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Max Schoetz Jr.

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## HOME RULE AND THE INHERENT POWERS OF A MUNICIPAL CORPORATION

By DEAN MAX SCHOETZ, JR., B.A., LL.B.

The persistent agitation for Home Rule for cities in Wisconsin still goes on. The legislature now in session after stormy debates had adopted a proposed amendment to our Constitution in order to secure self government for our cities which undoubtedly will sooner or later be submitted to the people of this state as required by our constitution.<sup>1</sup> It would seem that those who favor Home Rule for cities on the one hand are the most ardent advocates for centralized power when applied to individuals. If Home Rule is necessary for the prosperity and well being of a city, how much more so is it necessary for the prosperity and well being of the individual that he shall have the free exercise of his inherent rights to life, liberty, and the pursuit of happiness unfettered and unsubordinated to Government and centralized power. To admit that Home Rule is necessary for a municipality and not for the individual is an anomaly.

A municipal corporation in Wisconsin to-day is of the kind mentioned in Article XI of our Constitution. The words now mean a body corporate, consisting of the inhabitants of a designated area, created by the legislature, with or without the consent of such inhabitants for governmental purposes, possessing local legislative and administrative power, also power to exercise within such area so much of the administrative power of the state as may be delegated to it, and possessing limited capacity to own and hold property and to act in purveyance of public conveniences.<sup>2</sup> The operations of Government depend to a great extent, for their success and accomplishments upon the existence and agency of municipal corporations, such as counties, towns, cities and villages. Without the delegation of a portion of its powers to them, its end and object could not be attained. By narrow construction and legislative interference powers of

<sup>1</sup>Jt. Res. No. 18 S. Cities and villages organized pursuant to state law are hereby empowered to determine their local affairs and government \* \* \* \*"

<sup>2</sup>*Sutter vs. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 616. See *State ex rel. Shawano vs. Engel*, 171, Wis. 299, in which case Justice Eschweiler points out the distinction between quasi-municipal corporations such as towns and counties, and municipal corporations proper such as cities and villages.

municipal corporations have been unwisely and unnecessarily embarrassed for a proper exercise of their usefulness. The early Wisconsin cases recognized that municipalities had certain inherent powers independent of the delegated powers. In other words, municipal corporations were said to possess the following powers :

- (a) Those expressly enumerated in the Charters.
- (b) Such as are necessary for their appropriate use and execution.
- (c) Such as are inherent in every municipal corporation.

#### HISTORY OF LOCAL SELF GOVERNMENT IN AMERICA

DeTocqueville speaks of our system of local government as the American System and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has heretofore proved impossible.<sup>3</sup> Lieber makes the same comparison and shows that a centralized government, though by representatives freely chosen, must be despotic as any other form of centralization necessarily is. "Self-government," he says, "leaves everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality."<sup>4</sup>

We have followed in the main the New England township Government. The historical fact is, that local governments in this country, were either simultaneous with or preceded the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs.<sup>5</sup> In Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time.<sup>6</sup> In Rhode Island, it is also true that township government was first in the

<sup>3</sup> *Democracy in America.*

<sup>4</sup> *Civil Liberty and Self Government.* Chapter 21.

<sup>5</sup> *Hutchinson's Mass. Bay,* Chapter 1, *Washburn's Jud. Hist. of Mass.,* Chapter 1, *Elliott's New Eng.,* Vol. 4, pp. 425, 427.

<sup>6</sup> *Trumbull's Hist. of Conn.,* Vol. 1, pp. 132 and 498.

order of time,<sup>7</sup> so in Vermont the people not only for a time conducted all their public affairs in towns and plantations, through committees, officers, and leaders nominally appointed and submitted to by general consent and approbation.<sup>8</sup> In New Jersey towns were chartered in connection with grants of land.<sup>9</sup> The charter to Lord Baltimore plainly recognizes local government in the provision requiring the laws and ordinances established to conform to the laws, statutes or rights of New England.<sup>10</sup>

The general fact was, that whether the colony or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need, but when both were once established they ran parallel to each other, as they were meant to do, for all time.

The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependant on the crown, and to restrain them from political action in opposition to the court party, found in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only after vigorous protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the peoples' deputies, that to surrender local government was contrary to the Fifth Commandment, for said they, "Men may not destroy their political any more than their natural lives" so it is recorded they clung to "the civil liberties of New England" as "part of the inheritance of their fathers."<sup>11</sup> Mr. Jefferson writing to Governor Tyler in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our revolution, in its commencement in the Eastern States. Could I once see this, I should consider it as the dawn of the salvation of the republic."<sup>12</sup> Such are the historical facts regarding local government in America. Our traditions, practices, and acceptances have all been in one direction.

<sup>7</sup> *Arnold's Hist. of R. I.*, Chapter 7.

<sup>8</sup> *William's Hist. of Vermont*, Vol. 2, p. 163.

<sup>9</sup> *Mulford's Hist. of N. J.*, p. 143-144.

<sup>10</sup> *Bosman's Hist. of Maryland*, p. 290.

<sup>11</sup> *Bancroft's U. S.*, Vol. 2, page 125, 127.

<sup>12</sup> *Jefferson's Works*, Vol. 5, page 525.

## LOCAL SELF GOVERNMENT IN WISCONSIN

An examination of the early cases in Wisconsin will show that great stress was laid by our Court upon the inherent powers of municipal corporations. By inherent powers are meant such powers as are necessary to and inseparable in every corporation, and they came into existence as a matter of course as soon as a municipality is created. Under this power the City of Milwaukee built an abutting wall without any authorization from the legislature and it was strenuously contended in that case by a taxpayer that no power having been delegated to the city such power could not be exercised. The court, however, sustained the right of the city under its inherent power so to do. But the court in later decisions and the legislature by statutory enactments frittered away the inherent power and thereafter in this state it merely meant the common law powers of a corporation, namely:

- (1) To have perpetual succession;
- (2) To sue and be sued, implead and be impleaded; grant and receive by its corporate name and do other acts as a natural person;
- (3) To purchase, hold and sell property, real and personal, for the benefit of the municipality;
- (4) To have a common seal alterable at pleasure;
- (5) To make by-laws and ordinances for the government of the corporation.<sup>12a</sup>

<sup>12a</sup> In the original charter granted to the city of Milwaukee, the largest municipal corporation in the state, the legislature provided "that the city shall have the general powers possessed by municipal corporations at common law"; Ch. 56, *Laws of 1852*, sec. 1. In *Butler vs. City of Milwaukee*, 15 Wis. 546, 552, Chief Justice Dixon in construing these words said: "It might be a difficult task to enumerate the general powers of municipal corporations at common law' but I can find no difficulty in saying what is not one of them. . . ." In *Miller v. City of Milwaukee*, 14 Wis. 699, the same justice said: "The general powers possessed by municipal corporations at common law are words of very general import and an attempt to point out all the acts which they might be held to authorize would be a work of considerable labor. It must be presumed from the general words above quoted that the legislature considered that there were some powers pertaining to such corporations and which the city ought necessarily to possess which were omitted either by accident or because it was deemed impracticable specifically to regulate and define them by statute. In *Clason v. City of Milwaukee*, 30 Wis. 316, E. G. Ryan, city attorney and later the Chief Justice of the Supreme Court, argued that the authority of the city to enact such ordinance as the one in question was found in the common law powers. Jenkins, the former dean of Marquette Law School, who later became judge of the United States Court, contended that where the charter enables the city to pass ordinances for certain purposes its power of legislation is limited to the cases and objects specified, all others being excluded by implication. The court adopted Ryan's views and held the power to enact the ordinance in question came under the general powers found in the common law.

It seemed that at first the principle was recognized and well settled that while the State may mold municipal institutions according to its views of policy or expediency, yet local government was a matter of absolute right and the State could not take it away. But owing to pressure brought to bear by legislative enactments and by narrow constructions of the court, the inherent rights of the cities were lost track of and frittered away; and the court finally held that since all powers of a municipal corporation are derived from the law and the charter there were no other powers.<sup>13</sup>

A struggle then ensued to give to municipalities as much local government as was possible and a General Welfare Clause was usually included in every charter granted to a municipality. For the purpose of this article we will confine our discussion to the Special Charter of Milwaukee and its struggle for Home Rule.

#### GENERAL WELFARE CLAUSE

The common council shall have the management and control of the finances, and of all the property of the city, except as in this act otherwise provided, and shall likewise, in addition to all other powers herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules, by-laws and regulations for the government and good order of the city—for the benefit of the trade, commerce and health thereof—for the suppression of vice—for the prevention of crime—and for carrying into effect the powers vested in said common council; as they shall deem expedient;<sup>14</sup> and to declare and impose penalties, and to enforce the same against any person or persons who may violate any of the provisions of such ordinances, rules, by-

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A careful examination of the later decisions of Wisconsin does not disclose that any further reference has ever been made to the common law powers of municipal corporations.

See *Bell vs. Platteville*, 71 Wis. 139; *Killington vs. Superior*, 83 Wis. 222.

<sup>13</sup> *Rickertson v. Milwaukee*, 105 Wis. 501; *Superior vs. Roemer et al.*, 154 Wis. 345; *State ex rel. Mueller vs. Thompson*, 149 Wis. 488.

<sup>14</sup> This clause was in original charter of 1852 and was employed in holding city had power to establish a city slaughter house, in *Milwaukee vs. Gross*, 21 Wis. 243.

This is a general power and if any subject such as licensing saloons is specially covered in any subdivision we must look there for the power. *State ex rel. Sepic vs. Milwaukee*, 129 Wis. 562. See also *Miller vs. Milwaukee*, 14 Wis. 642.

## HOME RULE

laws, and regulations.<sup>15</sup> And such ordinances, rules, by-laws and regulations are hereby declared to be, and have the force of law, provided, that they be not repugnant to the constitution of the United States or of this state. And for these purposes the common council shall have authority—anything in a general law of this state to the contrary notwithstanding<sup>16</sup>—by ordinances, resolutions, by-laws, rules or regulations: (Here follows a specific enumeration of powers).

This, however, was not satisfactory to the City of Milwaukee as the court held that where specific grants of power were given to a city having a general welfare clause such specific grants acted as a restriction upon the general welfare clause,<sup>16a</sup> and a successful attempt was then made to enact a statute giving to the city the right to permit cities to amend their own charters without any interference by the state, but this act was subsequently declared unconstitutional by our court.<sup>17</sup>

Then followed the Home Rule clause in the city charter.<sup>18</sup>

### HOME RULE CLAUSE

1. All cities of the first class in this State are hereby granted the powers necessary to give full force and effect to the intention thereof.

2. Whenever the legislature has therefore granted to any city, however incorporated, a General Welfare Clause, preceded or followed by specific grants of power, such specific grants shall not be construed as restrictions upon general welfare clause, but such general welfare clause shall be given a liberal construction, to the end that the cities may exercise all powers granted therein or reasonably implied therefrom.

3. All statutes enacted by the legislature granting to such cities any powers or prescribing the method and manner of executing said powers shall be given a liberal construction, to the end that such cities shall be given the largest possible power and leeway of action under such statutes.

4. Whenever the legislature has heretofore or may hereafter grant any such power to do anything, such power shall be construed as including all things necessary to carry out said grant; and whenever, in construing any statute granting any powers or any rights to cities; there shall arise merely a question of doubt as to whether the legislature in-

<sup>15</sup> The circuit court cannot enjoin legislative acts of the common council. *State ex rel. Rose vs. Superior Court*, 105 Wis. 651.

<sup>16</sup> This clause was employed in the case of *Brandt vs. Milwaukee*, 69 Wis. 386, to prevent the general law from applying as to the vacation of streets because the subject is covered in the charter.

<sup>16a</sup> *Chain Belt Co. vs. Milwaukee*, 151 Wis. 188, 193.

<sup>17</sup> *State ex rel Mueller vs. Thompson*, 149 Wis. 488.

<sup>18</sup> Chapter 678, *Laws of 1913*.

tended to grant any power or right, whether expressed or implied, such doubt shall be resolved in favor of the city possessing such power or right shall concern in the above or the manner of carrying out any power or right.

5. Such cities are hereby empowered to employ experts and to provide for commissions, and to pay salaries therefor to investigate and report upon any matter which may concern the city, and to act in any advisory capacity to any public official or body.<sup>19</sup>

The Home Rule clause was given vitality by our Supreme Court and Justice Kerwin speaking for the court said "In the Chain Belt Company case, this court refers to the Rule of strict construction and says that the power to license cannot be implied under the General Welfare Clause. Since the decision of that case, however, we have had some legislation on the subject. Chapter 678, *Laws 1913* (Home Rule Clause *supra*). This legislation was intended to broaden the powers of cities of the first class."

However, Milwaukee wanted more. It desired to have real political liberty with reference to its purely local affairs. It desired only that which the early colonists had when they established the first forms of government on this territory as heretofore indicated in the history of Home Rule in America. The usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which over-turned tyrannies, the sentiments of manly independence and self control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, all combined, made it necessary in order to satisfy the people to give to municipalities liberty and Home Rule. Milwaukee demanded full control of their local affairs. Responding to this sentiment the legislature now in session, passed joint resolution No. 188 which provides:

Cities and villages organized pursuant to state law are hereby empowered to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state wide concern as shall with uniformity effect every city or every village. The method of such determination shall be prescribed by the legislature.

This amendment will now be submitted to a vote of the people

<sup>19</sup> *Filer and Stowell Co. vs. Milwaukee*, 161 Wis. 426, 154 N. W. 626. Decided October 26, 1915.



of Wisconsin for adoption and undoubtedly much debate will follow in this state on this question.

PRESERVATION OF LIBERTY—THE DOMINANT PURPOSE OF OUR GOVERNMENT

By the preamble of our Constitution preservation of liberty is given precedence over the establishment of government. The loss of inherent powers and liberties of municipal corporations by force of legislative acts and a narrow construction by the courts which gradually whittled away, fettered, curtailed, and even took away the liberty and freedom of action of cities and local units, and the now insistence of the people to have such liberties, thus taken away from their cities restored by constitutional amendment, should be a lesson to the people to put them on their guard so that their own inherent rights to life, liberty, and the pursuit of happiness shall not be whittled, fettered, and eventually lost because of the modern ideas of centralization of all powers and the curtailment of individual freedom. Already the people have been pressed with unreasonable laws depriving them of their liberties, curtailing their rights in the enjoyment of their life, their liberty, and their property, and each legislative session turns out a grist of new laws, still more encroaching upon the rights of the individual. Moreover power and authority have been given to administrative boards and officers constantly, during the interim while the legislature is not in session, to exercise dominion and power over the individual, dictating like a general in an army and carrying on government according to the rules of the army and not of liberty—constantly destroying individuality. The time will surely come, if this continues, when the people as individuals will seek a constitutional amendment as is now being sought by the people for cities, which will give back to them the right "to determine their own affairs" which by the laws of nature they have the right to do and which they sought to protect when this Government was founded, and to secure which, the Government pledged itself when it was organized. From the storm floods of legislative enactments and police regulations that threaten to make wreck of the liberties of the people, there will emerge, defaced, but not broken, the still living and breathing spirit of liberty, of our revolutionary fore-fathers carried down from generation to generation not by any command of the Constitution or laws but by the inherent powers of the

individual. The liberty of the individual and of local units will arise again to supremacy among the ruins of centralized dominion and will again be supreme in our country.