four corners in Sherrill.

Among the Consolidated Laws of New York there are chapters entitled General City Law and General Municipal Law. Relatively speaking, these chapters are now of almost negligible

[1] Following the decision of *State ex rel. Knisely v. Jones*, 66 Oh. St. 453 (1902), which declared all classification of cities void.

[2] Home rule was introduced in Ohio in 1912 by constitutional amendment.

importance to the cities of the state. They would be of even less importance if the legislature had been powerless to enact the many sections of these laws that now apply to classes of cities.[1] It is nevertheless possible, not to say probable, that if this proposed amendment is adopted the legislature will expand these chapters by enacting some additional laws that will "in terms and in effect apply alike to all cities". It seems fairly certain, however, that the number and range of such laws will be limited. Because of inherent difficulties the legislature will probably not attempt in any comprehensive way to "provide for the organization of cities" by mandatory laws of general application.

And this, no doubt, is the very result that is deliberately aimed at by the proposed amendment, despite the confusion and apparent contradiction that arises from the retention in the new provision of a clause of the old provision that imposes upon the legislature the duty of providing for the organization of cities. For the third section of the article confers upon every city "the power to adopt and amend local laws" relating to a series of enumerated subjects all of which pertain directly or indirectly to what has in legislative practice heretofore been regarded as "the organization of cities". With respect to this grant of power the legislature is competent only to provide "by general law for carrying it into effect."[2] In other words it is the apparent intention of the proposal (if one is justified in deriving deliberate intention from deliberate contradiction) that the legislature shall perform its first-mentioned duty of providing for the organization of cities by performing its last-mentioned duty of enabling cities to provide for their own organization.

IV

This home-rule proposal, like every other constitutional provision for home rule, makes in effect a division of powers between the state legislature on the one hand and the cities of

[1] See below, p. 666.

[2] See below, p. 679.

the state on the other. Far-reaching legal and practical difficulties are certain to arise out of the uncertainty of such division as is made by this proposal. The division is as follows: First, the legislature may enact any law relating to the property, affairs or government of cities, provided such law "applies in terms and in effect alike to all cities"; second, it may enact a special law relating to such matters upon an emergency message and by an extraordinary majority vote; and third, it may enact any law, whether general or special, "relating to matters other than the property, affairs or government of cities."[1] Thus is the sphere of legislative competence prescribed.

How, then, is the sphere of municipal competence defined? In view of the stringent limitations that are imposed upon the legislature in enacting laws relating to the "property, affairs or government of cities" (limitations that make it practically impossible for the legislature to regulate such matters adequately) one would naturally expect to find that the home-rule grant would extend to cities (subject to such statutes as the legislature might enact under the limitations imposed) power to enact laws relating to their own property, affairs or government. But strange to relate, when it comes to the home-rule grant[2] this phrase is wholly abandoned. Instead of a general grant (accompanied by specific declarations in respect to powers about which there might be doubt as to their inclusion in such grant) the home-rule clause takes the form of an enumeration of more or less specific powers.[3] While this enumeration eschews the use of the general phrase "property, affairs of government," and while it appears to settle some questions as to specific powers that might otherwise be uncertain, it nevertheless uses

[1] Sec. 4.

[2] Sec. 3.

[3] The question arises whether this curious arrangement may not result perchance in putting certain subjects of control almost completely in limbo. May there not be certain matters relating to the property, affairs or government of cities which are not included in the enumeration of powers granted to cities? If so, the cities will not be able to regulate such matters, and the legislature can do so only with great difficulty. Perhaps, however, this situation is saved by section 5 under which the legislature may confer upon cities "further powers of local legislation and administration".

words and phrases that are quite as vague and uncertain as any general grant of powers could be. The city, for example, is empowered to adopt and amend local laws relating to the "powers" of all its officers and employees. Now it is manifest that if the city may control the scope of the powers of its own officers it may also control the scope of its own powers.[1] The two are inseparable. The city cannot distribute powers to its officers unless it has powers to distribute. The sum of the powers of its officers is the sum of the powers of the city. Indeed, while it is quite possible to enumerate the entire powers of the city at one point in its charter and thereafter to distribute these same powers to the agencies that are set up by the charter, this is by no means a common practice in charter-making. Most of the powers of most cities are conferred not upon the city as such but upon specific officers and agencies. It seems clear, therefore, that under this grant of power to regulate the power of its officers the city is given a wholly indefinite scope of powers.

The city will also be empowered to control "the transaction of its business" and "the government and regulation of the conduct of its inhabitants". Such phrases may mean almost anything—or nothing. In the law of municipal corporations they have no adjudicated signification whatever. Indeed it is open to reasonable doubt whether the phrase "laws . . . relating to . . . the government . . . of its inhabitants" has any meaning, legal or otherwise, unless government of its inhabitants means simply government of the city. But the point of importance is that these phrases are quite as vague as, though possibly not identical with, the phrase "property, affairs or government."

[1] Unless, indeed, the home-rule grant were construed to vest cities with power to enact local laws relating to the powers already conferred upon its officers by existing charters and laws. In this view the city would be empowered only to redistribute existing powers of officers. Such a rule of construction does not appear to be reasonable. It would be especially unreasonable in the case of the small city with limited powers. As such a city advanced in population it would be unable to expand the competence of its officers commensurately with the official powers previously conferred on other cities.

V

In nearly all of the states with constitutional home rule the legal controversies that have arisen may be divided into two general classes. In the one class questions have been raised whether in the absence of any conflict with state law the city could exercise this or that specific power under the general and indefinite home-rule grant, however phrased. The other class of cases has involved conflicts between state laws and charter provisions (here called "local laws") dealing with the same subjects. In case of such conflict the question is: Which takes precedence and prevails, the state law or the charter provision? In view of the fact that home-rule cities have not often wandered far into the field of vagarious experimentation, but more especially in view of the wide range and almost endless ramifications of state laws (other than municipal charters proper) the cases involving conflicts have been far more numerous and far more important than the cases involving merely questions of power in the absence of conflict. It is, therefore, in the light of possible conflicts between state laws and charter provisions (local laws) that a home-rule provision should be chiefly scrutinized.

The local laws which cities will be empowered to enact in respect to the definite and indefinite subjects contained in the enumerated list must be "not inconsistent with the . . . laws of the state." What laws? In this question lies the whole unfathomed problem of conflict which must be gradually resolved by the courts through interminable years.

What laws indeed? With respect to some laws the answer is no doubt fairly certain. With respect to other laws one person's guess is as good as another's.

In the first place, then, the laws of the state with which "local laws" adopted by any city must be consistent will unquestionably include the general laws relating to the "property, affairs and government of any city" which "in terms and in effect apply alike to all cities", as well as the special laws relative to such matters which may be enacted in accordance with the extraordinary procedure prescribed. In enacting local laws cities will be circumscribed by such provisions of the existing

General City Law as are universal in application to the cities of the state. Moreover a local law adopted by any city will be superseded by a later law of the legislature if this later law is of general application to cities, or if, being special, it is enacted in the required manner. To the extent that the legislature can proceed by these avenues of approach the home-rule grant may be rendered wholly nugatory. So much is indisputable.

In the second place the laws of the state with which "local laws" must be consistent are not the whole body of state laws (for the most part special) that now go to make up the charters of the several cities of the state. If the cities cannot adopt "local laws" inconsistent with many of the provisions of their present charter laws the proposed grant of home rule would be foolish because futile. But this is not to say that these "local laws" will not have to be consistent with *some* of the provisions of existing charter laws. If perchance there are provisions in these charter laws—as there unquestionably are—that relate to matters other than the "property, affairs or government of cities", presumably the city will be estopped from enacting a "local law" upon such a matter. For example, take the matter of condemnation proceedings. The proposed amendment will empower the city to "adopt and amend local laws . . . relating to . . . the acquisition . . . of its streets and property." The sections of the present New York City charter which deal with this subject are honeycombed with provisions that make the Supreme Court an important agency in condemnation proceedings.[1] But the jurisdiction of the Supreme Court, considered in itself as a subject of legislation, is without doubt a matter "other than the property, affairs or government of cities." Will the city be competent to alter this jurisdiction even in respect to a matter over which it is given express competence—to wit, the acquisition of its streets and property? Incidentally it may be remarked that at numerous other points in the New York charter the courts are given special jurisdictional competence.

[1] Ashe, *The Greater New York Charter* (4th ed., 1917), secs. 959, 962, 970, 970a, 974, 975, 976, 977, 980, 981, 982, etc.

Again let us suppose that the subject of attempted local legislation relates to "the powers . . . of . . . officers . . . of the city" and also to a matter "other than the property, affairs or government" of the city. In other words, suppose that by a charter provision a municipal officer is given power in respect to some matter of state as distinguished from local concern. Here again would result a clear instance of conflict. Over the one matter the city is expressly empowered; over the other the legislature's competence is expressly preserved. To take only a single example: by the terms of the New York City charter certain powers are conferred upon the city board of health in respect to the report and record of marriage licenses.[1] These provisions relate to the powers of officers of the city, but they certainly also relate to matters "other than the property, affairs or government" of the city. It seems clear, therefore, that in adopting local laws cities will be compelled to make these local laws conform to *some* of the provisions of their existing charters.

In the third place similar questions of conflict will arise in respect to a great many provisions of law that are not found in municipal charters. In the Consolidated Laws, wholly apart from the chapters entitled "General City Law" and "General Municipal Law", there are innumerable provisions in many chapters that dovetail into the provisions of city charters. This is especially true of such chapters as the Civil Service Law, Education Law, Judiciary Law, Labor Law, Penal Law, Public Health Law, Public Officers Law, Transportation Corporations Law, and State Charities Law. Moreover these Consolidated Laws bristle with provisions that apply exceptionally to cities that are designated by name or by some special classification on the basis of population. Titularly and contextually these laws are without doubt general in character. That is to say, they deal more or less comprehensively for the entire state with this or that general subject of legislation, however special or local may be the application of some of their provisions. But that is not to say that none of their provisions relate to matters in respect to which cities will be empowered under this

[1] Ashe, *op. cit.*, secs. 1239, 1240.

proposed amendment to "adopt and amend local laws". Nor is it to say that all of their provisions relate to "matters other than the property, affairs or government of cities."

Probably the presumption will be in favor of regarding the Consolidated Laws as laws relating to matters other than the property, affairs or government of cities. With respect to many of these laws there can be practically no dispute on this point. A provision of the Insurance Law that applies exceptionally in New York City[1] is obviously a law that does not relate to the property, affairs or government of New York; the control of the insurance business has never been regarded, either in theory or practice, as having any relation to the affairs or government of cities. But this is due to the subject matter of the law and not at all to the fact that the provision in question is found in the Consolidated Laws. On the other hand, such a special provision in the Election Law[2] is in quite a different category. A provision of this kind certainly does relate to the affairs and government of the city; moreover, under the proposed amendment cities are specifically empowered to "adopt and amend local laws . . . relating to the . . . mode of selection . . . of all officers . . . of the city."

If it is to be held generally that, regardless of subject matter or of special municipal application, the mere inclusion of any matter in a chapter of the Consolidated Laws is sufficient not only to remove it from the control of "local laws" that may be adopted by cities but also to reserve it for unrestricted legislative control, it is manifest that the power of the legislature to invade the sphere of municipal home rule is wholly without limitation. Under such a rule of construction, if the legislature desires to override a "local law," it will be necessary only to find a berth for its provision in some existing or newly created chapter of the Consolidated Laws. Conspicuous among the chapters already available would be the General City Law and the General Municipal Law. Indeed if the consequences are fully appreciated—as they may or may not be in a specific case

[1] Insurance Law, Ch. XXVIII of the *Consolidated Laws*, sec. 133.

[2] Election Law, Ch. XXII of the *Consolidated Laws*, secs. 190, 209a.

at bar—it will be disastrous to the cause of home rule if the court should apply to the solution of this difficult problem of conflict the rule-of-thumb test of inclusion in or exclusion from the Consolidated Laws.

This curiously drafted proposal appears to be more complicated than the home-rule provisions in most other states. When carefully analyzed, however, it appears that its fundamental difficulty is practically identical with the difficulty that has developed in most of the other states. When a case of conflict arises between a locally-adopted "local law" and the "laws of the State" with which such "local laws" must be consistent, the question will be: What is the nature of the subject matter of these conflicting laws? Is it a subject in respect to which cities have been empowered to adopt local laws? Or is it a subject relating to a matter other than the "property, affairs or government of cities"? In many instances the only reasonable answer will be that it is both. But the courts are estopped from being reasonable. The two laws cannot stand together. They relate to the same subject matter but they are different. One must fall before the other. Ridiculous as it may be, the courts are therefore compelled to declare that the subject is inherently one thing or the other. Nor is the question that is involved a question of law or of fact. It is largely a question of dubious opinion put under the mandatory masquerade of a question of constitutional law. Whether a city should or should not exercise self-governing powers in numerous matters is a question of policy—a question of politics, if you choose. It is not a question of law. To require judges to answer it as if it were a question of law is to impose upon them an onerous duty that does not properly belong to them. It is indeed to invite self-stultification.

VI

Three important phrases that occur in this home-rule proposal have been in the New York constitution in identical or very similar words for a long time. These phrases are: (1) "the property, affairs or government of cities"; (2) "officers . . . of the city"; and (3) "local laws". The cases in which

these phrases have been construed by the New York courts throw a modicum of light upon how the courts will probably decide some of the questions of conflict that are certain to arise under this proposal.

The phrase, "property, affairs or government of cities" has been in the constitution since 1894.[1] A law relating to the "property, affairs or government of cities" is declared to be a "city law" which, if special, must be subjected to the suspensory veto of the local municipal authorities. In practice the legislature has been generous in its interpretation of what is a "city law". It has submitted to the local authorities most "special" laws about which there could be any question as to their being city or non-city laws.[2] In one or two cases, however, the Court of Appeals has been called upon to give specific interpretation to the phrase "property, affairs or government". Thus in a case decided in 1896[3] a liquor tax was upheld which, for purposes of excise taxes, created a classification of cities different from that provided by the constitution. This law was not submitted to the approval of the cities thus "specially" affected by its provisions. It was the view of the court that the law "is neither a general nor a special city law, nor does it relate to the 'property, affairs or government' of cities." It was on the contrary "a general state excise law, with such special provisions and adaptations as to the legislature seemed proper." The specific point involved in this case is now anachronistic; no controversy in respect to liquor licenses is likely to arise under the proposed home-rule amendment,[4] unless pre-

[1] Art. XII, which this home rule proposal will supersede.

[2] Since the enactment of the Consolidated Laws in 1909 apparently none of the "special" provisions of these laws has been singled out for judicial controversy on this point. The reason, no doubt, has been that such "special" provisions were usually part and parcel of what was otherwise obviously a general law. Occasionally, however, amendments to the Consolidated Laws which were of special municipal application have been treated by the legislature as if they were "special city laws". For example, *Laws of New York, 1916*, ch. 524, amending the Domestic Relations Law in respect to the solemnization of marriages in New York City was submitted to and accepted by the mayor.

[3] *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367 (1896).

[4] In the opinion, nevertheless, there is much food for thought in connection

chance "light wines and beers" are legalized under the Eighteenth Amendment and the license system of controlling their sale is restored.

Of far more importance are the cases involving laws establishing control over local public utilities. The Rapid Transit Act, enacted in 1891 [1], applied only to cities having a population of over one million. In 1912 this act, which had many times been amended, was sustained against the express contention, among other contentions, that it was a "special city law" relating to the "property, affairs or government of cities" and as such should have been submitted to the approval of the mayor of New York.[2] "In the first place", said the court, "the Rapid Transit Act was passed before this constitutional provision went into effect.[3] In the second place, the Act is not one of those contemplated by the provision in question. The latter contemplates laws which relate to municipal property and

with the home-rule proposal. For example, among other things the court said: "In enacting a general law [which in fact has special municipal applications] under the police power the legislature is not hampered or restrained by the classification of cities in the constitution." In other words, a police power law does not relate to the "property, affairs or government of cities". It is sufficient to remark that innumerable provisions of every city charter may properly be ascribed to an exercise of the police power of the state. Under the proposed amendment will there be no limit to the scope of legislative power over such charter provisions? Again the court said: "The granting of licenses for the liquor traffic has never been a corporate function or duty of a city, as such." In point of fact, except during the brief life of the Metropolitan Board of Excise (1866-1870) the granting of such licenses has been a function of the city of New York from the Dongan charter to the Volstead Act. The Dongan charter (sec. 10) declared: "The said mayor of the said city . . . shall have power and authority to give and grant licenses annually, under the public seal of the said city to all . . . public sellers of wine, strong waters, cider, beer, or any other sort of liquors." — Ashe, *The Greater New York Charter* (4th ed., 1917), p. 1558. This expression of opinion illustrates how historical facts may sometimes be ignored by the courts. Indeed this case, wholly apart from its specific subject matter, presents an admirable illustration of the kind of question that is likely to arise in far more acute form under the proposed home rule amendment.

[1] *Laws of New York, 1891,* ch. 4.

[2] *Admiral Realty Co. v. City of New York,* 206 N. Y. 110 (1912).

[3] The court did not advert to the fact that the Act had been many times amended since the constitutional provision went into effect and that none of these amendments had been submitted to the mayor of New York.

affairs and may be described, as the provision does describe them, as 'city' laws. To come within the precise provision which is invoked here it would be necessary to hold that the Rapid Transit Act was a 'special city law'. It seems to me that this term could not be regarded as a reasonable description of the statute before us. It was adopted not only for the benefit of the cities which, of course, would be affected, but of the public at large, and it confers broad powers, including that of the granting of franchises. It is a much more general law than is contemplated by the provision in question."

In 1907 the law which created the two public service commissions, one for New York City and the other for the rest of the state, was submitted to the mayor of New York and was passed by the legislature over the mayor's veto.[1] The submission of this law for the approval of the mayor indicated that the legislature regarded its subject matter as one relating to the property, affairs or government of the city. But neither the law of 1919, which abolished the public service commission of the first district and substituted a transit construction commissioner,[2] nor the law of 1921, which abolished the office of transit construction commissioner and substituted three transit commissioners, was submitted to the city.[3] The latter law was contested upon this among other grounds.[4] In sustaining the law against this contention the court simply quoted with approval the above-mentioned opinion which had been handed down in 1912.[5]

[1] *Laws of New York, 1907,* ch. 429.

[2] *Laws of New York, 1919,* ch. 520.

[3] *Laws of New York, 1921,* ch. 134.

[4] *Matter of McAneny v. Board of Estimate and Apportionment,* 232 N. Y., 377 (1922).

[5] On the point that the law was a "local law" and therefore in violation of Art. 3, sec. 18 of the constitution, the court reviewed the legislation pertaining to rapid transit, and concluded: "All of the legislation bearing on the subject has for many years recognized that a duty rested upon the legislature to provide for rapid transit, such a duty to be performed by itself or by an agent designated for the purpose, a function which the state in its sovereign capacity had a right to exercise irrespective of the city authorities, since it concerned the whole state just as much as the maintenance of highways or the management of other public utilities."

Under the adjudicated cases, therefore, one point appears to be settled, namely, that the regulation of local public utilities is a matter "other than the property, affairs or government of cities." Under the proposed home-rule grant cities will have no power in respect to this matter, which, at least so far as New York City is concerned, is the burning home-rule question of the hour. Whatever may be thought of the reasonableness of this interpretation of the phrase in question, it at least settles in advance a controversial point that has given considerable difficulty in other home-rule states. The decisions of the New York courts, however, furnish no further light on the meaning of the phrase, "property, affairs or government."

By this home-rule proposal cities, as we have seen, will be empowered to "adopt and amend local laws" relating to many matters concerning "all officers . . . of the city." Who are "officers" of the city? The phrase "city officers" has been in the constitution of New York since 1846 in a clause which declares among other things that all "city officers" shall be locally elected or locally appointed.[1] The complicated section of the constitution (sometimes called the "home-rule clause") in which this right is guaranteed to cities has received a good deal of judicial construction. In construing the term "city officers" it would have been quite possible for the courts to introduce the distinction between those officers who perform functions of local or city concern and those who, though commonly subject to local selection, may nevertheless be regarded as state officers because of the nature of their functions. In fact, however, this distinction has found little or no place in the recorded decisions interpreting this section. By applying other provisions of the section the courts did indeed permit the legislature to narrow the grant of the right of local selection of city officers.[2] But they gave no restricted meaning to the

[1] Constitution of New York, 1846, Art. X, sec. 2; Constitution of 1894, Art. X, sec. 2.

[2] For a discussion of the ways in which the legislature was permitted to invade this right see McBain, *The Law and the Practice of Municipal Home Rule*, pp. 35-42, and the cases there discussed.

term "city officers". By expression or by implication that term has been broadly construed to include such officers as police,[1] health,[2] excise,[3] tax[4] and election[5] officers. From the functional viewpoint any one of these officers might, not without some reason, have been held to be a state, not a city, officer. If this amendment is adopted, it will remain to be seen whether the New York courts will interpret the term "officers . . . of the city" with the same degree of liberality that they have applied to the term "city officers" as used in the section which conferred upon cities merely the right of local election or appointment. In its new connection the term has far larger implications, especially in view of the fact that the city will be empowered to control such large matters as the "powers" and "duties" of its officers.

The phrase "private or local bill" was likewise introduced into the constitution of 1846 and is used in the constitution of 1894 in the section that prohibits more than one subject in such a bill and in that which prohibits any "private or local bill" in respect to an enumerated list of legislative subjects.[6] In the course of time these sections have been construed in a large number of cases. It is highly improbable, however, that these cases will throw much if any light upon the term "local laws" as used in this home-rule provision. It seems fairly certain that they will not materially determine the content of the home-rule grant; for after all, the scope of that grant lies not in the term "local laws" but in the enumerated subjects in respect to which local laws may be adopted.

[1] *People ex rel. Wood v. Draper*, 15 N. Y. 532 (1857); *People ex rel. McMullen v. Shepard*, 36 N. Y. 286 (1867); *People ex rel. Bolton v. Albertson*, 55 N. Y. 50 (1873).

[2] *Metropolitan Board of Health v. Heister*, 37 N. Y. 661 (1868); but see *In the Matter of Whiting*, 2 Barb. (N. Y.) 513 (1848), in which a lower court held that the health officer of the port of New York was not a city officer.

[3] *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657 (1866), where, however, the constitutional guarantee of local selection of local officers was apparently not invoked. But see *People ex rel. Haughton*, 104 N. Y. 570 (1887), where the statutory phrase "all appointments to office in the city of New York" was construed to include commissioners of excise.

[4] *People v. Raymond*, 37 N. Y. 428 (1868).

[5] *Matter of Morgan v. Furey*, 186 N. Y. 202 (1906).

[6] Constitution of 1894, Art. III, secs. 16 and 18.

VII

It is somewhat difficult to consider, in the light of the peculiar phrasing of the New York proposal, the principal subjects of controversy that have arisen in the home-rule states. Nevertheless the attempt to do this briefly is probably worth the effort.

One or two matters that have given difficulty in the home-rule states are definitely disposed of by this proposal. Thus the whole subject of education is specifically excepted from the grant of home rule; it is apparently left under the exclusive jurisdiction of the legislature.[1] Again the matter of the "presentation, ascertainment, and discharge of claims" against the city—a matter that has given rise to considerable litigation in the home-rule states—is disposed of by express inclusion within the home-rule grant.[2]

As we have seen, moreover, one important subject—the right to regulate and control privately owned local utilities—has doubtless been settled by the judicial determination that a law dealing with such a matter does not relate to the "property, affairs or government of cities."[3] Even in the absence of such adjudication in advance, it is open to question whether any of the phrases of the proposed home-rule grant could be construed to confer such power upon cities, unless it could be regarded as implied in the power to control such uncertainties as the "transaction of its business" or the "government . . . of its inhabitants."

The constitutions of four of the home-rule states expressly confer upon cities the power to own and operate public utilities. Except in California,[4] however, these constitutional grants are accompanied by such stringent limitations in the matter of finance as to make them in most instances practically unavailable.[5]

[1] Sec. 7.

[2] Sec. 3.

[3] See above, p. 670 ff.

[4] Constitution of California, Art. XI, sec. 19, as amended in 1911.

[5] Constitution of Colorado, Art. XX, sec. 1, and of Oklahoma, Art. X, sec. 27, in both of which states a vote of the taxpaying voters is necessary. Constitu-

In California, even before the adoption in 1911 of a constitutional amendment conferring this power, it had been held that the general grant to the city of power to "frame and adopt a charter for its own government" included the power to provide in the home-rule charter for the ownership and operation of public utilities.[1] In Washington it was early implied that the city had the power to own and operate utilities only in so far as the legislature had expressly conferred such power in supplement of the home-rule grant.[2] In Texas extensive power to own and operate public utilities was conferred by the enabling act under which the legislature gave effect to the constitutional grant of home-rule.[3] In the other home-rule states controversies over municipal ownership have not arisen, apparently because cities have not attempted to extend their competence into this field. Under the New York proposal it is highly doubtful whether cities will be able effectually to claim any power to own and operate utilities. There is no specific reference to the subject. And even if municipal ownership could be gathered under the power to "adopt and amend local laws . . . relating to the powers . . . of all officers . . . of the city" or to the "government . . . of its inhabitants", the constitutional debt limit[4] would in most cities stand as an insuperable obstacle to any considerable adventure in this direction.

Matters pertaining to municipal elections have been held to be matters of state concern in Missouri[5] and Colorado.[6] But

tion of Michigan, Art. VIII, secs. 23 and 24, and of Ohio, Art. XVII, secs. 4, 5, and 6, in both of which states bonds beyond the debt limit may be secured only upon the property and revenues of the public utility in question.

[1] *Platt v. San Francisco,* 158 Cal. 74 (1910). See also *Matter of Russell,* 163 Cal. 668 (1912).

[2] *Seymour v. Tacoma,* 6 Wash., 138 (1893).

[3] *General Laws of Texas, 1913,* ch. 147.

[4] Art. 8, sec. 10.

[5] *Ewing v. Hoblitzelle,* 85 Mo. 64 (1884); *State ex rel. Faxon v. Owsley,* 122 Mo. 68 (1894); *State ex rel. McCurdy v. Slover,* 126 Mo. 652 (1894). In practice municipal elections in St. Louis and Kansas City are regulated almost wholly by state law.

[6] *Williams v. People,* 38 Col. 497 (1906); *Mauff v. People,* 52 Col. 562 (1912). But power over municipal elections was conferred upon home-rule cities by specific constitutional amendment in 1912; Art. 20, sec. 6.

the contrary rule has been applied in California,[1] Oklahoma,[2] Oregon[3] and Ohio.[4] In Washington the power of cities to regulate their own elections is derived from the legislature, not from the constitution, and to the extent that controversy has arisen this power over elections has been narrowly construed.[5] The New York proposal will empower cities to enact local laws relating to the "mode of selection . . . of all officers of the city." Whether this includes the power to regulate all or any matters pertaining to the election of city officers is uncertain. Moreover since the time of the election of city officers is specifically fixed by the constitution,[6] and since state Assemblymen, if no other state officers, are always elected at the same time, there would in any event be some difficulty in operating at one and the same election two differing sets of election requirements—one for local officers and the other for state officers.

Matters relating to local taxation have been held in Missouri[7] and Washington[8] to be matters in respect to which home-rule charter provisions must give way before state laws. But in California a home-rule charter may provide for the levy of taxes

[1] *Socialist Party v. Uhl,* 155 Cal. 776 (1909).

[2] *Lackey v. State ex rel. Grant,* 29 Okla. 255 (1911); but because of another provision of the constitution cities could not control matters pertaining to the nomination of candidates for municipal offices; *Mitchell v. Carter,* 31 Okla. 592 (1912).

[3] *State ex rel. Duniway v. City of Portland,* 133 Pac. 62 (1913).

[4] *Fitzgerald v. City of Cleveland,* 88 Oh. St. 338 (1913), which case, however, was not wholly conclusive on this point.

[5] *State ex rel. Fawcett v. Superior Court,* 14 Wash. 604 (1896); *State ex rel. Navin v. Weir,* 26 Wash. 501 (1901). But see *Hiltzinger v. Gillman,* 56 Wash. 228 (1909), sustaining a home rule charter provision for the recall of city officers.

[6] Sec. 6.

[7] *State ex rel. Halpin v. Powers,* 68 Mo. 320 (1878); *State ex rel. Ziegenhein v. St. Louis and San Francisco Railway Co.,* 117 Mo. 1 (1893); *State ex rel. Hunt v. Bell,* 119 Mo. 70 (1893); *City of St. Louis v. Meyer,* 185 Mo. 583 (1904). But see *City of St. Louis v. Sternberg,* 69 Mo. 289 (1879), where it was held that the power to frame a charter included the power to provide for taxation, provided there were no conflict with any state law.

[8] *State ex rel. Seattle v. Carson,* 6 Wash. 250 (1893).

that are expressly prohibited by state law.[1] The New York proposal confers upon cities no power over matters pertaining to taxation unless such power can be derived from the grant of competence over the "powers . . . of all officers . . . of the city" or over the "transaction of its business", or over the "government . . . of its inhabitants."[2] Certain it is that in most municipal charters the taxing power is inextricably interwoven with the "powers" of certain municipal officers. Again, therefore, the scope, if any, of the city's authority under this grant is wholly a matter of guess.

In contrast with the above-noted rule in New York, police officers have, under various constitutional provisions, been held in a number of states to be functionally state rather than city officers.[3] And specifically in home-rule states, control over police departments has been declared to be a matter of state concern in Missouri,[4] but a "municipal affair" in California[5] and Minnesota.[6] The home-rule provision of the Colorado constitution expressly confers power over police departments.[7] If the New

[1] *Ex parte Braun,* 141 Cal. 204 (1903); but a constitutional amendment of 1910 attempted to make a division between state and municipal sources of revenues; Art. 13, sec. 14.

[2] Section 1 of the proposal enjoins the legislature to "restrict their power of taxation", etc. Presumably, however, such restriction would have to be made in a law applicable in terms and in effect alike to all cities. While there are general tax laws, there are also many special provisions in city charters relating to taxation.

[3] *Mayor of Baltimore v. State,* 15 Md. 376 (1859); *People ex rel. Drake v. Mahaney,* 13 Mich. 481 (1865); *State ex rel. Attorney General v. Covington,* 29 Oh. St. 102 (1876); *State ex rel. Holt v. Denny,* 118 Ind. 449 (1888); *State ex rel. Atwood v. Hunter,* 38 Kans. 578 (1888); *Commonwealth v. Plaisted,* 148 Mass. 375 (1888); *State ex rel. Attorney General v. Moores,* 55 Neb. 480 (1898), overruled but not as to this point by *Redell v. Moores,* 63 Neb. 219 (1901); *Newport v. Horton,* 22 R. I. 196 (1900).

[4] *State ex rel. Attorney General v. McKee,* 69 Mo. 504 (1879); *State ex rel. Hawes v. Mason,* 153 Mo. 23 (1899); *State ex rel. Goodnow v. Police Commissioners of Kansas City,* 184 Mo. 109 (1904); *State ex rel. McNamee v. Stobie,* 194 Mo. 14 (1905).

[5] *Kahn v. Sutro,* 114 Cal. 316 (1896); *Popper v. Broderick,* 123 Cal. 456 (1899).

[6] *State ex rel. Zimmerman v. City of St. Paul,* 81 Minn. 391 (1900), where this ruling, however, was merely a matter of silent implication.

Constitution of Colorado, Art. XX, sec. 3.

York courts abide by their earlier view that a police officer is a city officer, power to regulate all matters pertaining to the police will doubtless devolve upon cities under the home-rule grant.[1]

Whether or not a city may regulate matters pertaining to police or magistrates' courts has been a subject of judicial controversy in a number of the home-rule states, with the usual contrariety of opinion.[2] In the state of New York police courts are established by many city charters.[3] Will the judges of these courts be regarded as "city officers" whose "powers" may be regulated under the proposed home-rule grant? Here is another question of doubt. But attention should be called to the fact that in the section dealing with the time of municipal elections,[4] the expression that is used is: "All elections of city officers, including . . . judicial officers of inferior local courts." For at least one purpose, therefore, in this specific article, police judges or magistrates are expressly declared to be "city officers."

Instances of possible, not to say probable, controversies might readily be multiplied—instances drawn not from theoretical speculation but from the recorded experiences of home-rule cities in other states. Enough has been said, however, to indicate the kind of questions that are likely to arise, the kind of uncertainty into which the cities of New York will be delivered, and the kind of burden that will be imposed upon the courts in resolving this uncertainty.

[1] Presumably, however, the city would have no power to affect judicial review of administrative removals; for this would go to a matter of affecting the jurisdiction of the higher courts of the state. See above, p. 665.

[2] *Union Depot Rd. Co. v. Southern Ry. Co.*, 105 Mo. 562 (1891); *Ex parte Kiburg*, 10 Mo. App. 442 (1881); *Ex parte Loving*, 178 Mo. 194 (1903); *Miner v. Justices Court*, 121 Cal. 264 (1898); *Ex parte Sparks*, 120 Cal. 395 (1898); *Ex parte Ah You*, 82 Cal. 339 (1890); *In re Cloherty*, 2 Wash. 137 (1891); *State ex rel. Simpson v. Fleming*, 112 Minn. 136 (1910). In 1896 an amendment to the California constitution expressly conferred power over police courts (Art. XI, sec. 8½), and in 1912 similar power was conferred by specific amendment in Colorado (Art. XX, sec. 6).

[3] See, for example, the Charter of Rochester, *Laws of New York, 1907*, ch. 755, Art. XVI. The law creating magistrates courts in New York City is not incorporated in the city charter.

[4] Sec. 6.

VIII

One or two other points deserve brief mention. Both the legislature and the city are, in precisely the same language, endowed with power to regulate the conditions of employment by municipalities or on public works[1]—a matter that is now regulated by the State Labor Law.[2] Presumably, however, the state law upon this subject would have to apply in terms and in effect alike to all cities; it would, therefore, take precedence over any contrary charter provision. Apparently the cities will be competent only to supplement the state regulations upon the subject; for it is difficult to see how so deliberate a contradiction of grants of power could be otherwise resolved.

The legislature is required to "provide by general law for carrying into effect" the home-rule grant.[3] It should be noted that the phrase here employed is simply "general law"; there is no requirement, so meticulously used elsewhere, that it shall apply in terms and in effect alike to all cities. It is impossible to say whether this is a result of careless drafting or of deliberate design. If the latter, it need only be remarked that the intention is lacking in clarity. Will the legislature (by the introduction of classification, for example) be able to provide a scheme of effectuation for New York that is quite different from the scheme provided for Sherrill?

Finally, it should be remarked, this proposal will permit a vast increase in the chaos of the already chaotic statutory sources of the government of cities. It will authorize cities to engage *ad libitum* in adding patches to the existing patchworks of their governments. In a few years the sources of their governmental organization and competence will be found in part in unrepealed (and perhaps unrepealable) provisions of their present legislative charters, in part in numerous other state laws that dovetail into and supplement charter laws, and in part in the "local laws" adopted by the cities themselves. All of the other home-rule states, except Oregon, Michigan

[1] Secs. 1 and 3.

[2] *Consolidated Laws*, ch. XXXVI, Labor Law, Art. II, sec. 3

[3] Sec. 3.

and Texas, have compelled any city that sought to exercise home-rule powers to adopt *ab initio* a complete home-rule charter—to make, in other words, a fresh start in embarking upon its home-rule career. The New York proposal not only does not require this but also, because of its curious and novel terms, probably makes it impossible; for it is open to question whether the enumerated subjects of control are sufficiently comprehensive to enable cities to adopt approximately complete charters.

In two respects this New York proposal may assert primacy among its fellows: it is probably the most unnecessarily involved and the least generous of any of them.

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heir of Sismondi and Michael Sadler, the foes of historic Liberalism; and the Liberalism which he proclaims is indebted less to the precepts of Smith and Ricardo than to the theories of Guild Socialists and even State Socialists.

"Capitalism" is to be retained but it is to be profoundly modified. In every organized industry there should be a standing Council including not only trade-union representatives and spokesmen of the managerial and organizing side of industry but also directly appointed representatives of the brain-workers in the industry. Such a Council should have power to determine "living family wage-rates or salary-rates" for each type of labor, whether of hand or brain, the hours of work, the methods of workshop organization, and, in short, all the problems affecting the worker in his relation to industry. The agreed decisions of these Councils should, after being reported to the Ministry of Labor and laid upon the table in Parliament, be made binding as minimum conditions upon all concerns engaged in the industry.

For dealing with unemployment, a system of state insurance, supplemented by other forms of state action, should be continued, but "it is unwise to trust to state action alone, or mainly, for the solution of the problem". The primary responsibility should be thrown upon each industry, on the principle that every industry ought to maintain its own citizens out of its own product. In many industries it would be possible for the Council immediately to work out a fair scale of unemployed pay which the state could make obligatory.

Distribution of the returns on capital should be regulated. *Bona fide* new enterprises might be allowed a period of years, without limitation of profits, in which to establish themselves. Thereafter their ordinary shareholders might be limited to a defined rate of interest until a reserve fund had been built up equivalent to the amount of the total capital. The reserve should be regarded as the property of the concern as a whole—not of the shareholders. It might, in bad years, be drawn upon for the purpose of meeting the liabilities of the concern, including the payment of the defined rate of interest to the ordinary shareholders; but the shareholders should be forbidden to divide the reserve among themselves. After the reserve had been formed, all further profits beyond the defined rate of interest might be divided between the state, the workers in the concern, and the ordinary shareholders. Such an arrangement would provide a desirable substitution for an excess profits tax and would lead to genuine profit-sharing and copartnership.