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SOME LEGAL ASPECTS OF THE CHICAGO CHARTER ACT OF 1907

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I

While the proposed charter for the city of Chicago failed to become a law, its potential existence during the summer months of 1907 secured it a place in the session laws of Illinois of that year. It may be expected that in future attempts at charter legislation here or elsewhere its provisions will be consulted. In view of that contingency it may be useful to offer a few comments upon some of the legal problems that presented themselves in drafting the charter, and the manner in which they were dealt with.

It will be necessary to confine this comment to the main features of the charter act, but the attention of students of the municipal law of Chicago should be called to some minor provisions of legal interest; so to the recasting to the provisions of the present city act on finance and expenditure (Article 11), which were intended to bring legal consistency into a branch of our municipal law that would, as it now stands, be impracticable, if it were strictly adhered to; also to the provisions for taking care of defaulted improvement bonds which will be found in Article 8, Section 15, and Article 15, Section 6 (see *Chicago v. Brede*, 218 Ill. 528). These improvements upon the present law will probably be adopted sooner or later. Of other secondary matters that were contentious and remained more or less unsettled, especially two deserve notice: The question of compensation for subsidewalk space, which was intended to be placed beyond the controversy in which it is involved at present, and

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the provision for the carrying out of orders of the board of health by the board and at the expense of the delinquent owner, a provision which is in operation in England and in some eastern cities, and which, in a carefully guarded form, deserves to gain an entrance into the law of Illinois (see Article 9, Section 16). These matters were not vital parts of the charter scheme.

II

Comprehensive charter legislation was a new matter for the present generation of the people of Illinois. Chicago, first incorporated under a general town corporation act of 1831, had received its first city charter in 1837, a second complete charter in 1851, and a third in 1863. The system of special charters was abandoned when the city in 1875 adopted the general Cities and Villages Act of 1872, at that time an adequate law for the growing metropolis, which numbered about 400,000 inhabitants. The Act of 1872 is said to have been drafted by Judge Tuley, who was thoroughly conversant with the condition and the needs of the city. Since 1872 there had been a very considerable amount of legislation amending and adding to the Act of 1872—the bulk of the law having been increased three or four fold—but the fundamental organization had on the whole been left untouched. The introduction of civil service reform, the revision of the Local Improvement Act, and a new regulation of the city's relation to the street railroads had been the most noteworthy changes. The system of enumerating the city's powers in detail—characteristic of nearly all American municipal charters—inevitably resulted in lack of provision for newly developing needs, and made it necessary to resort to the legislature for additional powers, sometimes of a relatively trifling character. But the chief difficulty of the city's government could not be reached by ordinary legislation; the development of its financial resources was hampered by constitutional limitations upon its borrowing power. The organization of a number of distinct municipalities on the same area, in part antedating the present constitution, had to some extent modified the operation of these limitations, but had on the other hand produced a serious lack of unity and coördination in the functions of local government. It was natural that an expansion of the bonding capacity of the city should carry with it a reduction of the number of bond-issuing governing bodies.

The constitutional amendment of 1904 was framed to provide a remedy for this condition of things; it allowed the consolidation of all local governments the area of which is entirely within the city limits (*i. e.,* of the towns, the school board, and the park governments, but excluding the county and the sanitary district,) with the city government; and in the event of the city assuming the indebtedness of at least two of the local governments so consolidated, it allowed the raising of the debt limit from 5 per cent of the assessed value (which is one-fifth of the full value) to 5 per cent of the full value of the taxable property of the city, counting as part of such 5 per cent a proportionate part of the debt of the county and the sanitary district. It also allowed special legislation for the city of Chicago, subject to a local referendum.

For the first time, since 1870, it thus became again possible to enact a special charter for Chicago, and for the first time the enactment of such a charter was made subject to specific constitutional limitations.

III

Home rule: In every city charter three classes of provisions may be distinguished: (1) Those by which the legislature defines the local powers and determines at least the principal parts of the local organization. They constitute the essential framework of the charter, and unless the constitution allows the inhabitants of the city to determine for themselves the scope and constitution of the local government, they must be settled by legislative enactment. From the legislature itself must also emanate those powers, which even a very broad definition of the term "powers of local government" would not cover, such as the power of eminent domain, especially outside of the city's own territory, or limitations of rights of action against the city. (See Article 8, Section 6; Article 8, Section 10; Article 8, Section 12). (2) Those provisions by which the state legislature imposes limitation upon local powers in order to enforce a distinct state policy which is to be operative within the locality, or in order to prevent an abuse of local powers and to secure protection to minority interests. (3) Detailed regulative provisions which might as well be left to local self-government, but which will creep into every statute through the legislative tendency to express with fullness and particularity the substance of the matter which it happens to have in hand.

Since practically every provision of a charter, being a binding state law, constitutes in the absence of saving clauses a limitation, it follows that the volume of a charter is generally in inverse proportion to the home rule which it bestows. A glance at the charter of Greater New York will illustrate the truth of this observation.

In Chicago there was a very general sentiment in favor of broad powers of local self-government, and while limitations of the second class above mentioned were of course inevitable, in the main the securing of the desired grant of home rule presented as much a problem of drafting as of policy.

The framers of the charter had intended to break away as far as practicable from the system of minute specification of powers. An examination of the charter act will show how far this effort was attended with success. In the present law the powers of the city council are enumerated in ninety-six separate items. The charter grouped them under a small number of important heads forming distinct articles; officers, corporate powers, police powers, finance, streets, public utilities, parks, schools, etc. In each of these articles one broad provision was placed giving the city control of the whole of the particular department of municipal activity. In nearly every case this meant a substantial enlargement of existing powers. No attempt was made to define public utilities in order not to leave the city powerless in the face of new industrial developments. Parks and driveways were allowed to be located outside of as well as within the city. The city's school powers would have covered every kind of educational institution and facility. The powers for charity and relief were almost entirely new. Even without the comprehensive clause of Article 5 the advance in home rule would have been very considerable.

The object of this much discussed clause[1] was to emphasize the fundamental principle of the whole charter, which in the words of the constitutional amendment was the creation of a "complete system of local municipal government." The bill framed by the convention defined the powers of the city council

[1] 5—1. The city council shall be the governing body of the municipality. It shall exercise the corporate powers of the city, and shall be vested with powers of local legislation adequate to a complete system of local municipal government subject to the general laws of the state, as by the next following section provided.

The legislative powers of the city council shall be subject to the provisions of this charter; but the specification of particular powers by

as "covering all matters of local legislation and municipal government that can be constitutionally delegated to it by the legislature." This the legislature refused to grant, but granted instead "powers of local legislation, adequate to a complete system of local municipal government."

The difference, however, was one of language and not of substance; both forms alike indicated that the city was to enjoy the full extent of permissible delegation of powers, subject to such limitations as the charter should expressly specify.

IV

The power of amendment[1]: It was necessary for practical reasons, in order to preserve continuity and to make such continuity appear on the face of the act, to incorporate into the charter a good deal of existing legislation with all its details just as it stood on the statute books; while it would have been more in

this charter shall not be construed as impairing the general grant of powers hereby bestowed except that no taxes shall be levied or imposed by the city council other than as hereinafter provided.

5—2. The legislative power of the city council shall be further subject to all existing laws of the state not rendered inoperative by this charter and to all general laws hereafter enacted by the general assembly in conformity with and subject to the constitution, but no general statute hereafer enacted relative to the government of the affairs of the cities of the state, or of cities containing a stated number of inhabitants and over, or allowing the formation of new municipal corporations in any part of the state, shall, in the absence of an express declaration of legislative intent to the contrary, be construed as applying to or operative within the city of Chicago.

5—3. The city council may provide for the carrying into effect of any of its powers by the creation of an appropriate official organization and by the delegation of adequate executive and administrative powers and duties, subject to the provisions of this charter.

[1]5—4. Whenever this charter makes any provisions or regulations with regard to a matter, the regulation of which the legislature has power to delegate to the city council, the city council may adopt an ordinance regulating such matter in whole or in part, and submit to the voters of the city, in the manner provided for the submission of propositions to popular vote, the question whether the provisions of the charter (which shall be designated in the ordinance by title, article, chapter, and section, as the case may be) regulating such subject matter shall be discontinued and the ordinance adopted by the city council be substituted in their stead. If the voters of the city shall vote in favor of such discontinuance and substitution, the provisions of the charter so designated shall from thenceforth be inoperative within the city, and the ordinance so adopted shall take effect. No ordinance amending or repealing such ordinance or amending or repealing any ordinance that may subsequently be substituted for it, shall go into effect until such ordinance shall have been approved by a majority of the voters of the city voting upon the question.

This section shall not apply to the provisions on taxation or to the article on public utilities, or to the provisions vesting the control of the school system of the city in a board of education, or to any provisions of this charter expressly prohibiting or restraining the exercise of particular powers by the city or any department or officer thereof.

conformity with the spirit of the charter to state the main principles of those laws in broad outlines and to leave their elaboration to the city council.

A way had to be found to reconcile these many detailed regulations with the principle of home rule. It was certain that amendments would be called for from time to time, and the question presented itself whether it would be possible to avoid going to the legislature for every trifling change. It was fully realized that a broad and unlimited power of amendment lodged in the city council would be contrary to legislative intent and most likely unconstitutional, but it was believed that a power of amendment might find legislative and judicial approval, if it were carefully circumscribed both as to subject matter and as to mode of exercise.

For a provision vesting in a subordinate legislative body the power to change the law enacted by a superior body a direct precedent was furnished by the charter of Greater New York. This provides (Section 3) that certain sections shall be continued in force until the Board of Aldermen shall pass ordinances regulating the matters provided for in said sections, and when the matter covered by any such section shall be regulated by ordinance, the section shall cease to have any force and effect. The Board of Aldermen is also given power to vary the building laws (Section 650). Louisiana also allows the charters of towns to be amended, upon petition of one-third of the taxpayers, and by an election held for that purpose (Laws of 1880, Chapter 110), and South Carolina permitted in similar manner an extension of the duration of city charters (Laws of 1902, No. 562). In Missouri an ordinance may supersede a statute, if the power is clearly given (38 Mo. 451), and the same is true under the express terms of a recent city charter granted in Nevada (Laws of 1905, Chapter 71).

There has so far been no exhaustive judicial discussion of the constitutionality of this practice. But the Supreme Court of Michigan has declared a provision of the charter of Detroit unconstitutional which allowed the charter to be amended, upon recommendation of the mayor and by resolution of the common council, or by petition of 5,000 voters, the proposition to be submitted to the voters of the city.

The Court adopted the opinion of a lower court which laid considerable stress upon the fact that legislative authority was

delegated, not to the legislative branch of the city government, but to its executive head, the mayor, or to any 5,000 electors (*Elliott v. Detroit*, 121 Mich. 611, 1894). However, the decision stood as a warning to be cautious in the formulation of such a grant of power.

No attempt was therefore made to vest in the city a general power to amend the Charter Act, but the power was carefully qualified in order to obviate, if possible, any constitutional objection.

The qualifications were that the power of amendment was limited to matters which in the first instance might have been committed to the city council; that even as to those it was made subject to important and far-reaching specific exceptions, and that it was not to be effective without popular vote.

The first qualification removed the objection of an unconstitutional delegation of legislative powers. The exceptions related to those matters as to which it might fairly be inferred that the legislature intended to impose a policy of its own upon the city—the provisions on taxation, the article on public utilities, the maintenance of a board of education to manage the school system, and every provision expressly prohibiting or restraining the exercise of particular powers by the city or any department or officer thereof. The latter exception particularly indicated the conservative and moderate character of the amending power.

The third qualification was in accordance with the spirit of the constitutional amendment and would have left the final decision upon the adoption of any amendment in the same hands, whether the amendment had been proposed by the council or by the legislature. If this consideration had not been controlling, an optional referendum upon petition of a small percentage of voters would have been much preferable, as being less unwieldy in operation and equally effective in securing popular control.[8]

With the provision for a compulsory referendum there was

[8]In order to permit such improvements in the details of the local improvement act not touching any matter of principle, as might be called for from time to time, the following provision was framed: (15—3.)

"The city council shall have the power by general ordinance passed by a vote of three-fourths of all its members to make provisions regarding the time and manner of notice, regarding the number of installments into which assessments may be divided, regarding the time of payment of assessments and the payment of the interest upon the same, also regarding the form, the terms, and conditions of the payment of, improvement bonds, and the provisions of any general local improvement act of the

very little to distinguish the clause from those forms of local option in which the legislature allows a municipality not only to adopt or not to adopt some particular local scheme, but also to discontinue its operation after having once adopted it. Under the Illinois laws the power to establish and give up city courts is perhaps the most conspicuous instance of this practice. Under the constitutional amendment all special legislation for Chicago is in effect local option legislation. With reference to those charter provisions which were to be subject to the local power of enactment, the legislature offered in the first instance some regulation of its own which the city might, after having adopted it, discontinue, and for the contingency of its discontinuance the legislature offered a local power of regulation subject to a referendum; and it provided that the power to discontinue and the power to regulate were to be exercised by one and the same act. At most, then, there was a new combination of several features, each of which was familiar to our legislative practice. It was hoped that the form chosen would have stood the test of judicial scrutiny. The power itself was so desirable that it would have been unwise not to try the experiment.

Another question relating to charter amendments deserves notice. Can a charter for the city of Chicago be changed only in accordance with the express provisions of the constitutional amendment of 1904 which requires submission to the voters, or can future legislation enacted for all cities of the state alike be made applicable also to the city of Chicago? Perhaps a distinction ought to be made between legislation which regulates matters not covered by the charter, and legislation which is repugnant to charter provisions. General legislation of the former kind may be desirable, for instance, for the purpose of introducing uniform methods of accounting. General legislation of the latter kind would in almost every case be contrary to the spirit of the constitutional amendment, and the presumption should be against a legislative intent to that effect. Therefore, while the question of power had to be left open, it was provided as a rule of construction that in the future any law passed with reference to cities should not apply to the City of Chicago, unless the legislative intent to the contrary should be clearly expressed (Article 22, Section 1).

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state upon any of these subjects shall be operative in the City of Chicago only in the absence of any different provision upon the same subject made under the power hereby granted."

V

Consolidation: The provision of the constitutional amendment allowing only the consolidation of local governments with jurisdiction confined to the territory of the City of Chicago made it necessary to leave intact the organization of five townships which extended partly into the city limits. It will also appear from the first section of the charter that the consolidation of the other towns is qualified by the proviso "that towns or townships shall be deemed to continue in existence only in so far as their continued existence may be necessary to the collection of taxes." The necessity of this proviso illustrates the incidental operation of constitutional limitations. The town collector had for a long time been an important figure in our revenue system. He survived when in 1898 the town assessors of Cook County were abolished. In 1901 when the township organization in large cities was reduced to a mere shadow, the office of township collector was not directly abrogated, but the treasurer was made ex-officio township collector, and in that capacity collects the local taxes at the present time. Had the charter undertaken to abolish the town organization outright, the county treasurer could have acted no longer as ex-officio township collector; to extend the functions of the county treasurer as such would have been beyond the scope of charter legislation, and the creation of a new city office for the collection of taxes would have brought a new element into a revenue system already sufficiently intricate. Hence it was deemed simplest to leave the towns in existence for tax collecting purposes.

The express consolidation of the school government with the city government would have removed a peculiar ambiguity in the relation between these two governmental organizations. The constitution of 1870 contains no positive provision for local divisions for educational purposes, but recognizes state, county, township and *district* school officers. The district is also the lowest unit for school purposes recognized by the general school law. For Chicago the charter of 1837 had provided that the common council might divide the city into school districts, each of which was to elect annually three trustees with power to purchase sites, etc. The charter of 1851 vested the title to all school lands in the city, and gave to the city council general powers over the school system. But the election of district trustees was discontinued only in 1857, when provision was made

for the appointment by the council of a Board of Education, the duties of which were to be prescribed by ordinance. By the charter of 1863 the powers of superintendence and control were vested directly in the Board of Education, but the title to the school lands continued in the city. The Cities and Villages Act of 1872 was entirely silent as to schools, and when the City of Chicago adopted it in 1875 its schools came to be governed by the school law, which had special provisions for cities over 100,000. Such a city corresponded to and virtually constituted a school district, but instead of elected directors it was to have a Board of Education, which was to be appointed by the mayor, but whose functions were prescribed by law, and were not to be exercised by the common council, except as especially provided by law. The common council was to levy the school taxes, and its concurrence was required for purchases and bond issues. The title to school property continued to be vested in the city, and as the city retained the financial powers and resources, the money borrowed for school purposes was to be raised on the credit of the city.

The resulting condition of law seems to be that the city corporation serves at the same time the purposes of a school district, but that its powers in that respect are derived from the school law and not from the city law. Does it follow that there are two separate and distinct corporations? Perhaps somewhat inadvertently the Supreme Court expressed the relation in that form in the case of *Speight v. People,* 87 Ill. 595, but the statement was practically withdrawn in *Brenan v. People,* 176 Ill. 620, when it was said that the Board of Education was not a municipal corporation and none the less a municipal agency or department of the city government, because certain corporate powers are vested in it. Again, however, the Supreme Court spoke of the Board of Education as a corporation or quasi-corporation when it denied the liability of the city for neglect or default in the construction of school buildings (*Kinnare v. Chicago,* 171 Ill. 332), but the decision was plainly and sufficiently founded upon the generally recognized principle that there is no municipal liability for default occurring in the discharge of public governmental duties.

The relation between the city and the school administration remained sufficiently uncertain to furnish the present mayor some slight color of legality when he undertook to remove members

of the Board of Education, and it required another decision of the Supreme Court to place this matter beyond controversy.

The adoption of the charter would have removed this ambiguity. The corporate identity of city and school organization would have had the positive sanction of the constitution, and the mayor's power of removal would have been regulated by express provision. The city being placed to some extent under a separate school law, a doubt would have arisen whether it would have been entitled to a share in the so-called distributive school fund, which by law is to be apportioned only among schools kept in accordance with the general school law. A provision was therefore inserted in the charter to the effect that "except as by this act modified, the provisions of the general school law shall apply to the City of Chicago, and for the purpose of sharing in the distribution of the common school fund and other distributive funds, the schools of the city shall be deemed to be kept in accordance with the provisions of said (the general school) law."

VI

The provision for submission to popular vote: The constitutional amendment, after providing for the submission to the voters of any "law based upon this amendment of the constitution, affecting the municipal government of the City of Chicago," adds, "and no local or special law based upon this amendment affecting specially any part of the City of Chicago shall take effect until consented to by a majority of the legal voters of such part of said city voting on the question at any election, general, municipal, or special."

Suppose the total vote cast in the city had shown a majority in favor of the adoption of the charter, but the vote cast in one town or in one park district had been adverse, what would have been the effect under the clause last quoted?

It would most probably have been contended that the amendment required a majority vote in each of the municipal corporations sought to be consolidated, and in order to meet this issue squarely the charter act provided that "in case any election precinct of the city is or shall be intersected by the boundary line of any of the municipal corporations sought to be consolidated by this act, the judges of election shall procure and the election commissioners shall furnish two or more ballot boxes so as to allow the votes of the residents of such municipal cor-

poration in such precinct to be received separately from the votes of the voters of such precinct residing outside of such municipal corporation, and the same shall be received and returned separately."

The force of the contention would have depended upon the question whether the charter was a special or local law with reference to each local government which it undertook to abolish.

Suppose the constitution of a State forbids the enactment of special laws granting or amending corporate charters, but all previously existing corporate charters had been granted under a reservation of a legislative power of amendment,—could the legislature of that state enact a general law affecting all corporations alike, organized under special as well as general laws? It seems that such power must exist. Yet it cannot exist if the general law is a special law with reference to each corporation incorporated under a special charter which is affected by the new law. The case thus put is parallel to the case of the town or park district in Chicago. All towns and park districts are in a sense similarly affected, for they are all equally consolidated with the city. Concede, however, that each park district, having an organization and powers of its own, is specially affected by such consolidation, yet the constitutional amendment does not require the special consent for every law affecting specially any part of the city, but only for every *local or special law* affecting specially such part. It does not appear how a law operative throughout the whole city can, at the same time, be said to be a local or special law, where the legislature contrasts the two classes of laws.

If the contention were well founded, the further question would have arisen, and would arise in any future charter, how the adverse vote in one town or park district would affect the adoption of the charter. The Charter Act left this to judicial construction; however, an expression of legislative intent would be controlling, and it would be appropriate. The effect of an adverse vote in one of the small and obscure park districts on the North Side should be at most to leave that district out of the consolidation; an adverse vote of two of the large park systems, on the other hand, should carry with it the rejection of the entire Act, since the increase of the bonding capacity of the city—one of the main reasons for seeking a charter—is constitutionally conditioned upon the assumption of the debts of two of

the corporations to be consolidated, which practically means two of the large park systems. The doubt would arise if only one of the three park systems should reject the charter, and the reasons for and against consolidation, leaving that one district out, would be so closely balanced as to make an express legislative disposition extremely desirable.

The idea that there should have been two separate votes in each part of the city to be specially affected, one regarding that part of the charter affecting that part, the other regarding the remainder of the charter, was entirely inadmissible and impracticable, for it would have been as impossible for the legislature to separate the consolidation from the other provisions as for the voter to separate his judgment and vote; for the resident of Hyde Park to vote for the charter, but against consolidation of the South Park system, would have been to vote for an impracticable and contradictory scheme.

Another idea should be briefly mentioned. The constitutional amendment says: "The general assembly shall have power * * * to pass any law (local, special, or general) providing a scheme or charter," etc. The general law was understood by the framers of the charter to mean a law general with regard to all parts of the city. Was this an error, and did the framers of the amendment mean a general law for the State or for all cities, incidentally constituting also a charter for Chicago? If so, the local and special law would be one relating to the City of Chicago alone, and the charter would be such local and special law, and in so far as it affected specially any park district would have to be approved by the voters of that district. It would also follow that—contrary to the assumption of Article 22, Section 1, of the Charter Act—no future general city legislation could have affected the city without its consent. The fact that later on the constitutional amendment distinguishes between a law based upon the amendment affecting the municipal government of Chicago, and a local or special law based upon the amendment affecting specially any part of the city, was taken to indicate that the term "local or special" was thereby further defined; but it might, of course, also be said that the words constitute a further differentiation of the term. At some time the Supreme Court may have to solve this puzzle, for the question is very likely to arise in future charter legislation.