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## Municipal Government in Ohio Before 1912

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While the Constitutional Convention was laboring behind closed doors in the summer heat of 1787 in Philadelphia, little bands of pioneers from Massachusetts and Connecticut were crossing the Alleghenies to Sumrills Ferry, Pennsylvania. There, during the fall and winter of 1787-88, they built boats to carry them to the Ohio, and down that mighty stream to the mouth of the Muskingum, where they arrived on April 7, 1788 to establish the first town in the Northwest Territory, Marietta.<sup>1</sup> Arthur St. Clair, the first governor of the Northwest Territory, arrived on July 9 to make it the seat of government in the Territory

A few months later, in the fall of 1788, another town was settled, opposite the mouth of the Licking River, on the north bank of the Ohio. This settlement was more advantageously located than the first and Governor St. Clair moved the territorial offices there from Marietta in the fall of 1789 and christened the town Cincinnati after the noted post-war Revolutionary society. Other early settlements, prior to statehood, in 1802, were: Gallipolis (1790), Manchester (1791), Chillicothe (1796), Dayton (1796), Franklinton (1797), Cleveland (1796), Youngstown (1798), Warren (1799) and Ravenna (1799)

From 1788 to 1799 the government of the Territory was vested in a governor, a secretary, and three judges. This group was given legislative authority until such time as the population of the territory should be sufficient to warrant the election of a legislative assembly. To this group, then, was given authority to establish units of local government. However, in both Marietta and Cin-

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<sup>1</sup>ROSEBOOM AND WEISENBURGER, A HISTORY OF OHIO 84 (1934)

cinnati the inhabitants met in 1789 and enacted local police regulations without the benefit of a charter.<sup>2</sup> Gallipolis did the same in 1790 although in this case the action was regularized by Governor St. Clair who appointed the officers chosen to enforce them.<sup>3</sup>

The first legislative assembly of the Territory met in Cincinnati in February, 1799, to make nominations to the President for members of a Council of five and reassembled in September to begin lawmaking. However, no municipal charters were granted. By federal act of 1800, the Northwest Territory was divided and Chillicothe was designated as the capital of the eastern section. The Territorial Assembly at its first meeting in Chillicothe passed an act to incorporate the Town of Marietta which served as a model for the later ones. By another act in the same year the Assembly required that all town plats be filed in the office of the county recorder.<sup>4</sup> In the second session, which met in November, 1801, and adjourned in January, 1802, similar acts were passed to incorporate Chillicothe, Cincinnati, Detroit, and Manchester.<sup>5</sup>

In April, 1802, Congress passed an enabling act authorizing the residents of Ohio to form a convention to prepare and adopt a state constitution. The Convention met at Chillicothe on November 1, 1802, and adjourned on November 29 after approving the document which had been drafted by them as the first constitution of the state of Ohio. There was no popular referendum. State officers were elected under the new state constitution and they took over the functions of government from the officers of the Northwest Territory on March 1, 1803, when the first General Assembly met at Chillicothe. The only reference to local government which the Assembly found in the new constitution was Article VI, Section 3, which provided: "All town and township officers shall be chosen annually by the inhabitants thereof, duly qualified to vote for members of the assembly, at such time and place as may be directed by law." Thus the legislature of the state was free to charter municipalities by special act. Since the governor had no veto power, the sole authority rested with the Assembly.

The first municipal charter enacted into law under the constitution of 1802 was that for Chillicothe, passed February 18, 1804. This act established a board of seven trustees and a treasurer elected by the freeholders, and an assessor, a collector, a supervisor, and a marshal elected by the freeholders and the householders of six months residence. The trustees were incorporated under the name of "the president, recorder, and trustees of the town of Chillicothe." The president and recorder were chosen by the trustees from among their own members. All officers were required to

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<sup>2</sup>SIEBERT, *THE GOVERNMENT OF OHIO* 103 (1908).

<sup>3</sup>*Id.* at 16.

<sup>4</sup>BOND, *THE FOUNDATIONS OF OHIO* 459 (1941).

<sup>5</sup>*Id.* at 466.

be freeholders. There was a fine of \$10.00 to \$30.00 for refusal to serve after election. However, no person could be compelled to serve for two successive terms.

Steubenville, Dayton and Lancaster were incorporated by similar charters in 1804 and 1805; St. Clairsville in 1807; Gallipolis and Springfield (Muskingum County) in 1808; Hamilton and Lebanon in 1810. By the time of enacting these latter charters, the Assembly was willing to permit all electors to vote for local officers, and to hold office. The list of officers was somewhat simplified.

By a general law of February 6, 1810, the Assembly provided for the incorporation of all townships as soon as they should have 20 electors. This was for the purpose of administering the trust property represented by section 16 of each township which had been set aside by Congress for school purposes, and, in certain areas, section 29 which had been dedicated by the proprietors for religious purposes.

In 1812 the General Assembly amended the charter granted to Athens in 1811 by prohibiting the town council from passing ordinances for the taking and impounding of livestock belonging to non-residents of the town, but found within its limits. A similar provision was inserted in several subsequent charters. Another common limitation referred to taxes for municipal purposes and provided that they should not exceed one-half per cent in some cases and one per cent in others.

When the General Assembly accepted the offer of the proprietors of the townsite of Columbus and determined to locate the capital there, a unique arrangement was made. The office of Director of the Town of Columbus was established, to be filled by joint action of the two houses of the legislature. The Director's basic function was to superintend the erection of public buildings in the new town. But he was also given power "to prevent and abate all nuisances in streets or public squares and to preserve state property from trespass." William Ludlow was appointed to this position on February 10, 1814, at a salary of \$600 per year. This was reduced to \$300 in 1815.

A new act for the incorporation of the town of Chillicothe was enacted in 1812. All white male freeholders and householders, residents for one year, were made electors. They chose nine persons as a common council, three each year for a three-year term. The council chose from its own number a mayor, a recorder, and a treasurer. Other officers and employees were appointed by the mayor and council. In this charter the mayor was given the judicial power of a justice of the peace for the first time.

When Zanesville was incorporated in 1814, it was as a borough, not as a town. However the act was in other respects the same as those for the government of towns. Still another variation, per-

petuated in the modern classification of municipal corporations in the state, was introduced by the charter of Cleveland, passed in 1814, which characterized the new corporation as a village. Columbus was incorporated as a borough in 1816, but in the title and in various sections of the act it is referred to as a town.

The first general law for the incorporation of towns was passed on January 7, 1817. Up to that time the general assembly of the State had passed 24 special charters as well as a number of amendatory acts. The general law provided that the householders in any town whose plat had been recorded (provided there were forty or more householders) might obtain letters of incorporation by pursuing the following procedure: (1) a petition signed by two-thirds of the householders and describing the name and location of the town should be presented to the court of common pleas of the county in which the town was situated; (2) the court would record the petition on its journals, order the clerk to post a copy at the court house door at least 30 days before the next term, and cause the sheriff to make proclamation of it on the first day of the following term; (3) at the next term the court would examine the truth of the facts stated in the petition, and if found true, issue an order so stating; (4) the clerk would issue a transcript and deliver it to the petitioners who would pay the fees assessed by the court; (5) the petitioners would cause the transcript to be filed in the office of the Secretary of State, who would "thereupon grant, under the seal of the state, letters of incorporation to such town, and record the same in a book to be kept in his office for that purpose." The petitioners paid the same fees as were allowed for recording deeds "and from the time of recording such letters of incorporation the town in such letters named shall be considered a corporate town for every intent and purpose in the said letters specified."

The organization, powers, and duties of the corporation were specified in the charter granted by the Secretary of State, whose form was specified in detail in the act. White male persons over 21, resident for one year were made electors. They were to meet at a place agreed upon in the town on the first Saturday in March annually and elect a president, recorder, and five trustees "who shall be a body corporate and politic with perpetual succession." The president was given judicial authority, and the president, recorder, and trustees, legislative power over subjects specified in the act.

Section 6 of the act provided "That if the president, recorder and trustees of any town incorporated under this act shall take upon themselves to exercise any power or authority not warranted by their letters of incorporation or to use their funds for any purpose not herein allowed, the supreme court shall have power and jurisdiction to stay all such proceedings . . . by writ of injunction

or prohibition (*sic*).” Towns theretofore incorporated by special law were granted authority to obtain letters of incorporation under the general law which would supersede their former charter.

In the next succeeding session of the General Assembly acts were passed amending several of the special charters formerly granted. One of these, to amend the charter of Zanesville, passed in 1818, purports to make the provisions of the general law concerning the incorporation of towns applicable to Zanesville, subject to the acceptance of the provisions of this section of the act by a town meeting of the freeholders and householders of the borough. This is the first known instance in Ohio history in which a legislative act, applying to a municipal corporation, was made contingent on local approval, a procedure which has become common in the State of New York.

Cincinnati became the first *city* in Ohio by an act of the General Assembly on February 5, 1819, which was amendatory of the earlier charter of 1815, which had been the first to establish wards as a basis for the election of the town council. This act also created a court of record composed of the mayor and three aldermen elected by the council with jurisdiction concurrent with that of the court of common pleas. The legislative functions of the former mayor were transferred to the president of the council.

The first separate volume of local acts of the Ohio General Assembly was published in 1820. It contained the local laws passed by the Eighteenth General Assembly which began its session in Columbus on December 6, 1819. However, except for a minor amendment to the special act under which the City of Cincinnati was operating, none of the 45 local acts related to municipalities, a remarkable record attesting to the effectiveness of the general incorporation act of 1817.

In the years which immediately follow 1819 there appear to have been no new incorporations by special act. However, with considerable frequency the special charters granted before 1817 were amended, particularly to extend boundaries or to grant additional corporate powers. There were also some special acts to change the names of towns, mostly unincorporated ones, to avoid confusion in the handling of the mail. On January 22, 1821, the Assembly passed an act repealing letters of incorporation which had been issued by the Secretary of State, pursuant to the general law, to the town of West Union in Adams county. A year later, a special act was passed incorporating the town of Canton, in Stark County, and the precedent of circumventing the general law was started.

The Twenty-seventh General Assembly, which convened in Columbus on December 1, 1828, amended the charter of the City of Cincinnati to authorize the city council to provide for the support

of common schools, thus establishing education as a function of local government, an arrangement advocated frequently today as a mode of simplifying our complex governmental machinery.

By 1834, when the Thirty-third General Assembly met, the passage of general laws formed an insignificant part of the total task of the legislators. The general laws of this session were published in a pamphlet of 58 pages. The local laws required 465 pages and included 334 separate acts. Of these 25 were for the incorporation of municipalities and 18 were for the amendment of municipal charters. In 1835 there were 24 acts of incorporation and 22 amendatory acts. In 1836 there were 22 new incorporations and 11 amendatory acts. In 1837, there were 24 new towns created and 19 amendatory acts passed.

By 1838 the burden of this special legislation had become so great that another general law was passed "for the regulation of incorporated towns." This act provided "that for the good order, regulation and government of all towns incorporated after the taking effect of this act" such towns should follow its provisions. The new law contemplated the enactment of special charters, but provided the details of town organization which could be incorporated by reference into subsequent acts of incorporation. The act dealt with suffrage, elections, officers, powers, oath of office, taxation, licensing of liquor sellers, improvement of streets and alleys, judicial powers of the mayor, use of the county jail, etc. It became effective on July 1 of that year. Nevertheless, the Thirty-seventh General Assembly also enacted special laws incorporating 20 more towns. As to part of them, the acts were in full as they had been theretofore. In the case of several others, the new general law was taken advantage of by reference in Section 2 of the act as follows: "The act for the regulation of incorporated towns aforesaid shall take effect and be in force from and after the passage of this act so far as relates to the said town of \_\_\_\_\_."

The Thirty-eighth General Assembly made full use of the general law by incorporating 13 towns by special acts but referring their structure and powers to the general act. One of them, Canal Fulton, incorporated on March 19, 1840, was called a borough. In 1841, 14 more towns were incorporated, all by short acts referring to the general law. The local laws of the Fortieth General Assembly show 19 more new incorporations, all by reference to the general law. By 1842 the tendency to pass detailed charters again appeared when apparently complete ones were enacted for Piqua and Mansfield. Only three new towns were incorporated, each by reference to the general law. There were a number of acts to amend or to repeal earlier corporate charters, so that in the Forty-first General Assembly there was a net reduction in the number of municipal corporations in the state. In 1844 this trend was reversed. Fourteen

new charters were granted, eleven of them by a single omnibus act. Only two charters were repealed.

Town legislation loomed large in the work of the Forty-third General Assembly which convened in December, 1844. Several new municipalities were chartered. There were three omnibus acts, one including 6 towns, another 3, and another 2 which with one single act, made 12, all of which were brought under the general law of 1839. Sandusky and Mt. Vernon were reincorporated by detailed acts in 1845. In addition there were 34 acts amendatory of existing charters. The omnibus method of incorporation under the general law continued in 1846 when 7 towns were included in a single act and 3 in another. In addition, Oberlin was given an individual charter which indicated that it should operate under the general law of 1839 except insofar as such law conflicted with the provisions of the act, which contained three sections dealing with local powers. Amendatory acts were less numerous during this session.

It will be recalled that the most common designation for a municipal corporation up to 1847 was that of "town," although the term "borough" was used occasionally, "village" once, and there were a few cities, including Cincinnati, Columbus, Chillicothe, and Sandusky. In 1847 the indexer of the local laws for the first time used the caption "cities and towns" rather than "Towns, Incorporated." This appears significant in view of the growth of urban communities. The Forty-fifth General Assembly continued the practise of incorporating towns by omnibus law under the general act of 1839. It also reincorporated several towns by more detailed acts and amended or supplemented the charters of others. Seventeen different towns were incorporated by a single omnibus act passed in February 1848 and three others by another act passed the same month. The Forty-sixth General Assembly enacted 8 more separate acts of incorporation.

The Forty-seventh General Assembly passed only one omnibus act referring to the 1839 law, including five towns. On the other hand it passed 13 separate incorporating acts, some referring to the general law, others not. The local laws passed by the Forty-eighth General Assembly occupy 767 pages as compared with the 129 pages of general laws. Among the former are one omnibus act affecting seven towns, and 34 special acts of incorporation, several of which were reincorporations of older municipalities. Springfield, Piqua, Tiffin, and Zanesville were elevated to the dignity of cities. The Forty-ninth General Assembly passed 27 new acts of incorporation for towns and 26 acts amendatory of previous charters. The stage was set for the constitutional convention's consideration of the problem of special legislation for local municipalities.

The Second Constitutional Convention of Ohio met at Columbus on May 6, 1850, to prepare a new constitution for a state which had completely outgrown the document framed forty-eight years before. After two months of work the Convention recessed from July 9 to December 2 because of a cholera epidemic then raging in the state. Their place of meeting after the recess was moved to Cincinnati. The convention completed its work and adjourned *sine die* on March 10, 1851.

One of the serious problems which faced the delegates at the convention was that of freeing the legislature of the state of the onerous task of enacting special laws. A part of this problem was that of the incorporation of cities and towns and the continual amendment of these charters to meet the needs of an expanding urban civilization. The Convention was not unanimous in its desire to eliminate these special laws. In Committee of the Whole on June 3, 1850, a proposed Section 36 of Article II of the draft was stricken out. It provided that "the General Assembly shall provide for the creation and government of municipal corporations by general and uniform laws."<sup>6</sup> It was suggested this matter was being dealt with in another committee, the one on Corporations other than Banking, and this proved to be true.

Mr. James W. Taylor of Huron and Erie, in the course of the debate, said, "It has been frequently said that three-fourths of the laws of Ohio are special and local in their nature. . . . We have a two fold abuse in this state—local interference by the central government, and an omnibus of local legislation vested in the court of common pleas."<sup>7</sup>

When the report of the Committee on Corporations other than Banking came before the Convention for discussion there was little mention of the problem of special charters for local government except by Peter Hitchcock, of Geauga and Trumbull, who proposed to except them from the provisions of Section 1 of Article XIII but, after protracted debate, the section was approved.<sup>8</sup> However, the important Section 6 of this article occasioned no debate whatever in the Committee of the Whole.<sup>9</sup> The whole of Article XIII was reported back to the Convention on March 10, 1851, by the standing Committee on Revision and agreed to without debate.<sup>10</sup>

The Constitutional Convention of 1850-51 approved the new constitution at Cincinnati on March 10, 1851. It was submitted to the voters at an election held on the third Tuesday in June and went into effect pursuant to their approval on the first day of

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<sup>6</sup>*Ohio Convention Debates*, Columbus, 1851, Vol. 1, p. 284.

<sup>7</sup>*Id.* at 285.

<sup>8</sup>*Id.* at 363.

<sup>9</sup>*Id.* at 447.

<sup>10</sup>*Ohio Convention Debates*, Columbus, 1851, Vol. 2, p. 351.

September, 1851. As finally approved, this constitution, which still is the fundamental law of Ohio, contained two provisions relating to municipal government. The first one, most specific, was Article XIII, Section 6. "The General Assembly shall provide for the organization of cities and incorporated villages, by general laws. . . ." The second, less direct, is Section 1 of the same article, "The General Assembly shall pass no special act conferring corporate powers." Apparently the future of local government was to rest upon general laws passed by the Assembly. The appellation of "town" was dropped, presumably to avoid confusion with townships and the term "village" appeared for the first time as of general application.

The first general law for the organization of "cities and incorporated villages," enacted May 3, 1852, provided "that all corporations which existed when the present constitution took effect, for the purposes of municipal government, either general or special, and described or denominated by any law then in force as cities, towns, villages or special road districts shall be and they are hereby organized into cities and incorporated villages . . . and all laws now in force for the organization and government of any such municipal corporations shall be, and they are hereby repealed."

The act provided that applications for the incorporation of new villages, signed by not less than 30 electors, should be presented to the board of county commissioners. This board after notice and hearing was empowered to order the incorporation, which became effective on filing the order with the county recorder and his furnishing two copies, one to the Secretary of State, the other to the petitioners. Cities were divided by the act into two classes—those of the first class including all those whose population was over 20,000, and those of the second class, including all others. Villages became cities when they had a population of 5,000 at any federal census. The effect of the new constitution was immediate and drastic. Only 24 special and local laws were passed in 1852, occupying 47 pages, while the general laws included 348 pages. Three town charters were repealed, none was granted, since this power had been withdrawn from the Assembly.

The general law of 1852 was amended on March 25, 1854, to make the advancement of a village to a city or a city of the second class to a city of the first class dependent upon the approval of the local council. Similar amendments to various sections of the general law are found in the session laws for the remainder of the nineteenth century. There is exhibited a strong tendency toward special legislation through a refinement of the system of classification. As cities grew and became more numerous their problems began to differentiate them one from another. Because of the prohibition against special legislation contained in Article

XIII, Section 1 of the Constitution it was impossible to enact laws for each city by name. So the subterfuge of dividing the cities into classes was resorted to instead. By 1880, when the Commissioners to Revise and Consolidate the Statutes reported to the General Assembly and the latter adopted the results of their labors as the Revised Statutes of Ohio, the classification of municipal corporations was as follows: "Municipal corporations are divided into cities, villages and hamlets; cities are divided into two classes, first and second; cities of the first class are divided into three grades, first, second, and third; cities of the second class are divided into four grades, first, second, third, and fourth; cities of the second class which hereafter become cities of the first class, shall constitute the fourth grade of the latter class; and villages which hereafter become cities shall belong to the fourth grade of the second class."<sup>11</sup>

Membership of cities in the various grades of the two classes was determined by population: those over 200,000 were in the first grade of the first class, 90,000-200,000 was the second grade, and 31,500-90,000 was the third grade. The cities of the second class, first grade, were 30,500 to 31,500, second grade 20,000-30,500, third grade, 10,000-20,000, and fourth grade, 5,000-10,000. Villages also were classified; those from 3,000-5,000 were in the first class and 200-3,000 were in the second class. No new hamlet might be incorporated unless it had 50 electors and no new village unless it had a population of 200.<sup>12</sup>

In 1893, the Revised Statutes made the application of this classification quite clear by adding to the titles of the various sections the names of the cities which then fell into each class or grade. Cities of the first class were Cincinnati, Cleveland, and Toledo, and each constituted a separate grade. In the second class, Columbus was the one city of the first grade, Dayton of the second grade, Sandusky, Springfield, Hamilton, Portsmouth, Zanesville, and Akron were of the third grade, and all other cities were of the fourth grade. It seems clear that the General Assembly was doing its best to use the concept of classification under general laws to revert to the condition which existed before 1852 when each city had to come to Columbus to secure amendments to its charter.

By 1902 the condition had become even worse. Each of the eleven largest cities of the state was isolated in a special class and

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<sup>11</sup>REVISED STATUTES OF OHIO, §1546 (1880).

<sup>12</sup>*Id.* §§1547-1551. The courts considered the question whether this was special legislation and gave a negative reply in *State v. Brewster*, 39 Ohio St. 653 (1884), and *Bronson v. Oberlin*, 41 Ohio St. 476 (1885). Cf. also *State ex rel. v. Hudson*, 44 Ohio St. 137, 5 N.E. 225 (1886); *State ex rel. v. Anderson*, 44 Ohio St. 247, 6 N.E. 571 (1886); and *Marmet v. State*, 45 Ohio St. 63, 12 N.E. 463 (1887).

grade under the guise of classification. The Supreme Court of the state finally balked at giving its approval to such legislation. The first case in which it indicated that it was no longer willing to go along with these excessive and absurd classifications was *Platt v. Craig*.<sup>13</sup> This case came up on error to the Circuit Court of Lucas County and involved the constitutional validity of a legislative act of April 14, 1900, which authorized the construction of a bridge over the Maumee River.<sup>14</sup> Judge Davis wrote the opinion of the court, holding the act invalid under Article II, Section 26, of the constitution.<sup>15</sup> There was no dissent. The court in the course of its opinion said that there was no emergency here which required special legislation. It is difficult to understand how an emergency could make such legislation valid as there is nothing in the constitution to authorize such an exception. On the other hand, it also is difficult to see why a special act was not appropriate in this case. Certainly no other city than Toledo had a Maumee River to cross, and no other river of Ohio is in any way similar to the Maumee. But, be that as it may, the log jam of special legislation was breached. However, it was not until somewhat later in the same term of court that it became clear to all that the structure which had been erected was completely demolished.

The second case in this series was *City of Cincinnati v. Trustees of Cincinnati Hospital* in which Judge Shauck delivered the opinion which held invalid an act of April 29, 1902, as in conflict with Article XIII, Section 1 of the constitution.<sup>16</sup> This was a special law which related to the powers and duties of the Trustees of the Cincinnati Hospital. It came up on error to the Circuit Court of Hamilton County. This case suggested a second constitutional provision under which the classification scheme might be held invalid, somewhat more logical and defensible than the first. Again there was no dissent.

The classic case, however, in which the house of cards definitely was flattened, was *State ex rel. Knisely v. Jones*.<sup>17</sup> This was an original action in mandamus in the Supreme Court to compel officers of the city of Toledo to turn over books and records to their successors under an act of the General Assembly, passed April 27, 1902, purporting to reorganize the board of police com-

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<sup>13</sup>66 Ohio St. 75, 63 N.E. 594. Decided March 18, 1902. *Jones v. State ex rel. Walbridge* also was decided by the same opinion.

<sup>14</sup>94 Ohio Laws 175.

<sup>15</sup>This section so far as it was applicable here provided that "All laws of a general nature shall have a uniform operation throughout the state."

<sup>16</sup>66 Ohio St. 440, 64 N.E. 420 decided June 24, 1902. The section of the constitution referred to prohibits the passing of any special act conferring corporate powers.

<sup>17</sup>66 Ohio St. 453, 64 N.E. 424, decided June 26, 1902.

missioners in cities of the third grade of the first class. In a well reasoned opinion Judge Shauck, speaking for the entire court, held the act invalid under Article XIII, Section 1 of the constitution and denied the writ. In the course of the opinion he said: "The increasingly numerous classes of municipalities show that even where a difference in population is made to appear as the basis of classification, the differences in population are so trivial that they cannot be regarded as the real basis. The real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. The apparent legislative intent is to substitute isolation for classification."

On the same day the court decided the case of *State ex rel. Attorney General v. Beacom*, the last in the series.<sup>18</sup> This was an original action in *quo warranto* against the municipal officers of the city of Cleveland under an act of March 16, 1891, applying to cities of the second grade of the first class. Upon the authority of the *Jones* case, Judge Shauck, speaking again for the entire court, granted a judgment of ouster. However, because of obvious difficulties which would arise from making such a judgment immediately effective, execution under it was deferred until October, just a little more than three months later.<sup>19</sup> Governor Nash, confronted with the prospect that all of the principal cities of the state would be without government, called a special session of the General Assembly, which met on August 25, 1902, to prepare a new municipal code which would conform to the provisions of the constitution prohibiting special legislation for municipal purposes. The code, introduced as Senate Bill 1, was finally passed and approved by the Governor on October 22, 1902, to go into effect in April, 1903.<sup>20</sup> It repealed hundreds of sections of the Ohio General Code relating to municipalities and established a new system which remains to this day, although subjected to many amendments and, since 1912, subject to the provisions of Article XVIII of the Constitution dealing with municipal home rule.

The Municipal Code of 1902 was almost Spartan in its simplicity. Municipalities in the state were divided into two classes: cities, including all places with a population in excess of 5,000 and villages, which could have 5000 or less. One uniform plan of government was provided for each of these two groups. This was not so difficult to accept in the villages, since they had been dealt with in only two classes before 1902. But cities found this scheme well

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<sup>18</sup>66 Ohio St. 491, 64 N.E. 427, decided June 26, 1902.

<sup>19</sup>This was later extended to permit new officers elected under the Municipal Code of 1902 to qualify.

<sup>20</sup>Cf. AUMANN, "OHIO GOVERNMENT IN THE TWENTIETH CENTURY: FROM NASH TO WHITE" in *The History of the State of Ohio* 6 (1942); Fairlie, *The Municipal Crisis in Ohio*, 1 MICH. L. REV. 352 (1903).

nigh intolerable. For a city like Cleveland, which had a population of 381,768 in 1900, to be governed by the same laws and subject to the same governmental structure as Painesville, with 5,024, obviously was difficult.<sup>21</sup> Some solution seemed imperative. However, it was ten years before it could be reached.

By 1910 the strait jacket was getting very tight. One of the strongest forces making for the approval by the voters in November of that year of a proposal for a constitutional convention was the feeling on the part of many city dwellers that they should have a greater voice in local affairs and that they should be able to provide for governments in their cities which were adequate to their needs. Delegates were elected in 1911 and the convention met at Columbus in January, 1912. The convention did not prepare an entirely new constitution. Instead it submitted to the voters a series of 41 amendments, all but eight of which were approved at a special election on September 3, 1912. One of those which was approved was Article XVIII providing for municipal home rule.

The proposal for municipal home rule was introduced into the constitutional convention by delegate Thomas G. FitzSimons of Cuyahoga County.<sup>22</sup> The proposal was referred to the Committee on Municipal Government on February 21, the same day that Theodore Roosevelt addressed the convention.<sup>23</sup> It was reported back by the Committee on April 18 after extended study with a recommendation of a substitute proposal.<sup>24</sup> This report was agreed to and ordered engrossed and read a second time.<sup>25</sup> The report was taken up for second reading and debate on the evening of April 29. In the absence of delegate George W. Harris of Hamilton County, who was Chairman of the Committee, the proposal was presented by delegate George W. Knight of Franklin County, Professor of History at The Ohio State University and a member of the Committee.

Professor Knight explained that the proposal was designed to

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<sup>21</sup>The only variation permitted by the codes was in the size of the city council. Cities under 25,000 had 7 councilmen, three of whom were at large and four were from wards. Cities of from 25,000 to 40,000 had 9 members divided three and six. For every 15,000 inhabitants beyond 40,000 there was one additional member. When the number reached 15, one out of five was elected at large. Cf. SIEBERT, *op cit. supra* note 2 at 109; Constitutional Convention of Ohio, *Proceedings and Debates*, Columbus, 1913, p. 1435, where Professor Knight says, "the municipal code provides one single form of government for all cities and one single form of government for all villages."

<sup>22</sup>Proposal No. 272, introduced on Feb. 19, 1912, Constitutional Convention of Ohio, *Proceedings and Debates*, Columbus, 1913, p. 341.

<sup>23</sup>*Id.* at 377.

<sup>24</sup>*Id.* at 1313, 1435. Professor Knight stated on April 29 that the committee had held between 25 and 30 meetings. <sup>25</sup>*Id.* at 1314.

accomplish three things: (1) to make it possible for different cities in the state of Ohio to have, if they so desire, different forms and types of municipal organization; (2) to get away from the rule that municipal corporations shall be held strictly within the limit of the powers granted by the legislature and adopt the rule that cities shall have power to do all things with reference to local government that are not prohibited; and (3) to clarify and expand the power of municipalities to acquire and operate public utilities. "The proposal does not undertake," he said, "to detach cities from the state, but it does undertake to draw as sharply and as clearly as possible the line that separates general state affairs from the business which is peculiar to each separate municipality."<sup>26</sup>

The first section of the home rule proposal wrote into the constitution the existing statutory rule as to the classification of municipal corporations as cities and villages, with the dividing line between them fixed at 5,000. While there was some debate as to the advisability of writing this rule into the constitution, it was approved by the convention without change. Section two, however, raised some more difficult questions. As submitted by the committee it repeated the existing constitutional rule from the first clause of Section 6 of Article XIII, "The general assembly shall, by general laws, provide for the incorporation and government of cities and villages." But it continued, adding, "and it may also enact special laws for the government of municipalities adopting the same." This was intended to provide a sort of optional system by which cities under the general law, without adopting a home rule charter could secure the benefits of certain optional laws adopted by the General Assembly merely by accepting their provisions in a local referendum. The word "special" was called obnoxious and was changed to "additional" in the final draft.

Section 3 of the proposal caused long and acrimonious debate. As submitted by the committee it provided that "municipalities shall have power to enact and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws, affecting the welfare of the state as a whole, and no such regulations shall by reason of requirements therein, in addition to those fixed by law, be deemed in conflict therewith unless the general assembly, by general law affecting the welfare of the state as a whole, shall specifically deny all municipalities the right to act thereon."<sup>27</sup> Mr. George W. Pettit of Adams County said almost at once that the phrase "affecting the welfare of the state as a whole" was surplusage. A number of other delegates feared that the section as worded would permit cities to regulate

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<sup>26</sup>*Id.* at 1434.

<sup>27</sup>*Id.* at 1439.

the liquor traffic in a way not contemplated by state law. While this was vehemently denied, the debate occupied several hours and resulted in several drastic amendments which reduced this section to its present form. During the course of this debate Mr. James W. Halfhill of Allen County asked, "Did your committee not consider that this was to a certain/extent experimental, to grant all that power to a municipality, to put it on a plane with sovereignty itself?" Mr. Knight replied, "No sir: it is not experimental at all to those familiar with municipal home rule. That is what it means. It means the people of a municipality shall have the right to control their own affairs."<sup>28</sup> Mr. Halfhill also asked, "Would not any municipality that framed and adopted a charter have the same right and reach the same end that you intend to grant by this provision?" Mr. Knight replied, "This applies to all municipalities. Your question applies only to those who frame their own charters."<sup>29</sup> This colloquy seems to establish the intent of the convention in approving this section as being to grant home rule power in passing ordinances to every municipality whether it adopts a home rule charter under Section 7 or not. This has been the interpretation used by our Supreme Court. In this respect Ohio appears to have gone further than any other state. In other states, in order to claim and exercise home rule powers, it is usually necessary that the municipality adopt a charter.

The source of the Ohio Home Rule amendment was revealed by Professor Knight in the course of the debates. He said that the basis on which the proposal was framed was a draft of a charter formulated by the Municipal League of Ohio.<sup>30</sup> Active in the preparation of the draft and the supporting arguments or briefs were Mayor Newton D. Baker, Professor Augustus R. Hatton of Western Reserve University, and John H. Clarke, a distinguished attorney of Cleveland.<sup>31</sup> The draft used was chosen over one prepared by an equally distinguished group in the city of Cincinnati.<sup>32</sup> Judge William Worthington of Hamilton County, although not a member of the Committee on Municipal Government, worked with the Committee at the request of its chairman, George W. Harris of Hamilton County. He analyzed the decisions of the California courts concerning home rule for cities interpreting a constitutional provision which had been in effect in that state since 1879.<sup>33</sup> The phrase "affecting the welfare of the state as a whole" which appeared in the committee's report was suggested by Mr. Starbuck Smith, delegate from Hamilton County who ably defended the desirability of its retention on the floor.<sup>34</sup> However, his efforts failed and the clause

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<sup>28</sup>*Id.* at 1441.

<sup>29</sup>*Id.* at 1457, 1465.

<sup>30</sup>*Id.* at 1457, 1464-1465.

<sup>31</sup>*Id.* at 1442.

<sup>32</sup>*Id.* at 1467.

<sup>33</sup>*Id.* at 1445.

<sup>34</sup>*Id.* at 1457.

was stricken from the three places (two in Section 3 and one in Section 7) where it appeared, by the adoption of an amendment submitted by delegate Edward W. Doty of Cuyahoga County.<sup>35</sup> Thus the way was opened for the struggle between city and state as to what is a general law, which has continued for the past thirty-five years and which has brought the Ohio home rule amendment into such disfavor and disrepute. One cannot predict with certainty what would have happened if the original phraseology had been retained, but it seems safe to say that the Supreme Court would have had considerably more difficulty than it has had in limiting the scope of municipal home rule.

On April 30, 1912, while the debate on the municipal home rule provision was still going on, delegate Robert Crosser from Cuyahoga County offered an amendment to add to the emasculated Section 3 the following words: "but such regulations shall be subject to the general laws of the state except in municipal affairs." Mr. Knight complained that it was the term "municipal affairs" which by its very vagueness had caused so much difficulty in California. He therefore offered as a substitute for Mr. Crosser's motion a proposal to change the phraseology by granting to municipalities "authority to exercise all powers of local self government."<sup>36</sup> This amendment was agreed to and appears in the constitution today, but unhappily it has done little to remedy the damage done by the earlier change.<sup>37</sup>

The final form of Article XVIII was approved on Tuesday, April 30, and referred to the Committee on Arrangement and Phraseology. It was reported with minor amendments on Friday, May 24.<sup>38</sup> On Tuesday, May 28, it was taken up for third reading. At this time Mr. David Cunningham of Harrison County said that the proposal "has received less real general consideration in open convention than any other important proposal before this body. . . . The proposal is a mongrel, a mixture of a little organic law and a great deal of pure legislation, and that legislation of the very worst and most vicious kind." An amendment by delegate E. J. Lampson of Ashtabula County which would have emasculated the municipal ownership provisions of the article was rejected by a voice vote.<sup>39</sup> Although there was some question as to whether the proposal adequately safeguarded the property interests of existing utility services and a suggestion that such publicly owned utilities might be called upon to pay county and state (but not municipal) taxes, there were no definite proposals for amendment and the measure passed by a roll call vote of 99 to 14.<sup>40</sup> The vote on final passage was re-

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<sup>35</sup>*Id.* at 1474. The vote was 66 to 41.

<sup>36</sup>*Id.* at 1485.

<sup>37</sup>*Id.* at 1489.

<sup>40</sup>*Id.* at 1869, May 28, 1912.

<sup>38</sup>*Id.* at 1795.

<sup>39</sup>*Id.* at 1867.

considered and the motion was laid on the table.<sup>41</sup> On May 31, the report of the Committee on Arrangement and Phraseology was made to the convention on the municipal home rule proposal. At this time a schedule was attached making the amendment effective on November 15, 1912, if approved by the voters, and the proposal was passed by a vote of 95 to 8. Five of the nine who had voted against it on May 28 switched to the affirmative side, one did not vote, and one who had voted affirmatively before switched to the negative.<sup>42</sup>

The municipal home rule amendment received the number 40 among the 41 amendments submitted to the people at the special election on September 3, 1912. The vote was 301,861 for, 215,120 against, a favorable majority of 86,741. About half as many voters cast ballots at the special election as voted for governor in 1908. The highest vote on any proposal was 586,295 as compared with a vote for governor in 1908 of 1,123,198 and in 1910 of 932,262.<sup>43</sup>

As pointed out by Professor Knight in the course of the debate in the convention, the adoption of the home rule amendment did not force the next general assembly to adopt a new municipal code, but it did supersede some sections of the code.<sup>44</sup> Since 1912 many amendments have been made, both by way of amendment of and addition to the municipal code of 1902. There is much confusion today as to exactly what the code provides, both for home rule cities and for non-home rule cities. For this reason, as well as because a housecleaning should be undertaken, as Jefferson suggested, every generation, it is submitted that the time is now ripe for a revision and codification of the laws of Ohio relating to municipalities. This is a task for which the Code Revision Commission, with such specialized aid as may be made available to it, is fully competent.

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<sup>41</sup>*Id.* at 1871.

<sup>42</sup>*Id.* at 1960-1961.

<sup>43</sup>*Id.* at 2114.

<sup>44</sup>*Id.* at 1435.