REPORT

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THE undersigned, acting as a committee of the Graduate School, have read the accompanying thesis submitted by Arnold V. Johnston for the degree of Master of Arts. They approve it as a thesis meeting the requirements of the Graduate School of the University of Minnesota, and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts.

Wm. R. Schaper
Chairman

Edward S. Thurston

J. F. Ebersole

May 29, 1915.

MUNICIPAL HOME RULE IN OREGON

A Study of the Legal Relation of the City to the State

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A Thesis submitted to the Faculty of the Graduate School of the University of Minnesota by

Arnold V. Johnston

in partial fulfilment of the requirements for the degree of Master of Arts.

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CHAPTER I.

INTRODUCTORY

That the government of American cities has been perhaps the least successful part of the whole American political and governmental system has been a patent fact for many years. It is the one weak spot to which the critical foreigner nearly always points when comparing the faults of democracy with the efficiency of the monarchical governments of the old world.

During the nineteenth century revelations of well-nigh hopeless inefficiency and deep-planted corruption in city government time and time again startled and appalled the American people; and the disillusionment which these revelations have wrought in the optimistic believers in a fated destiny of the western world has sobered and sombered the minds of many observers of passing events and tendencies.

Nevertheless, the saving optimism of the average

American has stood him in good stead. He has steadfastly refused to admit that the great principle of democracy was in any way weakened--or even at stake. If public servants do wrong, or fail to execute their trust satisfactorily, "get the law after them," or elect better public servants, has been his reply. The more or less brief spasms of municipal reform and local crusades against intrenched "bosses" and "rings," characteristic of the last half century, have been a means of carrying this reply into action.

In fact, the first remedy which the American people attempted to apply to their wasteful and inefficient city government was more democracy.* This was coincident with the rise of Jacksonian democracy and followed the early disappointments and failures of the "federal" plan of separation of powers and of checks and balances, borrowed from the scheme incorporated in the national government in 1789. Now a widening of the suffrage and an increase in the num-

* F. J. Goodnow, "Municipal Home Rule," 1897, p. 3.

ber of elective officers took place. But democracy was not a panacea. The notorious "spoils system," the great stain upon American political life, found its chief lodgement in the cities.

It took some time before it fully dawned upon the American people that there was something wrong with the system--not with the principle of democracy and people's rule, but with the machinery of carrying out that principle. But it was a realization of this fact that formed the basis of the next remedy to which they resorted to cure their corruption-infested cities. Reform in the organization of municipal governing bodies; a curtailment of powers here and an increase of powers there; a separation of functions here and a consolidation of functions there; easier and more effective means of holding local officers responsible, and responsive, to the voters who elected them; finally, in a number of states, the establishment of a rigorous control, or at least a sharp check, on local action by state officials--all these methods have been employed in a fruitless

endeavor to make the government of cities more nearly approximate the best American ideals of what should be the heritage of a democracy of freedom and opportunity--and of an intelligent citizenry.

In the long run, what city dwellers want of their government is efficiency and economy, extensive and judicious public improvements, well paved and well kept streets, a goodly number, or at least a modicum, of public parks and other recreation facilities, modern services and conveniences, such as water and light supply and sewerage, and, last but by no means least, low taxes--in short, a progressive and business-like administration. Democracy is here no longer an end; and when it fails as a means it is discarded. Efficiency is the watchword in public as well as in private business. It is the immediate need of, and demand of, the city voter.

But just as necessary is a proper form [redacted] of organization of government. In fact, correct organization must precede successful administration. The endeavor to obtain both these necessities has occu-

pied nearly the whole time of municipal reformers.

But, back of administration, and back of organization, lies just as vital a problem: the securing of the proper place of the city in the American governmental system. That so fundamental a question should not have been solved long ago seems amazing to anyone for the first time meeting with it. Without it solved, of course, attainment of perfect municipal government is rendered impossible at the outset. Fortunate it is, that it is becoming more and more evident to observers of municipal affairs that this question calls for immediate and concerted action; and let it be added, that it calls for the application of all the genius and foresight of statesmanship.

In a certain sense it may be said that the American city has had a quite well defined place in the American governmental system. It has been the creature of the state legislative body--its tool and its plaything, entirely at the mercy of its creator, except in so far as an alarmed and aroused electorate in a few states has, from time to time, placed con-

stitutional limitations on the suzerainty of the commonwealth lawmakers. The evils to which unrestrained legislative control of cities has given rise have been widely commented upon by writers on city government in recent years;* and a portion of this thesis will attempt to describe the situation created by the practice in one of the forty-eight states: Oregon. A brief historical review of the relation of American cities, in general, to the state legislatures will perhaps serve to make the extent and seriousness of the problem clearer.

The historical origin of American municipalities is to be found in the chartered boroughs, or municipal corporations, established in several of the English colonies during the seventeenth and eighteenth centuries.** The charters were granted by the royal

* F. J. Goodnow, "Municipal Home Rule," 1897, and "Municipal Government," 1910, Chaps VI-VIII; J. A. Fairlie, "Municipal Administration," 1901, Chap.V.

** Fairlie, "Essays in Municipal Administration," Chap. IV, on "Municipal Corporations in the Colonies," also Fairlie, "Municipal Administration," Chap. V; W. B. Munro, "The Government of American Cities," 1913, pp. 1-4; W. A. Schaper, "The City Charter Problem," in Papers and Proceedings of the Third Annual Meeting of the Minnesota Academy of Social Sciences, 1910.

governors as executive acts. They were on the same legal basis as those of the boroughs in England, and so were independent of the colonial assemblies. The functions, in turn, of these boroughs were limited strictly to the enacting of local ordinances and the administration of matters of purely local interest.

As times changed, however, and as these communities grew, local needs not provided for in the charters arose, and the local authorities found it necessary to obtain special grants of power. These did not come from the royal governors, but from the colonial assemblies. The former were becoming more and more disliked and distrusted. This change was a notable one. Tho in each case a grant from the assembly enlarged the actual functions and powers of the borough receiving it, this practice in time altered the status of municipal authorities so as to make them subordinate to the assemblies.*

After the Revolution it was thus natural and easy for the state legislatures to assume the func-

* Fairlie, "Municipal Administration," p. 76.

tion of charter-making, as well as of charter-amending. This put the municipal corporations in a still more dependent position; for their charters were thenceforth simply legislative statutes, liable to be altered or revoked by the legislature at any time. Of this the legislatures took full advantage. The upshot was, in short, that within less than half a century the state legislatures gained an absolute dominance, almost, over the most minute and purely local affairs of cities and towns. When the authorities of a city desired additional powers in order to provide for such local matters as the paving and lighting of streets and means of local transportation, waterworks, markets, and others, they had to seek the favor of a body of lawmakers the greater part of whom represented rural districts and exhibited an ignorance of urban conditions and a prejudice toward the inhabitants of municipalities.

Thus was the local "home rule" of the boroughs of colonial times virtually extinguished. In most of the states this is the situation today. The legal

status of municipal corporations, as well as other units of local government, is stated by one writer as follows: "In the absence of express constitutional restrictions, the local governments, city, county, and town, are creatures of the state legislatures, which can only exercise such powers as are definitely granted to them, and which the legislature can regulate; yes, make and unmake at will. Our state laws are thus centrally made and locally applied by locally elected officers, to a very marked degree..... This system is popularly known as local self-government."* The extent to which local self-government in America is merely a "popular" conception becomes very clear to anyone observing the course of legislative domination during the latter half of the nineteenth century.

So long as cities were comparatively small, and the needs of such communities meager, the situation revealed no such glaring abuses as to call forth much

* W. A. Schaper, "The City Charter Problem," p. 4.

protest. When it is noted that as late as 1820 there were only thirteen towns in the United States containing more than 8,000 inhabitants and their combined population was less than 500,000, or only 5% of the entire population of the country,* it is at once seen how insignificant were municipal affairs and municipal politics as compared with state affairs and state politics.

But there came a turn in events. The rapid growth of cities--a growth which by the end of the century became one of the phenomena of American political, social and economic life--made their continued government by state legislative bodies appear more and more cumbrous and anomalous. Municipalities became huge centers of population, larger, in many cases, than some of the former colonies. The complexities of urban life increased in a manner altogether unprecedented. Municipal activities grew and expanded with every year.

* Fairlie, "Municipal Administration," p. 80.

The increase of functions did not at first, as events showed, mean an increase in the powers of cities; it meant simply more special acts to permit municipalities to engage in new undertakings; it meant more interference by the legislature in municipal affairs.* Some additional powers were, of course, granted; for example, in taxation; for this was imperative if the cities were going to have the means of assuming their new functions.

This practice of legislation by special acts and interference in the most distinctly private affairs of cities continued, and even grew in extent, in the face of the first manifestations of reaction and protest. At first the cities could assert themselves but feebly. Nevertheless, by securing little concessions from state constitutional conventions in the form of partial checks upon the inroads of the legislatures, they laid the basis on which in later years municipal patriots could build a system of government suitable to, and responsive to, the needs

* Fairlie, "Municipal Administration," p. 84.

of city dwellers of today.

These restrictions on the interference by state legislatures in local affairs have been of great variety, but it will not here be attempted to outline, or even mention, them all. As the most flagrantly evil results seemed to be traceable to the general habit of chartering municipal corporations only by special acts and enacting special laws for the current needs of individual cities, towns and villages, the logical remedy was simply to take away from the legislatures this power. This was done; but up to the present time such prohibitory clauses have been incorporated into hardly a score of state constitutions.* General and uniform laws for the incorporation of cities and for their government became, in these states, the only means by which the legislatures could exercise their control over municipal corporations. Thus it was thought that legislative interference in local affairs, prompted by prejudice or by partisan poli-

* Munro, "The Government of American Cities," p. 55.

tics, would be effectually restrained.

But it would be absurd to attempt to make all city charters uniform and all laws for their government applicable to any and all municipalities, from the great metropolis of a million or more population to the hamlet of a few hundred inhabitants. In order, therefore, to make it possible to legislate rationally for such divergences, municipalities were, by constitutional provision, divided into classes according to population--or legislatures were empowered so to classify cities--and general laws to apply to the municipalities of one of the three or more classes created were made permissible.

At best, such restrictions as these were of only negative value; and when a legislature was allowed to classify cities without limitation as to number of classes, and to change the classification whenever it wished to, the futility of it all made it necessary to look about for some other manner or means by which live and energetic cities might be given room to develop in their own natural way and

grow in civic welfare as well as in size.

The next step was a radical one: namely, to permit municipalities themselves to frame and adopt their own charters, with the privilege of amending them and enacting, without let or hindrance, all such local legislation as the authorities and voters of the cities thought best. The city which can do these things is a truly "home rule" city; and it is with the fortunes of this modern political creation--and the reasons for its creation--that this thesis has to deal.

The plan originated in the state of Missouri, where it was advocated chiefly by the citizens of the largest cities in the state--St. Louis and Kansas City. When a constitutional convention met in 1875 to frame a new fundamental law for that state, a plan was incorporated in the constitution to permit cities of more than 100,000 population to frame and enact their own charters. The drafting of such a charter was to be done by a board of thirteen members elected by the voters of the city desiring a new act

of incorporation.*

The idea spread slowly. In 1879 it was adopted in California, in 1889 in Washington, in 1898 in Minnesota, in 1902 in Colorado, in 1906 in Oregon, in 1907 in Oklahoma, in 1908 in Michigan, in 1910 in Arizona, and in 1912 in Ohio, Nebraska and Texas.**

Is the right of cities to make and amend their own charters, and under them to enact local ordinances, to be unlimited? If not, how shall it be limited? There are interests which are vitally and primarily important to the citizens of a locality; but there are also subjects of local interest which affect just as forcible and vitally the people of a whole state. From the time of the establishment of the federal union in 1789 there have existed certain spheres of

* Missouri constitution, Art. IX, Secs. 16-17.

** California constitution of 1879, Art. XI, Secs. 6-8; Washington constitution, Art. XI, Sec. 10; Minnesota constitution, Art. IV, Sec. 36; Colorado constitution, Art. XX, Secs. 1-6; Oregon constitution, Art. IV, Sec. 1 a, and Art. XI, Sec. 2; Oklahoma constitution, Art. XVIII, Sec. 3; Michigan constitution, Art. XVIII, Sec. 20; Arizona constitution, Art. XIII, Secs. 1-3; Ohio constitution, Art. XVIII, Sec. 7; Nebraska constitution, Art. XI, Sec. 13; Texas constitution, Art. XI, Sec. 5.

For a brief history of this movement, see M. R. Maltbie, "City-Made Charters," in Yale Review, February, 1905.

ultimate state control, which the states must retain unless the system is to be radically changed. So long as this nation continues to be a land of federated states these spheres will exist. The "sovereign" state still lives, is the oft-repeated dictum in the decrees of our state courts.

All constitutional amendments so far adopted to allow a greater measure of home rule for local communities have--by express language or as interpreted by the courts--left this ultimate "sovereignty" of the state over the city unimpaired. It is only in the extent of its control thru the medium of the state legislature that there has been a real delimitation of action in municipal affairs. In one state--Washington--all that the "home rule" advocates have been able to obtain is freedom from legislative interference by special acts. In all the municipal "home rule" states the constitution and the general laws, in so far as the latter apply to the accepted spheres of paramount state jurisdiction, have been untouched.

Has there, then, been any real positive change effected in the legal status of municipalities as a result of permitting them to frame, adopt and amend their own charters? To the task of answering this question, as applying to one state, the major portion of this thesis will address itself.

The question of the relation of a municipality to the state in which it is situated is so complex and intricate, and involves such an endless chain of factors, that to study it in any detail in all the states--or even in the few which have adopted the system of "home rule"--would require more time than has been available in the preparation of this thesis. In the hope that the investigation of the problem in one typical state would yield approximately as valuable results, that most interesting commonwealth on the Pacific coast--Oregon--has been chosen as the field of inquiry.

"Home rule" is, of course, a question both of law and of practical politics; and, necessarily, the problem cannot be solved without a reference to both.

Nevertheless, it is only with the legal and constitutional problems that this investigation will concern itself. They must be solved first of all. It is hoped, however, that at some future time the inquiry may be extended to include a study of the actual workings of the plan in the state which has been chosen for consideration.

Radical as is the change inaugurated by the adoption of municipal "home rule" in a state, it is, at bottom, merely a modification of the method of ultimate state control of municipalities. In order, therefore, to arrive at a full comprehension of what the plan means in one state, one must have a knowledge of what were the principles and conditions obtaining before "home rule" was adopted. The pages immediately following will, therefore, treat in some detail of the establishment of local government in Oregon; this to be followed by an account of the rise and growth of legislative control, and a discussion of the legal principles upon which this control was for a half century based.

CHAPTER II.

BEGINNINGS OF LOCAL GOVERNMENT IN OREGON

1. ORGANIZATION OF LOCAL GOVERNMENT.

Community life in Oregon, as in most of the commonwealths of the United States, dates back to the trading posts and settlements of the first years of the nineteenth century. Historical origins are only indirectly involved in a study of modern municipal "home rule;" yet it may be illuminating as well as interesting to study the process by which units of local government are established and organized and their place in the governmental system secured.

During the first three decades after the first permanent settlement, in 1811, in what is now the state of Oregon, little attention was paid to this region by the pioneers who were steadily advancing the frontier line of the United States. In 1841, when the first attempt was made to establish civil government, the population of the region could be measured in hundreds. In 1843 a practically independent and

sovereign state was established, tho the articles of government adopted provided that it was to continue only until the United States should extend its jurisdiction over the territory.*

In 1844 the first steps were taken to organize machinery for the government of local subdivisions of the territory. By the organic act of 1843 the legislative body of the commonwealth was made to consist of representatives from four "districts," which were at the same time created.** As amended in 1844, the legislative power was to be vested in a "house of representatives" composed of delegates elected annually by the voters of the several "counties."*** In reality, these divisions were identical with the districts established in 1843. The same act provided that the judge of the territory should hold two terms of his court in each "county" during the year. Such county courts were by another act of 1844 authorized to appoint overseers in each county to have charge of road work and improvements, which were thus brought

* Hubert Howe Bancroft, "History of Oregon," vol. I, pp. 292-314.
** Ibid., p. 472, footnote.
*** Or. laws, 1843-1849, p. 98.

under the jurisdiction of county authorities. This law furnishes the first instance of the practice which later became common in Oregon of compelling all able-bodied men to work on the public highways for a certain period each year. Those who refused were made subject to fine. No provision was made for a road tax.*

The first piece of "municipal" legislation in Oregon on record was enacted at the following session, tho it must be explained that up to this time there had been no incorporation of any towns or villages. On December 22, 1845, the house of representatives decreed that the town of Robin's Nest should thenceforth be known as Linn City.**

It would be superfluous to attempt to outline in any detail the steps taken during the following years to organize the system of local government. The people at this time owed allegiance to no other country, but were continually clamoring for a full

* Or. laws, 1843-1849, p. 88.
** Ibid., p. 30.

territorial government under the protection of the United States. With the conclusion of the Treaty of Ghent with Great Britain in 1846, fixing the northern boundary of the territory under the jurisdiction of the United States at the 49th parallel, the people hoped for immediate action. Two years more, however, they had to wait. On the 14th of August, 1848, congress passed an act providing for a territorial government, and in the spring of the following year General Joseph Lane came to take the reins as first governor. The population of that part of the territory south of the Columbia River--that which comprises the present state of Oregon--could at this time hardly have numbered 15,000.

Numerous little towns and villages had at this time been laid out thruout the region, particularly in the verdant Willamette valley, which from the very first had attracted a majority of the immigrants. In addition to Astoria, founded in 1811, Oregon City had been laid out in 1840 and a large settlement was growing up at what is now the city of Salem. In 1845 two real estate men from New England founded what later

became the metropolis of the Northwest--Portland. From the very first it grew rapidly. In the Columbia valley, also, a few settlements had sprung up. Eighty-eight miles up from Portland, at the head of navigation, a mission had been established in 1838, followed by a trading station and military post; and around these grew up a town which received the name of The Dalles, or Dalles City.

After 1850 a horde of immigrants poured in, following the enactment by congress of a land donation law. "The population (of that part of the territory south of the Columbia River) before the large immigration of 1852 was about 20,000, most of whom were scattered over the Willamette valley farms," writes the historian of the Pacific coast.* "The rage for laying out towns, which was at its height from 1850 to 1853, had a tendency to retard the growth of any of them. Oregon City, the oldest in the territory, had not much over 1,000 inhabitants. Portland, by reason of its advantages for unloading shipping, had double that

* Bancroft, History of Oregon, vol. II, p. 251.

number. The other towns, Milwaukie, Salem, Corvallis, Albany, Eugene, Lafayette, Dayton and Hillsboro, and the newer ones in the southern valleys, could none of them count 1,000."

The first territorial legislative assembly convened in December, 1849. One of its first acts was the establishment of a system of common schools. At the head of the system was to be a superintendent of schools, elected triennially by the legislature; and under him, it was provided, there should be one school commissioner elected by the voters of each county. Furthermore, the law provided that school districts might be formed by the people of any town or neighborhood.*

The second session, which convened in December, 1850, continued the work of organizing the activities of the territory carried on by local officers. Among the important laws enacted was one providing for general elections. Under this act elections were to

* Laws first sess., Territorial Legislative Assembly, p. 66.

be held in each organized county, under the direction of county officials. In addition, "townships or other districts" were authorized to be set off by law as election precincts.* In 1851 a law was enacted stating that each election precinct in any county was entitled to at least one justice of the peace and one constable, to be elected by the qualified voters;** and in 1852 another law provided that "the qualified voters of each township or precinct" should elect justices and constables.***

Nearly all local governmental powers were at this time in the hands of county, school district and road district authorities, especially the first mentioned. Thus the duties of county commissioners, created at the second session, included the erection and repair of court houses, jails and other county public buildings; the laying out, altering and discontinuance of roads and highways; the licensing and fixing

* Laws 2nd sess., p. 101.
** Ibid., p. 164.
*** Laws 3rd sess., p. .

of rates of ferriage; the granting of saloon and such other licenses and the law authorized to be granted; the levying, assessing and collecting of taxes; and the superintendence of poor relief.*

Not all powers and functions, however, were under the jurisdiction of the governmental divisions mentioned. In 1850 the territorial legislature granted articles of incorporation to the inhabitants of Oregon City. In the following year a charter was granted to the city of Portland.** As early as 1849 some citizens of Portland organized an association, elected trustees, and built a school and a meeting house.***

It is in 1851 that the first reference is found in the general laws of Oregon to incorporated towns. Under an act passed in that year, it was provided that any person desiring to lay out any town should, before selling any lots in such town, have a copy of the plat recorded in the county recorder's office.

* Revised statutes of the territory, 1855, p.412.

** It is unfortunate that these two charters are missing from the bound volumes of Oregon territorial laws which were used in this study.

*** Thomas L. Cole, chapter on "Portland," in "Historical Towns of the Western States," edited by Lyman P. Powell (1901).

Whenever any person or corporation desired any lot, street, public square, or other land vacated in an unincorporated town, the law required a petition to the board of county commissioners, who were authorized, if no objection was made, in their discretion to vacate the same. Whenever any person or corporation wanted any such land vacated in an incorporated town, the law required a petition to the trustees or other body of the town. Furthermore, whenever any public square, street or other land should be vacated in any unincorporated town, the law stated that the property should vest in the board of county commissioners; but whenever any such land should be vacated in an incorporated town, it should vest in the trustees, or other corporate body; and the proper authorities in either case were empowered to sell the land and appropriate the proceeds for the benefit of the corporation.*

Thus was created the incorporated town in Oregon. As will be seen later, the Oregon lawmakers did

* Laws 2nd sess., p. 259.

not distinguish between cities and towns, except in the form of organization (and even this was not followed rigidly); so that here was launched by the legislature that political entity--the municipal corporation--whose history will be followed in some detail in the following pages.

Up to 1854 there is no mention in the general laws of the terms cities or villages. In that year, however, the territorial legislature passed an act relating to action on the official securities of public officers, and to suits by or against officers and public bodies, including any "county, city, village, or other municipal body." Among the officers empowered to prosecute actions in their official capacity were those of any "municipal corporation."* At the same session of the legislative assembly, another law was enacted providing that whenever "a city council of any incorporated city" should organize a fire department, certificates of membership in such department could be issued under such regulations as

* Revised statutes, 1855, p. 165.

might be prescribed by the city council.*

Local option for Oregon cities and towns is proclaimed as early as 1855. On January 25 of that year the legislative assembly enacted that, before any person desiring to retail spirituous liquors could proceed to secure a license, he should, at his own trouble and expense, obtain the signatures of a majority of the whole number of legal voters in the precinct in which he wished to sell liquor, praying that the license be granted. If he contemplated locating a saloon in a city or town, he was required to secure the signatures of a majority of the voters in the city or town; and if it was in a city divided into wards, then a majority of the ward in which he wished to set up his business was necessary.**

2 . THE FIRST MUNICIPAL CHARTERS.

On January 18, 1866, the Oregon legislature passed an act incorporating the town of Astoria,***

* Revised statutes, 1855, p. 572.
** Ibid., p. 547.
*** Special laws, 7th sess., p. 2.

and on January 25 it incorporated the city of Eola.*

Both the charters were essentially alike--in most respects identical. In the first place, the initial articles creating the "bodies politic and corporate" were alike in practically every detail. Astoria, a "town," was to be governed by a board of trustees of five members, and other minor officers. Eola was given what is generally regarded as more of a city form of government; namely, a mayor and a common council, with minor officers and departments. But the enumerated powers of the two governing bodies were substantially equal. In both communities power was given to make by-laws and ordinances not repugnant to the laws of the United States or of the territory, etc.; to levy and collect taxes, within prescribed limits, for county and territorial purposes; to protect the public health; to prevent and remove nuisances; to lay out and improve streets; to license auctioneers, peddlers, pawnbrokers, etc.; to provide a workhouse; to preserve order; to impose fines and

* Spec. laws 7th sess., p. 13.

other penalties for breach of ordinances; and to appropriate for any item of the debts and expenses of the municipality. Both communities, also, were empowered to prohibit public shows and amusements, gaming houses and saloons. In the Astoria charter it was provided that no person having paid a license to the city or town for any such purpose should be compelled to pay license fee to the county or territory. The Eola charter went farther, by expressly stating that no law authorizing any county officer to grant saloon licenses should apply to persons vending liquors within the city limits. By this provision the holder of a city license was not only exempted from paying a license tax to the county, but apparently it was left to the city authorities to determine the amount of the tax, the conditions to be met before a license should be granted, and the term for which the license should be given; and even to provide the officials to see that the conditions were lived up to. Under a general law of 1849 these matters had been placed in the hands of county authorities.*

*Laws 1st sess., p. 157.

The taxing powers of the governing bodies differed in the two communities. In the city of Eola the council was empowered to levy and collect a small tax in addition to that allowed in a previous section, whenever additional revenue should be required for some specific object. In the town of Astoria the board of trustees was given the same power, but on condition that the ordinance for that purpose be first submitted to and approved by the legal voters of the town. The board was also authorized to provide for the working of the county road tax upon the streets and public highways within the town limits, under supervision of the commissioner of streets and harbor. There was no similar provision in the Eola charter. The Astoria trustees were ordered to post annually a statement of receipts and disbursements. This was not required of the Eola council.

In the Astoria charter it was provided that the improvement of streets and walks was to be made and paid for by the owners of property fronting on the streets or walks whose improvement was desired by the trustees. But if such owners, or some of them, failed

to make the improvements, the commissioner of streets, if petitioned by the owners of more than half of the property in question, was to see that the improvement was made, in such manner as the board of trustees might provide; and then the commissioner could collect the cost from the property owners, according to frontage. In the Eola charter nothing was said of property owners improving a street or sidewalk. The council, however, was authorized to lay out and locate streets, alleys, landings, or wharves, when petitioned by two-thirds of the legal voters of the whole city, and then to determine the amount to be collected from each owner of adjoining property.

Some other specified powers which were peculiar to the Eola charter--to care for paupers, establish fire protection and night-watch and patrol, and erect market-houses and slaughter-houses--were probably due to special conditions existing in that city.

It is to be noted that the Astoria charter contained the provision that it was not to go in effect until submitted to the electors of the town and accepted by a majority of them at a meeting called for

that purpose. The Eola act of incorporation carried no such provision. Both charters, of course, contained clauses reserving to the territorial legislature the power to alter or repeal them at any time.

The charters of both municipalities prescribed a general election of all officers; and every election was to be conducted according to the general state law on the subject. Certain qualifications of officers were laid down, and the Eola act prescribed the qualifications for voting, which were, however, in conformity with the qualifications ordained in the state constitution.

In 1857 were incorporated the city of Salem,* the town of Corvallis,** and Dalles City.*** In the main, their charters were similar to each other and to those just described. Some departures from the existing models are, however, to be noted.

The charters of the two first-mentioned differed from the others in that their governing bod-

* Spec. laws 8th sess., p. 22.
**Ibid., p. 33.
*** Ibid., p. 1.

ies possessed some new minor powers, such as to establish hospitals, provide water for the city, prevent and regulate the running at large of animals and the discharge of fire-arms in the city. They differed from each other somewhat in their financial powers. Thus, the Salem charter, like those of Astoria and Eola, gave the city council exclusive power to appropriate for any item of city expenditure and to provide for the payment of the debts and expenses of the city. The Corvallis act contained a like clause, to which was added a proviso that the council might not create a debt greater than the estimated revenue for one year. In the Dalles City charter there was no clause giving any express power to appropriate. Like the Astoria charter, that of Dalles City was submitted for ratification to the voters of the city; the others became effective from the time of passage by the legislature.

Next year, 1858, a few minor amendments were made by the legislature to the Corvallis charter, in a special act granting to the city council power to establish a market.* At the same session the act

* Spec. laws 9th sess., p. 48.

of 1850 incorporating Oregon City was amended so as to enable the city council to abate any tax on application to the city recorder.* By a special act of January 16, a part of the town plat of Union Point, an unincorporated town, was declared to be vacated.** Another act, of January 15,*** amended the Portland charter of 1851 in some minor particulars. By still another act of 1858 the office of port warden for the city of Portland was created. On the city council was devolved the duty of defining this officer's duties and fixing his compensation, which, however, must be from fees.**** Finally, another charter was granted to the city of Salem, tho its original charter was only a year old. Unlike the first act of incorporation, this one was submitted to a vote of the people of the city. Some additional minor powers were given to the council, but a restriction was added to the city's borrowing powers. There was also a change made in boundaries.*****

* Spec. laws 9th sess., p. 76.
** Ibid., p. 71.
*** Ibid., p. 13.
**** Ibid., p. 32.
***** Ibid., p. 3.

In 1859, at the last session of the territorial legislative assembly, two municipal charters were granted: one to Oregon City,* to replace the act of 1850, and one to the town of Monmouth.** They differed in no essential respect from former charters. The former included a license clause similar to that in the Eola act, namely, in exempting any holder of a liquor license from the operation of any law authorixing county officers to grant licenses. The latter followed the provision in the Astoria charter by merely exempting a licensee from the necessity of paying a double license tax. The authorities in each were permitted to levy a special tax in addition to the regular tax provided for in the charter, if such a tax were first submitted to and approved by the voters of the city. The three charters granted in 1857 contained no such provision. Finally, while one of these acts of incorporation, that of Monmouth, was submitted to a vote of the electors, the Oregon City

* Spec. laws 10th sess., p. 3.
** Ibid., p. 13.

charter was not.

This concludes the territorial period. In June, 1857, after several ineffectual attempts to obtain a vote of the people of the territory favorable to the proposition of calling a convention to frame a constitution as a state of the union, the voters elected sixty delegates to convene for that purpose. On the third Monday in August of the same year these delegates met at Salem, adopted a constitution, and submitted the results of their efforts to the electorate. On the second Monday in November the election was held and the constitution ratified. For more than a year the people then had to wait for action by congress. At last, on February 14, 1859, congress passed an act admitting Oregon as a state, and on the same date the constitution went into effect.

As will be seen from the review of municipal legislation during Oregon's territorial period, the functions of cities and towns were exceedingly few, as compared to those of municipalities of today. Al-

lowance must be made, of course, for the fact that in all new and sparsely settled countries, with only few and small communities, the demands for conveniences and services by municipal action are not comparable to the demands which property owners and others now make. Then, too, a half century ago no cities, large or small, undertook to provide services to nearly the extent which they do now, and which citizens have come to look upon as almost in the nature of "inalienable rights."

As to the functions which we find that these early cities in Oregon actually exercised, it is apparent that the lawmakers had arrived at no very settled policy. A general law for the incorporation of municipalities was evidently out of the question; instead, the legislature had to provide, as best it could, for the individual needs of new municipalities as they arose. Considering how few were the cities in the territory and how scanty the needs of each one, it would be drawing a hasty conclusion to say that special legislation was not the best method of dealing with mu-

nicipal problems, as with many others. Even if it were not, it had not at this time given evidence of any abuse as such. At the last session of the territorial legislature, something over 100 special acts of various kinds were passed. These included thirty-one grants of divorce, fourteen acts establishing territorial roads, eleven acts for the relief of counties, persons, etc., and six relating to cities and towns--hardly more than a healthy, active legislature could take care of in a month. The session in question continued two months, which gave ample time for the few additional general laws which were passed.

As to the manner in which municipal powers were granted--the wording employed in conveying a general grant of governmental power, as was done in every act of incorporation--variations are to be found on every hand, interesting, perhaps, to a student of legislative methods and legal niceties and shades of expression in the framing of laws; but considered in connection with the settled rule of construction adopted by the courts in interpreting such grants of

power, they become of hardly more than antiquarian interest. The first charter considered--that of Astoria--not only contained among its enumerated powers that of making by-laws and ordinances "not repugnant to the laws of this territory, or to the laws of the United States;" there was a special section, apart from this, as follows: "It shall be the duty of the trustees of the town of Astoria to devise and adopt all such measures, regulations and ordinances connected with the police, security, tranquility, cleanliness, improvement and ornament of the town, and the public health, prosperity and welfare, and the regulations of the finances and public expenditures of the town, as shall be expedient from time to time, and in accordance with this act, the laws of this territory, and of the United States."* This grant was broader than those of some others, but not so sweeping as, for instance, that of Oregon City charter of 1859. In this act the section on enumerated powers begins by empowering the city coun-

* Astoria charter, Art. II, Sec. 2.

cil to "make by-laws and ordinances not repugnant to the constitution and laws of the United States, or laws of this territory, necessary to carry into effect the provisions of this charter." Then, at the end of a long list of expressed powers, comes a clause authorizing the council "generally to do all things which a city corporation can or ought, to secure the health, peace and interest of the citizens of said corporation, and to preserve good order within the same."*

As will be seen later on, such variations in expression--for such is all they amount to--make absolutely no difference in the status of municipal corporations before the courts.

* Oregon City charter, 1859, Art. IV, Sec. 2.

CHAPTER III.

A HALF CENTURY OF LEGISLATIVE CONTROL

1. CONSTITUTIONAL AND LEGAL BASIS OF LEGISLATIVE CONTROL.

Constitutional provisions.--An enumeration of the constitutional provisions relating to municipal legislation and government, and a brief review of the judicial interpretation of them and of the powers of the legislature under them, may perhaps be profitably prefaced to a history of legislative action in regard to the cities and towns of Oregon.

As is well known from the nature of the American federal union, state legislatures are supreme governing bodies, limited only by the national constitution, treaties and laws and the constitutions of the respective states--and as these are from time to time construed by the courts. In everything that concerns a state or the smallest minor subdivisions of a state, and is not delegated to the central government, the legislature is the supreme lawmaking a-

gency--in so far as it is not restricted by the state organic law.

Furthermore, enactments of a state legislature are usually regarded as final; that is, they ordinarily do not depend for their validity upon any external authority or exigency. To this some state constitutions have provided exceptions. Thus, in the first article of the Oregon constitution--the bill of rights --it is provided that no law shall be passed "the taking effect of which shall be made to depend upon any authority, except as provided in this constitution." The Oregon people have established an exception in their fundamental law in the form of a proviso that "laws locating the capital of the state, locating county seats, and submitting town and corporate acts, and other local and special laws, may take effect or not, upon a vote of the electors interested."* There is also a provision that "the operation of the laws shall never be suspended except by the authority of the legislative assembly."**

* Art. I, Sec. 21.
** Art. I, Sec. 22.

During territorial days, as has been noted, the legislative body sometimes submitted to the voters of cities and towns the question whether or not they wished to be incorporated under a charter framed by the legislature. But such a referendum was entirely discretionary with the legislature. This situation continued after the adoption of the constitution, for later forty-four years, the Oregon supreme court declared that this clause did not make it obligatory on the legislature to submit such acts to the interested voters of a locality.* During the fifty-six years since the adoption of the Oregon constitution the legislature has frequently taken occasion to submit measures of local interest to the voters affected, as, for instance, in the adoption of new charters.

Until prohibited in 1906, almost the sole method by which municipalities in Oregon were incorporated was by special charter acts. In 1893 the legislature enacted a general law for the incorporation of cities

* Baker County v. Benson, 40 Or. 220 (1901). This case involved the submission of an act pertaining to counties, not cities or towns; but the principle and applicability is the same.

and towns. According to this act, any portion of a county containing at least 150 inhabitants, and not already incorporated as a municipal corporation, was permitted to be incorporated. The act prescribed the procedure to be followed in incorporating; and it constituted the charter of any municipality that might be created in accordance with it.*

Nevertheless, after the passage of this act as well as prior to it, the almost sole method by which municipal corporations were created was by special act of the legislature. This policy was legalized by the constitution of 1857, which said: "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy vested corporate rights."**

It is to be noted that the constitution did not originally state that only municipal corporations

* Gen. laws 1893, pp. 119-133.
** Art. XI, Sec. 2.

might be formed by special laws; it said corporations "for municipal purposes," and while, at first sight, there may seem to be no substantial difference between the terms, the Oregon supreme court in 1891, in a carefully worded and painstaking interpretation, evolved a distinction in accordance with which counties, school districts, road districts, and similar governmental and administrative units were classed among corporations "for municipal purposes."* In arriving at its position the court throws much light upon the status of municipalities in Oregon.

"A corporation created for municipal purposes," says the court,"is a corporation created for public or governmental purposes, with political powers to be exercised for the public good and the administration of civil government, whose members are citizens, not stockholders; an instrument of government with certain delegated powers subject to the control of the legislature, and its members officers or agents of the government for the administration or discharge

* Cook v. Port of Portland, 20 Or. 580 (1891).

of public duties. A city or purely municipal corporation is perhaps the highest type of corporation created for municipal purposes, because it is a miniature government, having legislative, executive, and judicial powers, but there is another class of corporation, such as counties, school districts, road districts, which, tho varying in application and peculiar features, are but so many agencies or instrumentalities of the state to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes. It would be a narrow and unwarranted construction of language to say that municipal purposes means only city, town, or village purposes. The constitution of this state evidently contemplates the creation of counties under the direct supervision of, and by special act of, the legislature; yet no direct power is given to create them, and the section under consideration contains a direct prohibition against doing so, unless the word municipal covers this class of corporations. We thus perceive that the word municipal not only applies to cit-

ies, towns and villages, but has a broader and more general signification relating to the state or nation. .....It was in the broader and more general sense of the term that the words municipal purposes were used in the constitution of this state."*

The legal status of municipalities will be studied more in detail in the last chapter of this investigation. All that is important to note, at this point, is that incorporation of municipalities by special laws was expressly provided for in the constitution of Oregon. But the power of the legislature to pass special acts of all kinds pertaining to cities and towns was somewhat curtailed by a number of constitutional restrictions. They are summed up in the following subdivisions of Art. IV, Sec. 23:

"The legislative assembly shall not pass special

* The court also quotes Art. XI, Sec. 9, of the constitution, which states that no "county, city, town or other municipal corporation," could by a vote of its citizens or otherwise become a stockholder in any joint stock company, corporation, etc. But this clearly shows that, unless the framers of the constitution were here guilty of an oversight, the term "municipal corporation" is also to be given, in Oregon, just as broad a definition as a "corporation for municipal purposes." Does it not preclude the court from making the distinction it does between the two?

or local laws in any of the following enumerated cases:

"1. Regulating the jurisdiction and duties of justices of the peace, and of constables.....

"7. For laying, opening, and working on highways, and for the election or appointment of supervisors.

"8. Vacating roads, town plats, streets, alleys, and public squares.....

"10. For the assessment and collection of taxes for state, county, township, or road purposes.....

"13. Providing for opening and conducting the elections of state, county, and township officers, and designating the places of voting."

Notwithstanding this apparently clear prohibition, the Oregon legislature has habitually passed special acts governing cities and towns and relating to these subjects, and such matters have been included in the municipal charters it has granted. At no time has the supreme court of the state intervened to prevent the exercise of this power. The explanation is that the restrictions were not intended

to apply to cities and towns.

Art. IX, Sec. 1, of the constitution says that "the legislative shall provide by law for uniform and equal rate of assessment and taxation:" and in Sec. 32 of the bill of rights this is repeated, in part, in the declaration that "all taxation shall be equal and uniform." The great variations in the rates at which the legislature has by charter provision and otherwise permitted municipalities to tax local property shows that these clauses of the constitution do not refer to cities; and in numerous cases the state supreme court has held that the requirement of uniformity does not apply to local assessments.*

Legislative control of municipal elections and office-holding is reserved in the following clauses of the constitution:

"There shall be elected in each county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sher-

* King v. City of Portland, 2 Or. 146 (1865); Ladd v. Gambell, 35 Or. 393 (1899); King v. Portland, 38 Or. 402 (1900).

iff, coroner, and surveyor, who shall severally hold their offices for the term of two years. Such other county, township, precinct, and city officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law.....

"No person shall be elected or appointed to a county office who shall not be an elector of the county; and all county, township, precinct, and city officers shall keep their respective offices at such places therein, and perfomr such duties as may be prescribed by law.....

"Vacancies in county, township, precinct, and city offices shall be filled in such manner as may be prescribed by law."*

State control over the judiciary is provided for in Art. VII, Sec. 1, which, among other things,

* Art. VI, Secs. 6, 7, 8, 9. In Livesley v. Litchfield, 47 Or. 252 (1905), the court held that the section declaring officers of a city shall be elected or appointed in such manner as may be prescribed by law, does not empower the legislature to prescribe the qualifications of voters at municipal elections, but contemplates that the elections shall be by qualified voters (as stated in Sec. 6), the word "manner" meaning the mode of conducting the elections.

states that "municipal courts may be created to administer the regulations of incorporated towns and cities."

Art. XI, Sec. 5, of the constitution declares that "acts of the legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit." As a rule, the charters framed by the legislature did carry provisions regarding all these matters, but, perhaps thru inadvertence, sometimes the lawmakers failed to say anything about borrowing money. The policy of the supreme court in construing such restrictions, when made, has not been entirely uniform.

The remaining constitutional provisions pertaining to municipalities are as follows:

"The state shall never assume the debts of any county, town, or other corporation whatever, unless such debts shall have been created to repel invásion, suppress insurrection, or defend the state in war.

"No county, city, town, or other municipal corporation, by vote of its citizens or otherwise, shall

become a stockholder in any joint stock company, corporation, or association whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation, or association."*

Judicial interpretation of legislative control.--One of the most significant facts in connection with the legislative control of municipalities in Oregon during the half century following the adoption of the constitution is that its validity was so seldom questioned in the courts of the state. The great mass of litigation involving municipal corporations concerned, instead, the powers of municipalities under the charters granted to them by the legislature. Another fact of equal significance is the almost entire uniformity and regularity with which the supreme court has upheld the meddlesome action of the state lawmakers in their almost unlimited control over municipal affairs. The restrictions in the constitution upon special legislation on enumerated subjects have on a few occasions been put forth in order to check the legisla-

* Art. XI, Secs. 8 and 9. For definition of "other municipal corporation," see footnote, p. 49.

ture. On nearly every occasion, however, the court has sustained the legislature, basing its decisions, in the main, on the old rule of favorable construction of acts of the lawmaking branch of the government.*

"A municipal corporation is but the creature of the legislature," said the court in a case brought before it in 1895, involving the largest city of the state,** "and in its governmental or public capacity is one of the instruments or agents of the state for governmental purposes, possessing certain prescribed political and municipal powers, to be exercised by it on behalf of the general public rather than for itself; and over it as such agent the authority of the legislature is supreme and without limitation, other than such as may be found in the constitution."***

* The position of the Oregon supreme court is that the "extraordinary" power of courts to declare an act of the legislature unconstitutional is one that should not be exercised unless there is a plain conflict between the statute and the constitution: King v. City of Portland, 2 Or. 152 (1865); Cline v. Greenwood, 10 Or. 230 (1882); Cook v. Port of Portland, 20 Or. 580 (1891).

** Simon v. Northrup, 27 Or. 487 (1895).

*** Cited and affirmed in Brand v. Multnomah

"It must be conceded that the power of the legislature over public corporations within the state, so far as concerns their existence and boundaries, is practically without limit, unless restrained by some provision of the constitution," said the Oregon court on another occasion."*

One of the earliest cases before the court, decided in 1866,** furnishes a good example of the almost unlimited powers which the state supreme tribunal, from the first, allowed the legislature to exercise over cities and towns, and how constitutional restrictions were liberally construed in favor of the legislature. By a special act, that is, by the charter of Portland of 1864,*** the recorder of that city was made ex-officio justice of the peace within the city limits; this despite the provision in the con-

County, 38 Or. 79 (1900), in which the court, after declaring that all power (in this case, the control of streets) must be delegated to a municipality before it can be exercised, adds: "Nor does the mere fact that the state has delegated certain powers to the municipality inhibit it from again resuming or exercising such powers."

* Winters v. George, 21 Or. 251 (1891).

** Ryan v. Harris, 2 Or. 175 (1866).

*** Sp. laws 1864, p. 14, Sec. 5.

stitution prohibiting the legislature from passing special or local laws regulating the jurisdiction and duties of justices of the peace, and a general law of the state prescribing that "there shall be elected at a general election, by the qualified electors of the several election precincts of this state, one justice of the peace." This general law, it was claimed, should be binding in preference to any charter provisions, particularly because the constitution, in another clause, declared that "such township and precinct officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law."*

In deciding that the Oregon legislature did have power, under the constitution, by special act, as in a city charter, to make a city recorder ex-officio justice of the peace, the court did not consider the question whether or not a general law is binding upon the legislature in enacting special laws, such as charters. It merely held that the general law

* Art. VI, Sec. 7.

could not, in the present case, be construed to bar the action of the legislature, because, as the court reasoned, the general law only proposed that there should be at least one justice of the peace in each precinct, and that that one should be elected. "But there is no prohibition," said the court, "to the appointment or election of as many more as the legislature at a subsequent time might provide." In reference to the alleged constitutional difficulty, the court held that the prohibition of special laws regulating the jurisdiction of justices of the peace referred merely to the giving of magistrates in one locality greater jurisdiction over causes of action, or greater powers and authority, than in another—not to territorial jurisdiction.

The court really showed the actual reason for arriving at its decision when it stated that, when statutes conflict, they "must be construed so that all may be in force if possible." As far as such a ruling permitted the legislature full play in continually tinkering with and altering the general laws of the state by means of special acts concerning par-

ticular municipalities, the court dismissed this objection with the following statement: "Concerning subjects not limited or provided for in the constitution, the legislature has unlimited and absolute authority, guarded only by the right of the people to change their legislators."*

The right of the legislature to fix the compensation of municipal officers and regulate them to the extent of requiring a police judge to pay over the fees he collects as justice of the peace to the city treasury was called in question in two cases, but was in each instance decided in the affirmative.**

In 1885 the legislature imposed on the city of Portland a "water committee," composed of prominent citizens of Portland named in the act,*** with authority to construct a system of water supply for the

* In 1871 the court, in State v. Wiley, 4 Or. 184, upheld a charter amendment enacted by the legislature conferring the authority and jurisdiction of justice of the peace upon the police judge of the city of Portland, but ruled out that portion of one section of the amendment which attempted to limit his jurisdiction to criminal cases only.

** Adams v. Multnomah County, 6 Or. 117 (1876); City of Portland v. Besser, 10 Or. 242 (1882).

*** Sp. laws 1885, p. .

city, contract a debt of $700,000 for the purpose--which the city had to shoulder--and select from their own number a permanent "water commission" to have charge of the system when it was completed. The supreme court upheld this act, reversing a ruling of a lower court.* In arriving at its decision the court laid down a doctrice, however, which in reality might have formed the basis for restricting the activities of the state lawmakers much more than was realized by subsequent events.

"The power of the legislature over municipal corporations, in the absence of constitutional restrictions, is unlimited," said Justice Thayer in pronouncing the decision of the court, "except so far as they are endowed with rights incident to a private corporation, which, according to Mr. Dillon,** only extends to the private advantage of the particular corporation as a distinct legal personality, and to property acquired thereunder, and to contracts made in reference thereto." Taking up the distinction

* David v. Portland Water Committee, 14 Or. 98 (1886).

** "Municipal Corporations," Sec. 66.

thus laid down between municipal (private) and state (public) affairs, and dismissing from discussion a decision of the supreme court of Michigan*--which classed boards of police commissioners under the head of state matters, but "water commissioners" and "sewer committees for a particular city" under the head of municipal matters--Judge Thayer cited a number of cases from other state courts and from the United States supreme court** making the distinction, and concluded that the matter of supplying the city of Portland with pure water was a subject of state-wide concern. "Public parks, gas, water and sewage in towns and cities may ordinarily be classed as private affairs," he says, "but they often become matters of public importance; and when the legislature determines that there is a public necessity for their use in a certain locality, I do not think they can be designated as mere private affairs. That is a relative question. Take the case at bar. The city of Portland needs a

* People v. Hurlbut, 24 Mich. 44 ( ).
** New Orleans Gas Co. v. Louisiana Light Co., 115 U.S., 650 ( ).

supply of water. It has to be brought from some place outside of the city. The matter is presented to the legislature, and it determines that it is a matter of public necessity; that steps should be taken to insure to the city wholesome water at cheap rates; and can it be claimed that it was a mere private affair, and the legislature had not authority to interfere with it? It seems to me that this act bears upon its face ample proof that its object and design were to promote the public good, and that it is the exercise of a power that is governmental in its nature; nor do I discover in it any attempt or design to deprive the city of Portland of its autonomy. The city had, as I understand it, no right to establish waterworks. The act undertakes to do that and give the city the benefit of it. It places the enterprise under the management of wealthy and prominent citizens of the town, and to remove all suspicion of a job in the affair, requires them to serve without compensation. The sole object appears to be for the benefit of the city and county at large.....The court, I think, has a right to take judicial notice that the city of Port-

land is the metropolis of the state; that citizens from every part of it go there to dispose of the products of the country and to purchase supplies in return; that the country depends upon it as a mart, and that it depends upon the country for its trade, and that the advantages are mutual.....The people from every part of the state are drawn there thru business or for pleasure, and it is absurd to contend that they would not be incommoded, nor the state at large injured, if the town were stinted in its supply or furnished with a bad quality of a primary and essential element of life.....I conclude that it bears a semblance of arbitrariness, and that I would have been better satisfied with it if the city had been allowed to have issued the bonds; but they appear to acquiesce in it."

Thruout all this run two not entirely separated distinctions: namely, between private (corporate) and public (governmental) matters, on the one hand, and betwen municipal and state matters, on the other. The apparent confusion of the two renders it difficult to

draw any certain conclusions; but the clear recognition of the state-wide importance of the water supply in question, and the manifest emphasis given to this fact in forming the basis for its decision, shows quite clearly that the court recognized that here is a distinction of real legal importance. Were the power of the legislature in this case based only on this distinction, the question would present itself at once: Would the court deny a power to the legislature on the ground that it was exercised on a subject of only local and municipal concern? Answer this question in the affirmative and what would be the result? A field of legislation and administration free from interference by the state legislative body--in other words, nothing less than home rule.

Of course, such a conclusion, logical as it may seem, is wide of the truth, as the further history of legislation and adjudication in Oregon shows--at least until 1906. While there have been a number of cases upholding the right of the legislature to legislate on municipal affairs, because the affairs in question related to the cities in their public, govern-

mental capacity, the court has not had occasion to annul any acts of the legislature because they related to affairs not public and governmental.

In the same year that the Oregon court handed down its decision on the power of the legislature to impose upon the city of Portland a waterworks system, a special act of 1885* granting to a railroad company certain riparian ~~rights~~ property which had been dedicated to the city for use as a public levee also was questioned. In ruling that the legislature had ample authority to pass such an act, the court said: "The plenary power of the legislature over public corporations, except as to vested rights of property** and of creditors, is indubitably established."***

In 1895, when the legislature passed a special act**** providing for the appointment of a "bridge committee," with power to acquire, for the city of Portland, certain bridges and ferries, and for this

* Sp. laws 1885, p. 100.
** Dartmouth College Case, 4 Wheat. 519, cited on this point.
*** Portland and Willamette Valley Railroad Co. v. City of Portland, 14 Or, 188 (1886).
**** Laws 1895, p. 421.

purpose issue and sell bonds for the city, which were to constitute an obligation of the city, notwithstanding that the bridges and ferries in question were to be turned over to the county court, which was to take charge of and operate them, and notwithstanding that the bridges and ferries were entirely within the limits of the city, it seemed that now the legislature was carrying its powers to the limit--and farther. But the supreme court blandly replied that the legislature has power to compel a municipal corporation to perform a duty or execute some act in which the general public beyond the borders of the municipality has an interest. To the protestations of the city that previous legislation of this character on the city's financial affairs had been followed by only evil results, the court said: "The question is one of power alone, and, however unjust, inexpedient or even oppressive such legislation may be, the courts are powerless to declare it invalid if it is within the legitimate exercise of legislative powers."*

* Simon v. Northrup, 27 Or. 487 (1895).

No better commentary on the evils of legislative misrule of municipalities and the hopelessness of attempting to improve matters without a radical change in the state fundamental law could well be presented.

2. GROWTH OF SPECIAL LEGISLATION.

At the first regular session of the Oregon legislature after the admission of the state into the Union, the entire legislation on municipal affairs was comprised in four special laws. The first was an act to amend the city charter of Portland so as to take away from the mayor and councilmen their right to receive compensation for their services, which had been specially allowed them by an amendment to the charter in 1858.*

The second was an act "to regulate the fire department of the city of Portland."** It was passed because, as declared in the act, the corporate powers of the city were at this time inadequate to institute

* Gen laws 1st sess., 1860, p. 104.
** Ibid., p. 88.

an effective fire service in the city. It was devoted chiefly to organizing the system of governing the fire department, not to establishing fire companies, stations, and equipment. These already existed, and were simply continued by this act, provision being also made for the admission of new companies and stations in the future. The manner in which such additions were to be made was prescribed; but the administrative duty of making the additions and extensions was left to the authorities of the fire department.* Tho the act went into the details of creating each and every office which was to go to make up the department and of defining the size of each company, etc., some supervisory powers were given to the locally elected city council. Thus, the council was to order all work and supplies for the department and locate all cisterns and stations which it might desire to establish. All work done for the department should be under supervision of the chief engineer (a member of

* The officers of the department, including a "board of delegates" from each company, were elected by the personnel of the department, directly or indirectly. The personnel, in turn, was selected by the board.

the department) and a committee of the council; and the engineer was required to report annually to the council.

This act is typical of the entire period of special legislation. Whether this law was wanted by the people of Portland or not, is immaterial. Very probably it was; for it provided for a very obvious defect in the charter. Be this as it may, the law-makers of the state--all more or less interested in the city which was at this time outstripping all the others in the state, but some undoubtedly little informed of its actual needs--imposed upon the citizens of Portland a fire department organized by itself and in the choice of members of which the voters of the city had no part. The real power, that of deciding whether or not the city should have an adequate fire department, and of determining the essential character of the service, was in the hands of the state legislative body. As if in recognition of the fact that the prevention and extinguishment of fires was really a local, municipal affair, the legis-

lature permitted the local authorities a limited supervision of the administration of this function.*

The remaining special legislation concerning cities and towns, at the first session of the state legislature, consisted of three charters: one incorporating the town of Jacksonville,** another the city of Albany,*** and the third a new act of incorporation for the city of Salem.**** All three charters were submitted to a vote of the people of the respective municipalities.

At the second legislative session, in 1862, the special legislation on cities and towns consisted of but one act: to enlarge the boundaries of the town of Corvallis.*****

In 1866 two new charters were granted: to the city of Harrisburg****** and the city of Scio;*******

* The arrangement was changed in 1882 (Sp. laws 12th sess., p. 73) when it was provided that the fire department should be under the control of a board of commissioners appointed by the mayor, with the consent of the city council.

** Gen. laws 1st sess., p. 94.

*** Ibid., p. 83.

**** Ibid., p. 107.

***** By an act of 1870 they were again enlarged.

****** Gen. laws 4th sess., p. 51.

******* Ibid., p. 64.

and the charter of Oregon City was amended in some important particulars.* The changes concerned the taxing and local improvement powers and, in addition, the power to grant liquor licenses, which was restricted so as to prohibit the issuing of licenses to women. In the charter of 1859 liberal powers had been given to the city for the protection of the public health within the city, including, among other things, the right to make regulations looking toward preventing the introduction of contagious diseases. Apparently this was not comprehensive enough, for in the act of 1866 "additional" power was expressly given to the city council to remove persons affected with contagious diseases from the city to any suitable hospital provided by the city for the purpose. Similarly, by the earlier charter the city was authorized thru its street commissioner to collect road taxes on the roads and streets within the municipal limits and apply them to the improvement of the same. Now the council was authorized to direct the expend-

* Gen. laws 4th sess., p. 48.

iture of a portion of the road tax upon roads outside the city.

A more significant change in the charter, however, was in a limitation which it placed on the liability of the city for the torts of its officers, for damage to property resulting from work on streets, and for the performance of illegal contracts. As to contracts, it was now declared that the city should in no way be bound by any contracts not authorized by ordinance or made in writing and properly signed. As to torts, the city was now declared exempt from liability for any loss or injury to person or property growing out of any casualty or accident on account of the condition of any street or public ground. Very prudently, however, it was expressly provided that this should not exonerate any officer of the city, or any person, from liability in any case when the loss or injury was caused by his neglect or misconduct.

Here was a distinct advance upon the civil code which had been adopted in 1862 and which made the mu-

nicipal corporation liable in all the cases mentioned.* Oregon City was now given a measure of protection not enjoyed at this time by any other municipalities. It might be pertinent to ask at this point: If these provisions in the Oregon City charter were good ones, why were they not made part of the general laws of the state applying to all municipalities, or a number of them, so as to make more certain and definite the liability of city officers for their tortious acts and omissions? A study of the suits brought to the supreme court of Oregon during a half century shows that, had there been such an amendment as this, or a similar one, to the general civil code, making possible a full comprehension and agreement on the part of legal opinion in the municipalities as to what was the liability --particularly as to torts--of the corporation, on the one hand, and of its officers and agents, on the other, there might have been avoided much expensive and vexatious litigation.

* Laws 2nd sess., Code of Civil Procedure, Chap. IV, Title IV, Secs. 346-350.

The legislative session of 1868 is marked by the enactment of a larger number than usual of special laws incorporating new municipalities or amending the charters of existing ones. This period, in general, marks the beginning of a henceforth increasing number of such special acts, an increase which continued with added momentum with each succeeding session of the legislature, almost without exception, until the "home rule" constitutional amendments in 1906 put a stop to it.

The special laws enacted at the session of 1868 consisted of (1) an act to enlarge the corporate powers of the city of Corvallis; (2) an act to amend the charter of Portland; (3) another to amend the Salem charter; (4) a new charter for Dalles City; (5) an act to incorporate the city of Roseburg; and (6) an act extending the boundaries of the city of Astoria.

In 1870 seven more special acts affecting cities and towns were passed. They included acts incorporating the cities of East Portland and Jefferson and the town of Clatsop, and other acts amending the charters of Dalles City, Portland, Albany, and Cor-

vallis.

In 1872 eight such special laws were enacted. They consisted of acts incorporating the city of Junction and the town of Forest Grove, a new charter for the city of Roseburg, and acts amending the charters of Portland, East Portland, Salem, Jacksonville, and Astoria.

At the session of 1874 the number of special laws regarding municipal corporations increased to sixteen. They consisted of amendments to eight charters; seven new charters; and a special act authorizing an individual to establish a gas manufactory in Portland.

In 1876 four towns and cities were incorporated; new charters were granted to two cities; one charter was amended; and special acts were passed to authorize an individual to establish waterworks in Albany and to empower the city of Salem to incur an indebtedness of $50,000 for the purpose of building a bridge across the Willamette River. The total number of special laws thus showed a decrease from the preceding

session.

The year 1878, however, showed an increase to fourteen special acts, including six incorporation acts; amendments to five charters; two special acts to enable Dalles City to dispose of certain lands which the city held; and a law repealing that of the year 1876 authorizing the establishment of waterworks in the city of Albany.

In 1880 the number of special acts passed was twenty-two; in 1882 it fell to fourteen; in 1885 the number more than doubled, totaling thirty-four; and at a special session in the same year fourteen more were added. In 1887 the number rose to thirty-two; in 1889 to thirty-six; and in 1891 to eighty. In the last mentioned year the special laws covered 973 pages, while the general statutes of the session required but 188 pages.

In 1893 was enacted what might have marked a turning point in the history of municipal legislation in Oregon: namely, a general law for the incorporation of cities and towns. One would naturally

expect that a law such as this, providing for the automatic incorporation of new municipalities and furnishing a complete charter for such cities and towns as desired to be incorporated in this manner, would obviate the necessity of the legislature undertaking to frame and grant new charters, or at least that the number of such special acts would be considerably reduced. At the same session that this general incorporation law was adopted, however, there were passed seventy special acts relating to cities and towns. At the following session, in 1895, as was to be expected, their number fell off nearly 50%; namely, to forty-one.

Beginning with 1899 the number rose again, to fifty-one, and in 1901 to sixty-nine. In 1903 there was a slight decrease, to sixty-four, but in 1905, at the last session of the legislature before the constitutional prohibition of special legislation incorporating municipalities, the number rose to eighty, thus just reaching the record set by the session of 1893. So voluminous were the session laws

becoming at this time--for the charters were also increasing steadily in length and complexity--that those enacted in 1903 and 1907 were bound in two separate volumes, one for the general laws and the other for the special acts. The latter required a book of more than 1100 pages, as compared with 430 pages in the volume recording the general statutes.

So much for the volume of special laws. That this sort of legislation was becoming, not only an unjust burden upon the state lawmakers, but a real nuisance, if not a positive evil, is quite obvious, even tho figures can tell but little. A better picture of the situation can be given by describing briefly how certain cities fared as result of the numerous special acts passed concerning them.

The city of Astoria, which was the object of many early acts, can be taken as a typical example. At the session of 1891 a new charter was granted to this city, and another special act authorized the municipality to erect a sea-wall and to grade streets and construct sewers in connection with the project,

and to issue bonds for the purpose. In 1893 the charter was amended and the act authorizing the construction of the sea-wall repealed. At the following session three acts affecting Astoria were passed: to amend the charter in the matter of local improvements; to authorize the construction or acquisition of a bridge across Young's Bay, and the issuance of bonds; and to legalize some incurred indebtedness of the city. In 1898, at an extra session, acts were passed to grant exemption certificates to members of the Astoria volunteer fire department, and further to amend the charter powers. In 1899 another new charter was framed for the city and in 1901 this charter was amended.

The experience of Dalles City was much the same. From 1891 to 1905, inclusive, special acts affecting this city were passed at every session, except in 1898 and in 1901; and new charters were granted in 1895 and in 1899.

The city of Eugene received a new charter in 1891; in 1893, 1899, and 1903 this charter was amended

in more or less important particulars; and in 1905 the municipality was once more reincorporated.

Oregon City was given a new charter at three successive sessions--in 1891, 1893, and 1895--and the last one was amended in 1899 and 1903.

The charter of the city of Salem was amended by three distinct acts in 1891, tho all bear the same date, so that in reality there was only one general revision act; new charters were granted in 1893 and 1899, and this last one was amended once in 1901 and twice in 1903.

These are but typical cases. To get an idea of the extent to which the practice of special legislation can develop in exceptional cases, one needs only to run over the special acts passed during these years relating to the city of Portland. Portland, the only real metropolitan community in the state, was almost from the first an object of particular concern to the legislature; and even the supreme court of the commonwealth said in 1886* that what affected Port-

* David v. Portland Water Committee, 14 Or. 98; quoted on p. 60 and seq.

land affected the state as a whole.

At the session of 1891 seven special laws were passed relating to Portland. First was the act creating the "water committee" to acquire a water supply for the city. The second was an act to authorize the consiguous cities of Portland, East Portland and Albina to construct or acquire one or more bridges across the Willamette River. For this purpose a temporary "bridge committee" and a permanet "bridge commission" were provided for. Then followed an act consolidating these cities to form one municipal corporation for certain purposes, under the name of the "Port of Portland." It was created for the special purpose of improving the Willamette River at the point where these cities touched the stream, and also for the purpose of constructing and maintaining a ship canal in the Willamette and Columbia rivers the entire distance of 120 miles that lay betwen the cities and the ocean.

After this was done a new charter was conferred upon the city of Portland, and this was further amend-

ed so as to alter the boundaries and change some of the charter powers; and finally the act of 1882 establishing a paid fire department for the city was amended. All these changes were made in one session of the legislature.

The history of the subsequent years is much the same. In 1893 the charter was again amended, as well as the act creating the Port of Portland; the "bridge committee" and "bridge commission" created in 1891 for the consolidated corporation were authorized to acquire and operate a ferry; and finally still another charter was given to the city.

In 1895 a special act was passed authorizing Portland to acquire a bridge and ferry, including franchises, and to issue bonds; and three amendments were tacked on the charter: (1) to change the city boundaries, (2) to correct an inadvertent omission in the charter of 1893, and (3) to amend those portions dealing with the waterworks.

At the special session of the legislature in 1898 one more new charter was framed for the city.

In 1899 the act establishing the Port of Port-

land was once more changed.

In 1901 an act was put thru the legislature authorizing the city to levy a special tax and to transfer certain moneys to its special funds. This was on January 25. Just one week later this act was repealed. Other acts of this year included one to authorize the city to appropriate money for the Oriental Fair to be held in Portland in 1905; another to permit the city council to turn over a certain city block to several patriotic societies; and, last of all, an act to provide for a board of Portland citizens to frame a new charter for the city.

The student of municipal "home rule" at once seizes upon this as a tardy, withal, but nevertheless gracious, recognition by the state legislature of the inherent justice of allowing a local community to establish its own instrument of government and provide for the needs of which it alone is informed and in which it primarily is interested. So it probably was. The movement for "home rule," which reached a successful culmination five years later, was undoubtedly now

under way. The board which was to frame the new charter consisted of Portland citizens, designated by name in the act. After the board should have completed its draft of a charter, it was to submit it to a vote of the electors of the city and, if approved by them, the bill for enacting it into law was to be presented to the legislature for adoption or rejection as a whole.*

Finally, at the session of 1901, another amendment was added to the act establishing the Port of Portland.

At the following session, in 1903, the charter framed by the board of Portland citizens was adopted by the legislature. But this did not prevent the legislators from adding two amendments to the charter at the same session and to feel called upon to pass four additional acts relating to the city: (1) to authorize the levy of a special tax for the purpose of acquiring a fire-boat; (2) to empower the city to build a bridge across the Willamette River, with provision for issuing bonds and submitting the whole

* Sp. laws 1901, p. 296.

proposition to the voters of the city; and (3, 4) to establish two more ferries across the Willamette. Two special acts also were passed revising and amending again the act incorporating the Port of Portland.

In 1905 the city charter was twice amended.

But it would be superfluous to expatiate more on the subject of special legislation. To any student of municipal affairs the evils of the practice, in those states in which it has not been effectually prohibited, are patent. The arguments which he has learned to regard as convicting such a practice before the bar of an intelligent public opinion are everywhere pretty much the same. Their validity as regards the situation in Oregon before 1906 differs in no essential respect from their validity as applied to other states. In short, perhaps the conditions which have been described may be designated as <u>normal</u> to all states permitting the practice.

In fact, such an evil is an <u>inevitable</u> result of modern municipal conditions--continual changes in needs, the phenomenal growth within the last half

century of cities, and the unprecedented number of functions which a modern municipality undertakes, and is called upon, to perform. As has been previously pointed out, there was, at the time when the state of Oregon first began to be dotted with an ever increasing number of settlements, no other agency than the legislative body of the commonwealth to give a legal status to these early cities and towns and put them in their proper place in the state governmental system.

However, as the local communities grew in number and size, and the complexities of urban life increased, it became impossible for the legislature to give adequate attention to the needs of each community. Then the practice of providing for their needs by innumerable special acts did become a positive evil. Even the enactment in 1893 of a general incorporation act did not prevent the evil from continuing to grow, so long as the legislature reserved to itself the right of deciding on such needs of individual cities and towns as could not be provided for

in a general law.

That a check ought, sooner or later, be put on the activities of the legislature could hardly have been questioned. The difficult and fundamental question: should the state legislature entirely abdicate its reserved power of determining matters of local municipal concern, cannot be answered, if at all, before the experiments with "home rule" have yielded some definite results. It will form the subject of the concluding chapter of this study.

3. DEVELOPMENT OF MUNICIPAL POWERS.

To an understanding of what "home rule" actually can mean to the municipalities of Oregon--or of any other state--some information is necessary in regard to what were the activities and functions of cities and towns, and what legal powers municipal corporations possessed, while under the domination of the state legislature. As a study of judicial opinions will show, the more or less accepted, and more or less definite, sphere of municipal action during the regime of legislative control will have

a great influence in determining how large a sphere will be conceded to municipalities under a system by which they are permitted to frame and adopt their own charters.

For the purpose of this study, the most important municipal powers, those throwing the most light on the question of local self-government versus state control, are (1) the financial powers, (2) the power to make local improvements, (3) the power to establish or regulate public utilities, and (4) the general police power. The last-mentioned includes particularly the power to license and regulate certain forms of business, such as the retailing of intoxicating liquors. They will be taken up in the order named.

Financial powers.--The very earliest charters in Oregon, as a rule, provided that the governing bodies of the cities and towns might levy and collect, for municipal purposes, taxes on such property as was taxable for state and county purposes. The maximum rate up to which a city or town could tax was

generally stated in the charter. Sometimes permission was given to levy a special additional tax; but it was usually required that such a measure must be referred for approval or rejection to the voters of the municipality. Some acts of incorporation specifically empowered the authorities to borrow money and pay the debts of the municipality; others made no mention of borrowing or debts. In some the indebtedness was not allowed to exceed a certain limit; in others there was no limitation mentioned. Thus there was clearly no settled policy as to municipal financial powers embodied in the early legislative grants.

During later years it may be said, in general, that the tendency was to permit individual cities to raise their tax rates from time to time, as their needs increased; that the kinds of taxes they were allowed to levy increased in number;* that more adequate powers were given city authorities to enforce the collection of taxes from delinquents; that the

* The poll tax appeared in the Dallas charter off 1874; in North Brownsville in the same year, and in the Halsey charter in 1876, etc.

borrowing powers became more definitely fixed, and were in a great many instances increased, from time to time, in response to the growth of cities; and that the powers of county authorities to collect road taxes within municipalities were gradually eliminated. The general incorporation act of 1893 for the organization of new municipalities fixed a rate of 10 mills; and it provided that the authorities of no city or town coming under the act could in any manner create any debt or liability singly or in the aggregate exceeding the sum of $2,500, without obtaining permission from the legislature. Within these limits, and with the further restriction that their tax regulations were to conform as nearly as possible to the general laws of the state, the city councils were empowered to provide by ordinance for a system of assessment, levy and collection of taxes for municipal purposes. The act provided for enforcement of the collection of taxes, and also laid down a limitation on the council powers in this respect, so that redemption by former owners of property sold for taxes might

not be obstructed.

The right to tax being essentially a sovereign attribute, it can necessarily be exercised by municipalities only in the manner and to the extent it is conferred upon them in their charters, or by general law. In a number of instances the authority of the Oregon supreme court had to be invoked to prevent city councils from attempting to tax objects which they were not entitled to.* Several attempts to avoid the payment of debts which cities had contracted and of the interest due on such debts also were frustrated by the court.** These instances constitute the bulk of the cases in which the financial powers of Oregon cities were passed on by the supreme court.

Local improvement powers.--Chief among the powers of a municipal corporation is, perhaps, that of making local public improvements. It is also the power most frequently controverted. This power is de-

* Corbett v. City of Portland, 31 Or. 407 (1897); Gadsby v. Portland, 38 Or. 135 (1900).

** Monteith v. Parker, 36 Or. 170 (1899); Brockway v. Roseburg, 46 Or. 77 (1905).

rived, in the main, from two other powers: namely, that of eminent domain and of control of its streets and other public property. Both these powers, it is hardly necessary to add, are delegated powers.

Local improvement powers were from the first granted to the cities and towns in Oregon in liberal--or at least general--terms. Difficulties were, however, early met by the cities in carrying out these powers, because of the opposition of property owners. In this respect, the situation in Oregon was simply like that in all the other commonwealths of the United States where federal and state constitutional guarantees of "due process of law," appropriation of private property for public use only when accompanied by just compensation, and others, gave recalcitrant people a basis for resisting municipal action involving the taking of any property or the impesition of burdens to meet the cost of local improvements.

In order to remdy inadequacies in the municipal charters in the matter of carrying out desired improvements, the legislature early attempted to speci-

fy more carefully and in more detail what the powers of municipalities should be. Typical of such attempts were the changes made in three charters in 1868. The clauses of the existing charter of Corvallis, conferring in general terms upon the city council the power to lay out and improve streets, sidewalks, etc., were amended so as to empower the council to compel property owners to construct and repair sidewalks and improve the streets adjacent to their lots; and in case any improvement were made by the city, the council was authorized to collect the cost from benefited property owners by selling their lots, if necessary.*

Similarly, the Portland charter of 1864, which provided that when a street had been once improved it could merely be "repaired," was now changed to permit the city council, on petition of a stated proportion of owners of abutting property, to order it to be "improved" again; that is, graded and laid out anew.**

* Sp. laws 1868, p. 68.
** Ibid., p. 90.

As the charter of the city of Salem was at this time amended, the council was given specific powers to improve the public grounds within the city, to establish and open streets and alleys, and to establish or alter the grade of, or improve in any way, any street or part of street, whether then or thereafter laid out in the city. The procedure to be followed in ascertaining the cost of improvements, the assessing of benefited property owners, and the collection of such assessments by sale of the property, if necessary, was outlined in detail. Similar minute provisions were made for the awarding of damages to the owners of injured property.*

Two years prior to this, in 1866, the legislature had passed a general law authorizing incorporated cities and towns (as well as organized counties) to aid in the construction and repair of public highways and river improvements, and levy an annual tax, running thru one or more years, for the purpose. This

* Sp. laws 1868, p. 81.

could be done by the municipal authorities, however, only when petitioned for by a majority of the voters or approved by them at a referendum election.*

From time to time thenceforth additional and supplemental provisions were enacted to aid municipalities in carrying out local improvements, too numerous and varied to enumerate. Under the general incorporation act of 1893, city councils were authorized to provide for the establishment of grades of streets, sidewalks and crosswalks, to open new streets and alleys, pave them, etc., and to improve any public grounds within the city limits. For these purposes private property might be condemned or purchased, in accordance with the general laws of the state.**

Notwithstanding these generous provisions of law, the cities did not always succeed in realizing what were quite clearly intended to be their charter-given

* Gen. laws 4th sess., p. 21.
** In 1893, also, a general act applying to all incorporated cities of 2,500 or more population was passed to provide for the issuance of bonds for the improvement of streets and the laying of sewers. (Gen. laws 1893, p. 171)

powers. In this case the courts frequently came to the aid of protesting property owners. As the state supreme court pointed out in 1886, when the city authorities of Portland attempted to put a liberal construction on their assessment powers, the taking of private property thru ordinary assessment proceedings constitutes a derogation of the old commoh law principle that no one shall be deprived of this property without the judgment of his peers--and statutes in derogation of the common law are to be strictly construed.* This has been a guiding principle of the Oregon tribunal in a long series of decisions.

As early as 1864 the Portland charter provided that, in all proceedings permitted in regard to local improvements, the acts of the city council should be presumed to be regular and duly done, until the contrary were shown; and when any such proceedings should be, by other charter provisions, committed to the discretion of the council, such discretion or judgment, when exercised and declared, should be fi-

* Dowell v. City of Portland, 13 Or. 248 (1886).

nal and not reviewable, or called in question, elsewhere. Such was the liberal grant of the legislature. But when the charter was cited in defense of the city's action the supreme court simply replied that the charter only barred a legal remedy; it did not prevent a resort to a remedy in equity, which was provided for by the general laws of the state.* In 1877 these same provisions in the charter were held not to dispense with the necessity of showing by the council record that the required notice of a proposed street improvement had been given. In other words, what these provisions meant was, not to presume the jurisdiction of the city council to pass an ordinace for improvement and assessment, but that, after jurisdiction had been lawfully acquired, without which there could be no assessment, subsequent proceedings should be presumed to be regular and duly done, until the contrary were shown.**

Almost innumerable have been the cases before the Oregon supreme court simply reiterating, in one form

* King v. City of Portland, 2 Or. 146 (1865).
** Van Sant v. City of Portland, 6 Or. 395 (1877).

or another, this general principle.* Taken separately, they are only so many cases of technical judicial construction, but considered in the aggregate, they constitute a continuous limitation on the powers of municipal corporations which is not to be overlooked in any investigation of what municipal powers really and actually are. Municipalities are, in short, limited by both their charters and the state and federal constitutions--even by the common law, when necessary--and as these are construed by the judiciary. Thus, the Oregon court has held that, where the charter fails to afford property owners the notive and opportunity to be heard, which constitute, according to the modern interpretation, the requirements of "due process," the giving of a notice and hearing is just as imperative.**

* Among them are: Northern Pacific Terminal Co. v. Portland, 14 Or. 24 (1886); Hawthorne v. East Portland, 13 Or. 271 (1886); Ladd v. East Portland, 18 Or. 87 (1889); Ladd v. Spencer, 23 Or. 193 (1892); Strout v. Portland, 26 Or. 294 (1894); Smith v. Minto, 30 Or. 351 (1897); Allen v. Portland, 35 Or. 420 (1899); Wingate v. Astoria, 39 Or. 603 (1909).

**Wilson v. City of Salem, 24 Or. 504 (1893); Strout v. Portland, 26 Or. 294 (1894); Clinton v. Portland, 26 Or. 410 (1894); Shannon v. Portland, 38 Or. 382 (1900); King v. Portland, 38 Or. 402 (1900); Hendry v. City of Salem, 64 Or. 152 (1913).

The paramount and primary control of the highways of a state, including the streets in cities, lies in the legislature; but it has been the rule from the start that this control should be delegated to municipalities. This is necessary, for without such a control city authorities could not exerxise their very necessary powers of opening, grading, draining, leveling and repairing streets and alleys. In fact, so completely has this been recognized as being in the necessary order of things, that it is the accepted rule that when jurisdiction over streets has been given to a city, general laws in regard to roads and road labor cease to be applicable as soon as the city exercises its powers.*

But it is to be clearly noted that a municipality does not <u>own</u> its streets. Municipal corporations may own waterworks, market-houses, etc., but they cannot own streets; that is, they can have no private property in them. This is a technical point, but it

* Dillon, "Municipal Corporations," Sec. 534; quoted by Judge McArthur in East Portland v. Multnomah County, 6 Or. 62 (1876).

becomes of importance when it is considered that a city's power over streets extends only to regulating their use for public purposes;* and the state legislature may, whenever it so desires, transfer their supervision and control to another governmental agency, such as the county court.**

Public utilities--Franchises.--Public utilities, in the sense in which this term is used today, had hardly an existence in Oregon when it became a state. From the beginning, municipalities were permitted to establish systems of water supply and sewage disposal, but besides these the only ventures ~~XX~~ which cities and towns undertook were the building of wharves, markets and, in a few instances, slaughterhouses. Specific authorization to erect waterworks and reservoirs beyond the corporate limits was needed, and this later became quite common. Also, cities and towns from time to time were given power to erect lighting plants both to light ~~both~~ the streets and provide lighting for the

* Portland & Willamette Valley Railroad Co. v. City of Portland, 14 Or. 188 (1886).
** Simon v. Northrup, 27 Or. 487 (1895).

people of the locality.

Perhaps the earliest charter in which mention was made of franchises was that of Astoria of 1876.* The city was authorized to construct a system of lighting or, if it so desired, grant a franchise to a private person or corporation to use the streets of the city for that purpose. Such a franchise, the act declared, should be used and exercised "under such regulations as the council shall from time to time prescribe." A franchise might also be granted to a street railway company to use the streets; and the council was empowered to lay down the terms on which such a franchise might be exercised, including the making of regulations for the running of cars and the fixing of rates.

The general incorporation act of 1893 authorized the granting of franchises for a lighting system, water supply, wharfage service, street railway and telephone companies, and to fix the rates to be charged by these utilities; "and no such city or town shall

* Laws 1876, p. 115, Art. IV, Sec. 2.

ever deprive itself of the right thru its common council of regulating and adjusting any such rates, so that the same shall be reasonable for the services rendered, at least once in any period of two years."

The charter of the city of Salem* gave the council exclusive power to grant a franchise to a street railway company to use its streets; and this was construed by the municipal authorities to confer on them the power to grant an exclusive franchise. But this the supreme court denied them. Both the primary control of streets and the power to grant exclusive franchises, said the court, rests in the state legislature, and while it is the universal practice to turn over the control of streets to municipalities, such is not the case with the granting of franchises. Therefore, declared the court, when an exclusive franchise or privilege to use the streets of a city is drawn in question, and is claimed by the grantee to be derived thru a municipal ordinance or contract,

* Laws 1889, p. 528, Sec. 6.

the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. "Nothing short of express legislative authority will authorize a municipality to grant such a privilege or enter into such a contract," said the court.*

Under a subsequent charter, the city council of Salem was empowered to grant a similar franchise "upon such terms as the council may prescribe;"** and under this provision its action in exacting a bond from a grantee was upheld by the supreme court, even tho no mention was made in the charter of bonds. In addition to the authority given by the clause quoted, the court held there was an implied right of the city to require such a bond because the state legislature, the origin of the power, could do so.***

The position of the court seems to be that, as in the carrying out of local public improvements, the city must show clear authority in acquiring jurisdiction to grant franchises, but, once the jurisdiction

* Parkhurst v. Capital City R'y Co., 23 Or. 471 (1893).
** Laws 1899, p. 924, Sec. 6.
*** Salem v. Anson, 40 Or. 339 (1902).

has been lawfully acquired, a goodly amount of discretion will be allowed the city authorities in the exercise of their powers.

Police powers--Licenses.--Power to secure the public health, peace, safety and general well-being of the people of the community was common to all the early charters granted by the Oregon territorial legislature, for which purposes city and town authorities were authorized to devise and adopt "measures, regulations and ordinances" apparently without restriction, except in so far as they might conflict with state and federal constitutions and laws.

In addition, the councils were empowered to exercise these powers for such specific purposes as to establish night watch and patrol and fire protection; to regulate the running at large of animals and the discharge of fire-arms within the city; to prevent and remove nuisances, and, as a rule, to define what constituted nuisances; to suppress gaming and disorderly houses, saloons, public shows, etc.; and to suppress or regulate and license theatricals and the sale of intoxicating liquors. The licensing

power also covered peddlers, pawnbrokers, auctioneers, brokers, etc., etc., varying in the different charters according to the conditions in the several municipalities--and as the legislature saw the conditions.

As has been noted in a previous chapter, a sort of local option in the matter of licensing the sale of liquor was in effect as early as 1855. General laws for the licensing and regulation of saloons were early in operation; and some of the first charters provided that holders of city or town licenses should be exempt from paying any state or county license tax. But this was by no means a uniform practice.

Later it did become more and more common to exempt holders of municipal licenses from the necessity of paying additional license fee; and provision was made that no part of any license money collected by the cities should go to the county treasury. In several charters it was prescribed that the license tax should not be less than that prescribed by state law. In one town, Dallas, legislative prohibition was in force for a time, as far as the indiscriminate sale

in saloons was concerned, for its charter of 1874 forbade the sale of spirituous or intoxicating liquors within the town, excepted imported liquors in the original packages, or upon the written prescriptions of a practicing physician.*

More severe restrictions on the licensing power also became common later on. Applicants for permits were required to deposit bonds to secure compliance with the ordinances and laws regulating the sale of liquors, which became more exacting. In some charters, as in that of Dalles City,** every applicant for a license was required to post notices in a number of public places in the ward in which he wished to carry on the business; and he had to secure the signatures of a majority of the legal voters in the ward to a petition asking the city council to grant the license. After depositing petition and bonds, opportunity was given to objectors to frustrate his attempt to secure the permit, if they could muster a greater number of persons in the ward to sign their

* Laws 1874, p. 155, sed. 5.
** Laws 1880, p. 69.

names to a remonstrance. No license could be granted to a woman or minor; and the selling of liquor to any woman or minor, or Indian, or to any intoxicated person or common drunkard, and the permitting of women or minors to frequent a saloon, were made cause for revoking a license.

The importance of these details is not so important as the fact that the legislature reserved for itself the function of determining the terms upon which saloons should be licensed in the individual cities and towns, and of fixing the regulative powers of the local authorities. General laws governing the licensing of saloons were passed by the legislature in 1885,* 1889** and in 1891;*** but they all expressly provided that they should apply to no incorporated cities and towns.

Cities and towns which might incorporate under the general incorporation act of 1893 were empowered,

* Laws 1885, p. 25; amended by another act of the special session of 1885, p. 38.
** Laws 1889, p. 9.
*** Laws 1891, p. 187.

thru their councils, to license, regulate and control any lawful business or occupation; to license, tax, regulate and restrain the sale of intoxicants; to prevent and restrain gambling, disorderly houses, and opium dens; and to "suppress or prohibit anything injurious to the public morals, safety, or health, and make police regulations for the protection of the same."

In 1904 the people of Oregon adopted a local option law, permitting whole counties to vote out saloons, and also separate precincts, in case any counties should vote against prohibition. Municipalities as such were not permitted to decide for or against license.*

It should be noted that, tho "exclusive power" was, as a rule, conferred upon city authorities to license and regulate the sale of liquors, the jurisdiction of state (county) authorities was not, according to the Oregon supreme court, abdicated in the matter of punishing violations of state law gov-

* Laws 1905, p. 41.

erning the operation of licensed businesses, if the court could find any law investing them with the prosecution and punishment of such laws.* In other words, the criminal law and its enforcement are matters of state policy. One exception is to be noted. The specific and emphatic language of the general law of 1889, reinforced by just as clear language in a charter, giving city authorities power to prescribe and enforce the punishment for violation of local ordinances relating to the sale of liquor, has been held to exclude the county court from its former jurisdiction when the city charter has provided a municipal court to try such offendors.**

It will not be attempted here to go into the judicial construction of charter powers relating to the regulation of licensed forms of business, the suppression of nuisances, and other forms of exercising local police powers. In general, it may be

* Palmer v. State, 2 Or. 66 (1863); Burchard v. State, 2 Or. 78 (1863); State v. Horton, 21 Or. 83 (1891).--The same principle as to gambling: State v. Ayers, 49 Or. 61 (1907); State v. Baker, 50 Or. 381 (1907).

** State v. Haines, 35 Or. 379 (1899).

said that the Oregon court has permitted local authorities a wide latitude in carrying out their powers, as long as the requirement of reasonableness has been complied with.*

Public peace and safety, so far as the policing of cities and towns in Oregon was concerned, was in the beginning under the control of the legislature, to a great extent. Power to establish night watch and patrol was often granted in the early charters; but as a rule nothing was mentioned about these matters, and presumable the legislators preferred to take it upon themselves to provide for the policing of municipalities. As time went, however, and the cities grew in size and population, the establishment and management of police departments were turned over to the cities themselves.

The city of Portland affords a good example. By

* As to liquor selling: In Re Schneider, 11 Or. 288 (1883); Woods v. Town of Prineville, 19 Or. 108 (1890); Beers v. Dalles City, 16 Or. 334 (1888); Hubbard v. Town of Medford, 20 Or. 315 (1891); Houck v. Ashland, 40 Or. 117 (1901); Cranor v. Albany, 43 Or. 144 (1903).--As to gambling: Ex Parte Ah Hoy, 23 Or. 89 (1892); Portland v. Yick, 44 Or. 439 (1904).

a special act of 1870,* the police force of that city was to be organized by a board of police commissioners of three members appointed by the governor. This board was empowered to appoint a chief of police, captains, lieutenants, patrolmen, and to remove or suspend them for any cause which it deemed sufficient; to fix the compensation of all members of the force; and to make regulations for the government of the department. In 1874 the board of police commissioners was made elective by the people of the city, and the power to fix the pay of members of the force and make regulations for its government and administration was transferred to the city council.** In 1880 the powers that remained with the commissioners were all given to the mayor and council.***

Public health was included in the police powers delegated to municipalities by the Oregon legislature. In 1905 a general statute was passed for the establishment of boards of health in municipalities. They

* Laws 1870, p. 120.
** Laws 1874, p. 210.
*** Laws 1880, p. 109.

were to consist of local officers: the mayor and the council when not otherwise provided. The legislature, however, fixed the compensation of all health officers and defined their powers and duties.*

The enumeration of governmental powers might be carried out in endless detail, but it is believed that the foregoing include substantially the most important. Two other functions often exercised by municipal corporations--the conducting of local elections and the maintaining of common schools--have not been mentioned. The latter can be disposed of in a few words: It is in Oregon a function exercised by the state.

As to elections: These were from first to last conducted by local officers, but always in accordance with law, tho in the latter charters more and more special regulations were laid down. As far as the right to vote is concerned, this was a constitutional matter and could not be restricted by the legislature

* Laws 1905, p. 262.

thru charter provisions.* The legislature could, however, and often did, prescribe the qualifications of municipal officers.

The people of a city have no inherent right to hold an election, said the Oregon supreme court in 1891.** Furthermore, said the court in another case, tho, as a matter of convenience, it is usual to delegate to municipalities the right to provide their own officers, the state has a direct interest in the good government of its cities and towns, and therefore a reserved right, if it chooses to retain it, in municipal elections.***

Acting on this principle, the Oregon legislature has enacted a number of laws of a general nature to regulate the nomination and election of local officers. In 1885 an act was passed to provide for the registration of voters in cities and towns,****

* Livesley v. Litchfield, 47 Or. 248 (1905).
** State ex rel. v. Simon, 20 Or. 365 (1891).
*** Robertson v. Groves, 4 Or. 210 (1871).
**** The next year this part of the law was thrown out by the supreme court because requiring registration as a prerequisite for voting and thereby the constitutional right of suffrage. (White v. Commissioners of Multnomah County, 13 Or. 317 (1886).

and the regulation of ballots, challenging of voters, duties of election judges, preservation of order at polls, counting of votes. These provisions were applicable to all elections in the state, including those of incorporated cities and towns.* Most of them, except as to registration, and in addition many other matters, were incorporated in a new elections act of 1891.** In the latter year a primary election law to apply to cities of 2,500 or more inhabitants, was enacted. It prescribed notices prior to primaries in the local newspapars, and the manner of selecting judges and clerks and their duties; and it prohibited intimidation, bribery, ballot-box stuffing, etc.***

The general municipal incorporation act of 1893 provided that elections in all cities and towns coming under the act should be held in accordance with state law.

In 1901 another primary election law was adopted, this time to apply to cities of more than 10,000 popu-

* Laws 1885, p. 91.
** Laws 1891, p. 8.
*** Ibid., p. 4.

lation.* In 1903 an act was passed to extend the provisions of the Australian ballot law to elections in all cities and towns containing 2,000 or more inhabitants.**

All these show plainly that the state legislature of Oregon preferred to reserve to itself the direction of all elections of municipal officers.

It would be difficult to sum up accurately the results on the status of municipal corporations and the extent of their powers of the fifty years of legislative control. In general, the functions of municipalities had increased in number, of course; but so had also the opportunities of the state legislature to regulate municipal activities. As far as can be ascertained from a study of judicial opinion, the half century had done nothing to change the status of cities and towns as almost completely at the mercy of the prejudices, partisan politics and whims of the state legislature.

* Gen. laws 1901, p. 317.
** Gen. laws 1903, p. 250.

CHAPTER IV.

MUNICIPAL HOME RULE

1. ESTABLISHMENT OF THE SYSTEM.

The years 1902 and 1906 were years of epoch-making achievements in the political history of Oregon. Much as this state is now pointed to as being the most progressive commonwealth in the Union, as the most democratic democracy in the world, the state where reform innovations in government are first put to test and whose experiments mark the pathway for other progressive states to follow--the state, in short, where the sovereign people actually do rule, and do it effectively and efficiently--prior to the last decade the people of this western commonwealth were known, if for anything, for all-round and rather extreme conservatism.*

But it would be culpable to fail to note that

* Joseph Schaefer, "Oregon as a Political Experiment Station," in Monthly Review of Reviews, August, 1906.

the restricted opportunities of an undeveloped and sparsely settled state had as much, and more, to do with this seeming unprogressiveness than any inherent defect in the enterprise of the people. At the time of the admission of Oregon as a state there were only about 50,000 people inhabiting its 96,699 square miles. According to the United States census of 1860, the population at that time was 52,465. In 1870 the population was 90,923; in 1880, 174,768; in 1890, 313,767; in 1900, 413,536; and in 1910, 672,765. Of this number about one-third (207,214) lived in the city of Portland in 1910.

Above all, the surprising achievements of the people of Oregon in practically revolutionizing political affairs afford ample proof that they are neither a slow nor an unprogressive people. The surprising part of it, to those who take little stock in efforts of ordinary people to rule themselves, is that it was the bringing of the government more directly into the hands of the people of the state that started them on the way toward their unprede-

dented political, economic and social reform.

For forty-five years after the original constitution of Oregon was framed, in 1857, this document remained unamended. Good as it may have been for the time when it was drafted, it necessarily became in time an antequated instrument of government. It then became necessary for the people either to amend it piecemeal thru the medium of the legislature and referenda to the voters, or have it thoroly overhauled by means of a constitutional convention, or provide some means whereby the people of the state could, whenever they desired, alter their constitution to suit themselves. They chose the last course.

To detail the movement for direct popular government in the state which has been selected for this study would be beyond the scope of the present thesis. Oregon, like all the western states, was profoundly stirred by the Populistic movement of the early nineties; and it was probably on this account that the agitation for the initiative and referendum commenced here at this time. The idea, of course, was brought

from Switzerland. Several attempts to prevail upon the state legislature to initiate a constitutional amendment to carry out these principles failed, until at the session of 1899, when a joint resolution was passed by large majorities. The resolution was reintroduced two years later, as the constitution then required, and only one vote was recorded in opposition. It went to the people and was by them adopted by an overwhelming majority. (1902).

The way was now cleared for any changes which the people wanted, either in the constitution or in the laws.

At the general election in June, 1904, a local option law on the question of licensing the sale of intoxicating liquors was proposed by the people of the state by initiative proceedings and approved by them by a vote of 43,316 to 40,198. Eighteen days later it went into effect, pursuant to a proclamation of the governor.* Under this act of the people, the voters of any county could by a majority vote prohibit the

* Gen. laws 1905, p. 41.

sale of liquor in that county. The law was sometimes referred to as the county option law. However, tho a majority vote in a whole county for prohibition for prohibition would prevail in every township, precinct and municipality within the county, a vote in favor of prohibition in any one or more precincts would render those precincts "dry," despite a "wet" majority in the county as a whole.

One of the purposes of this local option law was to place the responsibility for the solution of the vexatious and ever recurring question of licensing saloons on the local communities directly affected, and thus relieve the legislature of this burden.* In this respect, the same purpose lay behind its enactment as that which brought about the adoption of "home rule" as a part of the constitution in 1906. That it did not have the desired result is manifest from a study of some of the municipal charters granted at the session of 1905. Some of these provided that the power conferred in them to license, tax, regu-

* A. H. Eaton, "The Oregon System" (1912), p. 78.

late or restrain the sale of intoxicating liquors should be subject to the provisions of the local option law. Clauses to this effect appeared in the charters of Brownsville,* of Halsey** and of Junction City.*** On the other hand, several charters were granted at the same time containing clauses exempting the municipalities in question from the operation of the local option law.

Examples of the latter are to be found in the charters of Condon,**** which stipulated that "no provision of the law concerning the sale or disposition of any.....liquors in Gilliam county, nor any law of the state now or hereafter enacted, shall apply to the sale or disposition of the same in the city of Condon;" the charter of Estacada,***** which declared that "the said laws of Oregon relating to licenses for the sale of.....liquors shall not be in force within the limits of said city;" and the charter of the city

* Sp. laws 1905, p. 293.
** Ibid., p. 34.
***Ibid., p. 834.
**** Ibid., p. 410.
***** Ibid., p. 884.

of Medford,* which, as amended in 1905, empowered the city council to "license, tax, regulate or prohibit barrooms, drinking shops.....and all places where..... liquors are sold or kept for sale, irrespective of any general law of the state on this subject enacted by the legislature or by the people at large."

On the question of the power of the state legislature, prior to the "home rule" amendments, to exempt a city, by alteration of its charter, from the operation of the local option law, the Oregon supreme court in 1908 ruled that it had this power, declaring that "the legislature, when not interdicted by amendments to the organic act of the state, is a lawmaking body of coordinate authority with the people, when the latter exercise the initiative power they have reserved."**

As the Oregon court points out in this case, it is quite probable that it was because of this attempt of the legislature to exempt certain cities from the operation of the local option law, which was a "people's measure," and in order to prevent any further

* Sp. laws 1905, p. 996.
** Hall v. Dunn, 52 Or. 475 (1908).

encroachment on the law, that the people of the state, in the following year, by overwhelming majorities adopted the two "home rule" amendments to their state constitution to take out of the hands of the legislature the power to frame, adopt and amend municipal charters and to place this power in the hands of the people of the municipalities themselves.

This explanation is not, of course, intended to detract from the weight of the more important reason for the adoption of these amendments--the evils which had arisen from the practice of the legislature in enacting and amending the charters of cities and towns by special acts, and the biennial contests which had arisen as a consequence, particularly in regard to the affairs of the city of Portland. It does show very plainly, however, that local conditions often have more to do with such things as statute-making and constitution-changing in respect to municipalities than casual observers of municipal affairs are wont to think.

2. THE SYSTEM DESCRIBED.

"Home rule" constitutional amendments.--Art. XI, Sec. 2, of the Oregon constitution was in 1906, under popular initiative proceedings, by a vote of 52,567 to 19,852, amended to read as follows:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incoration 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."

At the same time, and also under initiative proceedings, Art. IV, ~~Shdch~~, as amended in 1902, reserved to the people of the state the powers of initiative and referendum, was, by a vote of 47,678 to 16,735, further amended by the addition of a new section (Sec. 1 a), in part as follows:

"The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal regulation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the legal voters may be required to order the referendum nor more than fifteen percent to propose any measure, by the initiative, in any city or town."

Thus, with one stroke and with a brevity that it striking and incisive, the old principle of local self-government was asserted in the fundamental law of Oregon. To every incorporated city and every incorporated town, from the largest to the smallest, was intrusted the power and the duty, thru its qualified electors, of framing its own credentials of political existence

and articles of government, and of changing these whenever in the judgment of these same electors a change was needed--with the sole restriction that any such steps should be subject to the constitution and criminal laws of the state.

The method by which "home rule" was thus granted to municipal corporations in Oregon differed from the mode employed in every one of the states in which the principle has been adopted; and the nature of the grant can be better understood by comparing, briefly, the Oregon plan with the system as introduced in California, Missouri, Washington, Minnesota, Colorado, Oklahoma, Michigan, Arizona, Ohio, Nebraska and Texas.

Application of the plan.--In the first place, to what municipal corporations does "home rule" apply?

In the first two states--Missouri and California--in which the system was introduced, it was the large cities that first clamored for "home rule." As Portland felt more than any other city in Oregon the burden of legislative interference in municipal affairs, so it was the large cities in these pioneer

"home rule" states that felt most keenly the restraint upon their governmental activity. When, therefore, the constitutional convention which drafted a new fundamental law for Missouri in 1875 was persuaded to give the new idea a trial, the plan was restricted to cities with 100,000 or more inhabitants.* So it has remained in Missouri, with the result that only two municipalities--St. Louis and Kansas City--can avail themselves of the privilege of making and amending their own charters. In California, also, which adopted a new constitution in 1879, the "home rule" privilege was limited to cities of 100,000 population,** but it has since been extended to include any municipality containing more than 3,500 population.*** A distinct departure has been made in California in allowing counties also to adopt charters framed by boards of freeholders.****

The Washington constitution of 1889 granted "home rule" to cities of the first class; that is, to such as

* Missouri constitution, Art. IX, Secs. 16-17.
** California constitution of 1879, Art. XI, Secs. 6-8.
*** Art. XI, Sec. 8, as amended in 1887.
****Art. XI, Sec. 7½, as amended in 1911.

contained 20,000 or more population.*

Minnesota, modelling her constitutional amendment of 1898 upon the Missouri plan, carried it to its logical conclusion by making it apply to any city or village in the state.** As interpreted by the Minnesota supreme court from the title of the act proposing the amendment and a subsequent enabling act passed by the legislature in 1899,*** it was the intent of those who framed the amendment that it should apply to only incorporated cities in existence at the time of its adoption and to any and all villages which might later desire to become incorporated as cities--but not to cities that might thereafter be incorporated under general law.**** In order, therefore, that cities which might in the future desire to be incorporated under general law and afterward avail themselves of the privilege of amending their charters--

* Washington constitution, Art. XI, Sec. 10.
** Minnesota constitution, Art. IV, Sec. 36.
***Gen. laws 1899, p. 462, chap. 351.
**** State ex rel. v. O'Connor, 81 Minn. 79 (1900).

slight as is this possibility--the legislature in 1907 amended the enabling act of 1899 so as to include "any city or village in the state of Minnesota, whenever incorporated." *

Under the Michigan constitution as adopted in 1908,** it was ordained that each city and village should have power to "frame, adopt and amend" its charter; and in a case brought to the supreme court of the state in 1912,*** it was contended that only prospective cities yet to be organized were intended to come within the scope of these provisions, thus tying the hands of all the many and important cities already incorporated. This contention the court rejected, but, apparently to remove all doubts in the matter, an amendment was adopted in the same year, permitting each city and village to "frame, adopt and amend its charter, and to amend an existing charter of a city or village heretofore granted or passed by the legislature."****

* Gen. laws 1907, p. 532, chapter 375.
** Art. VIII, Sec. 20.
*** Gallup v. City of Saginaw, 170 Mich.195 (1912).
**** Art. VIII, Sec. 20, as amended in 1912.

The constitutional amendment adopted in Colorado in 1902 permitted cities of the first and second class to frame and adopt their own charters.* Thus all municipalities having more than 2,000 inhabitants are included; but the legislature may at any time change the classification. Oklahoma, in its new constitution of 1907, also conferred the privilege upon cities of more than 2,000 population.** The Arizona plan, adopted in 1910, was patterned upon that of Oklahoma, but restricted its application to cities of more than 3,500 people.*** In Ohio, under the new constitution of 1912, any city or village is included.**** In the same year Texas and Nebraska adopted amendments granting "home rule" to cities having more than 5,000 inhabitants.*****

The Oregon amendments of 1906 prohibit the state legislature from enacting, amending or repealing the charter of any municipality, city, or town; empower

* Colorado constitution, Art. XX, Secs. 4, 5, 6.
** Oklahoma constitution, Art. XVIII, Sec. 3.
*** Arizona constitution, Art. XIII, Secs.1, 2, 3.
**** Ohio constitution, Art. XVIII, Sec. 7.
***** Texas constitution, Art. XI, Sec. 5; Nebraska constitution, Art. XVI, Sec. 13.

the voters of every city and town to enact and amend their charter; reserve the initiative and referendum to the voters of every municipality and district; and provide that cities and towns may provide for the manner of exercising these powers. With such a variety of expression, to give a technical and distinctive meaning to each of these terms would be to introduce an almost endless list of possibilities of interpretation. Happily, the Oregon supreme court has endeavored to reconcile such conflicting constructions as have been attempted, and to bring forth the substance of what the Oregon people really believed they were voting for when they adopted these amendments.

The broad definition given by the Oregon court to the terms "corporations for municipal purposes" and "municipal corporations" has already been noted; how they were defined so as to embrace counties, school districts and road districts, as well as cities and towns--and even such creations of the legislature as incorporated ports. Following this definition, the court in 1907 held that the terms "municipality" and "district" were expressions of equivalent import.* In

* Acme Dairy Co. v. Astoria, 49 Or. 520 (1907).

the same year the legislature passed an act** establishing and incorporating the Port of Columbia, similar to the Port of Portland, established in 1891; and the question at once arose as to the power of the legislators to do this, in view of the amendments of 1906. In ruling against the attempt of the legislature, the court hinted that such a port was a municipal corporation, as it had itself decided sixteen years before. In this case, however, it was not necessary to base its decision on this ground, because, as the court pointed out, under the constitution as amended in 1906 the creation of any corporation, public or private, by special laws, was forbidden.**

The next year the court had to give a categorical answer to the question as to whether or not the "home rule" amendments applied to incorporated ports as municipal corporations; for the power of the Port of Portland to amend its charter was disputed. The court then applied the definition it had given in

* Laws 1907, p. 182.
** Farrell v. Port of Columbia, 50 Or. 169 (1907).

1891 and declared that incorporated ports could amend their charters just as other municipalities could; tho, as the court added, such a port "is neither a city nor a town in the strict sense of the word."* In still another case** the court held that, since incorporated ports, tho municipal corporations, were neither cities nor towns, they were not meant to be included in that clause*** of the constitution which provided that acts incorporating cities and towns shall restrict their powers of contracting debts.

Bearing in mind the definition of municipal corporation to include counties, school districts and road districts--and, in fact, all public corporations created by a state--and the fact that this was used as a basis by the Oregon court for including incorporated ports in the term "municipality," the interesting question arises: Does not the Oregon system also mean "home rule" for counties, school districts and road districts? Obviously, the limited character

* Farrell v. Port of Portland, 52 Or. 582 (1908).
** Straw v. Harris, 54 Or. 424 (1909).
*** Art. XI, Sec. 5.

of school districts and road districts precludes including them in the plan, at least for the present. But is not "home rule" for counties at once possible and feasible? Has not California already introduced such a plan? Sweeping as is the declaration of the Oregon judges in 1891 and pregnant as are the possibilities which can by analogy by conjured up from it, some recent statements of the court leave the matter still in some doubt.

"A county is a municipal or quasi-municipal corporation," said the court in a recent case,* "comprising the inhabitants within its boundaries and formed for the purpose of exercising the powers and discharging the duties of local government and the administration of public affairs conferred upon it by law.....A county is not, in a strict sense, a municipal corporation.....In a certain sense, it comes within the rules and principles of law applicable to such corporations.....In this state we have a dual system of legislation. By the provisions of our constitutional amendments, the right to enact local,

* Schubel v. Olcott, 60 Or. 503 (1912).

special and municipal measures is reserved to the legal voters of their municipalities and districts. This authority is to be exercised in the localities by means of the initiative process. Whatever have been the duties and powers of counties prior to the adoption of these amendments, we see no reason why such quasi-municipalities or districts cannot be endowed with legislative functions by the plain provisions of the constitution."

Method of framing and adopting "home rule" charters.--Whatever the extent to which "home rule" is to be applied, it will be granted that to allow any local subdivision of the state to frame and adopt its own charter of incorporation without the intervention of the legislature is nearly to effect a revolution in constitutional law. But shall the "sovereign" state, from which every corporation, public and private, derives its existence, permit its creatures--cities and towns--to do this with no restriction whatever? Certainly, not. Shall the state allow them entire discretion as to the manner in which such charters shall be framed? So far, this has been done in

but one state--Oregon--tho the constitutional amendment ordained by Texas in 1912 contains only the restriction that the adoption of "home rule" charters shall be subject to such limitations as may be prescribed by the legislature. In all the other states above mentioned, the constitutions either give directions as to the mode of framing and amending charters or instruct the legislatures to give the directions.

Thus, in Missouri, California, Washington, Minnesota, Nebraska, Oklahoma and Arizona, boards of freeholders perform the task of drawing up a charter draft for submission to the voters of each city. In Colorado the framers must be taxpayers, while in Michigan and Ohio they need only have the qualifications of electors. Election by the people is the mode of choosing the boards or commissions in every state in which the method of selection has been laid down, except in Minnesota, where the judges of the district court appoint fifteen freeholders, either on their own initiative or on petition of 10% of the voters of

the city.

Various means of taking the initiative in the matter of selecting charter makers have been provided in the other states--sometimes the city council only, sometimes only the voters on petition of 1% to 25%, sometimes either the one or the other. In four of the states--California, Colorado, Oklahoma and Arizona--an election is first held to determine whether or not a board or commission to frame a charter shall be chosen, and if this is ratified by a majority vote another election is held to elect members of such board or commission. In Michigan both proposals are voted on at the same time; if the first loses there is no canvass made of the votes cast for commissioners. In the other states a vote on members of the charter-framing body is taken at once, it being presumed that the initiative taken by the people or the city authorities is a sufficient indication that it is the desire of the voters that there shall be framed a charter for submission to the electors.

In three states it requires more than ratifica-

tion by the voters of a municipality to accomplish the legal adoption of a charter or charter amendment. In California the constitution prescribes that, if a majority of those voting on the charter proposition vote in favor, it must be submitted to the state legislature and be approved by a majority of both houses, separately or by joint resolution; but they must approve or reject it unaltered. In Oklahoma and Arizona a charter must receive the approval of the governor, who must sign it if it does not conflict with the constitution or the laws of the state.

Are "home rule" amendments self-executing?--In several states the vital issue has been raised as to whether or not the constitutional amendments conferring "home rule" upon cities and towns are self-executing; and much litigation has resulted. The issue is vital because upon it depends the question whether or not there must be legislative action in order that municipalities may avail themselves of the privilege of framing and amending their charters, and whether or not the cities are to be subject to a continuing con-

trol by the state legislature thru this means. In Oregon, perhaps, the issue is most complicated, because of the fact that "home rule" was conferred in that state by simultaneous but separate amendments which have been construed differently on this point. Much confusion has been the result, and after nearly a dozen rulings on the matter by the state supreme court, the situation is not yet altogether settled. Before venturing into an analysis of these decisions, a brief outline of the situation in the other "home rule" states may be of value.

"Any city.....may frame a charter for its own government," are the opening words of Art. IX, Sec. 16, of the Missouri constitution; and a majority of the states which have followed the lead of Missouri have copied also the style employed in this pioneer attempt to phrase an adequate grant to municipalities to rule themselves. The question whether or not this section of the Missouri constitution is self-executing has never been made the basis of a test in the courts; but so the supreme bench has obviously assumed it to

be. In California* and Oklahoma** the supreme courts have pronounced the "home rule" grants to be self-executing, so that subsequent action by any legislature for the purpose of laying down terms under which municipalities might avail themselves of the grant would be void--or, at best, superfluous.

In the light of these decisions it is difficult to understand the contrary position of the supreme court of Washington. Art. XI, Sec. 10, of the constitution of that state commences as follows: "Any city containing a population of 20,000 inhabitants or more shall be permitted to frame a charter for its own government....." In a case brought before it in 1895,*** this court held that it was competent for the legislature to supplement the constitutional provision by pointing out the manner in which the right conferred by the constitution might be exercised, and by prescribing rules for the guidance of city councils in regard to procedure to be followed in carrying into

* People v. Hoge, 55 Cal. 616 (1880).
** State ex rel. v. Scales, 21 Okla. 683 (1908).
*** Reeves v. Anderson, 13 Wash. 17 (1895).

effect the constitutional grant--even tho the Washington constitution of 1879 makes quite detailed provision therefor. The court seems to rest its argument on a quotation from Judge Codley's "Constitutional Limitations," to the effect that a constitutional provision is not self-executing "when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law..... Perhaps even in such cases (where the power is self-executing), legislation may be desirable, by way of providing remedies for the protection of the rights secured, or of regulating the claim of the right so that its exact limits may be known and understood."

Following the ruling of the California and Oklahoma courts, the "home rule" grants in Colorado, Arizona and Ohio should be put down as self-executing, for they are almost exactly alike in the language they employ.

On the other side, the Minnesota amendment of 1898 and Secs. 20 and 21 of Art. VIII of the Michigan constitution are not self-executing, and have been so

construed by the courts. The amended Sec. 36 of Art. IV of the Minnesota constitution begins thus: "Any city or village in this state may frame a charter for its own government as a city, consistent with and subject to the laws of this state, as follows: The legislature shall provide, under such restrictions as it deems proper, for a board of fifteen freeholders....." The section includes also the following clause: "Before any city shall incorporate under this act the legislature shall prescribe by general law the general limits within such charter shall be framed." In 1902 the Minnesota court, accordingly, held the amendment not to be self-executing, and it upheld an enabling act of the legislature.*

The clauses in the Michigan constitution of 1908 covering the "home rule" provisions read as follows: "The legislature shall provide by general law for the incorporation of cities, and by general law for the incorporation of villages. Under such general laws, the electors of each city and village shall have power

* State ex rel. v. Kievel, 86 Minn. 136 (1902).

and authority to frame, adopt and amend its charter, and, thru its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.** The state supreme court in 1911*** declared that these provisions were not self-executing, and in 1912*** the authority of the legislature was held to be limited to the passage of one, and only, one, general law for incorporating cities, and to one law for incorporating villages, thus preventing the state lawmakers from enacting further legislation for the regulation of current municipal affairs.

In brevity and conciseness the "home rule" grant in Michigan is similar to that in Oregon, but in applying the constitutional profisions of the latter state bewildering difficulties have been met.

* This section was amended in 1912, but the amendment did not change its character as a non-self-executing instrument.

** Attorney General v. Common Council of Detroit, 164 Mich. 369 (1911).

*** Attorney General v. Detroit Common Council, 168 Mich. 249 (1912).

Legislative provision in Oregon for local initiative and referendum.--Because of the perplexities and doubts as to the power of cities to amend their charters, in accordance with the two amendments of 1906, without an enabling act of the state legislature, that body, on February 25, 1907, passed an act for that purpose.* It was in the nature of an emergency act for the "public safety," to repeal a law of 1903 which was enacted to carry into effect the initiative and referendum amendment of the year before and which was found not to be comprehensive enough in view of the extension of these powers of direct legislation to municipalities. Its special purpose was to provide for and regulate elections to be held under the "home rule" amendments. It will be remembered that one of these amendments stated that the manner of exercising the initiative and referendum powers should be prescribed by general laws, "except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to

* Laws 1907, pp. 398-408.

their municipal legislation." The enabling act, therefore, provided that its provisions should apply only to such cities and towns as had not made the necessary provisions, or, in case they had made provision, the law should apply only to such matters on which the municipal authorities had not made, or should not make, "conflicting" provisions.*

Both the initiative and referendum of bills were to be invoked by petition, according to the act. In case of the former, the percentage of the voters necessary was not stated, but the constitutional amendment of 1906 set it at not more than 15%. In case of the latter, 10%, the maximum percentage permitted by the constitution, was fixed by the law. Any person was qualified to sign a petition for the initiative or referendum for any measure upon which he was

* Two other exceptions were as follows: "This act shall not apply to the general laws governing the method of determining whether stock of any kind shall be permitted to run at large in any county or portion thereof, nor to the provisions of the local option laws providing methods of determining whether the sale of intoxicating liquors shall be prohibited in any county, city, precinct, ward or district."

entitled to vote under the laws of the state. Such petitions should be addressed to the city clerk, auditor or recorder.

Initiative petitions could demand submission to the people of both proposed ordinances and charter amendments. A referendum could be invoked on either the whole or a part of an act of the city council--whether an ordinance, franchise or resolution. On receiving an initiative petition, the council might either (1) pass the ordinance or amendment desired, without referring it to the people, (2) pass it and refer it to the people, (3) reject it, in which case it must be referred, (4) take no action on it, in which case it also must be referred, by the city claerk, auditor or recorder, or (5) whether it rejected it or took no action on it, submit a competing ordinance or amendment to the electors. Any act submitted to and approved by the people was not subject to the veto of the mayor.

To give opportunity for the circulation of referendum petitions, the act provided that no ordinance

resolution or franchise enacted by a city council should take effect until thirty days after its passage by the council and approval by the mayor, "except measures necessary for the immediate preservation of the peace, health or safety of the city; and no emergency measure shall become immediately operative unless it shall state, in a separate section, the reasons why it is necessary that it should become immediately operative, and shall be approved by the affirmative vote of three-fourths of all the members elected to the city council, and also approved by the mayor."

In addition to referendum on petition, which included also the submission by the council of competing measures, the law provided that charter amendments might be proposed and submitted by the council without petition of any kind. Such amendments might be voted on at either a general or special election.*

* The act also provided for:
(1) The size and form of petition sheets, their verification by circulators, and their filing with the city authority; the printing and binding of them, if found sufficient--with the proviso that "the forms

Legislative provision versus local enactments.--
At the time this law was passed there had been no adjudication by the courts as to whether or not the "home rule" amendments of 1906 were self-executing; but there was pending a suit which reached the state supreme court three months later.* The case arose from an at-

herein are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

(2) Safeguards for securing action on petitions, by giving the right to apply for mandamus to compel the authorities to act, and giving the county courts jurisdiction of such cases.

(3) Placing the desired legislation on the ballots; providing for a title to the act, with a true and impartial statement of its purpose, written by the city attorney.

(4) Election pamphlets, to be published under direction of the city clerk, auditor, or recorder, with arguments pro and con, including any arguments which any person, company or organization might wish, which were to be filed with the proper authority for printing and distribution, at the expense of those desiring such printing and distribution.

(5) The manner of voting upon such measures, which was to be "the same as is now or may be required and provided by law;" provided that no measure should be adopted unless it received a majority "of the total number of respective votes casy on such measure."

(6) Counting of the votes by the regular boards of judges, clerks, etc.; canvassing of the returns by the city clerk (or auditor or recorder) in the presence of the mayor, who was to issue the proclamation announcing the result.

* Acme Dairy Co, v. Astoria, 49 Or. 520 (1907).

tempt of the city to amend its charter. A local private corporation deeming the amendment objectionable, called in question the power of the city to alter its charter. Power to do this, the complainant attempted to show, could be derived, if at all, only from Art. IV, Sec 1 a, which permitted cities and towns to provide for the manner of exercising the initiative and referendum powers as to their "municipal legislation." That the amendment of city charters was "municipal legislation" was denied by the complainant.

In overcoming these objections, the court pointed out emphatically that Art. IV, Sec. 1 a, must be read together with Art. XI, Sec. 2, amended at the same time, which gave the legal voters of every city and town power to enact and amend their charter. Doing this, the court concluded that it was the intention of the framers of Art. IV, Sec. 1 a, and also of the people who ratified it, "to vest an incorporated town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter, which change is reasonaoly within

the generic term of 'municipal legislation.'" Art. XI, Sec. 2, might not be self-executing,* the court held, but Art. IV, Sec. 1 a, was. "A section of the fundamental law is self-executing," said the court, "when it prescribes a rule the application of which puts into operation the constitutional provision.....The amendment quoted having expressly authorized cities and towns to provide for the manner of exercising the initiative as to their municipal legislation, the provision is therefore self-executing in respect to the class of enactments specified."**

Very similar was a case brought to the supreme court the next year.*** It involved the validity of that part of the enabling act of 1907 which provided that charter amendments might be proposed and submitted to the voters by a city council without an initia-

* So held not to be in Kiernan v, Portland, 57 Or. 454 (1910).

** The court makes the technical observation, in this case, that, while Art. XI, Sec. 2, as amended, deprives the legislature of all authority to enact, amend or repeal the charter of any city or town, the voters of the municipality are empowered only to enact and amend their charter.--See also McKeon v. City of Portland, 61 Or. 385 (1912).

*** McKenna v. City of Portland, 52 Or. 191 (1908).

tive petition. This was questioned in view of the amendment of 1906 reserving the initiative and referendum powers to the voters of municipalities and providing, as interpreted in the Astoria case, that this initiative power might be used in the amending of city charters. It was contended that the right of the voters of a municipality to enact or amend their charter was, in fact, only by virtue of the initiative powers reserved to them, and that therefore any act of the state legislature providing a different procedure was void. To this the court replied that the right to enact or amend a charter was not necessarily an initiative power; that, instead, it existed by virtue of Art. XI, Sec. 2, as amended; and that the enabling act of 1907 was for the purpose of carrying into effect this amendment, as well as Art. IV, Sec. 1 a. This being so, a city might be instructed by the legislature as to the manner of exercising its power of amending its charter.

There appears to be no question, therefore, that Art. XI, Sec. 2, is not self-executing.* On the other

* In Hall v. Dunn, 52 Or. 475 (1908), the court

hand, the dictum of the state court on the other "home rule" amendment, Art. IV, Sec. 1 a, is that it is self-executing. In other words, the grant to municipalities to enact and amend their charters free from legislative interference needs legislative action to make it available to the people of the municipalities, while the reservation to the voters of cities and towns of the powers of initiative and referendum as to their municipal legislation is fully accomplished by the constitutional amendment, needing only the action of the municipalities themselves to put it into practice. When it is considered, however, that the term "municipal legislation" includes the amending of charters, and might just as easily be construed to include their enactment--now that this is no longer a state legislative matter--the distinction here laid down is

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says: "The amendment of Sec. 2 of Art. XI of the organic law empowering the legal voters of every city and town to enact and amend their municipal charters, subject to the constitution and criminal laws of the state, is not self-executing, and operates prospectively only, so that the adoption of such amendment did not alter the charter of the city of Medford as enacted by the legislative assembly, Feb. 7, 1905."

at once seen to be merely a fine legal nicety without any substantial value--all of which the Oregon court practically agrees to when it says that the two amendments are to be read together.

In 1911, when the supreme court was called upon to rule on the validity of an act of the authorities of the town of Springfield in calling and holding an election on amending the town charter, in a manner slightly different from that laid down in the act of 1907, without having provided for such method by ordinance or charter, as the law provided, the court declared its position as follows: "As cities and towns are authorized to provide the manner of exercising the initiative and referendum powers in municipal legislation, except as to the number of legal voters required as petitioners therefor, and as this clause of the organic act is self-executing, no enabling act was required to put into operation this provision of the fundamental law, and such being the case the general law requiring cities and towns to provide by ordinance or charter the manner of exercising such pow-

ers is advisory only, and does not prohibit the adoption of any other reasonable manner of exercising the powers reserved."*

This obviously refers to Art. IV, Sec. 1 a. Three other decisions of the same court, however, show very clearly that it is only in a limited way that this amendment is self-executing. If this statement is not true, then the alternative is to hold the Oregon supreme court guilty of a contradiction.

To take up the first of these cases:** According to the Portland charter of 1903,*** a city ordinance went into effect immediately on its approval by the mayor, contrary to the act of 1907 to carry into effect the amendments of 1906, which provided that no ordinance should take effect until thirty days after its approval by the mayor, within which time referendum petitions might be filed against it. In order to uphold the law as against the charter, so that the right of referendum might not be lost to the people

* McBee v. Town of Springfield, 58 Or. 459 (1911).
** Long v. City of Portland, 53 Or. 92 (1909).
*** Sp. laws 1903, p. 20, Sec. 49.

of Portland, the court deemed it necessary to show the absolute necessity of the law of 1907 to carry into effect the constitutional amendment in question, which did not provide for any time in which to file referendum petitions, and so was, in this respect, not self-executing. In the language of the court: "Sec. 1 a, Art. IV, of the constitution is not self-executing, for the reason that it makes no provision as to its enforcement. It only declares or reserves the right, without laying down rules by means of which this right may be given the force of law. It contains no provision as to the time and place of filing the petition, nor the time when, or the manner in which, the law voted upon shall take effect; and, in view of Sec. 49 of the charter, some provision is required to give time and opportunity to invoke the referendum against an ordinance passed by the council;;;;;..This was recognized by the framers of this amendment, as it provides therein that the manner of exercising such power shall be prescribed by general laws or by the city."*

* The other cases upholding this view are: State ex rel. v. Portland Railway, Light and Power Co., 56 Or. 32 (1910), and Schubel v. Olcott, 60 Or.503 (1912).

3. THE CITY versus THE STATE.

Fundamental limitations upon "home rule."—The American political system, as at present constituted, requires that a municipal corporation shall be subordinate absolutely to the state. It is only from the lawmaking branch of the government that the "home rule" city is to be freed; and even this freedom is not absolute. Where the limitation is not laid down in the constitution itself, the courts have undertaken to supply it. In Oregon, by way of preface, it may be stated that the restrictions have been laid down in both manners. As will be remembered, Art. XI, Sec. 2, as amended in 1906, grants to cities and towns the power to enact and amend their charters, "subject to the constitution and criminal laws of the state of Oregon." The further restrictions laid down by the state supreme court will be considered in the following pages.

Not all the states have provided the same limitations in their constitutions; but they all contain the restriction, expressed or implied, that charters

framed by the voters of municipalities shall be in harmony with and subject to the constitution and the laws of the state--at the very least, to the general laws on such subjects as are deemed to be of state-wide concern. If this were not so, the people of "home ruled" cities could with impunity and at will set aside as many state laws as they liked and set up a real "imperium in imperio." That such a situation would be far beyond what was ever contemplated by the framers of constitutions and constitutional amendments conferring the privilege of "home rule" upon municipalities has been so frequently asserted by the courts and by writers on municipal government that no argument is necessary.

The Missouri constitution, the first to recognize fully the principle of "home rule" in charter making, declares merely that such a charter shall supersede any existing charter or amendments thereto. Such a clause is common to nearly all the constitutions covering the subject. Other states have attempted to specify more exactly what state laws are superseded,

and what are not. By constitutional amendments in California and Colorado, freeholders' charters have been declared to prevail over all laws inconsistent therewith; but, so far as known, no court in either of these states has stated or intimated that a general law upon matters regarded as of state-wide importance and not of purely local concern is superseded or annulled by a city-framed charter. The Michigan and Texas grants most nearly resemble that of Oregon, the reservation in these states being that charters must be subject only to the constitution and general laws. The Oklahoma constitution, and that of Arizona copied from it, declare that "home rule" charters shall become "the organic law" of municipalities and supersede any existing charters and charter amendments and such ordinances as are not consistent with the new charters.

The Washington constitution on this point is the most conservative of all, as only special laws--laws which in the other states considered are prohibited altogether--are superseded. In contrast with the Washington constitution of 1889 is the new funda-

mental law of Ohio adopted in 1912. Special laws are forbidden only as to the incorporation of municipalities. Special acts may be passed for the government of cities and villages, but such laws must in every instance be referred to the electors of the municipality affected. In addition to framing, adopting and amending charters for their own government, cities and villages may "exercise all powers of local self-government and adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with the general laws."

The people of California have amended their constitutional provision for municipal "home rule" six times since the adoption of the constitution of 1879. Under the original arrangement, only inconsistent special laws were superseded by freeholders' charters--just as is still the situation in Washington--and the supreme court in a number of cases construed this to mean that a general law was to prevail over a charter in all matters, whether of purely local concern or not.* But the large cities--San Francisco and

* The case of Davies v. City of Los Angeles, 86

Los Angeles--were not satisfied with this state of affairs, and in 1892* obtained the ratification of an amendment to the constitution striking out the word "special" and making freeholders' charters superior to "all laws inconsistent with such charter."

But there was another section of the California constitution authorizing the legislature to pass general laws for the incorporation and organization of cities and expressly stating that all charters "framed or adopted by authority of this constitution shall be subject to and controlled by general laws." No exception was made of municipal affairs, and the possibility thus remained that the supreme court might hold general laws, even in strictly municipal affairs, superior to "home rule" charters. Further, there being no constitutional limitation on the num-

Cal. 37 (1890), furnishes a typical example. No distinction such as was later adopted between matters of state and municipal concern was made in this decision, and a general law on the opening and widening of streets was held paramount to a charter clause on the same subject.

* Other amendments had been adopted in 1887 and in 1890.

ber of classes of cities which the legislature might create and legislate for, the restriction to general laws might be entirely evaded.* In 1896, therefore, another amendment was incorporated in the fundamental law providing that all charters "framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws."

As has been stated in a previous chapter, municipal corporations in Oregon were, before the adoption of the principle of "home rule," the mere creatures not only of the state, but of the state legislature. "In granting charters to cities, and in creating municipal corporations," said the supreme court in 1868, "the legislative assembly do not intend to sever the political relations already existing, that a city only obtains certain local rights, such as better improvement of highways, more protection against danger

* Milo R. Maltbie, "City-Made Charters," in Yale Review, February, 1905.

and damage from fire, disease, violence, etc., with the power to pass local laws applicable to the new state, not inconsistent with general ones."*

The old established rule in regard to the powers of muhicipal corporations is that such only can be exercised as are (1) granted in express words; (2) necessarily or fairly implied in or incident to the powers expressly granted; or (3) essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable.** It is perfectly plain that this rule applies whether the charter is a product of the state legislature or an act of the people of a municipality. The question of judicial interpretation of charter provisions in cases where they are invoked to justify the action of city authorities is not, therefore, of any direct importance in a study of "home rule." The real problem arises in the conflicts between charter provisions and the general statutes of the state.

* Craig v. Mosher, 2 Or. 323 (1868).
** J. F. Dillon, "Municipal Corporations," Vol. I, p. 448.

So long as both charters and general laws proceeded from the same source--the legislature--such conflicts as did arise did not critically affect any fundamental constitutional and legal principles. A study of the decisions of the court in adjudicating such conflicts will show that the judges were guided by possibly four principles: (1) a later statute as a rule prevails over a former one;* (2) the intent of the framers of the law is to be given much weight;** (3) repeals by implication are not to be favored;*** and (4) whenever two apparently conflicting laws can be reconciled without greatly stretching their meaning and intent, this should by all means be done.**** As justification for the last-mentioned principle the court would often cite the charter itself, which usu-

* O'Harra v. City of Portland, 3 Or. 525 (1869); Hall v. Dunn, 52 Or. 475 (1908), and other local option cases.

** O'Harra v. City of Portland, supra; State ex rel. v. McKinnon, 8 Or. 493 (1880); Sandys v. Williams, 46 Or. 327 (1905); Hall v. Dunn, supra; State ex rel. v. Malheur County Court, 54 Or. 255 (1909).

*** State ex rel. v. Malheur County Court, supra.

**** Burchard v. State, 2 Or. 78 (1863); Palmer v. State, 2 Or. 66 (1863); King v. Portland, 2 Or.146 (1865); Mayhew v. City of Eugene, 56 Or. 102 (1910).

ally contained the reservation that such powers as were granted by, and enumerated in, that instrument were to be exercised in a manner not inconsistent with the laws of the state.

But the introduction of municipal "home rule" puts an altogether new face on this question.

What is the position of municipalities in the state governmental system under such a regime? Has their relations toward the state legislature been radically changed? What is the standing of a city-made charter provision as opposed to a conflicting state law on the same subject? In what way is it essentially different from the former status of charter clauses which failed to comply with the provisions of general statutes? These questions must be answered with some definiteness before any judgment can be passed on the value of the right of cities and towns to frame, adopt and amend their own charters.

In the first case brought to the Oregon supreme court involving the "home rule" amendments of 1906, and local action under the amendments, the optimistic

view of great and extensive powers and possibilities of independent municipal action received a rebuff. As has already been described, the state local option law of 1904--whose provisions were in a numoer of cases evaded by charter amendments enacted by the legislature in the following year granting to certain cities the right to license the sale of intoxicating liquors irrespective of any general state laws on the subject--provided that if a county voted "dry," such a vote would prevail over every part of the county, notwithstanding one or more precincts voted "wet;" but if the county as a whole voted "wet," such a vote would not prevail in such precincts as voted "dry."

At the general election in 1906 the question of prohibition was submitted to the voters of a number of counties in the state, including the county of Coos, in which is situated the city of Coquille. Coos county voted "wet" as a whole, but West Coquille precinct, which embraced the entire city of Coquille and also some territory beyond the city, voted for prohibition, which was accordingly put into effect thruout the pre-

cinct. In August, 1906, the city of Coquille, acting under the "home rule" amendments of that year, by a vote of its citizens amended its charter so as to authorize the licensing of saloons in the city. Then the city council granted a license to a certain party, who was soon arrested for violating the local option law; whereupon he cited his license and the city charter amendment.

In this case the court went direct to the constitutional amendment granting to cities the right to amend their charters, subject to the constitution and criminal laws of the state. The local option law is a criminal law, ruled the court, so that it prevails, wherever adopted, over any charter provisions. The "home rule" amendment, said the court, "does not affect the right of the legislature, or of the people by the initiative, to enact any law they deem proper affecting the criminal laws of the state, and changes therein and new criminal laws will apply to the cities regardless of their character."*

* Baxter v. State, 49 Or. 353 (1907).--See also obiter dictum in State v. Cochran, 55 Or. 157 (1909).

But, it may be interposed, here is a case particularly and specifically excepted by the constitution from the ordinary application of the "home rule" amendments. Will not the courts, in every other sort of attempted infringement upon the privilege of "home rule," whether by the legislature or by the people thru the initiative, annul and prevent such attempted infringement as cannot justify itself as being a criminal law?

In 1909 the legislative assembly enacted a general law for the incorporation of ports,* and objection was raised that, contrary to the "home rule" amendments, it in effect attempted to amend the charters of such cities as might be included in whatever ports would be established in accordance with the act.** This the court denied, declaring that the act did not "directly attempt to amend the charter of any city or town within the bounds thereof." "Under any view," said the court, "it may only affect the charters and

* Gen, laws 1909, p. 78.
** Straw v. Harris, 54 Or. 424 (1909).

ordinances of such cities and towns to the extent that they may be in conflict or inconsistent with the general object and purpose for which the port may be organized." To the contention that the creation of a port would take away from the cities included within it their lawfully conferred control of wharves and locks, and that to deprive them of this control would amount to an essential amendment of their charters, the court gave reply in the following decisive fashion:

"True, the language used in the amendment considered would appear to give to 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.....those provisions must be construed in connection with others of our fundamental laws.....Whatever may be the literal import of the amendment, 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 Art. IV, Sec. 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 objects 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 re-

* "No new state shall be formed or erected within the jurisdiction of any other state."

peal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided for by our fundamental laws. This, under the constitution as it now stands, may be done by the legislature thru general laws only, and the same authority may be invoked by the people thru the initiative by either general or special enactments; only the legislature being inhibited from adopting the latter method."

The meaning is quite plain. What the "home rule" amendments really and actually gave to the cities and towns was the power to enact and amend their charters and, thru the initiative and referendum, to enact legislation, as to matters consonant with, and germane to, the general purpose and objects of municipalities.

In 1910 the Oregon supreme court was called on to consider the validity of a charter amendment adopted by the people of McMinnville four years before. After citing the case just quoted and declaring that the state can delegate any local powers to incorporated

cities and towns, Justice King says: "But in the absence of any clear and express declaration to that effect, by the source from which the authority emanates, only those powers incident and germane to the city government may be deemed delegated, and they are always subject to control and regulation by the law-making department in the manner provided by the constitution."*

One more enunciation of this doctrine will be quoted. The city of Portland was [illegible] involved, the question this time being in regard to the power of the city, by amendment of its charter, to obtain the right to locate a public bridge over the Willamette River at a point where the river was exclusively within the municipal boundaries. In deciding in favor of the city, the court said: "The people of this state, by the constitutional amendment heretofore quoted, have seen fit to confer upon municipal corporations the right to enact their own charters; the

* City of McMinnville v. Howenstine, 56 Or. 451 (1910).

only limitation upon that right being that such charters shall not conflict with the constitution or the criminal laws of the state. We take it, therefore, that within the limits of the municipality, and for those purposes which are strictly municipal, the city of Portland may include in its charter by amendment any provision or right that the legislature might have granted before the constitution was so amended."*

This pronouncement sums up, it is believed, better than a score of rulings on actual details of powers could do, the judicial attitude as to what the "home rule" amendments really accomplished. Any right or privilege which the state legislative assembly might have conferred upon cities and towns, in the exercise of its own powers, may now be assumed by the municipalities themselves as of right under the constitution. For is not this new right of municipal corporations limited by, and subject to, solely the fundamental law and the source whence comes the fundamental law--namely, the people of the state? But the

* Kiernan v. Portland, 57 Or. 454 (1910).

one great limitation remains and must ever be kept in mind: Such rights and privileges which the municipalities may now assume must be for purposes which are strictly municipal.

Thus the whole of the vital question as to what municipalities can do--and in what respect they are freed from the control of the state legislature--becomes a judicial matter. Up to the present time the Oregon court has had occasion in only a very few cases to decide what are appropriately matters of local and municipal interest and what concern rather the state as a whole. Its hint, however, that it will be guided, within limits, by what the legislature under the old regime chose to delegate to the cities and towns affords a fairly definite basis for a prediction as to what functions the court will in the future concede to fall within the sphere of municipal activity.

What this field of municipal affairs has been in Oregon has been dwelt on in some detail in a preceding chapter. An attempt to determine what the sphere of

legislation and administration is, or will be, under a system of "home rule" will, therefore, necessarily involve some repetition. Of course, a rigid adherence by the courts to what have been municipal powers in the past is not to be expected. Times change; and, tho the sphere of municipal activity, as opposed to the state, may not have appreciably widened, and may not in the future--in fact, in some matters, such as the control of public utilities, the movement thruout the country just now seems to be the other way--the daily functions of municipal corporations will change and expand with the ever growing and changing conditions of public life and the needs of the people.

Tho the Oregon supreme court has not stated as much, it is reasonable to infer that it will be guided in determining what are local and what are state matters by what the legislature has in the past chosen, and will in the future choose, to confer on cities and towns; or, by what it has not reserved, and will not in the future reserve, to itself. This, it seems, must of necessity be the case. While the general right of municipalities to enact and amend their

own charters, and adopt local legislation, is now part of the public policy established by the people of the state in their constitution, nevertheless, the determination of what are local and municipal affairs, and what are not, is just as clearly left a part of that portion of public policy which is directed and determined by the legislative branch of the government--and interpreted and restricted by the judicial branch.

Adopting this inference will make it less difficult to form an estimate of what the "home rule" amendments accomplished in reserving or conferring powers of one kind or another on municipal corporations--and depriving the legislature of those powers.

Primarily, then municipal "home rule" is a question of powers. It is powers that constitute the sphere of municipal action. These will be taken up briefly, as found in statutes and judicial opinions. Then a brief review of the general tendency of the legislature in conforming its activities to the principle laid down in the amendments of 1906 will be presented; and from the information thus obtained,

an attempt will be made to estimate the real status of "home rule." The short time that has elapsed since the "home rule" amendments went into effect in Oregon will, unfortunately, make any treatment of the subject inadequate.

Financial powers.--As pointed out in a preceding chapter, the power to tax for municipal purposes was conferred on all cities and towns, tho the rate and the objects to be taxed were matters regulated by the legislature. Similarly, in borrowing, while it was a power almost as common, the limitations on the amount to which indebtedness could be incurred were prescribed by the legislature.

After the adoption of the "home rule" amendments the city of Grants Pass amended its charter, by initiative proceedings, so as to authorize its common council to incur an indebtedness of $200,000, far beyond what was permitted under the charter as granted by the legislature prior to 1906. The question then arose: Is municipal indebtedness a matter of state concern? And the court decided that it was.

While the power of the legislature is unlimited when not restricted by the constitution, said the court, such unlimited powers do not extend to a city, which must confine its activities to municipal affairs.*

The Oregon court has not had occasion to say whether or not taxation for local revenue purposes is a matter of municipal concern entirely. As far as the right to tax for municipal purposes is concerned, it is hard to see how a city could be prevented by the legislature from putting such a right in its charter--if there were no other manner by which a municipal corporation could be provided with means for carrying on its necessary functions. But another question arises when the limitations on the exercise of the power are considered. The right to tax is a sovereign function; and the power to tax is a power to destroy. Hence, the power in the hands of any other authority than the state must be carefully limited; in other

* Riggs v. Grants Pass, 66 Or. 266 (1913).--The same position has been taken by the supreme court of Minnesota: Beck v. City of St. Paul, 87 Minn. 381 (1902); American Electric Co. v. City of Waseca, 102 Minn. 329 (1907).

words, the power and the function must remain primarily a state power and function.

Local improvement powers.--In the examination of the power to make local improvements, in a preceding chapter, it was found that it was universally and in generous terms delegated to municipalities; so much so as to make it essentially a local and municipal function. Where the power of eminent domain was involved, it was found to be delegated to the cities and towns, tho the constitutional and common law guarantees of private property rights formed a continuing restriction on the exercise of the right. Where the control of streets was involved, it was a practically unlimited, tho delegated, power, except that streets must be used for public purposes.

As in taxation, so also here it must be borne in mind that the conferring of these functions did not at all mean that the legislature divested itself of the power, or even the practice, of regulating the exercise of the local improvement powers. Assessments afford a good example. Tho the power and

the mode of exercising the power were conferred in more or less detail in the individual charters, the legislature by a number of general statutes made numerous additional regulations. Thus, in 1901 and 1905 laws were passed permitting property owners in any incorporated city or town, when assessed for more than $25 for sewer improvements, to pay their assessments in installments. As the law stood in 1905, this privilege could not be accorded anyone by whom old assessments on sewer or street improvements remained unpaid.

Despite the "home rule" amendments of the following year, and despite the fact that local improvements and the assessment of property therefor are so much a local function,* the regulations of these gen-

* In 1909 the Oregon supreme court held that a tax levy and bond issue for the construction of a sewerage system were authorized by a charter clause permitting such a tax and bond issue "for any specific purpose within the authority of the corporation," for, as the court said, a sewer is "a specific city purpose."--Naylor v. McCulloch, 54 Or. 305.

The building of bridges within the city limits is also a municipal matter.--Kiernan v. Portland, 57 Or. 454 (1910).

The courts of Missouri and Minnesota have indicated that the manner of levying and collecting assessments for local improvements is so much a local

eral functions manifestly remained unimpaired in their application. This is shown by the fact that in 1907 the law was amended to permit application for the payment of sewer assessments in installments even tho old assessments remained unpaid.* At the same session of the legislature another law was enacted in regard to laying out or improving streets. It applied to all cities of 50,000 or more population--thus only to Portland. The privilege of paying assessments in installmets was accorded to property owners whose benefits were valued at more than $50. The act also empowered the city authorities to issue bonds for the total of such assessments as were not paid at once; and the terms and conditions of such bond issues were prescribed in detail.**

In 1910, in one of the most important "home rule" cases to come before the Oregon supreme court,

function as to supersede state laws on the same subject: State ex rel. v. Field, 99 Mo. 352 (1889); Turner v. Snyder, 101 Minn. 481 (1907).

* Gen. laws 1907, p. 361.

** Ibid., p. 231.

that tribunal was called upon squarely to decide whether or not the power of eminent domain was a right inherent in municipal corporations under the amendments of 1906; that is, whether or not a city could exercise this right without an express grant from the legislature or the people of the state. The decision of the court was in the affirmative.*

The facts in the case were as follows: In 1907 the city of McMinnville adopted an amendment to its charter authorizing its water and light commission to acquire by condemnation proceedings all necessary rights over lands for a pipe line for its waterworks, even to the extent of extending such a line outside the limits of the city, and to extinguish any riparian rights that might interfere with the project. The case was different from any that the court had ever before been called upon to decide; and similar problems ruled on by other state courts related to the exercise of eminent domain within municipal limits

* City of McMinnville v. Howenstine, 56 Or. 451 (1910).

only. With no precedents to follow, therefore, the Oregon judges had to decide whether or not (1) the supplying of water to a city was a municipal matter and (2) whether or not the right of eminent domain inhered in a municipal corporation.

In pronouncing the opinion of the court on the first point, Justice King said: "That the construction of waterworks for the use of the citizens of any municipality is germane to and necessarily incident to the health and prosperity, as well as essential to the continued growth and existence of our cities, there is no room for discussion.....Under the rapid growth and complexity of municipal governments in later years, with the advanced knowledge and improved methods for the prevention of epidemics, as well as against destruction by fires, etc., it would seem that without question the procurement of a pure and abundant supply of water is as much an incident to city government, and equally as essential to the security of the health, life, and success of its inhabitants as is the existence of a police force."

Perhaps it was because of the necessity of a city having a pure water supply, and other factors of expediency, that the court gave an affirmative answer to the second question also. Its argument continued as follows:

"Would it be reasonable, then, to hold that our cities and towns, before being permitted to exercise the right of eminent domain, must await the action of the legislature by the enactment of some general law applying to all the cities of the state? To do so would be to say that no city may exercise this right without the same privilege being extended to all incorporated towns. Such has never been the course pursued in this state. It has been the policy, since the inception of our government, to grant to the cities such rights only when by the legislature deemed proper and advisable; doing so only as the occasion might arise, specifically and not generally.....If, then, it was not intended to permit municipalities to assert this right, when deemed proper by the majority of the citizens thereof, in the event the legislature fails to provide a general law on the subject, including there-

in all such localities, the only way left open for any public incorporations of this character, when desiring to open or widen streets, provide for waterworks, or make other public improvements, when the price of property essential to be taken for the purpose cannot be agreed upon, would be to initiate and submit a bill to the people of the entire state, which could occur every two years, else submit to the extortion of the individual owner." The "home rule" amendments, added Judge King, were "obviously intended to aid and not to embarrass" cities and towns.*

Regarding extension of the right of eminent domain beyond the city limits, the court held that this was permissible, for this had so frequently been granted by the legislature that it was manifestly the intention of the framers of the constitutional amend-

* Decisions of the courts in Missouri, Minnesota and Colorado agree with the docrtine here laid down: Kansas City v. Marsh Oil Co., 140 Mo. 458 (1897); Braun v. Kansas City, 216 Mo. 108 (1909); State ex rel. v. District Court of Ramsey County, 87 Minn. 146 (1902); Londoner v. City of Denver, 52 Col. 15 (1911).--The supreme court of Washington has taken a contrary view: In Re Cloherty, 2 Wash. 137 (1891); Tacoma v. State, 4 Wash/ 64 (1892).

ments of 1906 to include this privilege with other rights of local legislation.

Public utilities.--Monopolies in the form of exclusive franchises, it has been said, are matters of state concern. But the granting to private persons or corporations of permission to establish and operate local public utilities, such as waterworks, lighting plants, street railway lines, and others, was very commonly devolved upon the municipalities in Oregon. So in 1911 the supreme court held that, since supplying a city with water was a necessary incident to a municipal corporation, the right to grant a franchise therefor was to be implied.*

Since 1906 the Oregon legislature has enacted several laws on municipal utilities, which indicate very clearly an intention that they shall conform to a general state-wide policy. In 1909 a general law** was passed to provide for a systematic regulation, distribution and use of water, and for the determination of private rights and public rights in con-

* City of Joseph v. Joseph Waterworks Co., 57 Or. 586 (1911).

** Gen. laws 1909, p. 319.

nection with securing a supply of water. The act divided the whole state into two geographical divisions for this purpose, and it provided that, subject to existing rights, all waters in the state might be appropriated for use.

In 1911 a general act was passed authorizing any incorporated city or town controlling or operating a system of waterworks or electric light and power plant, and any person or corporation controlling or operating the same under lease or ownership, to sell water or electricity either within or without the limits of the city or town.* Another law of the same year authorized incorporated cities and towns to construct drains, ditches and sewers beyond the corporate limits. In this case, however, the city authorities had to petition the county court, which was to appoint commissioners to view the route of the proposed ditches or sewers and assess benefits and damages accruing from the proposed undertaking

* Gen. laws 1911, p. 121.

of the municipality. The commissioners were then to report to the county court, which, if satisfied that the improvement was needed, was to issue an order approving the project.*

In 1911 the Oregon legislature enacted a general law for the regulation of all public utilities in the state, municipal and otherwise. They were to be under the supervision and regulation of the state railroad commission. Section 61, which dealt with municipal utilities, declared that every municipality should have power to determine the quality and character of every kind of product or services within the city. Within the limits of the act, each municipality could also determine the terms and conditions upon which any public utility corporation should be permitted to occupy its streets or other public property. The city could require of any utility company any "reasonable" modifications, additions and extensions to its physical plant, equipment or service; could designate the location and nature of all such

* Gen. laws 1911, p. 443.

additions and estensions, the time within which they must be completed, and all conditions under which they must be constructed--subject to review by the state commission. Any determination of these matters by the local authorities should be, the act declared, prima facie reasonable; but on complaint of any public utility the commission was to grant it an opportunity to prove that it was not reasonable. The law contained the following interesting proviso: "No ordinance or other municipal regulation shall be reviewed by the commission.....which was, prior to such review, enacted by the initiative or which was, prior to such review, referred to and approved by the people of said municipality, or while a referendum thereon is pending." Despite a little ambiguity in the language of this last provision, it can undoubtedly be said to carry out fully the spirit of the constitutional amendments of 1906 and to grant "home rule" to the people of all municipalities which desire to avail themselves of its liberal provisions.*

* Gen. laws 1911, p. 483, Sec. 61.

Police powers--Local option.--Local police powers for the protection of the public peace, health and safety, as has been previously described, were bestowed in generous portions on localities by the Oregon legislature; and several rulings by the state supreme court show that the safeguarding of morals is plainly to be seen in the restrictions on the liquor traffic, also a common local function.

Power to punish offenses against the public peace borders upon the criminal power of the state, and so must be strictly construed in this respect. It covers only what the words mean: public peace, or public tranquility. Thus, it does not carry with it power to punish such offenses against public policy as keeping stores open on Sunday, which does not disturb the peace or tranquility of the people.* Similarly, power to prevent and restrain riots, noise, and other disturbance does not carry with it the power to punish the crime of assault with a deadly weapon.** In other words, the criminal law and penal law

* City of Corvallis v. Carlile, 10 Or. 139 (1882).
** Walsh v. City of Union, 13 Or. 589 (1886).

are matters of state policy; so that, as a rule, violations of the conditions on which licenses of any kind are held are subject to state law in the matter of penalties, aside from forfeiture of the license.

The prevention of fires is of prime importance to local communities, and, as has been shown, the Oregon legislature came to recognize this fact. The state supreme court in 1888 declared that municipalities may enact regulations for this purpose under their general police powers,* evidently alluding to the "general welfare," or similar clauses, common to nearly all the charters. The declaration is important as indicating that, not only the protection from fire hazards, but also all other local safety and general police regulations, are inherently local and municipal functions.

The prevention and removal of nuisances has been commonly delegated to the local authorities in Oregon; and with this power has commonly been that of defining what shall constitute a nuisance. Jurists have dewel-

* Beers v. Dalles City, 16 Or. 334 (1888).

oped a number of rules restricting the right of a legislative body, whether of a municipality or of the state, to define nuisances; but it is believed that the Oregon supreme court stated these in a nutshell recently when it declared that, so long as the definition of a nuisance in a charter is not clearly arbitrary and unjust, and manifestly wrong, the courts will uphold it.* The same principle applies to the enactment of ordinances.

In a little earlier case the court upheld the right of the city of Portland to repeal an ordinance granting a right to maintain a slaughterhouse, on the ground that such an industry, tho not necessarily a nuisance, may become so, and a municipality cannot bargain away its police powers. In deciding when a slaughterhouse becomes a nuisance, the court held, a large share of discretion is to be allowed to the local authorities. "Tho under a general grant of power over the subject," said the court, "a common council

* Mayhew v. City of Eugene, 56 Or. 102 (1910).

has no authority to adopt an ordinance declaring a thing a nuisance which is in fact not one, yet in doubtful cases, depending upon a variety of circumstances requiring an exercise of judgment and discretion, their action is conclusive and, pursuant to such grant, they are empowered to adopt an ordinance declaring a slaughterhouse within the corporate limits a nuisance."*

Municipal corporations have no inherent power to levy or collect license fees of any kind; it must be delegated to them.** Yet the power has been so universally delegated that it seems to be fully a local function, so far as its exercise is concerned. In some instances the power to license and regulate is extended to prohibition, as in gambling and prostitution. Before 1906 the power to license in Oregon had to be

* Portland v. Cook, 48 Or. 550 (1906). In this instance the charter authorized the council to "license, tax, control and regulate slaughterhouses..... and to provide for their exclusion from the city." (Laws 1891, p. 806).

** Lent v. Portland, 42 Or. 488 (1903).--But it may be implied from the power to license and regulate: Abraham v. City of Roseburg, 55 Or. 359 (1910).

expressly delegated; it could not be inferred from the term"regulate." In so holding, the court plainly expressed the intent of the state legislature that in the particular case in question saloons should not be permitted; and the moral side of the question was recognized.*

Prior to 1904, then, to the function of licensing was a local one, it is clear that the determination of policy as to whether or not the sale of liquor should be permitted was reserved to the state legislative body.** But the people of Oregon have since then changed their policy--three times. In 1904 the county local option law, already described, made the determination as to license or no license a matter to be settled by counties, except that precincts within a county might by vote prohibit the sale of intoxicants within their limits. Tho the legislature

* Pacific University v. Johnson, 47 Or. 448 (1906). The charter provision in question was of the city of Forest Grove, where a college was located.

** Such has also been declared to be the situation in two other "home rule" states, Minnesota and Colorado: Grant v. Berrisford, 94 Minn. 45 (1904); Walker v. People, 55 Col. 402 (1913).

could, nevertheless, exempt a municipality from the operation of the local option law before the adoption of the "home rule" amendments in 1906,* a city could not, after 1906, by its own action exempt itself from the results of a county or precinct vote.**

At the general election in 1908 a proposal for amending the constitution on this subject was submitted to the voters of the state. It consisted of an addition to Art. XI, Sec. 2, which granted the voters of cities and towns power to enact and amend their charters. It read as follows:

....."and the exclusive power to license, regulate, control and tax, or to suppress or prohibit theaters, race tracks, pool rooms, bowling alleys, billiard halls, and the sale of liquors, subject to the provisions of the local option law of the state of Oregon within the corporate limits of any municipality, is vested in such municipality."

Tho advocated as a "practical home rule" measure by its supporters,*** it was plainly an effort

* Hall v. Dunn, 52 Or. 475 (1908); see p. 122.
** Baxter v. State, 49 Or. 353 (1907); see p. 166.
*** Argument filed with the secretary of state and published in the election pamphlet of 1908, p. 60.

of the saloon, pool room and theater interests to free the cities from the control of the legislature and the people outside the cities and leave them unrestrained in runing towns "wide open."* It was bitterly and publicly denounced all over the state as an attempt to nullify the provisions of the local option law, which it undoubtedly was, even tho it expressly declared that its provisions should be subject to this law. The result of the vote showed that the people in 1908 were on the whole satisfied with the principle of county option, or at least that they wished to give the principle a thoro test before abandoning it.** The proposal was defeated by a vote of 52,346 to 39,442.

Two years later, however, in 1910, the liquor interests were successful--but to their own grief, as was shown four years afterward. The proposal for an amendment was now submitted in a slightly different form. It read as follows:

....."and the exclusive power to license, regu-

* Argument filed with the secretary of state and published in the election pamphlet of 1908, pp. 61-62.
** Eaton, "The Oregon System," p.

late, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the state of Oregon."

Fathered by the "Greater Oregon Home Rule Association," and the signed petitions of 40,000 "leading citizens, including business and professional men, farmers, bankers, and many ministers,"* this amendment was adopted by a vote of 53,321 to 50,779. Municipal "home rule" had evidently become somewhat of a success, because it was now a shibboleth to be employed in cajoling the voters of a state into permitting liquor interests further to intrench themselves in the larger cities, particularly Portland, untouched and unaffected by whatsoever might be the sentiment of the people of the state outside the municipalities.

Municipal option was really but another form of local option, which had so far proved quite successful. At the 1910 election the anti-saloon people pro-

* Argument filed with the secretary of state and published in the election pamphlet of 1910, p. 75.

posed a constitutional amendment for state-wide prohibition. They also had two initiative bills put on the ballot, one to provide for searches in enforcing prohibition in "dry" territory and the other to regulate shipments of liquor into territory from which saloons had been ousted. These measures went farther than the Oregon people cared to go at this time, in view of the satisfaction which the local option principle had given, and this fact undoubtedly aided in the defeat of prohibition by more than 17,000 votes, and the success of the reactionary proposal of the liquor interests.*

In the fall of 1914 the liquor interests in Oregon met their Waterloo. Perhaps it was because women were now permitted to exercise the right of suffrage. At any rate, at the general election in November, the 17,000 majority against prohibition of four years before was now wiped out and the electors adopted an amendment to their constitution or-

* Eaton, "The Oregon System," p. 41.

daining that after January 1, 1916, the manufacture and sale of intoxicating liquors should be prohibited thruout the state.

In view of this result, it is not of such great importance to investigate what were the legal effects of the adoption of the 1910 amendment.* An interesting construction of the declaration contained in it that municipalities should within their limits be subject to the local option law has, however, been given by the state supreme court.** The amendment impliedly repealed, said the court, so much of the local option law as permitted the voters of a county to petition for a prohibition election, or vote upon such a question, when any part of the county consisted of an incorporated city or town. It amended the local option law so as to allow, instead, an election in any ward or precinct of a municipality, even tho prohibition had carried in the entire county. But the local option law as

* The amendment was in 1912 held to be self-executing: State v. Perkins, 61 Or. 163.
** State v. Schluer, 59 Or. 18 (1911).

such still remained, for it could be put into operation in such country districts as desired it, and in such municipalities as desired it. The right granted to cities, however, was necessarily governed by all the provisions of the local option law that could be made applicable; so that, in initiating a change for or against prohibition, the petition to the county court which the law required was still necessary.

Notwithstanding that the amendment of 1910 was so obviously a measure in favor of the liquor interests, the supreme court has held that it did not give the people of a city in a local option election power to compel the city to license the sale of liquor. Notwithstanding a vote against prohibition, said the court, a city may, either thru its council or by initiative, prohibit the sale of intoxicants.*

The amendment, said the court in another case, also made the municipalities the sole agents of the state in exercising the police power respecting regulation of the sale of intoxicants within their lim-

* Salem Brewery Assn. v. City of Salem, 69 Or. 120 (1914).

its. In other words, the state had, by its constitution, delegated a portion of its police power; but, said the court, the power cannot be delegated or bargained away so as to place it beyond recall. In this statement the light of subsequent events can make a prophecy appear.*

Municipal elections.--The conduct of municipal elections, as has been shown in a preceding chapter, was before 1906 regarded as a matter of state-wide concern; and in accordance with this principle the legislature enacted a series of laws regulating the matter. As a matter of convenience, however, the actual holding of elections was done by the local authorities. But all such functions were expressly delegated, and from its power to hold an election for city officers a municipal council could not claim a right to hear and determine election contests.** This function, too, was commonly delegated to municipalities,

* State v. Hearn, 59 Or. 227 (1911).

** Robertson v. Groves and City of Corvallis, 4 Or. 210 (1871); State ex rel. v. McKinnon, 8 Or. 493 (1880).

but, unless so specified in the charter, it did not give the city council exclusive and final jurisdiction.* The same principle obtained in reference to the power of a city council to be judge of the election and qualifications of its own members.**

But the "home rule" amendments of 1906 changed matters greatly. "Cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation," reads Art. IV, Sec.1 a, of the constitution. Under this amendment, provisions which municipalities may make regarding direct legislation by their citizens prevail over general laws on the subject enacted by the legislature.*** They are limited only by the constitution. The amendment just quoted declares the initiative and referendum powers to be reserved to the "legal voters" of municipalities; therefore, a city has

* State ex rel. v. McKinnon, 8 Or. 493 (1880); Simon v. Portland Common Council, 9 Or. 437 (1881).

** State ex rel. v. Kraft, 18 Or. 550 (1890).

*** McKenna v. City of Portland, 52 Or. 191 (1908), cited on p. 150; McBee v. Town of Springfield, 58 Or. 459 (1911), cited on p. 154.

no right to limit the exercise of these powers to registered voters.* The amendment carries the further restriction that not more than 10% of the legal voters of a city may be required to order the referendum, nor more than 15% to propose any measure. It was undoubtedly in regognition of this change of policy that the Oregon supreme court in 1913 declared that municipal elections and the choice of municipal officers are matters of purely municipal concern.** Elections for the purpose of enacting or amending charters are also necessarily included, for the amendment of charters is now a municipal affair in Oregon.***

Annexation of territory.--A vote of a municipality to extend or alter its boundaries amounts to a charter amendment.**** Are the people of a city, accordingly, to be unrestrained in whatever steps they

* Woodward v. Barbur, 59 Or. 70 (1911).

** State ex rel. v. Portland, 65 Or. 273 (1913).--It may be remarked here that in California and Colorado amendments have been incorporated in the constitutions conferring upon municipalities the right, under their privilege of adopting and amending their own charters, to provide for the election of local officers.

*** Acme Dairy Co. v. Astoria, 49 Or. 520 (1907), cited on p. 148.

**** Cook v. Portland, 69 Or. 572 (1914).

may wish to take in absorbing adjacent territory? Manifestly, no. Interests in no way urban or municipal would be involved, so that it would no longer be a local matter.*

4. LEGISLATIVE CONTROL UNDER "HOME RULE".

While it is beyond the scope of this investigation to attempt to determine whether or not "home rule" has been successful in the Oregon cities and towns in which it has been put into operation, or to compare the present situation with conditions during the five decades of special legislation, nevertheless, in the preceding pages some reference has necessarily been made, from time to time, of the workings, and advantages and disadvantages, of the two systems. A description of the "home rule" plan would also be incomplete without an account of how the state legislature--at whose activities the reform of 1906 was aimed--has conformed its conduct and field of opera-

* State ex rel. v. Port of Tillamook, 62 Or. 332 (1912); Thurber v. McMinnville, 63 Or. 410 (1912); Landless v. City of Cottage Grove, 64 Or. 155 (1913).

tions to the letter and spirit of the "home rule" amendments.

It was the intent of the framers of the amendments of 1906 that not only the creation of municipal corporations by special acts, but also any special legislation whatever affecting the local interests of but one city or town, should be prohibited; for that is reserved to the legal voters of each municipality. Despite this clear intent, the legislature, at its first session after the adoption of the constitutional amendments, passed four acts that were clearly local and special.

One of these was to establish and incorporate the Port of Columbia.* The legislators were perhaps not aware that, sixteen years before, the state supreme court had ruled that the term "municipal corporations" included incorporated ports,** but the judges had not forgotten it, and when objection was made to the action of the legislature and brought

* Gen. laws 1907, p. 182.
** Cook v. Port of Portland, 20 Or. 580 (1891), cited on p. 47.--See also Farrell v. Port of Portland, 52 Or. 582 (1908), cited on p. 133.

before the court, they promptly pronounced the act null and void. It was in reality because the amendments of 1906 forbade the creation of any kind of corporation, public or private, by special act, however, that the court held the act to be in violation of the constitution.*

Another act of the 1907 session was one declaring all county roads within the city of Cornelius to be streets of the city, and giving the city authorities jurisdiction over them. It required that 40% of all property taxes and all road poll taxes collected within the city be turned over to the city treasurer. Thus far, perhaps no objection could be made to the act, even tho clearly special in nature; for, as has been said, the primary and original control of streets and highways is lodged in the legislature, and in this case the legislature had manifestly not relinquished its control. Furthermore, the sovereign right to tax is essentially a state function. But the act went farther and specified that the taxes

* Farrell v. Port of Columbia, 50 Or. 169 (1907).

mentioned must be set apart by the city as a separate "city street improvement fund." It ordained that the city should use the roads in question as city streets and work and maintain them and improve them; and the street improvement fund could thenceforth be expended only for this purpose.*

The expediency and advisability of neither the act nor any of its provisions is here questioned. It was passed as an "emergency measure." But some of its provisions violated the spirit of the "home rule" amendment without a doubt.

Similar was an act to create a public playgrounds board for the city of Portland.** This board was made to consist of the mayor of the city, the judge of the juvenile court of Multnomah county, the district superintendent of schools, the librarian of the city public library, and the president of a local athletic club. It was given exclusive control of public playgrounds and gymnasiums, and was authorized to levy a

* Gen, laws 1907, p. 99.
** Ibid., p. 308.

small tax for the purpose of acquiring land needed for playgrounds. The management of public playgrounds, a part of the educational system, is undoubtedly a state matter in Oregon; but when the legislature empowers a board of this kind to levy a tax on a particular city and to purchase and hold property "in the name of the city," and imposes the duty upon the municipal water board to provide water for playgrounds and gymnasiums "free of charge," it seems that there is a real interference with local authorities in a sphere that is usually reserved to municipal action.

Finally, at the session of 1907 the legislature passed an act to validate the appointment of certain employes of the city of Portland whose selection had unintentionally been made in a manner not complying with the civil service rules laid down in the charter. Suit having been brought in the county court against one of these employes, and a decision adverse to his continuance in the employ of the city having been given, the legislature, in order to prevent the court from annulling the appointments of 174 others in

the same situation, now passed an act to validate the same.*

In 1909 the legislature authorized the "water commission" of the city of Corvallis--a body of four members chosen by a previously established "water committee" (whose membership was fixed by an act of 1905) from its own membership--to acquire property outside the city which was needed for protecting the municipal water supply. Like the "water committee" imposed on the city of Portland in 1885 and the Corvallis "water committee" of 1905, the commission was now empowered to issue bonds--to the sum of $40,000--which the city was obligated to pay.** Here, again, the expediency, or even the possible necessity, of the act is not drawn in question. But that the spirit of "home rule" was violated by it there can be no doubt.

In 1911 several special acts were passed, one of which was subsequently thrown out by the supreme court. This one*** provided that every incorporated port

* Gen. laws 1907, p. 119.
** Gen. laws 1909, p. 265.
*** Gen. laws 1911, p. 319.

which contained more than 100,000 population, as shown by the last federal census, should be governed by a board of seven commissioners appointed by the governor of the state. Obviously, tho general in form, the act referred only to the Port of Portland, and this the court took into consideration when it declared the act unconstitutional. If there is to be any classification of ports, or of any other corporations, said the court, it must be based upon some real and actual distinction, which the court could not see in the present case.*

On this principle it would seem that the same objection could be made to a law adopted in the same year providing for the manner of calling elections in cities of more than 100,000 population, upon the question of annexation of territory.** At the same time the legislature passed an act to provide for constables and deputy constables in cities having more than 100,000 inhabitants, and fixing their terms of office, salaries, etc. Constables and deputy constables are

* State ex rel. v. Swigert, 59 Or. 132 (1911).
** Gen, laws 1911, p. 422.

undoubtedly state officers, so that no real objection can be made to the act. At the same time, the fact that they were made elective by the people of the city --Portland--would seem to indicate that the legislature recognized that to some extent the personnel of these officers can sometimes be of special concern to a municipality.*

In 1911 the legislature once more came to the rescue of the city of Portland. At an election in 1909 the voters of that city adopted an amendment to the charter authorizing the city council to issue bonds to the amount of $2,000,000 for the purpose of constructing a bridge across the Willamette River, and for acquiring approaches for the same. In accordance with this amendment, $250,000 in bonds was sold without any question being raised; but when the council put $500,000 more on the market several suits were instituted to test the validity of the amendment and the authority of the city to incur an indebtedness to this amount without an act of the legislature. In or-

* Gen. laws 1911, p. 343.

der to set at rest all questions, therefore, the legislature now enacted that the city was fully authorized and empowered to adopt the charter amendment in question and to construct the bridge and issue bonds therefor; and any errors or irregularities in such proceedings as had been taken were declared to be "cured and validated."*

5. CONCLUSIONS.

It is difficult to draw any conclusions from these acts. While some of them seem clearly to invade the intended field of municipal legislation reserved by the constitutional amendments of 1906, others simply show that there is a large, tho undefined, field of governmental action in which the combined activities of both local communities and the state legislative body must continue and commingle. It is a close analogy to the "twilight zone" between the spheres of federal and state action, which has formed such a vexatious and delicate problem for American

* Gen. laws 1911, p. 23.

statesmen and the jurists who have had to meet this most elusive source of difficulty in the American constitutional system.

Still others of these acts show on their face that it was to meet real and pressing exigencies that the legislature intervened. The real field of municipal action has not, by far, been determined in Oregon. Only a very few years have elapsed since the experiment of "home rule" was put into operation, so that the unsettled situation, in this respect, is not to be wondered at.

As is apparent to all, the field of municipal action can never be a static thing. Not only will the quantum of municipal powers and functions change, due to changing conditions of social, economic and political life, but the relation of the city to the state, that governmental unit which is itself undergoing a silent transformation, will necessarily vary with the fortunes of the latter. What effect potential changes in the position of the states in the American federal system will have upon the relation of municipal cor-

porations to the state, particularly in the "home rule" states, is a question too remote to call forth a venture at prophecy. The relation is too indefinite and uncertain, as it is.

As in the past, so in the future the course of events will be shaped by the trend of social and economic life--and as interpreted by the legislative and judicial branches of the government. The question of "home rule" being to such a great extent one of undefined powers and spheres of action, it is inconceivable that a scheme of local self-government could be evolved without the guidance, direction and restraint of the courts. In this lies also the inherent difficulty and unsatisfactoriness of the whole plan. Municipal corporations will always have duties of a governmental nature as agencies of the state to perform, as well as private functions of a corporate character, and so long as this is true, there must always be an undefined sphere of governmental action where the duties of local corporation and agency of the state blend. The possession of this two-fold character of

municipalities, furthermore, makes any material relaxation of ultimate control by the state impossible.

It is undoubtedly because of these facts that there is such a lack of harmony among thoughtful students of municipal government as to the ultimate value of a plan whereby municipalities are enabled to frame, adopt and amend their own acts of incorporation, and under them enact local legislation free from interference by the legislative body whose duty it is to determine the great matters of state policy.

"The congregating together of a large number of individuals on a small surface does not change their relation to the state, and it would be decentralization gone mad to permit the establishment of a number of small sovereignties, independent, under the constitution, of the central power, and yet all members of the same commonwealth," was the emphatic assertion of a speaker nearly twenty years ago at a national conference for good city government.*

* F. W. Holls, "State Boards of Municipal Control;" paper read at the Fourth National Conference for Good City Government, 1896, under auspices of the National Municipal League, Proceedings, p. 226.

If sovereignty were divisible, "home rule" cities might be conceived as being, perhaps, part sovereign. But the study which has been made of the scheme as adopted and put into practice in Oregon shows as clearly as one could wish that it was never the intention of the framers of the "home rule" constitutional amendments in that state to set up any "sovereign" political entities. It seems also to show that such could never be the effect, even if contemplated, in any state of the Union. Municipal "home rule" is not, therefore, a scheme of a nature to call forth such violent condemnation, tho the inherent difficulties in the plan must be admitted.

Perhaps the greatest authority in the United States on the legal aspects of municipal corporations, in referring to the idea of having the people of localities vote on the adoption of charters and charter amendments, says: "A prompt, frank and sincere recognition of local requirements by the legislature will usually render unnecessary any resort to a referendum such as is here provided for, and it may be ques-

tioned, upon experience up to the present, whether freeholders' charters will prove to be so satisfactory as to come into general use thruout the country."*

This criticism does not present any insuperable difficulties in the way of putting "home rule" into successful operation. It merely suggests that the legislature, which has been wanting in the past, might awaken to the need of putting the creation of municipal corporations on a higher basis than it has. The doubt cast on the ability of municipalities to frame satisfactory charters for their own governmetn is also something which remains to be proved.

The greatest difficulties, it is believed, are the ones which have been brought out in this inquiry; and they can be summed up in the single statement that the plan as so far developed has not presented a clear and definite solution of what should be the correct relation of the city to the state. Perhaps this is asking too much of the plan. In the field of public law and political science, the intangibleness and relativ-

* J. F. Dillon, "Municipal Corporations," Vol. I, p. 112.

ity of the materials upon which to experiment--the human equation, the many-sided character of the relation of social beings with one another and with the social or political group, and the perpetual flux of life and evolution of conditions--make the attainment of rigid, automatic and definite solutions of problems at once impossible and---undesirable.

But this does not necessarily mean only negative results from this investigation. Municipal "home rule" is still in the experimental stage. Its introduction into a state cannot be expected to bring about an immediate determination of the sphere of action which is to be conceded to local communities. From a state of practically complete dependence upon the state legislative body, with a chaotic confusion as to what were its governmental functions and what were its functions as a business corporation, it would be impossible at one stroke to cleave a line and mark out the sphere which a municipality could thenceforth call its own.

Tho, as has been pointed out, there will always be a "twilight zone," it is apparent that the sphere

of municipal action will become more and more clarified and definite, and if the courts and the legislative bodies of the states can be prevailed upon to refrain from unnecessarily encroaching upon that sphere, the problem of the correct relation of a city to the state will be brought much nearer solution.

How to combine the greatest freedom of local action with sufficient control on the part of the state, and how to limit the interference of the legislature without preventing that interference when required, is the problem to which the experiment of "home rule," more than any other plan, is directly addressing itself. It is this which makes municipal "home rule" a living issue.

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