No. 14288

Supreme Court of Illinois

People ex rel.

vs.

Coventry et al

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. ~~67~~ 1262

1488. 358-199

People
vs.
City of Chicago

358

SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. THE CITY OF CHICAGO,

vs.

ALEXANDER C. COVENTRY *et al.*

BRIEF FOR RESPONDENTS,

BY

C. BECKWITH.

F. Fulton & Co., Printers, 148 Lake Street, Chicago.

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SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, and WILLIAM WAYMAN.

Application for a Mandamus.

BY an act of the legislature of this State, approved February 21, 1861, a board of police was created for the city of Chicago, consisting of three commissioners. The act provides that the Governor shall nominate, and, by and with the advice and consent of the senate, appoint the first commissioners, who were respectively to hold their offices for two, four and six years from and after the then next municipal election in said city, and until their successors were duly elected and qualified. Under this act, the respondents were duly appointed and qualified as commissioners, and they proceeded to organize the board, and have ever since discharged, and are still discharging, the duties required of them by its provisions.

The general assembly of the State, by a joint resolution, adopted February ——, 1859, recommended to the electors, at the next election of members of the general assembly, to vote for or against a convention, and a majority of such electors having voted in favor of it, the legislature, by an act approved January 31, 1861, called a convention to alter or

amend the constitution, to meet at Springfield, on the first Tuesday of January, 1862. The act provided that the number of delegates should be the same as the number of members of the house of representatives, and that they should be chosen on the Tuesday next after the first Monday of November, 1861, in the same manner, at the same place, and by the same electors in the same districts that chose the members of the house of representatives.

The act further provides, that the amendments, revisions or alterations of the constitution agreed to by the convention, shall be submitted by it to the people for their adoption or rejection, at an election to be called by the convention. Provision is made for holding such election, and for ascertaining the result. If a majority of the votes given at such election are in favor of accepting the alterations or amendments, or any part thereof, they are to become the supreme law of the State; but if a majority of the votes given at such election are against the amendments or alterations, or any part thereof, then the same are to be null and void. The schedule of the proposed constitution provides, that it shall be submitted to the people for their adoption or rejection, at an election to be held on the Tuesday next after the third Monday of June, 1862, and the manner in which the result of such election shall be ascertained.

It also provides, that if a majority of the votes polled are for the adoption of the proposed constitution, it shall become the supreme law of the State, from and after September 1, 1862; but if a majority of the votes polled are given against the proposed constitution, the same shall be null and void.

It further declares that the provisions of the constitution required to be executed prior to the adoption or rejection thereof by the people, shall be in force immediately.

The framers of the proposed constitution provided that the thirty-fourth section of the schedule should, upon a certain contingency, go into operation on the third Tuesday of April, 1862, without its being previously submitted to the people of the State for their adoption or rejection. The section provides: "That, at the next municipal election, to be held in

"the city of Chicago, on the third Tuesday of April, 1862, "the legal voters of said city shall cause to be printed or "written upon all their ballots the following words: 'For the "city of Chicago electing its own officers;' or the words: "'Against the city of Chicago electing its own officers;' "which shall be canvassed and returned with the election re- "turns of the ballots, as is now provided by law. And, in "case there shall be a majority of the legal voters, voting at "said election, in favor of the people of said city electing "their own officers, as indicated by said above mentioned "words, then it shall not be lawful for any officers of that "city to be chosen in any other manner than by a vote of the "people of said city, or appointed in any other manner than "by the mayor and aldermen, as provided by present laws; "and the act approved February 2, 1861, entitled 'An act "regulating the custody and sale of personal property under "legal process, in the city of Chicago, and the towns of South "Chicago, West Chicago, and North Chicago, in Cook county;' "also, 'An act to establish a board of police in and for the "city of Chicago, and to prescribe their powers and duties,' "approved February 21, 1861; and also so much of an act "approved February 18, 1861, as is embraced in section sixty- "six and one-half (66½) of an act to amend the city charter "of Chicago, and creating three commissioners to examine "into the finances of said city, be, and the same are each and "all of them hereby repealed; and the powers and duties of "all officers appointed under and by virtue of said acts, shall "immediately cease. And hereafter, neither the governor "nor general assembly shall appoint any person to any office "for said city of Chicago; but all officers shall be elected "by the people of said city, or appointed by the mayor and "aldermen, as provided by present laws, or by such general "laws as may hereafter be passed by the general assembly "under the constitution."

The majority of the votes cast at the late municipal election were "for the city of Chicago electing its own officers," and the city of Chicago now claims that the powers of the board of police have ceased. The commissioners have cer-

tain property in their possession, to which the city is entitled if their powers have ceased, and for the recovery of which there is no adequate legal remedy. Under these circumstances, the city applies to this court for a mandamus to compel a surrender to it of the property alleged to be wrongfully withheld.

The question presented for your Honors' consideration, as will be seen, is, whether the convention had power to pass and repeal laws in such manner as it thought proper. The provisions of the act of the legislature, under which the delegates to the convention were elected, were set at defiance, and the convention assumed that it was vested with the supreme authority of the people of the State. It asserted that it was subject to no restraint whatever, other than the constitution of the United States, and such as its members might voluntarily impose upon themselves. The supreme authority of a community, includes executive and judicial, as well as legislative powers, and if the convention possessed legislative power, it might also have exercised the executive and judicial powers of the people. The convention was a body of delegates, having delegated powers, but it is asserted that the people delegated to them the entire sovereign power of the community. Statesmen, jurists and historians have hitherto pointed to the States of this Union with pride, as governments, the powers of which were not absolute, but restrained by written constitutions. It has not been supposed that our institutions, and our rights and liberties could be placed absolutely in the power of a body of men who were subject to no restraint whatever, except such as their own judgment might dictate to them. Mr. Justice Blackstone, in his Commentaries (vol. 1, p. 146), says, whenever the supreme authority is vested in the same body of men, there can be no public liberty, and Mr. Justice Story asserts that it would be subversive of the principles of a free constitution. The Federalist remarks, "That the accumulation of all powers, legis-
"lative, executive and judiciary in the same hands, whether
"of one, a few or many, and whether hereditary, self-ap-
"pointed or elective, may be justly pronounced the very defi-

"nition of tyranny." Mr. Jefferson thought that the concentration of these powers in the same hands, was precisely the definition of a despotic government. "It," says he, "will be no alleviation that these powers will be exercised "by a plurality of hands and not by a single one. One "hundred and seventy-three despots would surely be as op- "pressive as one. An elective despotism is not the govern- "ment we fought for, but one which should not only be found- "ed on free principles, but in which the powers of govern- "ment should be so divided and balanced among several "bodies of magistracy, as that no one could transcend their "legal limits without being effectually checked and restrained "by the others." The elder President Adams, in his defense of the constitutions of government of the United States, shows with great clearness and force, that all such governments had ended their career in acts of profligate despotism and disgrace. Kent says, "The instability and violent meas- "ures of the French convention of 1793, which continued for "some years to fill all Europe with astonishment and horror, "tended to display in a most forcible and affecting light, "the miseries of a single unchecked body of men, clothed "with all the legislative powers of the state." The people of this State would be astonished to learn that they had vested the supreme authority of the community in a convention of delegates elected for a particular purpose.

With such authority the convention might have passed or repealed any laws it thought proper, and executed the laws in such manner as it thought expedient. It could have abolished the senate and house of representives, and discharged the executive of the State from the performance of any of his official duties, or from his office altogether. It could have heard causes, rendered judgments therein, and caused them to be executed without the aid of the judiciary. If the convention possessed the supreme authority of the people, it could have abolished the entire judicial system of the State, without establishing any other system in its place. Clothed with such authority, the convention was not subject to any constitution or law, and it might have perpetuated its

own existence and powers, and the people could have escaped from its tyranny only by a revolution resulting in a dethronement of the usurpers from their power The fundamental principles of our government lead to no such results, and a careful examination of these principles will show that delegates of the people are never vested with the entire sovereign power, but only with such powers as are especially delegated to them.

According to the theory of our government, all political power is primarily vested in the people, and from them all political power is derived. The political power of the people is primarily vested in them as an aggregate community, and it is frequently described as a sovereign power—not for the purpose of asserting that it has any of the peculiar attributes of power vested in sovereigns—but to express the idea that it includes all political power vested in the supreme authority of a community. Although all political power is vested in the people, they cannot exercise it directly as an aggregate community, either in masses or *per capita*. The portion of political power vested in each individual of a community, is the right to have a voice in the determination of all questions to be directly acted upon by the community; and the direct aggregate power of the whole community, is made up of the individual powers of its members. The direct exercise of the aggregate power of the people, is suffrage, and by its exercise their power as a community, is, to a certain extent, for certain purposes, and under certain restrictions, delegated to their representatives. The people, as a community, do not delegate to their representatives absolute power, but only such powers as are necessary or expedient for them to have for certain specified purposes.

"Sovereignty," says the Hon. Robert J. Walker, in his letter to Hon. Lewis Cass, dated December 15, 1857, "is "vested exclusively in the people of each State, and performs "its first and highest function in forming a State government "and State constitution. This highest act of sovereignty, "in my judgment, can only be performed by the people them-"selves, and cannot be delegated to conventions or other

"intermediate bodies. Conventions are composed of dele-
"gates—they are mere agents or trustees, exercising not a
"sovereign, but a delegated power, and the people are the
"principals. The power delegated to such conventions can
"properly only extend to the framing of the constitution, but
"its ratification or rejection can only be performed by the
"power where the sovereignty rests—namely, the people
"themselves. We must not confound sovereign with dele-
"gated powers. The provisional authority of a convention
"to frame a constitution and submit it to the people, is a
"delegated power, but sovereignty alone, which rests exclu-
"sively with the people, can ratify and put in force that con-
"stitution. And this is the true doctrine of popular sover-
"eignty; and I know of no such thing, nor does the Federal
"constitution recognize it, as delegated or conventional sov-
"ereignty." These views were put forth by Mr. Walker in a printed address delivered at Natches in 1833, and were approved by Madison, the principal founder of our Federal constitution, as shown in a letter of Hon. Charles J. Ingersoll, of Philadelphia, published in the *Globe* at Washington, in 1836. *Mr. Madison then stated that these were the views of Mr. Jefferson.* "The people," said Mr. Madison, in his celebrated report on the Virginia resolutions, "not the govern-
"ment, possess the absolute sovereignty." The provision of the constitution of the United States declaring that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, has ever been considered as a statement of a fundamental principle in regard to the powers of delegates of the people. "The reservation to
"States is as separate States, in exercising the powers
"granted by their State constitutions, and the reservation to
"the people is to 'the people' of the several States in exer-
"cising their sovereign right of framing or amending their
"State constitution." The people, perhaps, may authorize their delegates to put a constitution in force, but such authority is not to be derived by any implication whatever. If no such express authority is conferred upon delegates, it has

ever been understood that such authority was withheld, and that the people reserved to themselves the right to ratify or reject the proposed constitution.

Story on the Constitution, § 1907.

These were the views of Madison as expressed in his report on the Virginia resolutions, and the same views are expressed by Mr. Jefferson in his draft of the Kentucky resolutions of 1798 and 1799. The act of the Territorial legislature of Kansas of 1857 provided for the election of delegates to form a constitution preparatory to the admission of that territory into the Union as a State, but it made no provision for submitting to the people the constitution that might be framed by the convention. The rule in regard to the powers of the delegates to that convention was, however, so well settled, that Mr. Buchanan took it for granted in his instructions to Gov. Walker that the constitution to be framed would be submitted to the people for their adoption or rejection, and authorized him, in the most explicit terms, so to assure the people of that territory. In his message of December 8, 1857, he says he had never entertained a serious doubt upon the subject, and proceeds to give most satisfactory and conclusive reasons for the rule. The bill called the Toombs bill for the admission of Kansas, passed the Senate of the United States in 1856, and it provided for the formation of a constitution by delegates, but it contained no provision that it should be submitted to the people. In regard to it, the patriot and statesman Douglas, whose name should ever be mentioned with reverence, said, "My explanation of that [his vote in favor of the Toombs "bill] is to be given in the precise language of the explanation "of the President of the United States in his message, in which "he says that, in his instructions to Gov. Walker, he took it "for granted that the constitution was to be submitted to the "people, under a law that was silent on the subject. *The "Toombs bill being silent, I took it for granted, too, and I "suppose every other man did, that it was to be submitted.* "I merely adopted the same process of reasoning that the "President himself says he adopted, and which he was amazed

"to find was not carried out. If the President was right "in taking that for granted, I do not know why I was not "right in taking the same thing for granted."

"I will ask the Senator to show me an intimation from any "one member of the Senate, in the whole debate on the "Toombs bill, or in the Union from any quarter, that the "constitution was not to be submitted to the people. I will "venture to say that, on all sides of the chamber, it was so "understood at the time."

Again: "The point I have made was that, being silent, it "was understood as a matter of course that it was to be sub- "mitted. Such a clause (*i. e.*, one expressly requiring the "constitution to be submitted to the people) was unnecessary. "That was the President's construction of the act of the "Kansas legislature. That was my construction of the "Toombs bill. That the bill was silent on the subject is true, "and my attention was called to that about the time it passed; "and I took the fair construction to be, *that powers not dele- "gated were reserved, and that of course the constitution "would be submitted to the people.*"

Cong. Globe, 1857–8, Part 1, pp. 21, 22.

For the purpose of presenting the question arising in this case, it is not important to mention the preliminary steps requisite to the establishment of a new government. In the absence of any organized government and of any constituted authority having power to organize one, the people may legitimately institute an inceptive organization for the purpose of bringing together its representatives to form a government, but before the attempted Kansas usurpation, I think no body of men in this country ever assumed to have authority to put a constitution in force without express authority from the people so to do. The emphatic rebuke of an indignant people of this attempted usurpation of power, ought not so soon to have been forgotten. Having ascertained the nature of the powers granted to delegates to form a constitution, it then becomes important to ascertain the powers of those who administer a government under a constitution after it has been adopted.

When a government is rightfully established, the sov-

ereign power of the people, to a certain extent, and under certain restrictions, is delegated to, and placed in the hands of its representatives, constituting that government, called the State. The form of the government, and the powers and duties of those administering it, are, in this State, as in all other States in the Union, prescribed and limited by a written constitution. No power to make, execute or administer laws is delegated by the people to any one, except to its representatives who administer the government; and no power is delegated even to them to do any act contrary to the written constitution prescribing their powers and duties. Thus, while our government is one of the people, it is one having a prescribed form, and is to be administered by its legitimate representatives, and none others, in accordance with such form and in no other manner.

The powers of the government are divided into three distinct departments, and each of them is confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another. All acts of either of these departments, within the sphere of its powers, are acts of the people, and all persons exercising any power in, under, or through either of them, simply administer or execute the power of the people. Legislation is required to be in the name of the people; executive acts and duties are to be performed in their name, and the judicial power is to be asserted in the same manner. The legislative power of the people is ordinarily vested in a senate and house of representatives, to be chosen in accordance with some organic or other law, prescribing the number of representatives in each body, the time and manner in which they are to be elected, and the qualifications of the electors as well as the elected. The manner in which the legislative power of the people shall be exercised is also prescribed by a written constitution.

In this State, the legislative power and authority of the people is vested solely and exclusively in a general assembly, consisting of a senate and house of representatives, to be elected by the people. The manner in which laws are to be

enacted is specifically prescribed, and it is declared that no bill shall become a law until the requirements of the constitution are complied with. The representatives of the people, in whom legislative power is vested, are restrained in its exercise in certain cases, and absolutely prohibited from exercising it in others; but where there is no restraint and no prohibition, the *entire* legislative power of the people is vested in the general assembly. The people, in their primary capacity, have no power to pass a law. The general assembly has no power to authorize the people in their primary capacity to pass laws. No law can be passed except by those representatives of the people in whom the legislative power is solely and exclusively vested, nor in any manner except the one prescribed by the constitution.

Sedgwick on Statutory and Constitutional Law, pp. 164, 165.

Thorne v. *Cramer*, 15 Barb. 112.

Barto v. *Himrod*, 4 Seld. 483.

The executive power of the people in this State is vested in a governor, to be elected in the manner prescribed by the constitution, and whose powers and duties are defined and limited by it. Until the constitution is changed, in pursuance of, and in conformity to, some law, the executive power of the people will remain in its representative, in whom it is solely and exclusively vested. Until that time, he must be elected in the manner prescribed by the constitution, and his powers and duties will remain unaltered and unchanged. Until that time, no executive power of the people can be exercised by any person other than their representative, the governor, in whom such power is solely and exclusively vested. Among the duties imposed upon the executive officer of the people, is that of examining all bills passed by the senate and house of representatives, and either approving the same, or returning them to the house in which they originated, with his objections thereto in writing. This provision of the constitution was designed to prevent hasty and improvident legislation, and so long as the constitution remains in force, no bill or ordinance can become a law, without it is

first submitted to the governor, for his approval or disapproval, by the legislative power, as the constitution requires. The paramount law of the land, overriding and annulling all acts of representatives of the people in conflict with it, no matter for what purpose they were elected, declares that so long as the present constitution remains in force, no act of legislative power shall be exercised by any one, except by the representatives of the people *in the general assembly*, and by them only in the manner prescribed by the provisions of the constitution.

The judicial power of the people in this State, is vested in courts of justice, consisting of a certain number of judges. Until the present constitution is changed, in pursuance of, and in conformity to, some law, no persons can exert the judicial powers of the people, who are not judges of the courts, in whom such power is exclusively vested. The late convention, however, undertook to pass laws under their own assumed authority, without the aid of the general assembly, or the approval of the executive; and to have carried out their despotic assumptions, they should have assumed to administer them. They undertook to abrogate so much of the old constitution as required laws to be passed by the general assembly and approved by the executive; and they might with just as much propriety have abrogated that portion of the constitution which requires laws to be administered by the judiciary, and usurped that branch of the government also. These considerations lead to an examination of the manner in which a people may rightfully change their form of government, or alter, or amend their constitution.

It is evident, from what has already been said, that the people may and do limit the powers delegated and conferred upon their representatives. It is equally evident that they may and do limit their own powers. They limit themselves in many important respects. It is only necessary to mention some instances in which binding limitations are made. In every State the people have surrendered the right of voting for every one they might choose to vote for, and have limited

their right of choosing, so as to be obliged to select persons having particular qualifications. They have disqualified themselves from voting, unless they have certain qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections; they can only vote at a particular time, at a particular place, and under particular conditions. They also place a limitation upon their powers in regard to changes in the form of their government, and in regard to alterations and amendments of their constitution. Their powers in regard to changes of the form of their government, and in regard to alterations and amendments of their constitution are to be exerted and exerted only in conformity with some law. No such change, alteration or amendment can be made, until the law-making power provides a mode in which they may be made. Since the decisions in regard to the famous Dorr rebellion in Rhode Island (7 How. 1) it has been settled that the people cannot change their form of government, except under and in pursuance of the provisions of some law, or by revolution. As before remarked, the people cannot directly exercise their political power in their aggregate capacity. They cannot in that capacity frame a constitution. The power of the people must be exercised by suffrage, and hence the necessity of a law prescribing the manner in which, the persons by whom, and the purposes for which the right may be exercised. Infants, females, and other persons, are not permitted to exercise the right of suffrage in person. Those who are permitted to exercise the right in person represent the whole community. The very nature of the right of suffrage requires a law prescribing who may exercise it, and the manner in which it shall be done. The law must not stop with these particulars. A law declaring that all male adults who had resided in the State one year, might vote on the first Tuesday of November, 1862, would not be sufficient to enable the people to exercise the right of suffrage. The law must go further and declare for what purpose the electors are to vote, and the manner in which the result of such voting shall be officially ascertained and made known. 7 How. 1.

Under such a law, and none other, those who are permitted to vote, may exercise the right of suffrage. Under such a law, and none other, the voters may vote for or against a given proposition submitted to them. Under such a law the voters may elect delegates for the purposes and with the powers specified in it. The law is the act of the people, and the delegates elected under it are clothed *by the people* with such powers as they are elected to exercise, and none others. They are elected to exercise such powers as are specified in the law, declaring the purpose for which they shall be elected. Under the law of 1861 the people elected delegates for the purpose of framing a constitution to be submitted to them for their adoption or rejection, and for no other purpose. The people granted to the delegates all the authority they ever had, and upon what principle can it be said that the people delegated to the members of the convention, authority to put a constitution in force, when the people never elected them for any such purpose? Until it is established that persons delegated to do a particular act, in a specified manner, have power to do what they please, and in such manner as they please, it will remain a self-evident proposition that persons elected to do a particular thing, in a particular manner, cannot do all things in such manner as they may think proper. The usual mode in which the people change their constitution is by a convention of delegates elected in conformity to some law for that purpose.

In the old thirteen States, the constitutions first adopted by them, with but two exceptions, contained no provision for their own amendment; and still, all of them have been amended in pursuance of laws passed by the legislative power. Such laws have uniformly prescribed the mode in which amendments might be made, and the requirements of such laws have been considered binding upon those who derived their authority under them. Whenever, in the course of events, it is supposed to be expedient to ascertain the will of the people on a new exigency, or on a new state of things, or of opinion, and there is no constitutional provision on the subject, the legislative power must be and is the sole judge

of such expediency; and if it judges such ascertainment of the will of the people to be expedient, it must provide by law, the mode and manner in which the will of the people shall be ascertained.

The first section of the twelfth article of the present constitution of the State, which has been in force since April 1, 1848, provides, that "whenever two-thirds of all the members elected to each branch of the general assembly shall "think it necessary to alter or amend this constitution, they "shall recommend to the electors, at the next election of "members of the general assembly, to vote for or against a "convention; and if it shall appear that a majority of all the "electors of the State voting for representatives, have voted "for a convention, the general assembly shall at their next "session call a convention, to consist of as many members "as the house of representatives at the time of making said "call, to be chosen in the same manner, at the same place, "and by the same electors, in the same districts that chose "the members of the house of representatives, and which "convention shall meet within three months after the said "election, for the purpose of revising, altering or amending "this constitution."

Under the provisions of this article of the constitution, it is not made the duty of the general assembly to recommend to the electors to vote for or against a convention until two-thirds of all the members of each branch of that body shall think it necessary to alter or amend the constitution. When there is no constitutional provision upon the subject, a duty is imposed upon the legislative power to provide by law for a change of the fundamental law, whenever, in the opinion of a majority of its members, it is necessary that such a change should be made. Although in this State the duty is not imposed until two-thirds of the members are of that opinion, still, whenever the time arrives, the nature of the duty is the same in the one case as in the other. Where there is no constitutional provision, the legislative power may prescribe such time, manner, and condition as it may think proper, in regard to making the change. In this State, the constitution

has expressed a particular manner in which the legislative power shall perform some of its duties, and thereby restrained it from performing them in these particulars in any other manner.

There is a wide difference between the legislature's exceeding its authority, and a neglect to perform its duties. In the former case, the law is void; while in the latter, no right or authority is derived, however clear and unquestioned the duty may be which should have been discharged. All constitutions impose certain duties upon those who represent the people in the several departments of the government. The representatives in the legislative department, in whom all legislative power is vested, are required to pass certain laws. The executive is required to do certain acts, and the judicial officers are required to do other acts. To secure the performance of these several duties, the people have required all of their representatives to take an oath, by which they solemnly oblige themselves to discharge the duties imposed upon them. But while the highest moral obligation is imposed upon such representatives to perform their duties, it is well settled that it rests solely upon their consciences. It is well understood, that constitutional provisions requiring the legislative power to pass laws, have no operation as laws. The legislative power may be required in the most imperative manner to pass a law, but if it neglects its duty in this regard, the rule which it should prescribe as a law can never become one.

The people of the State cannot legally vote for or against a convention, without a law authorizing them so to do. When such a law is passed, the people must vote in conformity to its provisions. They have no power in regard to voting for or against a convention, beyond the powers conferred by the law, and such powers must be exercised in the manner which it prescribes. The constitution directs the legislative power to pass a law calling a convention, if it shall appear that a majority of all the electors of the State voting for representatives have voted for it; but if the legislative power neglects to perform its duty in this regard, no delegates can be elected,

and no convention can be held. The law which the legislature is required to pass, is the only authority under which delegates can be elected. It is the only authority under which they can assemble. After the convention is assembled, it is a body whose powers are conferred upon it by the people, under the law calling it into existence, and are limited to the purpose for which its members were elected. The people elected the delegates to perform certain duties, and when they accepted of the office to which they were elected, they became bound to discharge those duties.

It is said that the law-making power did not confer upon the convention as much authority as it was entitled to exercise, and, therefore, it is claimed to have the right to assume such additional authority as ought to have been conferred upon it. But it is well settled, if the legislative power only performs its duty in part, the law which is such part performance, is the limit of the powers of those acting under it, and the duty which remains unperformed confers no power, or authority, upon those acting under the law.

A more plausible argument in favor of the assumed powers of the convention is, that when it had assembled it had full power to alter, revise, or amend the constitution, in such manner as it should think proper, under and by virtue of the provisions of the present constitution. The provisions of the present constitution are assumed to override the law of 1861 prescribing the duties and limiting the powers of the delegates of the convention. The argument assumes that the present constitution is a grant of power to such delegates as might be elected to exercise the power granted. The force of this argument is not perceived so long as it is admitted that the delegates were not elected for the purpose of exercising the powers supposed to be granted. If the delegates were elected for the purpose of exercising other powers than those supposed to be granted, it could not be pretended that they would have authority to exercise the power of amending the constitution and putting the amendments in force. So, if the people have elected delegates for the purpose of exercising a portion of the powers, and have not elected them to exercise

another portion which they might have exercised had they been elected for that purpose, it is not perceived upon what principle they can exercise that portion of the powers which they were not elected to exercise.

"If," say the Judges of the Supreme Court of Massachusetts, "however, the people should, by the terms of their "vote, decide to call a convention of delegates to consider "the expediency of altering the constitution in some partic- "ular part thereof, we are of opinion that such delegates "would derive their whole authority and commission from "such vote; and upon the general principles governing the "delegation of power and authority, they would have no "right under such vote to act upon and propose amendments "in other parts of the constitution not so specified."

6 Cushing, 575.

The idea of the people granting to themselves power is a novel one. The convention which framed the present constitution had no power to authorize a succeeding convention to put a constitution in force against the will of the people; and the people, in adopting the present constitution, did not, *and could not*, bind succeeding generations in that regard. While the people must exercise their sovereign powers in conformity to some law prescribing the time, place, and manner in which they shall be exercised, the sovereign power itself is inalienable. One generation cannot bind another so that it cannot, by its suffrages exercised according to law, define and limit the powers of its delegates; and it cannot be supposed that the framers of the present constitution intended to abridge the rights of the people in this respect, or that the people in its adoption so intended. The framers of the present constitution must be presumed to have intended that the legislature should call a convention to revise, alter, or amend the constitution, when the time mentioned should arrive, and to leave to the people to specify the purpose or purposes for which its delegates should be elected. The language of the instrument is to be construed according to the well-settled rules of construing like instruments. We have seen that the power to

amend the constitution was vested in the people in their amend the constitution was vested in the people in their aggregate capacity, to be exercised according to law, but an inalienable one. Hitherto, inalienable rights have not been supposed to be grantable, and it is not now perceived how the inalienable rights of the people could be so granted to their delegates as to make the delegates principals and the people agents. The people, from whom all authority is derived, have, according to the argument, become servants, and the delegates become masters. The rules in regard to grants of power are not applicable to such a case. If the people had elected the delegates to revise, alter, or amend the present constitution, and had not provided that such revision, alterations, or amendments should be submitted to them for their adoption or rejection, then the rules in regard to grants of power would have some application; but, even then, the well-settled rule would reserve to the people the power to adopt or reject the proposed constitution. The well-settled rule on this subject was again re-iterated by Senator Douglas in his speech delivered on the 22nd day of March, 1858. He says: "The convention assembled under "the authority of the Territorial legislature alone, and hence "was bound to conduct all of its proceedings in conformity "with and in subordination to the authority of the legisla- "ture. The moment the convention attempted to put its "constitution into operation against the authority of the Ter- "ritorial legislature, it committed an act of rebellion against "the government of the United States. A convention assem- "bled under the authority of the Territorial legislature could "do no act to subvert the legislature which brought the con- "vention into existence."

A careful examination of the provisions of the first section of the twelfth article of the constitution will show that they confer no powers whatever.

They are all of them in restraint of the exercise of powers which were vested in the legislature, and so far as those restraints do not operate, the power of the legislature is left untouched, and in full force. The legislature had ample

power, without the provision of the constitution, to call a convention for the purpose of revising, altering, or amending that instrument. It had power to make the call at such time, in such manner, and under such conditions as it should judge expedient. It also had full power to prescribe the powers and duties of the convention. The constitution, however, provides that it shall not be the duty of the legislature to make such a call, until two-thirds of each branch think it necessary, nor until it shall have recommended to the electors at the next election of the general assembly, to vote for or against a convention, nor until it shall appear that a majority of all the electors of the State voting for representatives, have voted for it. When these requirements are complied with, then the legislature shall exercise its inherent power of calling a convention, but not until then. So, as to the provisions of the constitution, in regard to the manner in which the call shall be made.

Unrestrained by those provisions, the legislature could have called the convention at such time as it pleased; have had it consist of as many members as was thought expedient; have had them chosen at such time, in such manner, by such persons, and in such districts as it might have prescribed. The only effect of the constitution was to restrain the legislature from making a call at any session except at its next session; to restrain it from fixing the number of delegates at a greater or smaller number than the number of representatives at the time of making the call, and to restrain it from prescribing any manner, place, electors or districts, than those that chose the members of the house of representatives. Unrestrained by the constitution, the legislature might have fixed such time for the convention to meet as it thought proper, and the only effect of its provision in this regard, is to restrain the legislature from fixing the time beyond three months after the election of the delegates. Thus it will be seen that every provision of the constitution is in restraint of the power of the legislature. These restrictions were complied with, and in every other respect the power of the legislature remained the same as though no restrictions had been im-

posed. It might fix the time when the election of delegates should be held. It might fix the time when the delegates should meet in convention, subject to the restriction which I have just mentioned. It might, in its discretion, exercise all of the powers vested in it where it was not restricted from so doing.

Having ascertained the true source of the power under which the convention assembled, and that such power is unlimited, except so far as it is restrained by the constitution, and there being no such restraint in this regard, it follows that the legislature had power to define the duties of the convention, and the purposes for which the delegates to that body should be elected.

The provisions of the present constitution are to be construed so as to harmonize one with another. All of them were adopted to transmit unimpaired to succeeding generations the blessings of civil, political and religious liberty; to secure a more perfect form of government; establish justice; insure domestic tranquility; provide for the common defense; promote the general welfare, and secure the blessings of liberty to the people and their posterity. I am unwilling to believe that the framers of the present constitution, having these ends in view, intended that a convention which should be assembled thereafter for its revision, alteration and amendment, with the same ends in view, should have power to abrogate one provision after another until every vestige of a constitutional government was destroyed, and then usurp the supreme authority of the government itself.

As before remarked, the people when they voted for and elected delegates to the convention, never intended that it should have any powers, other than what the law conferred upon it. The people never intended to delegate to the convention the supreme authority of the State, with power to repeal and pass laws at its will and pleasure. The people elected the delegates to frame a constitution under the law, and submit it to them for their adoption or rejection, and for no other purpose. The powers of the convention were neither legislative, executive nor judicial, but related to an

organic law, prescribing the form of the government, imposing duties upon its several departments and restraining them within certain limits. The office of such a law is to declare in whom the several powers of the government shall be vested, and to impose duties and restraints upon each of its departments. Beyond these provisions the convention had no power to go, and when it transcended these limits, its acts were void, even with the adoption of them by the people. If it could pass laws, and put them in force by a vote of the people, it could have tried cases and had its judgments become binding in the same manner. These are perhaps questions not necessary to be passed upon in the present case, as the section of the proposed constitution in controversy has not yet been submitted to the people of the State for their adoption or rejection. Taking well-established principles as our guide, they lead to the irresistible conclusion that the late convention was subject to the constitution and the laws, and its powers were limited to the purposes specified in the law calling it into existence. The amended constitution can only become the supreme law of the State in the manner specified in that act. No part of that instrument can become a law until it is submitted to the whole people of the State, nor until a majority of the whole people have voted in favor of it. The convention had no power to put the different sections in force by submitting one to the people of Chicago, another to the people of Union county, and a third to the people of Cairo, and so on, until each section was made to depend for its validity upon the vote of the people of a particular district selected by the convention. And it is confidently submitted, the convention had no power to pass or repeal any law in the manner mentioned in the thirty-fourth section of the schedule of the amended constitution, and its attempt so to do is a nullity.

C. BECKWITH,

Of Counsel for Respondents.

358

SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. THE CITY OF CHICAGO,

vs.

ALEXANDER C. COVENTRY *et al.*

BRIEF FOR RESPONDENTS,

BY

C. BECKWITH.

F. Fulton & Co., Printers, 148 Lake Street, Chicago.

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SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, and WILLIAM WAYMAN.

Application for a Mandamus.

BY an act of the legislature of this State, approved February 21, 1861, a board of police was created for the city of Chicago, consisting of three commissioners. The act provides that the Governor shall nominate, and, by and with the advice and consent of the senate, appoint the first commissioners, who were respectively to hold their offices for two, four and six years from and after the then next municipal election in said city, and until their successors were duly elected and qualified. Under this act, the respondents were duly appointed and qualified as commissioners, and they proceeded to organize the board, and have ever since discharged, and are still discharging, the duties required of them by its provisions.

The general assembly of the State, by a joint resolution, adopted February ——, 1859, recommended to the electors, at the next election of members of the general assembly, to vote for or against a convention, and a majority of such electors having voted in favor of it, the legislature, by an act approved January 31, 1861, called a convention to alter or

amend the constitution, to meet at Springfield, on the first Tuesday of January, 1862. The act provided that the number of delegates should be the same as the number of members of the house of representatives, and that they should be chosen on the Tuesday next after the first Monday of November, 1861, in the same manner, at the same place, and by the same electors in the same districts that chose the members of the house of representatives.

The act further provides, that the amendments, revisions or alterations of the constitution agreed to by the convention, shall be submitted by it to the people for their adoption or rejection, at an election to be called by the convention. Provision is made for holding such election, and for ascertaining the result. If a majority of the votes given at such election are in favor of accepting the alterations or amendments, or any part thereof, they are to become the supreme law of the State; but if a majority of the votes given at such election are against the amendments or alterations, or any part thereof, then the same are to be null and void. The schedule of the proposed constitution provides, that it shall be submitted to the people for their adoption or rejection, at an election to be held on the Tuesday next after the third Monday of June, 1862, and the manner in which the result of such election shall be ascertained.

It also provides, that if a majority of the votes polled are for the adoption of the proposed constitution, it shall become the supreme law of the State, from and after September 1, 1862; but if a majority of the votes polled are given against the proposed constitution, the same shall be null and void.

It further declares that the provisions of the constitution required to be executed prior to the adoption or rejection thereof by the people, shall be in force immediately.

The framers of the proposed constitution provided that the thirty-fourth section of the schedule should, upon a certain contingency, go into operation on the third Tuesday of April, 1862, without its being previously submitted to the people of the State for their adoption or rejection. The section provides: "That, at the next municipal election, to be held in

"the city of Chicago, on the third Tuesday of April, 1862, "the legal voters of said city shall cause to be printed or "written upon all their ballots the following words: 'For the "city of Chicago electing its own officers;' or the words: "'Against the city of Chicago electing its own officers;' "which shall be canvassed and returned with the election re- "turns of the ballots, as is now provided by law. And, in "case there shall be a majority of the legal voters, voting at "said election, in favor of the people of said city electing "their own officers, as indicated by said above mentioned "words, then it shall not be lawful for any officers of that "city to be chosen in any other manner than by a vote of the "people of said city, or appointed in any other manner than "by the mayor and aldermen, as provided by present laws; "and the act approved February 2, 1861, entitled 'An act "regulating the custody and sale of personal property under "legal process, in the city of Chicago, and the towns of South "Chicago, West Chicago, and North Chicago, in Cook county;' "also, 'An act to establish a board of police in and for the "city of Chicago, and to prescribe their powers and duties,' "approved February 21, 1861; and also so much of an act "approved February 18, 1861, as is embraced in section sixty- "six and one-half (66½) of an act to amend the city charter "of Chicago, and creating three commissioners to examine "into the finances of said city, be, and the same are each and "all of them hereby repealed; and the powers and duties of "all officers appointed under and by virtue of said acts, shall "immediately cease. And hereafter, neither the governor "nor general assembly shall appoint any person to any office "for said city of Chicago; but all officers shall be elected "by the people of said city, or appointed by the mayor and "aldermen, as provided by present laws, or by such general "laws as may hereafter be passed by the general assembly "under the constitution."

The majority of the votes cast at the late municipal election were "for the city of Chicago electing its own officers," and the city of Chicago now claims that the powers of the board of police have ceased. The commissioners have cer-

tain property in their possession, to which the city is entitled if their powers have ceased, and for the recovery of which there is no adequate legal remedy. Under these circumstances, the city applies to this court for a mandamus to compel a surrender to it of the property alleged to be wrongfully withheld.

The question presented for your Honors' consideration, as will be seen, is, whether the convention had power to pass and repeal laws in such manner as it thought proper. The provisions of the act of the legislature, under which the delegates to the convention were elected, were set at defiance, and the convention assumed that it was vested with the supreme authority of the people of the State. It asserted that it was subject to no restraint whatever, other than the constitution of the United States, and such as its members might voluntarily impose upon themselves. The supreme authority of a community, includes executive and judicial, as well as legislative powers, and if the convention possessed legislative power, it might also have exercised the executive and judicial powers of the people. The convention was a body of delegates, having delegated powers, but it is asserted that the people delegated to them the entire sovereign power of the community. Statesmen, jurists and historians have hitherto pointed to the States of this Union with pride, as governments, the powers of which were not absolute, but restrained by written constitutions. It has not been supposed that our institutions, and our rights and liberties could be placed absolutely in the power of a body of men who were subject to no restraint whatever, except such as their own judgment might dictate to them. Mr. Justice Blackstone, in his Commentaries (vol. 1, p. 146), says, whenever the supreme authority is vested in the same body of men, there can be no public liberty, and Mr. Justice Story asserts that it would be subversive of the principles of a free constitution. The Federalist remarks, "That the accumulation of all powers, legis-"lative, executive and judiciary in the same hands, whether "of one, a few or many, and whether hereditary, self-ap-"pointed or elective, may be justly pronounced the very defi-

"nition of tyranny." Mr. Jefferson thought that the concentration of these powers in the same hands, was precisely the definition of a despotic government. "It," says he, "will be no alleviation that these powers will be exercised "by a plurality of hands and not by a single one. One "hundred and seventy-three despots would surely be as op- "pressive as one. An elective despotism is not the govern- "ment we fought for, but one which should not only be found- "ed on free principles, but in which the powers of govern- "ment should be so divided and balanced among several "bodies of magistracy, as that no one could transcend their "legal limits without being effectually checked and restrained "by the others." The elder President Adams, in his defense of the constitutions of government of the United States, shows with great clearness and force, that all such governments had ended their career in acts of profligate despotism and disgrace. Kent says, "The instability and violent meas- "ures of the French convention of 1793, which continued for "some years to fill all Europe with astonishment and horror, "tended to display in a most forcible and affecting light, "the miseries of a single unchecked body of men, clothed "with all the legislative powers of the state." The people of this State would be astonished to learn that they had vested the supreme authority of the community in a convention of delegates elected for a particular purpose.

With such authority the convention might have passed or repealed any laws it thought proper, and executed the laws in such manner as it thought expedient. It could have abolished the senate and house of representives, and discharged the executive of the State from the performance of any of his official duties, or from his office altogether. It could have heard causes, rendered judgments therein, and caused them to be executed without the aid of the judiciary. If the convention possessed the supreme authority of the people, it could have abolished the entire judicial system of the State, without establishing any other system in its place. Clothed with such authority, the convention was not subject to any constitution or law, and it might have perpetuated its

own existence and powers, and the people could have escaped from its tyranny only by a revolution resulting in a dethronement of the usurpers from their power The fundamental principles of our government lead to no such results, and a careful examination of these principles will show that delegates of the people are never vested with the entire sovereign power, but only with such powers as are especially delegated to them.

According to the theory of our government, all political power is primarily vested in the people, and from them all political power is derived. The political power of the people is primarily vested in them as an aggregate community, and it is frequently described as a sovereign power—not for the purpose of asserting that it has any of the peculiar attributes of power vested in sovereigns—but to express the idea that it includes all political power vested in the supreme authority of a community. Although all political power is vested in the people, they cannot exercise it directly as an aggregate community, either in masses or *per capita.* The portion of political power vested in each individual of a community, is the right to have a voice in the determination of all questions to be directly acted upon by the community; and the direct aggregate power of the whole community, is made up of the individual powers of its members. The direct exercise of the aggregate power of the people, is suffrage, and by its exercise their power as a community, is, to a certain extent, for certain purposes, and under certain restrictions, delegated to their representatives. The people, as a community, do not delegate to their representatives absolute power, but only such powers as are necessary or expedient for them to have for certain specified purposes.

"Sovereignty," says the Hon. Robert J. Walker, in his letter to Hon. Lewis Cass, dated December 15, 1857, "is "vested exclusively in the people of each State, and performs "its first and highest function in forming a State government "and State constitution. This highest act of sovereignty, "in my judgment, can only be performed by the people themselves, and cannot be delegated to conventions or other

"intermediate bodies. Conventions are composed of dele-
"gates—they are mere agents or trustees, exercising not a
"sovereign, but a delegated power, and the people are the
"principals. The power delegated to such conventions can
"properly only extend to the framing of the constitution, but
"its ratification or rejection can only be performed by the
"power where the sovereignty rests—namely, the people
"themselves. We must not confound sovereign with dele-
"gated powers. The provisional authority of a convention
"to frame a constitution and submit it to the people, is a
"delegated power, but sovereignty alone, which rests exclu-
"sively with the people, can ratify and put in force that con-
"stitution. And this is the true doctrine of popular sover-
"eignty; and I know of no such thing, nor does the Federal
"constitution recognize it, as delegated or conventional sov-
"ereignty." These views were put forth by Mr. Walker in a printed address delivered at Natches in 1833, and were approved by Madison, the principal founder of our Federal constitution, as shown in a letter of Hon. Charles J. Ingersoll, of Philadelphia, published in the *Globe* at Washington, in 1836. *Mr. Madison then stated that these were the views of Mr. Jefferson.* "The people," said Mr. Madison, in his celebrated report on the Virginia resolutions, "not the govern-
"ment, possess the absolute sovereignty." The provision of the constitution of the United States declaring that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, has ever been considered as a statement of a fundamental principle in regard to the powers of delegates of the people. "The reservation to
"States is as separate States, in exercising the powers
"granted by their State constitutions, and the reservation to
"the people is to 'the people' of the several States in exer-
"cising their sovereign right of framing or amending their
"State constitution." The people, perhaps, may authorize their delegates to put a constitution in force, but such authority is not to be derived by any implication whatever. If no such express authority is conferred upon delegates, it has

ever been understood that such authority was withheld, and that the people reserved to themselves the right to ratify or reject the proposed constitution.

Story on the Constitution, § 1907.

These were the views of Madison as expressed in his report on the Virginia resolutions, and the same views are expressed by Mr. Jefferson in his draft of the Kentucky resolutions of 1798 and 1799. The act of the Territorial legislature of Kansas of 1857 provided for the election of delegates to form a constitution preparatory to the admission of that territory into the Union as a State, but it made no provision for submitting to the people the constitution that might be framed by the convention. The rule in regard to the powers of the delegates to that convention was, however, so well settled, that Mr. Buchanan took it for granted in his instructions to Gov. Walker that the constitution to be framed would be submitted to the people for their adoption or rejection, and authorized him, in the most explicit terms, so to assure the people of that territory. In his message of December 8, 1857, he says he had never entertained a serious doubt upon the subject, and proceeds to give most satisfactory and conclusive reasons for the rule. The bill called the Toombs bill for the admission of Kansas, passed the Senate of the United States in 1856, and it provided for the formation of a constitution by delegates, but it contained no provision that it should be submitted to the people. In regard to it, the patriot and statesman Douglas, whose name should ever be mentioned with reverence, said, "My explanation of that [his vote in favor of the Toombs "bill] is to be given in the precise language of the explanation "of the President of the United States in his message, in which "he says that, in his instructions to Gov. Walker, he took it "for granted that the constitution was to be submitted to the "people, under a law that was silent on the subject. *The "Toombs bill being silent, I took it for granted, too, and I "suppose every other man did, that it was to be submitted.* "I merely adopted the same process of reasoning that the "President himself says he adopted, and which he was amazed

"to find was not carried out. If the President was right "in taking that for granted, I do not know why I was not "right in taking the same thing for granted."

"I will ask the Senator to show me an intimation from any "one member of the Senate, in the whole debate on the "Toombs bill, or in the Union from any quarter, that the "constitution was not to be submitted to the people. I will "venture to say that, on all sides of the chamber, it was so "understood at the time."

Again: "The point I have made was that, being silent, it "was understood as a matter of course that it was to be sub- "mitted. Such a clause (*i. e.*, one expressly requiring the "constitution to be submitted to the people) was unnecessary. "That was the President's construction of the act of the "Kansas legislature. That was my construction of the "Toombs bill. That the bill was silent on the subject is true, "and my attention was called to that about the time it passed; "and I took the fair construction to be, *that powers not dele- "gated were reserved, and that of course the constitution "would be submitted to the people.*"

Cong. Globe, 1857–8, Part 1, pp. 21, 22.

For the purpose of presenting the question arising in this case, it is not important to mention the preliminary steps requisite to the establishment of a new government. In the absence of any organized government and of any constituted authority having power to organize one, the people may legitimately institute an inceptive organization for the purpose of bringing together its representatives to form a government, but before the attempted Kansas usurpation, I think no body of men in this country ever assumed to have authority to put a constitution in force without express authority from the people so to do. The emphatic rebuke of an indignant people of this attempted usurpation of power, ought not so soon to have been forgotten. Having ascertained the nature of the powers granted to delegates to form a constitution, it then becomes important to ascertain the powers of those who administer a government under a constitution after it has been adopted.

When a government is rightfully established, the sov-

ereign power of the people, to a certain extent, and under certain restrictions, is delegated to, and placed in the hands of its representatives, constituting that government, called the State. The form of the government, and the powers and duties of those administering it, are, in this State, as in all other States in the Union, prescribed and limited by a written constitution. No power to make, execute or administer laws is delegated by the people to any one, except to its representatives who administer the government; and no power is delegated even to them to do any act contrary to the written constitution prescribing their powers and duties. Thus, while our government is one of the people, it is one having a prescribed form, and is to be administered by its legitimate representatives, and none others, in accordance with such form and in no other manner.

The powers of the government are divided into three distinct departments, and each of them is confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another. All acts of either of these departments, within the sphere of its powers, are acts of the people, and all persons exercising any power in, under, or through either of them, simply administer or execute the power of the people. Legislation is required to be in the name of the people; executive acts and duties are to be performed in their name, and the judicial power is to be asserted in the same manner. The legislative power of the people is ordinarily vested in a senate and house of representatives, to be chosen in accordance with some organic or other law, prescribing the number of representatives in each body, the time and manner in which they are to be elected, and the qualifications of the electors as well as the elected. The manner in which the legislative power of the people shall be exercised is also prescribed by a written constitution.

In this State, the legislative power and authority of the people is vested solely and exclusively in a general assembly, consisting of a senate and house of representatives, to be elected by the people. The manner in which laws are to be

enacted is specifically prescribed, and it is declared that no bill shall become a law until the requirements of the constitution are complied with. The representatives of the people, in whom legislative power is vested, are restrained in its exercise in certain cases, and absolutely prohibited from exercising it in others; but where there is no restraint and no prohibition, the *entire* legislative power of the people is vested in the general assembly. The people, in their primary capacity, have no power to pass a law. The general assembly has no power to authorize the people in their primary capacity to pass laws. No law can be passed except by those representatives of the people in whom the legislative power is solely and exclusively vested, nor in any manner except the one prescribed by the constitution.

Sedgwick on Statutory and Constitutional Law, pp. 164, 165.
Thorne v. *Cramer*, 15 Barb. 112.
Barto v. *Himrod*, 4 Seld. 483.

The executive power of the people in this State is vested in a governor, to be elected in the manner prescribed by the constitution, and whose powers and duties are defined and limited by it. Until the constitution is changed, in pursuance of, and in conformity to, some law, the executive power of the people will remain in its representative, in whom it is solely and exclusively vested. Until that time, he must be elected in the manner prescribed by the constitution, and his powers and duties will remain unaltered and unchanged. Until that time, no executive power of the people can be exercised by any person other than their representative, the governor, in whom such power is solely and exclusively vested. Among the duties imposed upon the executive officer of the people, is that of examining all bills passed by the senate and house of representatives, and either approving the same, or returning them to the house in which they originated, with his objections thereto in writing. This provision of the constitution was designed to prevent hasty and improvident legislation, and so long as the constitution remains in force, no bill or ordinance can become a law, without it is

first submitted to the governor, for his approval or disapproval, by the legislative power, as the constitution requires. The paramount law of the land, overriding and annulling all acts of representatives of the people in conflict with it, no matter for what purpose they were elected, declares that so long as the present constitution remains in force, no act of legislative power shall be exercised by any one, except by the representatives of the people *in the general assembly*, and by them only in the manner prescribed by the provisions of the constitution.

The judicial power of the people in this State, is vested in courts of justice, consisting of a certain number of judges. Until the present constitution is changed, in pursuance of, and in conformity to, some law, no persons can exert the judicial powers of the people, who are not judges of the courts, in whom such power is exclusively vested. The late convention, however, undertook to pass laws under their own assumed authority, without the aid of the general assembly, or the approval of the executive; and to have carried out their despotic assumptions, they should have assumed to administer them. They undertook to abrogate so much of the old constitution as required laws to be passed by the general assembly and approved by the executive; and they might with just as much propriety have abrogated that portion of the constitution which requires laws to be administered by the judiciary, and usurped that branch of the government also. These considerations lead to an examination of the manner in which a people may rightfully change their form of government, or alter, or amend their constitution.

It is evident, from what has already been said, that the people may and do limit the powers delegated and conferred upon their representatives. It is equally evident that they may and do limit their own powers. They limit themselves in many important respects. It is only necessary to mention some instances in which binding limitations are made. In every State the people have surrendered the right of voting for every one they might choose to vote for, and have limited

their right of choosing, so as to be obliged to select persons having particular qualifications. They have disqualified themselves from voting, unless they have certain qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections; they can only vote at a particular time, at a particular place, and under particular conditions. They also place a limitation upon their powers in regard to changes in the form of their government, and in regard to alterations and amendments of their constitution. Their powers in regard to changes of the form of their government, and in regard to alterations and amendments of their constitution are to be exerted and exerted only in conformity with some law. No such change, alteration or amendment can be made, until the law-making power provides a mode in which they may be made. Since the decisions in regard to the famous Dorr rebellion in Rhode Island (7 How. 1) it has been settled that the people cannot change their form of government, except under and in pursuance of the provisions of some law, or by revolution. As before remarked, the people cannot directly exercise their political power in their aggregate capacity. They cannot in that capacity frame a constitution. The power of the people must be exercised by suffrage, and hence the necessity of a law prescribing the manner in which, the persons by whom, and the purposes for which the right may be exercised. Infants, females, and other persons, are not permitted to exercise the right of suffrage in person. Those who are permitted to exercise the right in person represent the whole community. The very nature of the right of suffrage requires a law prescribing who may exercise it, and the manner in which it shall be done. The law must not stop with these particulars. A law declaring that all male adults who had resided in the State one year, might vote on the first Tuesday of November, 1862, would not be sufficient to enable the people to exercise the right of suffrage. The law must go further and declare for what purpose the electors are to vote, and the manner in which the result of such voting shall be officially ascertained and made known. 7 How. 1.

Under such a law, and none other, those who are permitted to vote, may exercise the right of suffrage. Under such a law, and none other, the voters may vote for or against a given proposition submitted to them. Under such a law the voters may elect delegates for the purposes and with the powers specified in it. The law is the act of the people, and the delegates elected under it are clothed *by the people* with such powers as they are elected to exercise, and none others. They are elected to exercise such powers as are specified in the law, declaring the purpose for which they shall be elected. Under the law of 1861 the people elected delegates for the purpose of framing a constitution to be submitted to them for their adoption or rejection, and for no other purpose. The people granted to the delegates all the authority they ever had, and upon what principle can it be said that the people delegated to the members of the convention, authority to put a constitution in force, when the people never elected them for any such purpose? Until it is established that persons delegated to do a particular act, in a specified manner, have power to do what they please, and in such manner as they please, it will remain a self-evident proposition that persons elected to do a particular thing, in a particular manner, cannot do all things in such manner as they may think proper. The usual mode in which the people change their constitution is by a convention of delegates elected in conformity to some law for that purpose.

In the old thirteen States, the constitutions first adopted by them, with but two exceptions, contained no provision for their own amendment; and still, all of them have been amended in pursuance of laws passed by the legislative power. Such laws have uniformly prescribed the mode in which amendments might be made, and the requirements of such laws have been considered binding upon those who derived their authority under them. Whenever, in the course of events, it is supposed to be expedient to ascertain the will of the people on a new exigency, or on a new state of things, or of opinion, and there is no constitutional provision on the subject, the legislative power must be and is the sole judge

of such expediency; and if it judges such ascertainment of the will of the people to be expedient, it must provide by law, the mode and manner in which the will of the people shall be ascertained.

The first section of the twelfth article of the present constitution of the State, which has been in force since April 1, 1848, provides, that "whenever two-thirds of all the members elected to each branch of the general assembly shall "think it necessary to alter or amend this constitution, they "shall recommend to the electors, at the next election of "members of the general assembly, to vote for or against a "convention; and if it shall appear that a majority of all the "electors of the State voting for representatives, have voted "for a convention, the general assembly shall at their next "session call a convention, to consist of as many members "as the house of representatives at the time of making said "call, to be chosen in the same manner, at the same place, "and by the same electors, in the same districts that chose "the members of the house of representatives, and which "convention shall meet within three months after the said "election, for the purpose of revising, altering or amending "this constitution."

Under the provisions of this article of the constitution, it is not made the duty of the general assembly to recommend to the electors to vote for or against a convention until two-thirds of all the members of each branch of that body shall think it necessary to alter or amend the constitution. When there is no constitutional provision upon the subject, a duty is imposed upon the legislative power to provide by law for a change of the fundamental law, whenever, in the opinion of a majority of its members, it is necessary that such a change should be made. Although in this State the duty is not imposed until two-thirds of the members are of that opinion, still, whenever the time arrives, the nature of the duty is the same in the one case as in the other. Where there is no constitutional provision, the legislative power may prescribe such time, manner, and condition as it may think proper, in regard to making the change. In this State, the constitution

has expressed a particular manner in which the legislative power shall perform some of its duties, and thereby restrained it from performing them in these particulars in any other manner.

There is a wide difference between the legislature's exceeding its authority, and a neglect to perform its duties. In the former case, the law is void; while in the latter, no right or authority is derived, however clear and unquestioned the duty may be which should have been discharged. All constitutions impose certain duties upon those who represent the people in the several departments of the government. The representatives in the legislative department, in whom all legislative power is vested, are required to pass certain laws. The executive is required to do certain acts, and the judicial officers are required to do other acts. To secure the performance of these several duties, the people have required all of their representatives to take an oath, by which they solemnly oblige themselves to discharge the duties imposed upon them. But while the highest moral obligation is imposed upon such representatives to perform their duties, it is well settled that it rests solely upon their consciences. It is well understood, that constitutional provisions requiring the legislative power to pass laws, have no operation as laws. The legislative power may be required in the most imperative manner to pass a law, but if it neglects its duty in this regard, the rule which it should prescribe as a law can never become one.

The people of the State cannot legally vote for or against a convention, without a law authorizing them so to do. When such a law is passed, the people must vote in conformity to its provisions. They have no power in regard to voting for or against a convention, beyond the powers conferred by the law, and such powers must be exercised in the manner which it prescribes. The constitution directs the legislative power to pass a law calling a convention, if it shall appear that a majority of all the electors of the State voting for representatives have voted for it; but if the legislative power neglects to perform its duty in this regard, no delegates can be elected,

and no convention can be held. The law which the legislature is required to pass, is the only authority under which delegates can be elected. It is the only authority under which they can assemble. After the convention is assembled, it is a body whose powers are conferred upon it by the people, under the law calling it into existence, and are limited to the purpose for which its members were elected. The people elected the delegates to perform certain duties, and when they accepted of the office to which they were elected, they became bound to discharge those duties.

It is said that the law-making power did not confer upon the convention as much authority as it was entitled to exercise, and, therefore, it is claimed to have the right to assume such additional authority as ought to have been conferred upon it. But it is well settled, if the legislative power only performs its duty in part, the law which is such part performance, is the limit of the powers of those acting under it, and the duty which remains unperformed confers no power, or authority, upon those acting under the law.

A more plausible argument in favor of the assumed powers of the convention is, that when it had assembled it had full power to alter, revise, or amend the constitution, in such manner as it should think proper, under and by virtue of the provisions of the present constitution. The provisions of the present constitution are assumed to override the law of 1861 prescribing the duties and limiting the powers of the delegates of the convention. The argument assumes that the present constitution is a grant of power to such delegates as might be elected to exercise the power granted. The force of this argument is not perceived so long as it is admitted that the delegates were not elected for the purpose of exercising the powers supposed to be granted. If the delegates were elected for the purpose of exercising other powers than those supposed to be granted, it could not be pretended that they would have authority to exercise the power of amending the constitution and putting the amendments in force. So, if the people have elected delegates for the purpose of exercising a portion of the powers, and have not elected them to exercise

another portion which they might have exercised had they been elected for that purpose, it is not perceived upon what principle they can exercise that portion of the powers which they were not elected to exercise.

"If," say the Judges of the Supreme Court of Massachusetts, "however, the people should, by the terms of their "vote, decide to call a convention of delegates to consider "the expediency of altering the constitution in some partic- "ular part thereof, we are of opinion that such delegates "would derive their whole authority and commission from "such vote; and upon the general principles governing the "delegation of power and authority, they would have no "right under such vote to act upon and propose amendments "in other parts of the constitution not so specified."

6 Cushing, 575.

The idea of the people granting to themselves power is a novel one. The convention which framed the present constitution had no power to authorize a succeeding convention to put a constitution in force against the will of the people; and the people, in adopting the present constitution, did not, *and could not*, bind succeeding generations in that regard. While the people must exercise their sovereign powers in conformity to some law prescribing the time, place, and manner in which they shall be exercised, the sovereign power itself is inalienable. One generation cannot bind another so that it cannot, by its suffrages exercised according to law, define and limit the powers of its delegates; and it cannot be supposed that the framers of the present constitution intended to abridge the rights of the people in this respect, or that the people in its adoption so intended. The framers of the present constitution must be presumed to have intended that the legislature should call a convention to revise, alter, or amend the constitution, when the time mentioned should arrive, and to leave to the people to specify the purpose or purposes for which its delegates should be elected. The language of the instrument is to be construed according to the well-settled rules of construing like instruments. We have seen that the power to

amend the constitution was vested in the people in their amend the constitution was vested in the people in their aggregate capacity, to be exercised according to law, but an inalienable one. Hitherto, inalienable rights have not been supposed to be grantable, and it is not now perceived how the inalienable rights of the people could be so granted to their delegates as to make the delegates principals and the people agents. The people, from whom all authority is derived, have, according to the argument, become servants, and the delegates become masters. The rules in regard to grants of power are not applicable to such a case. If the people had elected the delegates to revise, alter, or amend the present constitution, and had not provided that such revision, alterations, or amendments should be submitted to them for their adoption or rejection, then the rules in regard to grants of power would have some application; but, even then, the well-settled rule would reserve to the people the power to adopt or reject the proposed constitution. The well-settled rule on this subject was again re-iterated by Senator Douglas in his speech delivered on the 22nd day of March, 1858. He says: "The convention assembled under "the authority of the Territorial legislature alone, and hence "was bound to conduct all of its proceedings in conformity "with and in subordination to the authority of the legisla- "ture. The moment the convention attempted to put its "constitution into operation against the authority of the Ter- "ritorial legislature, it committed an act of rebellion against "the government of the United States. A convention assem- "bled under the authority of the Territorial legislature could "do no act to subvert the legislature which brought the con- "vention into existence."

A careful examination of the provisions of the first section of the twelfth article of the constitution will show that they confer no powers whatever.

They are all of them in restraint of the exercise of powers which were vested in the legislature, and so far as those restraints do not operate, the power of the legislature is left untouched, and in full force. The legislature had ample

power, without the provision of the constitution, to call a convention for the purpose of revising, altering, or amending that instrument. It had power to make the call at such time, in such manner, and under such conditions as it should judge expedient. It also had full power to prescribe the powers and duties of the convention. The constitution, however, provides that it shall not be the duty of the legislature to make such a call, until two-thirds of each branch think it necessary, nor until it shall have recommended to the electors at the next election of the general assembly, to vote for or against a convention, nor until it shall appear that a majority of all the electors of the State voting for representatives, have voted for it. When these requirements are complied with, then the legislature shall exercise its inherent power of calling a convention, but not until then. So, as to the provisions of the constitution, in regard to the manner in which the call shall be made.

Unrestrained by those provisions, the legislature could have called the convention at such time as it pleased; have had it consist of as many members as was thought expedient; have had them chosen at such time, in such manner, by such persons, and in such districts as it might have prescribed. The only effect of the constitution was to restrain the legislature from making a call at any session except at its next session; to restrain it from fixing the number of delegates at a greater or smaller number than the number of representatives at the time of making the call, and to restrain it from prescribing any manner, place, electors or districts, than those that chose the members of the house of representatives. Unrestrained by the constitution, the legislature might have fixed such time for the convention to meet as it thought proper, and the only effect of its provision in this regard, is to restrain the legislature from fixing the time beyond three months after the election of the delegates. Thus it will be seen that every provision of the constitution is in restraint of the power of the legislature. These restrictions were complied with, and in every other respect the power of the legislature remained the same as though no restrictions had been im-

posed. It might fix the time when the election of delegates should be held. It might fix the time when the delegates should meet in convention, subject to the restriction which I have just mentioned. It might, in its discretion, exercise all of the powers vested in it where it was not restricted from so doing.

Having ascertained the true source of the power under which the convention assembled, and that such power is unlimited, except so far as it is restrained by the constitution, and there being no such restraint in this regard, it follows that the legislature had power to define the duties of the convention, and the purposes for which the delegates to that body should be elected.

The provisions of the present constitution are to be construed so as to harmonize one with another. All of them were adopted to transmit unimpaired to succeeding generations the blessings of civil, political and religious liberty; to secure a more perfect form of government; establish justice; insure domestic tranquility; provide for the common defense; promote the general welfare, and secure the blessings of liberty to the people and their posterity. I am unwilling to believe that the framers of the present constitution, having these ends in view, intended that a convention which should be assembled thereafter for its revision, alteration and amendment, with the same ends in view, should have power to abrogate one provision after another until every vestige of a constitutional government was destroyed, and then usurp the supreme authority of the government itself.

As before remarked, the people when they voted for and elected delegates to the convention, never intended that it should have any powers, other than what the law conferred upon it. The people never intended to delegate to the convention the supreme authority of the State, with power to repeal and pass laws at its will and pleasure. The people elected the delegates to frame a constitution under the law, and submit it to them for their adoption or rejection, and for no other purpose. The powers of the convention were neither legislative, executive nor judicial, but related to an

organic law, prescribing the form of the government, imposing duties upon its several departments and restraining them within certain limits. The office of such a law is to declare in whom the several powers of the government shall be vested, and to impose duties and restraints upon each of its departments. Beyond these provisions the convention had no power to go, and when it transcended these limits, its acts were void, even with the adoption of them by the people. If it could pass laws, and put them in force by a vote of the people, it could have tried cases and had its judgments become binding in the same manner. These are perhaps questions not necessary to be passed upon in the present case, as the section of the proposed constitution in controversy has not yet been submitted to the people of the State for their adoption or rejection. Taking well-established principles as our guide, they lead to the irresistible conclusion that the late convention was subject to the constitution and the laws, and its powers were limited to the purposes specified in the law calling it into existence. The amended constitution can only become the supreme law of the State in the manner specified in that act. No part of that instrument can become a law until it is submitted to the whole people of the State, nor until a majority of the whole people have voted in favor of it. The convention had no power to put the different sections in force by submitting one to the people of Chicago, another to the people of Union county, and a third to the people of Cairo, and so on, until each section was made to depend for its validity upon the vote of the people of a particular district selected by the convention. And it is confidently submitted, the convention had no power to pass or repeal any law in the manner mentioned in the thirty-fourth section of the schedule of the amended constitution, and its attempt so to do is a nullity.

C. BECKWITH,

Of Counsel for Respondents.

358

SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. THE CITY OF CHICAGO,

vs.

ALEXANDER C. COVENTRY *et al.*

BRIEF FOR RESPONDENTS,

BY

C. BECKWITH.

F. Fulton & Co., Printers, 148 Lake Street, Chicago.

Filed May 19, 1862
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SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, and WILLIAM WAYMAN.

Application for a Mandamus.

BY an act of the legislature of this State, approved February 21, 1861, a board of police was created for the city of Chicago, consisting of three commissioners. The act provides that the Governor shall nominate, and, by and with the advice and consent of the senate, appoint the first commissioners, who were respectively to hold their offices for two, four and six years from and after the then next municipal election in said city, and until their successors were duly elected and qualified. Under this act, the respondents were duly appointed and qualified as commissioners, and they proceeded to organize the board, and have ever since discharged, and are still discharging, the duties required of them by its provisions.

The general assembly of the State, by a joint resolution, adopted February ——, 1859, recommended to the electors, at the next election of members of the general assembly, to vote for or against a convention, and a majority of such electors having voted in favor of it, the legislature, by an act approved January 31, 1861, called a convention to alter or

amend the constitution, to meet at Springfield, on the first Tuesday of January, 1862. The act provided that the number of delegates should be the same as the number of members of the house of representatives, and that they should be chosen on the Tuesday next after the first Monday of November, 1861, in the same manner, at the same place, and by the same electors in the same districts that chose the members of the house of representatives.

The act further provides, that the amendments, revisions or alterations of the constitution agreed to by the convention, shall be submitted by it to the people for their adoption or rejection, at an election to be called by the convention. Provision is made for holding such election, and for ascertaining the result. If a majority of the votes given at such election are in favor of accepting the alterations or amendments, or any part thereof, they are to become the supreme law of the State; but if a majority of the votes given at such election are against the amendments or alterations, or any part thereof, then the same are to be null and void. The schedule of the proposed constitution provides, that it shall be submitted to the people for their adoption or rejection, at an election to be held on the Tuesday next after the third Monday of June, 1862, and the manner in which the result of such election shall be ascertained.

It also provides, that if a majority of the votes polled are for the adoption of the proposed constitution, it shall become the supreme law of the State, from and after September 1, 1862; but if a majority of the votes polled are given against the proposed constitution, the same shall be null and void.

It further declares that the provisions of the constitution required to be executed prior to the adoption or rejection thereof by the people, shall be in force immediately.

The framers of the proposed constitution provided that the thirty-fourth section of the schedule should, upon a certain contingency, go into operation on the third Tuesday of April, 1862, without its being previously submitted to the people of the State for their adoption or rejection. The section provides: "That, at the next municipal election, to be held in

"the city of Chicago, on the third Tuesday of April, 1862, "the legal voters of said city shall cause to be printed or "written upon all their ballots the following words: 'For the "city of Chicago electing its own officers;' or the words: "'Against the city of Chicago electing its own officers;' "which shall be canvassed and returned with the election re- "turns of the ballots, as is now provided by law. And, in "case there shall be a majority of the legal voters, voting at "said election, in favor of the people of said city electing "their own officers, as indicated by said above mentioned "words, then it shall not be lawful for any officers of that "city to be chosen in any other manner than by a vote of the "people of said city, or appointed in any other manner than "by the mayor and aldermen, as provided by present laws; "and the act approved February 2, 1861, entitled 'An act "regulating the custody and sale of personal property under "legal process, in the city of Chicago, and the towns of South "Chicago, West Chicago, and North Chicago, in Cook county;' "also, 'An act to establish a board of police in and for the "city of Chicago, and to prescribe their powers and duties,' "approved February 21, 1861; and also so much of an act "approved February 18, 1861, as is embraced in section sixty- "six and one-half (66½) of an act to amend the city charter "of Chicago, and creating three commissioners to examine "into the finances of said city, be, and the same are each and "all of them hereby repealed; and the powers and duties of "all officers appointed under and by virtue of said acts, shall "immediately cease. And hereafter, neither the governor "nor general assembly shall appoint any person to any office "for said city of Chicago; but all officers shall be elected "by the people of said city, or appointed by the mayor and "aldermen, as provided by present laws, or by such general "laws as may hereafter be passed by the general assembly "under the constitution."

The majority of the votes cast at the late municipal election were "for the city of Chicago electing its own officers," and the city of Chicago now claims that the powers of the board of police have ceased. The commissioners have cer-

tain property in their possession, to which the city is entitled if their powers have ceased, and for the recovery of which there is no adequate legal remedy. Under these circumstances, the city applies to this court for a mandamus to compel a surrender to it of the property alleged to be wrongfully withheld.

The question presented for your Honors' consideration, as will be seen, is, whether the convention had power to pass and repeal laws in such manner as it thought proper. The provisions of the act of the legislature, under which the delegates to the convention were elected, were set at defiance, and the convention assumed that it was vested with the supreme authority of the people of the State. It asserted that it was subject to no restraint whatever, other than the constitution of the United States, and such as its members might voluntarily impose upon themselves. The supreme authority of a community, includes executive and judicial, as well as legislative powers, and if the convention possessed legislative power, it might also have exercised the executive and judicial powers of the people. The convention was a body of delegates, having delegated powers, but it is asserted that the people delegated to them the entire sovereign power of the community. Statesmen, jurists and historians have hitherto pointed to the States of this Union with pride, as governments, the powers of which were not absolute, but restrained by written constitutions. It has not been supposed that our institutions, and our rights and liberties could be placed absolutely in the power of a body of men who were subject to no restraint whatever, except such as their own judgment might dictate to them. Mr. Justice Blackstone, in his Commentaries (vol. 1, p. 146), says, whenever the supreme authority is vested in the same body of men, there can be no public liberty, and Mr. Justice Story asserts that it would be subversive of the principles of a free constitution. The Federalist remarks, "That the accumulation of all powers, legis-"lative, executive and judiciary in the same hands, whether "of one, a few or many, and whether hereditary, self-ap-"pointed or elective, may be justly pronounced the very defi-

"nition of tyranny." Mr. Jefferson thought that the concentration of these powers in the same hands, was precisely the definition of a despotic government. "It," says he, "will be no alleviation that these powers will be exercised "by a plurality of hands and not by a single one. One "hundred and seventy-three despots would surely be as op- "pressive as one. An elective despotism is not the govern- "ment we fought for, but one which should not only be found- "ed on free principles, but in which the powers of govern- "ment should be so divided and balanced among several "bodies of magistracy, as that no one could transcend their "legal limits without being effectually checked and restrained "by the others." The elder President Adams, in his defense of the constitutions of government of the United States, shows with great clearness and force, that all such governments had ended their career in acts of profligate despotism and disgrace. Kent says, "The instability and violent meas- "ures of the French convention of 1793, which continued for "some years to fill all Europe with astonishment and horror, "tended to display in a most forcible and affecting light, "the miseries of a single unchecked body of men, clothed "with all the legislative powers of the state." The people of this State would be astonished to learn that they had vested the supreme authority of the community in a convention of delegates elected for a particular purpose.

With such authority the convention might have passed or repealed any laws it thought proper, and executed the laws in such manner as it thought expedient. It could have abolished the senate and house of representives, and discharged the executive of the State from the performance of any of his official duties, or from his office altogether. It could have heard causes, rendered judgments therein, and caused them to be executed without the aid of the judiciary. If the convention possessed the supreme authority of the people, it could have abolished the entire judicial system of the State, without establishing any other system in its place. Clothed with such authority, the convention was not subject to any constitution or law, and it might have perpetuated its

own existence and powers, and the people could have escaped from its tyranny only by a revolution resulting in a dethronement of the usurpers from their power The fundamental principles of our government lead to no such results, and a careful examination of these principles will show that delegates of the people are never vested with the entire sovereign power, but only with such powers as are especially delegated to them.

According to the theory of our government, all political power is primarily vested in the people, and from them all political power is derived. The political power of the people is primarily vested in them as an aggregate community, and it is frequently described as a sovereign power—not for the purpose of asserting that it has any of the peculiar attributes of power vested in sovereigns—but to express the idea that it includes all political power vested in the supreme authority of a community. Although all political power is vested in the people, they cannot exercise it directly as an aggregate community, either in masses or *per capita*. The portion of political power vested in each individual of a community, is the right to have a voice in the determination of all questions to be directly acted upon by the community; and the direct aggregate power of the whole community, is made up of the individual powers of its members. The direct exercise of the aggregate power of the people, is suffrage, and by its exercise their power as a community, is, to a certain extent, for certain purposes, and under certain restrictions, delegated to their representatives. The people, as a community, do not delegate to their representatives absolute power, but only such powers as are necessary or expedient for them to have for certain specified purposes.

"Sovereignty," says the Hon. Robert J. Walker, in his letter to Hon. Lewis Cass, dated December 15, 1857, "is "vested exclusively in the people of each State, and performs "its first and highest function in forming a State government "and State constitution. This highest act of sovereignty, "in my judgment, can only be performed by the people themselves, and cannot be delegated to conventions or other

"intermediate bodies. Conventions are composed of dele-
"gates—they are mere agents or trustees, exercising not a
"sovereign, but a delegated power, and the people are the
"principals. The power delegated to such conventions can
"properly only extend to the framing of the constitution, but
"its ratification or rejection can only be performed by the
"power where the sovereignty rests—namely, the people
"themselves. We must not confound sovereign with dele-
"gated powers. The provisional authority of a convention
"to frame a constitution and submit it to the people, is a
"delegated power, but sovereignty alone, which rests exclu-
"sively with the people, can ratify and put in force that con-
"stitution. And this is the true doctrine of popular sover-
"eignty; and I know of no such thing, nor does the Federal
"constitution recognize it, as delegated or conventional sov-
"ereignty." These views were put forth by Mr. Walker in a printed address delivered at Natches in 1833, and were approved by Madison, the principal founder of our Federal constitution, as shown in a letter of Hon. Charles J. Ingersoll, of Philadelphia, published in the *Globe* at Washington, in 1836. *Mr. Madison then stated that these were the views of Mr. Jefferson.* "The people," said Mr. Madison, in his celebrated report on the Virginia resolutions, "not the govern-
"ment, possess the absolute sovereignty." The provision of the constitution of the United States declaring that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, has ever been considered as a statement of a fundamental principle in regard to the powers of delegates of the people. "The reservation to
"States is as separate States, in exercising the powers
"granted by their State constitutions, and the reservation to
"the people is to 'the people' of the several States in exer-
"cising their sovereign right of framing or amending their
"State constitution." The people, perhaps, may authorize their delegates to put a constitution in force, but such authority is not to be derived by any implication whatever. If no such express authority is conferred upon delegates, it has

ever been understood that such authority was withheld, and that the people reserved to themselves the right to ratify or reject the proposed constitution.

Story on the Constitution, § 1907.

These were the views of Madison as expressed in his report on the Virginia resolutions, and the same views are expressed by Mr. Jefferson in his draft of the Kentucky resolutions of 1798 and 1799. The act of the Territorial legislature of Kansas of 1857 provided for the election of delegates to form a constitution preparatory to the admission of that territory into the Union as a State, but it made no provision for submitting to the people the constitution that might be framed by the convention. The rule in regard to the powers of the delegates to that convention was, however, so well settled, that Mr. Buchanan took it for granted in his instructions to Gov. Walker that the constitution to be framed would be submitted to the people for their adoption or rejection, and authorized him, in the most explicit terms, so to assure the people of that territory. In his message of December 8, 1857, he says he had never entertained a serious doubt upon the subject, and proceeds to give most satisfactory and conclusive reasons for the rule. The bill called the Toombs bill for the admission of Kansas, passed the Senate of the United States in 1856, and it provided for the formation of a constitution by delegates, but it contained no provision that it should be submitted to the people. In regard to it, the patriot and statesman Douglas, whose name should ever be mentioned with reverence, said, "My explanation of that [his vote in favor of the Toombs "bill] is to be given in the precise language of the explanation "of the President of the United States in his message, in which "he says that, in his instructions to Gov. Walker, he took it "for granted that the constitution was to be submitted to the "people, under a law that was silent on the subject. *The "Toombs bill being silent, I took it for granted, too, and I "suppose every other man did, that it was to be submitted.* "I merely adopted the same process of reasoning that the "President himself says he adopted, and which he was amazed

"to find was not carried out. If the President was right "in taking that for granted, I do not know why I was not "right in taking the same thing for granted."

"I will ask the Senator to show me an intimation from any "one member of the Senate, in the whole debate on the "Toombs bill, or in the Union from any quarter, that the "constitution was not to be submitted to the people. I will "venture to say that, on all sides of the chamber, it was so "understood at the time."

Again: "The point I have made was that, being silent, it "was understood as a matter of course that it was to be sub-"mitted. Such a clause (*i. e.*, one expressly requiring the "constitution to be submitted to the people) was unnecessary. "That was the President's construction of the act of the "Kansas legislature. That was my construction of the "Toombs bill. That the bill was silent on the subject is true, "and my attention was called to that about the time it passed; "and I took the fair construction to be, *that powers not dele-"gated were reserved, and that of course the constitution "would be submitted to the people.*"

Cong. Globe, 1857-8, Part 1, pp. 21, 22.

For the purpose of presenting the question arising in this case, it is not important to mention the preliminary steps requisite to the establishment of a new government. In the absence of any organized government and of any constituted authority having power to organize one, the people may legitimately institute an inceptive organization for the purpose of bringing together its representatives to form a government, but before the attempted Kansas usurpation, I think no body of men in this country ever assumed to have authority to put a constitution in force without express authority from the people so to do. The emphatic rebuke of an indignant people of this attempted usurpation of power, ought not so soon to have been forgotten. Having ascertained the nature of the powers granted to delegates to form a constitution, it then becomes important to ascertain the powers of those who administer a government under a constitution after it has been adopted.

When a government is rightfully established, the sov-

ereign power of the people, to a certain extent, and under certain restrictions, is delegated to, and placed in the hands of its representatives, constituting that government, called the State. The form of the government, and the powers and duties of those administering it, are, in this State, as in all other States in the Union, prescribed and limited by a written constitution. No power to make, execute or administer laws is delegated by the people to any one, except to its representatives who administer the government; and no power is delegated even to them to do any act contrary to the written constitution prescribing their powers and duties. Thus, while our government is one of the people, it is one having a prescribed form, and is to be administered by its legitimate representatives, and none others, in accordance with such form and in no other manner.

The powers of the government are divided into three distinct departments, and each of them is confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another. All acts of either of these departments, within the sphere of its powers, are acts of the people, and all persons exercising any power in, under, or through either of them, simply administer or execute the power of the people. Legislation is required to be in the name of the people; executive acts and duties are to be performed in their name, and the judicial power is to be asserted in the same manner. The legislative power of the people is ordinarily vested in a senate and house of representatives, to be chosen in accordance with some organic or other law, prescribing the number of representatives in each body, the time and manner in which they are to be elected, and the qualifications of the electors as well as the elected. The manner in which the legislative power of the people shall be exercised is also prescribed by a written constitution.

In this State, the legislative power and authority of the people is vested solely and exclusively in a general assembly, consisting of a senate and house of representatives, to be elected by the people. The manner in which laws are to be

enacted is specifically prescribed, and it is declared that no bill shall become a law until the requirements of the constitution are complied with. The representatives of the people, in whom legislative power is vested, are restrained in its exercise in certain cases, and absolutely prohibited from exercising it in others; but where there is no restraint and no prohibition, the *entire* legislative power of the people is vested in the general assembly. The people, in their primary capacity, have no power to pass a law. The general assembly has no power to authorize the people in their primary capacity to pass laws. No law can be passed except by those representatives of the people in whom the legislative power is solely and exclusively vested, nor in any manner except the one prescribed by the constitution.

Sedgwick on Statutory and Constitutional Law, pp. 164, 165.
Thorne v. *Cramer*, 15 Barb. 112.
Barto v. *Himrod*, 4 Seld. 483.

The executive power of the people in this State is vested in a governor, to be elected in the manner prescribed by the constitution, and whose powers and duties are defined and limited by it. Until the constitution is changed, in pursuance of, and in conformity to, some law, the executive power of the people will remain in its representative, in whom it is solely and exclusively vested. Until that time, he must be elected in the manner prescribed by the constitution, and his powers and duties will remain unaltered and unchanged. Until that time, no executive power of the people can be exercised by any person other than their representative, the governor, in whom such power is solely and exclusively vested. Among the duties imposed upon the executive officer of the people, is that of examining all bills passed by the senate and house of representatives, and either approving the same, or returning them to the house in which they originated, with his objections thereto in writing. This provision of the constitution was designed to prevent hasty and improvident legislation, and so long as the constitution remains in force, no bill or ordinance can become a law, without it is

first submitted to the governor, for his approval or disapproval, by the legislative power, as the constitution requires. The paramount law of the land, overriding and annulling all acts of representatives of the people in conflict with it, no matter for what purpose they were elected, declares that so long as the present constitution remains in force, no act of legislative power shall be exercised by any one, except by the representatives of the people *in the general assembly*, and by them only in the manner prescribed by the provisions of the constitution.

The judicial power of the people in this State, is vested in courts of justice, consisting of a certain number of judges. Until the present constitution is changed, in pursuance of, and in conformity to, some law, no persons can exert the judicial powers of the people, who are not judges of the courts, in whom such power is exclusively vested. The late convention, however, undertook to pass laws under their own assumed authority, without the aid of the general assembly, or the approval of the executive; and to have carried out their despotic assumptions, they should have assumed to administer them. They undertook to abrogate so much of the old constitution as required laws to be passed by the general assembly and approved by the executive; and they might with just as much propriety have abrogated that portion of the constitution which requires laws to be administered by the judiciary, and usurped that branch of the government also. These considerations lead to an examination of the manner in which a people may rightfully change their form of government, or alter, or amend their constitution.

It is evident, from what has already been said, that the people may and do limit the powers delegated and conferred upon their representatives. It is equally evident that they may and do limit their own powers. They limit themselves in many important respects. It is only necessary to mention some instances in which binding limitations are made. In every State the people have surrendered the right of voting for every one they might choose to vote for, and have limited

their right of choosing, so as to be obliged to select persons having particular qualifications. They have disqualified themselves from voting, unless they have certain qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections; they can only vote at a particular time, at a particular place, and under particular conditions. They also place a limitation upon their powers in regard to changes in the form of their government, and in regard to alterations and amendments of their constitution. Their powers in regard to changes of the form of their government, and in regard to alterations and amendments of their constitution are to be exerted and exerted only in conformity with some law. No such change, alteration or amendment can be made, until the law-making power provides a mode in which they may be made. Since the decisions in regard to the famous Dorr rebellion in Rhode Island (7 How. 1) it has been settled that the people cannot change their form of government, except under and in pursuance of the provisions of some law, or by revolution. As before remarked, the people cannot directly exercise their political power in their aggregate capacity. They cannot in that capacity frame a constitution. The power of the people must be exercised by suffrage, and hence the necessity of a law prescribing the manner in which, the persons by whom, and the purposes for which the right may be exercised. Infants, females, and other persons, are not permitted to exercise the right of suffrage in person. Those who are permitted to exercise the right in person represent the whole community. The very nature of the right of suffrage requires a law prescribing who may exercise it, and the manner in which it shall be done. The law must not stop with these particulars. A law declaring that all male adults who had resided in the State one year, might vote on the first Tuesday of November, 1862, would not be sufficient to enable the people to exercise the right of suffrage. The law must go further and declare for what purpose the electors are to vote, and the manner in which the result of such voting shall be officially ascertained and made known. 7 How. 1.

Under such a law, and none other, those who are permitted to vote, may exercise the right of suffrage. Under such a law, and none other, the voters may vote for or against a given proposition submitted to them. Under such a law the voters may elect delegates for the purposes and with the powers specified in it. The law is the act of the people, and the delegates elected under it are clothed *by the people* with such powers as they are elected to exercise, and none others. They are elected to exercise such powers as are specified in the law, declaring the purpose for which they shall be elected. Under the law of 1861 the people elected delegates for the purpose of framing a constitution to be submitted to them for their adoption or rejection, and for no other purpose. The people granted to the delegates all the authority they ever had, and upon what principle can it be said that the people delegated to the members of the convention, authority to put a constitution in force, when the people never elected them for any such purpose? Until it is established that persons delegated to do a particular act, in a specified manner, have power to do what they please, and in such manner as they please, it will remain a self-evident proposition that persons elected to do a particular thing, in a particular manner, cannot do all things in such manner as they may think proper. The usual mode in which the people change their constitution is by a convention of delegates elected in conformity to some law for that purpose.

In the old thirteen States, the constitutions first adopted by them, with but two exceptions, contained no provision for their own amendment; and still, all of them have been amended in pursuance of laws passed by the legislative power. Such laws have uniformly prescribed the mode in which amendments might be made, and the requirements of such laws have been considered binding upon those who derived their authority under them. Whenever, in the course of events, it is supposed to be expedient to ascertain the will of the people on a new exigency, or on a new state of things, or of opinion, and there is no constitutional provision on the subject, the legislative power must be and is the sole judge

of such expediency; and if it judges such ascertainment of the will of the people to be expedient, it must provide by law, the mode and manner in which the will of the people shall be ascertained.

The first section of the twelfth article of the present constitution of the State, which has been in force since April 1, 1848, provides, that "whenever two-thirds of all the members elected to each branch of the general assembly shall "think it necessary to alter or amend this constitution, they "shall recommend to the electors, at the next election of "members of the general assembly, to vote for or against a "convention; and if it shall appear that a majority of all the "electors of the State voting for representatives, have voted "for a convention, the general assembly shall at their next "session call a convention, to consist of as many members "as the house of representatives at the time of making said "call, to be chosen in the same manner, at the same place, "and by the same electors, in the same districts that chose "the members of the house of representatives, and which "convention shall meet within three months after the said "election, for the purpose of revising, altering or amending "this constitution."

Under the provisions of this article of the constitution, it is not made the duty of the general assembly to recommend to the electors to vote for or against a convention until two-thirds of all the members of each branch of that body shall think it necessary to alter or amend the constitution. When there is no constitutional provision upon the subject, a duty is imposed upon the legislative power to provide by law for a change of the fundamental law, whenever, in the opinion of a majority of its members, it is necessary that such a change should be made. Although in this State the duty is not imposed until two-thirds of the members are of that opinion, still, whenever the time arrives, the nature of the duty is the same in the one case as in the other. Where there is no constitutional provision, the legislative power may prescribe such time, manner, and condition as it may think proper, in regard to making the change. In this State, the constitution

has expressed a particular manner in which the legislative power shall perform some of its duties, and thereby restrained it from performing them in these particulars in any other manner.

There is a wide difference between the legislature's exceeding its authority, and a neglect to perform its duties. In the former case, the law is void; while in the latter, no right or authority is derived, however clear and unquestioned the duty may be which should have been discharged. All constitutions impose certain duties upon those who represent the people in the several departments of the government. The representatives in the legislative department, in whom all legislative power is vested, are required to pass certain laws. The executive is required to do certain acts, and the judicial officers are required to do other acts. To secure the performance of these several duties, the people have required all of their representatives to take an oath, by which they solemnly oblige themselves to discharge the duties imposed upon them. But while the highest moral obligation is imposed upon such representatives to perform their duties, it is well settled that it rests solely upon their consciences. It is well understood, that constitutional provisions requiring the legislative power to pass laws, have no operation as laws. The legislative power may be required in the most imperative manner to pass a law, but if it neglects its duty in this regard, the rule which it should prescribe as a law can never become one.

The people of the State cannot legally vote for or against a convention, without a law authorizing them so to do. When such a law is passed, the people must vote in conformity to its provisions. They have no power in regard to voting for or against a convention, beyond the powers conferred by the law, and such powers must be exercised in the manner which it prescribes. The constitution directs the legislative power to pass a law calling a convention, if it shall appear that a majority of all the electors of the State voting for representatives have voted for it; but if the legislative power neglects to perform its duty in this regard, no delegates can be elected,

and no convention can be held. The law which the legislature is required to pass, is the only authority under which delegates can be elected. It is the only authority under which they can assemble. After the convention is assembled, it is a body whose powers are conferred upon it by the people, under the law calling it into existence, and are limited to the purpose for which its members were elected. The people elected the delegates to perform certain duties, and when they accepted of the office to which they were elected, they became bound to discharge those duties.

It is said that the law-making power did not confer upon the convention as much authority as it was entitled to exercise, and, therefore, it is claimed to have the right to assume such additional authority as ought to have been conferred upon it. But it is well settled, if the legislative power only performs its duty in part, the law which is such part performance, is the limit of the powers of those acting under it, and the duty which remains unperformed confers no power, or authority, upon those acting under the law.

A more plausible argument in favor of the assumed powers of the convention is, that when it had assembled it had full power to alter, revise, or amend the constitution, in such manner as it should think proper, under and by virtue of the provisions of the present constitution. The provisions of the present constitution are assumed to override the law of 1861 prescribing the duties and limiting the powers of the delegates of the convention. The argument assumes that the present constitution is a grant of power to such delegates as might be elected to exercise the power granted. The force of this argument is not perceived so long as it is admitted that the delegates were not elected for the purpose of exercising the powers supposed to be granted. If the delegates were elected for the purpose of exercising other powers than those supposed to be granted, it could not be pretended that they would have authority to exercise the power of amending the constitution and putting the amendments in force. So, if the people have elected delegates for the purpose of exercising a portion of the powers, and have not elected them to exercise

another portion which they might have exercised had they been elected for that purpose, it is not perceived upon what principle they can exercise that portion of the powers which they were not elected to exercise.

"If," say the Judges of the Supreme Court of Massachusetts, "however, the people should, by the terms of their "vote, decide to call a convention of delegates to consider "the expediency of altering the constitution in some partic- "ular part thereof, we are of opinion that such delegates "would derive their whole authority and commission from "such vote; and upon the general principles governing the "delegation of power and authority, they would have no "right under such vote to act upon and propose amendments "in other parts of the constitution not so specified."

6 Cushing, 575.

The idea of the people granting to themselves power is a novel one. The convention which framed the present constitution had no power to authorize a succeeding convention to put a constitution in force against the will of the people; and the people, in adopting the present constitution, did not, *and could not*, bind succeeding generations in that regard. While the people must exercise their sovereign powers in conformity to some law prescribing the time, place, and manner in which they shall be exercised, the sovereign power itself is inalienable. One generation cannot bind another so that it cannot, by its suffrages exercised according to law, define and limit the powers of its delegates; and it cannot be supposed that the framers of the present constitution intended to abridge the rights of the people in this respect, or that the people in its adoption so intended. The framers of the present constitution must be presumed to have intended that the legislature should call a convention to revise, alter, or amend the constitution, when the time mentioned should arrive, and to leave to the people to specify the purpose or purposes for which its delegates should be elected. The language of the instrument is to be construed according to the well-settled rules of construing like instruments. We have seen that the power to

amend the constitution was vested in the people in their amend the constitution was vested in the people in their aggregate capacity, to be exercised according to law, but an inalienable one. Hitherto, inalienable rights have not been supposed to be grantable, and it is not now perceived how the inalienable rights of the people could be so granted to their delegates as to make the delegates principals and the people agents. The people, from whom all authority is derived, have, according to the argument, become servants, and the delegates become masters. The rules in regard to grants of power are not applicable to such a case. If the people had elected the delegates to revise, alter, or amend the present constitution, and had not provided that such revision, alterations, or amendments should be submitted to them for their adoption or rejection, then the rules in regard to grants of power would have some application; but, even then, the well-settled rule would reserve to the people the power to adopt or reject the proposed constitution. The well-settled rule on this subject was again re-iterated by Senator Douglas in his speech delivered on the 22nd day of March, 1858. He says: "The convention assembled under "the authority of the Territorial legislature alone, and hence "was bound to conduct all of its proceedings in conformity "with and in subordination to the authority of the legisla- "ture. The moment the convention attempted to put its "constitution into operation against the authority of the Ter- "ritorial legislature, it committed an act of rebellion against "the government of the United States. A convention assem- "bled under the authority of the Territorial legislature could "do no act to subvert the legislature which brought the con- "vention into existence."

A careful examination of the provisions of the first section of the twelfth article of the constitution will show that they confer no powers whatever.

They are all of them in restraint of the exercise of powers which were vested in the legislature, and so far as those restraints do not operate, the power of the legislature is left untouched, and in full force. The legislature had ample

power, without the provision of the constitution, to call a convention for the purpose of revising, altering, or amending that instrument. It had power to make the call at such time, in such manner, and under such conditions as it should judge expedient. It also had full power to prescribe the powers and duties of the convention. The constitution, however, provides that it shall not be the duty of the legislature to make such a call, until two-thirds of each branch think it necessary, nor until it shall have recommended to the electors at the next election of the general assembly, to vote for or against a convention, nor until it shall appear that a majority of all the electors of the State voting for representatives, have voted for it. When these requirements are complied with, then the legislature shall exercise its inherent power of calling a convention, but not until then. So, as to the provisions of the constitution, in regard to the manner in which the call shall be made.

Unrestrained by those provisions, the legislature could have called the convention at such time as it pleased; have had it consist of as many members as was thought expedient; have had them chosen at such time, in such manner, by such persons, and in such districts as it might have prescribed. The only effect of the constitution was to restrain the legislature from making a call at any session except at its next session; to restrain it from fixing the number of delegates at a greater or smaller number than the number of representatives at the time of making the call, and to restrain it from prescribing any manner, place, electors or districts, than those that chose the members of the house of representatives. Unrestrained by the constitution, the legislature might have fixed such time for the convention to meet as it thought proper, and the only effect of its provision in this regard, is to restrain the legislature from fixing the time beyond three months after the election of the delegates. Thus it will be seen that every provision of the constitution is in restraint of the power of the legislature. These restrictions were complied with, and in every other respect the power of the legislature remained the same as though no restrictions had been im-

posed. It might fix the time when the election of delegates should be held. It might fix the time when the delegates should meet in convention, subject to the restriction which I have just mentioned. It might, in its discretion, exercise all of the powers vested in it where it was not restricted from so doing.

Having ascertained the true source of the power under which the convention assembled, and that such power is unlimited, except so far as it is restrained by the constitution, and there being no such restraint in this regard, it follows that the legislature had power to define the duties of the convention, and the purposes for which the delegates to that body should be elected.

The provisions of the present constitution are to be construed so as to harmonize one with another. All of them were adopted to transmit unimpaired to succeeding generations the blessings of civil, political and religious liberty; to secure a more perfect form of government; establish justice; insure domestic tranquility; provide for the common defense; promote the general welfare, and secure the blessings of liberty to the people and their posterity. I am unwilling to believe that the framers of the present constitution, having these ends in view, intended that a convention which should be assembled thereafter for its revision, alteration and amendment, with the same ends in view, should have power to abrogate one provision after another until every vestige of a constitutional government was destroyed, and then usurp the supreme authority of the government itself.

As before remarked, the people when they voted for and elected delegates to the convention, never intended that it should have any powers, other than what the law conferred upon it. The people never intended to delegate to the convention the supreme authority of the State, with power to repeal and pass laws at its will and pleasure. The people elected the delegates to frame a constitution under the law, and submit it to them for their adoption or rejection, and for no other purpose. The powers of the convention were neither legislative, executive nor judicial, but related to an

organic law, prescribing the form of the government, imposing duties upon its several departments and restraining them within certain limits. The office of such a law is to declare in whom the several powers of the government shall be vested, and to impose duties and restraints upon each of its departments. Beyond these provisions the convention had no power to go, and when it transcended these limits, its acts were void, even with the adoption of them by the people. If it could pass laws, and put them in force by a vote of the people, it could have tried cases and had its judgments become binding in the same manner. These are perhaps questions not necessary to be passed upon in the present case, as the section of the proposed constitution in controversy has not yet been submitted to the people of the State for their adoption or rejection. Taking well-established principles as our guide, they lead to the irresistible conclusion that the late convention was subject to the constitution and the laws, and its powers were limited to the purposes specified in the law calling it into existence. The amended constitution can only become the supreme law of the State in the manner specified in that act. No part of that instrument can become a law until it is submitted to the whole people of the State, nor until a majority of the whole people have voted in favor of it. The convention had no power to put the different sections in force by submitting one to the people of Chicago, another to the people of Union county, and a third to the people of Cairo, and so on, until each section was made to depend for its validity upon the vote of the people of a particular district selected by the convention. And it is confidently submitted, the convention had no power to pass or repeal any law in the manner mentioned in the thirty-fourth section of the schedule of the amended constitution, and its attempt so to do is a nullity.

C. BECKWITH,

Of Counsel for Respondents.

358

SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. THE CITY OF CHICAGO,

vs.

ALEXANDER C. COVENTRY *et al.*

BRIEF FOR RESPONDENTS,

BY

C. BECKWITH.

F. Fulton & Co., Printers, 148 Lake Street, Chicago.

Filed May 19, 1862
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SUPREME COURT,

APRIL TERM, 1862.

THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, and WILLIAM WAYMAN.

Application for a Mandamus.

BY an act of the legislature of this State, approved February 21, 1861, a board of police was created for the city of Chicago, consisting of three commissioners. The act provides that the Governor shall nominate, and, by and with the advice and consent of the senate, appoint the first commissioners, who were respectively to hold their offices for two, four and six years from and after the then next municipal election in said city, and until their successors were duly elected and qualified. Under this act, the respondents were duly appointed and qualified as commissioners, and they proceeded to organize the board, and have ever since discharged, and are still discharging, the duties required of them by its provisions.

The general assembly of the State, by a joint resolution, adopted February ——, 1859, recommended to the electors, at the next election of members of the general assembly, to vote for or against a convention, and a majority of such electors having voted in favor of it, the legislature, by an act approved January 31, 1861, called a convention to alter or

amend the constitution, to meet at Springfield, on the first Tuesday of January, 1862. The act provided that the number of delegates should be the same as the number of members of the house of representatives, and that they should be chosen on the Tuesday next after the first Monday of November, 1861, in the same manner, at the same place, and by the same electors in the same districts that chose the members of the house of representatives.

The act further provides, that the amendments, revisions or alterations of the constitution agreed to by the convention, shall be submitted by it to the people for their adoption or rejection, at an election to be called by the convention. Provision is made for holding such election, and for ascertaining the result. If a majority of the votes given at such election are in favor of accepting the alterations or amendments, or any part thereof, they are to become the supreme law of the State; but if a majority of the votes given at such election are against the amendments or alterations, or any part thereof, then the same are to be null and void. The schedule of the proposed constitution provides, that it shall be submitted to the people for their adoption or rejection, at an election to be held on the Tuesday next after the third Monday of June, 1862, and the manner in which the result of such election shall be ascertained.

It also provides, that if a majority of the votes polled are for the adoption of the proposed constitution, it shall become the supreme law of the State, from and after September 1, 1862; but if a majority of the votes polled are given against the proposed constitution, the same shall be null and void.

It further declares that the provisions of the constitution required to be executed prior to the adoption or rejection thereof by the people, shall be in force immediately.

The framers of the proposed constitution provided that the thirty-fourth section of the schedule should, upon a certain contingency, go into operation on the third Tuesday of April, 1862, without its being previously submitted to the people of the State for their adoption or rejection. The section provides: "That, at the next municipal election, to be held in

"the city of Chicago, on the third Tuesday of April, 1862, "the legal voters of said city shall cause to be printed or "written upon all their ballots the following words: 'For the "city of Chicago electing its own officers;' or the words: "'Against the city of Chicago electing its own officers;' "which shall be canvassed and returned with the election re- "turns of the ballots, as is now provided by law. And, in "case there shall be a majority of the legal voters, voting at "said election, in favor of the people of said city electing "their own officers, as indicated by said above mentioned "words, then it shall not be lawful for any officers of that "city to be chosen in any other manner than by a vote of the "people of said city, or appointed in any other manner than "by the mayor and aldermen, as provided by present laws; "and the act approved February 2, 1861, entitled 'An act "regulating the custody and sale of personal property under "legal process, in the city of Chicago, and the towns of South "Chicago, West Chicago, and North Chicago, in Cook county;' "also, 'An act to establish a board of police in and for the "city of Chicago, and to prescribe their powers and duties,' "approved February 21, 1861; and also so much of an act "approved February 18, 1861, as is embraced in section sixty- "six and one-half (66½) of an act to amend the city charter "of Chicago, and creating three commissioners to examine "into the finances of said city, be, and the same are each and "all of them hereby repealed; and the powers and duties of "all officers appointed under and by virtue of said acts, shall "immediately cease. And hereafter, neither the governor "nor general assembly shall appoint any person to any office "for said city of Chicago; but all officers shall be elected "by the people of said city, or appointed by the mayor and "aldermen, as provided by present laws, or by such general "laws as may hereafter be passed by the general assembly "under the constitution."

The majority of the votes cast at the late municipal election were "for the city of Chicago electing its own officers," and the city of Chicago now claims that the powers of the board of police have ceased. The commissioners have cer-

tain property in their possession, to which the city is entitled if their powers have ceased, and for the recovery of which there is no adequate legal remedy. Under these circumstances, the city applies to this court for a mandamus to compel a surrender to it of the property alleged to be wrongfully withheld.

The question presented for your Honors' consideration, as will be seen, is, whether the convention had power to pass and repeal laws in such manner as it thought proper. The provisions of the act of the legislature, under which the delegates to the convention were elected, were set at defiance, and the convention assumed that it was vested with the supreme authority of the people of the State. It asserted that it was subject to no restraint whatever, other than the constitution of the United States, and such as its members might voluntarily impose upon themselves. The supreme authority of a community, includes executive and judicial, as well as legislative powers, and if the convention possessed legislative power, it might also have exercised the executive and judicial powers of the people. The convention was a body of delegates, having delegated powers, but it is asserted that the people delegated to them the entire sovereign power of the community. Statesmen, jurists and historians have hitherto pointed to the States of this Union with pride, as governments, the powers of which were not absolute, but restrained by written constitutions. It has not been supposed that our institutions, and our rights and liberties could be placed absolutely in the power of a body of men who were subject to no restraint whatever, except such as their own judgment might dictate to them. Mr. Justice Blackstone, in his Commentaries (vol. 1, p. 146), says, whenever the supreme authority is vested in the same body of men, there can be no public liberty, and Mr. Justice Story asserts that it would be subversive of the principles of a free constitution. The Federalist remarks, "That the accumulation of all powers, legis-
"lative, executive and judiciary in the same hands, whether
"of one, a few or many, and whether hereditary, self-ap-
"pointed or elective, may be justly pronounced the very defi-

"nition of tyranny." Mr. Jefferson thought that the concentration of these powers in the same hands, was precisely the definition of a despotic government. "It," says he, "will be no alleviation that these powers will be exercised "by a plurality of hands and not by a single one. One "hundred and seventy-three despots would surely be as op- "pressive as one. An elective despotism is not the govern- "ment we fought for, but one which should not only be found- "ed on free principles, but in which the powers of govern- "ment should be so divided and balanced among several "bodies of magistracy, as that no one could transcend their "legal limits without being effectually checked and restrained "by the others." The elder President Adams, in his defense of the constitutions of government of the United States, shows with great clearness and force, that all such governments had ended their career in acts of profligate despotism and disgrace. Kent says, "The instability and violent meas- "ures of the French convention of 1793, which continued for "some years to fill all Europe with astonishment and horror, "tended to display in a most forcible and affecting light, "the miseries of a single unchecked body of men, clothed "with all the legislative powers of the state." The people of this State would be astonished to learn that they had vested the supreme authority of the community in a convention of delegates elected for a particular purpose.

With such authority the convention might have passed or repealed any laws it thought proper, and executed the laws in such manner as it thought expedient. It could have abolished the senate and house of representives, and discharged the executive of the State from the performance of any of his official duties, or from his office altogether. It could have heard causes, rendered judgments therein, and caused them to be executed without the aid of the judiciary. If the convention possessed the supreme authority of the people, it could have abolished the entire judicial system of the State, without establishing any other system in its place. Clothed with such authority, the convention was not subject to any constitution or law, and it might have perpetuated its

own existence and powers, and the people could have escaped from its tyranny only by a revolution resulting in a dethronement of the usurpers from their power The fundamental principles of our government lead to no such results, and a careful examination of these principles will show that delegates of the people are never vested with the entire sovereign power, but only with such powers as are especially delegated to them.

According to the theory of our government, all political power is primarily vested in the people, and from them all political power is derived. The political power of the people is primarily vested in them as an aggregate community, and it is frequently described as a sovereign power—not for the purpose of asserting that it has any of the peculiar attributes of power vested in sovereigns—but to express the idea that it includes all political power vested in the supreme authority of a community. Although all political power is vested in the people, they cannot exercise it directly as an aggregate community, either in masses or *per capita*. The portion of political power vested in each individual of a community, is the right to have a voice in the determination of all questions to be directly acted upon by the community; and the direct aggregate power of the whole community, is made up of the individual powers of its members. The direct exercise of the aggregate power of the people, is suffrage, and by its exercise their power as a community, is, to a certain extent, for certain purposes, and under certain restrictions, delegated to their representatives. The people, as a community, do not delegate to their representatives absolute power, but only such powers as are necessary or expedient for them to have for certain specified purposes.

"Sovereignty," says the Hon. Robert J. Walker, in his letter to Hon. Lewis Cass, dated December 15, 1857, "is "vested exclusively in the people of each State, and performs "its first and highest function in forming a State government "and State constitution. This highest act of sovereignty, "in my judgment, can only be performed by the people themselves, and cannot be delegated to conventions or other

"intermediate bodies. Conventions are composed of dele-
"gates—they are mere agents or trustees, exercising not a
"sovereign, but a delegated power, and the people are the
"principals. The power delegated to such conventions can
"properly only extend to the framing of the constitution, but
"its ratification or rejection can only be performed by the
"power where the sovereignty rests—namely, the people
"themselves. We must not confound sovereign with dele-
"gated powers. The provisional authority of a convention
"to frame a constitution and submit it to the people, is a
"delegated power, but sovereignty alone, which rests exclu-
"sively with the people, can ratify and put in force that con-
"stitution. And this is the true doctrine of popular sover-
"eignty; and I know of no such thing, nor does the Federal
"constitution recognize it, as delegated or conventional sov-
"ereignty." These views were put forth by Mr. Walker in a printed address delivered at Natches in 1833, and were approved by Madison, the principal founder of our Federal constitution, as shown in a letter of Hon. Charles J. Ingersoll, of Philadelphia, published in the *Globe* at Washington, in 1836. *Mr. Madison then stated that these were the views of Mr. Jefferson.* "The people," said Mr. Madison, in his celebrated report on the Virginia resolutions, "not the govern-
"ment, possess the absolute sovereignty." The provision of the constitution of the United States declaring that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, has ever been considered as a statement of a fundamental principle in regard to the powers of delegates of the people. "The reservation to
"States is as separate States, in exercising the powers
"granted by their State constitutions, and the reservation to
"the people is to 'the people' of the several States in exer-
"cising their sovereign right of framing or amending their
"State constitution." The people, perhaps, may authorize their delegates to put a constitution in force, but such authority is not to be derived by any implication whatever. If no such express authority is conferred upon delegates, it has

ever been understood that such authority was withheld, and that the people reserved to themselves the right to ratify or reject the proposed constitution.

Story on the Constitution, § 1907.

These were the views of Madison as expressed in his report on the Virginia resolutions, and the same views are expressed by Mr. Jefferson in his draft of the Kentucky resolutions of 1798 and 1799. The act of the Territorial legislature of Kansas of 1857 provided for the election of delegates to form a constitution preparatory to the admission of that territory into the Union as a State, but it made no provision for submitting to the people the constitution that might be framed by the convention. The rule in regard to the powers of the delegates to that convention was, however, so well settled, that Mr. Buchanan took it for granted in his instructions to Gov. Walker that the constitution to be framed would be submitted to the people for their adoption or rejection, and authorized him, in the most explicit terms, so to assure the people of that territory. In his message of December 8, 1857, he says he had never entertained a serious doubt upon the subject, and proceeds to give most satisfactory and conclusive reasons for the rule. The bill called the Toombs bill for the admission of Kansas, passed the Senate of the United States in 1856, and it provided for the formation of a constitution by delegates, but it contained no provision that it should be submitted to the people. In regard to it, the patriot and statesman Douglas, whose name should ever be mentioned with reverence, said, "My explanation of that [his vote in favor of the Toombs "bill] is to be given in the precise language of the explanation "of the President of the United States in his message, in which "he says that, in his instructions to Gov. Walker, he took it "for granted that the constitution was to be submitted to the "people, under a law that was silent on the subject. *The "Toombs bill being silent, I took it for granted, too, and I "suppose every other man did, that it was to be submitted.* "I merely adopted the same process of reasoning that the "President himself says he adopted, and which he was amazed

"to find was not carried out. If the President was right "in taking that for granted, I do not know why I was not "right in taking the same thing for granted."

"I will ask the Senator to show me an intimation from any "one member of the Senate, in the whole debate on the "Toombs bill, or in the Union from any quarter, that the "constitution was not to be submitted to the people. I will "venture to say that, on all sides of the chamber, it was so "understood at the time."

Again: "The point I have made was that, being silent, it "was understood as a matter of course that it was to be sub- "mitted. Such a clause (*i. e.*, one expressly requiring the "constitution to be submitted to the people) was unnecessary. "That was the President's construction of the act of the "Kansas legislature. That was my construction of the "Toombs bill. That the bill was silent on the subject is true, "and my attention was called to that about the time it passed; "and I took the fair construction to be, *that powers not dele- "gated were reserved, and that of course the constitution "would be submitted to the people.*"

Cong. Globe, 1857–8, Part 1, pp. 21, 22.

For the purpose of presenting the question arising in this case, it is not important to mention the preliminary steps requisite to the establishment of a new government. In the absence of any organized government and of any constituted authority having power to organize one, the people may legitimately institute an inceptive organization for the purpose of bringing together its representatives to form a government, but before the attempted Kansas usurpation, I think no body of men in this country ever assumed to have authority to put a constitution in force without express authority from the people so to do. The emphatic rebuke of an indignant people of this attempted usurpation of power, ought not so soon to have been forgotten. Having ascertained the nature of the powers granted to delegates to form a constitution, it then becomes important to ascertain the powers of those who administer a government under a constitution after it has been adopted.

When a government is rightfully established, the sov-

ereign power of the people, to a certain extent, and under certain restrictions, is delegated to, and placed in the hands of its representatives, constituting that government, called the State. The form of the government, and the powers and duties of those administering it, are, in this State, as in all other States in the Union, prescribed and limited by a written constitution. No power to make, execute or administer laws is delegated by the people to any one, except to its representatives who administer the government; and no power is delegated even to them to do any act contrary to the written constitution prescribing their powers and duties. Thus, while our government is one of the people, it is one having a prescribed form, and is to be administered by its legitimate representatives, and none others, in accordance with such form and in no other manner.

The powers of the government are divided into three distinct departments, and each of them is confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another. All acts of either of these departments, within the sphere of its powers, are acts of the people, and all persons exercising any power in, under, or through either of them, simply administer or execute the power of the people. Legislation is required to be in the name of the people; executive acts and duties are to be performed in their name, and the judicial power is to be asserted in the same manner. The legislative power of the people is ordinarily vested in a senate and house of representatives, to be chosen in accordance with some organic or other law, prescribing the number of representatives in each body, the time and manner in which they are to be elected, and the qualifications of the electors as well as the elected. The manner in which the legislative power of the people shall be exercised is also prescribed by a written constitution.

In this State, the legislative power and authority of the people is vested solely and exclusively in a general assembly, consisting of a senate and house of representatives, to be elected by the people. The manner in which laws are to be

enacted is specifically prescribed, and it is declared that no bill shall become a law until the requirements of the constitution are complied with. The representatives of the people, in whom legislative power is vested, are restrained in its exercise in certain cases, and absolutely prohibited from exercising it in others; but where there is no restraint and no prohibition, the *entire* legislative power of the people is vested in the general assembly. The people, in their primary capacity, have no power to pass a law. The general assembly has no power to authorize the people in their primary capacity to pass laws. No law can be passed except by those representatives of the people in whom the legislative power is solely and exclusively vested, nor in any manner except the one prescribed by the constitution.

Sedgwick on Statutory and Constitutional Law, pp. 164, 165.
Thorne v. *Cramer*, 15 Barb. 112.
Barto v. *Himrod*, 4 Seld. 483.

The executive power of the people in this State is vested in a governor, to be elected in the manner prescribed by the constitution, and whose powers and duties are defined and limited by it. Until the constitution is changed, in pursuance of, and in conformity to, some law, the executive power of the people will remain in its representative, in whom it is solely and exclusively vested. Until that time, he must be elected in the manner prescribed by the constitution, and his powers and duties will remain unaltered and unchanged. Until that time, no executive power of the people can be exercised by any person other than their representative, the governor, in whom such power is solely and exclusively vested. Among the duties imposed upon the executive officer of the people, is that of examining all bills passed by the senate and house of representatives, and either approving the same, or returning them to the house in which they originated, with his objections thereto in writing. This provision of the constitution was designed to prevent hasty and improvident legislation, and so long as the constitution remains in force, no bill or ordinance can become a law, without it is

first submitted to the governor, for his approval or disapproval, by the legislative power, as the constitution requires. The paramount law of the land, overriding and annulling all acts of representatives of the people in conflict with it, no matter for what purpose they were elected, declares that so long as the present constitution remains in force, no act of legislative power shall be exercised by any one, except by the representatives of the people *in the general assembly*, and by them only in the manner prescribed by the provisions of the constitution.

The judicial power of the people in this State, is vested in courts of justice, consisting of a certain number of judges. Until the present constitution is changed, in pursuance of, and in conformity to, some law, no persons can exert the judicial powers of the people, who are not judges of the courts, in whom such power is exclusively vested. The late convention, however, undertook to pass laws under their own assumed authority, without the aid of the general assembly, or the approval of the executive; and to have carried out their despotic assumptions, they should have assumed to administer them. They undertook to abrogate so much of the old constitution as required laws to be passed by the general assembly and approved by the executive; and they might with just as much propriety have abrogated that portion of the constitution which requires laws to be administered by the judiciary, and usurped that branch of the government also. These considerations lead to an examination of the manner in which a people may rightfully change their form of government, or alter, or amend their constitution.

It is evident, from what has already been said, that the people may and do limit the powers delegated and conferred upon their representatives. It is equally evident that they may and do limit their own powers. They limit themselves in many important respects. It is only necessary to mention some instances in which binding limitations are made. In every State the people have surrendered the right of voting for every one they might choose to vote for, and have limited

their right of choosing, so as to be obliged to select persons having particular qualifications. They have disqualified themselves from voting, unless they have certain qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections; they can only vote at a particular time, at a particular place, and under particular conditions. They also place a limitation upon their powers in regard to changes in the form of their government, and in regard to alterations and amendments of their constitution. Their powers in regard to changes of the form of their government, and in regard to alterations and amendments of their constitution are to be exerted and exerted only in conformity with some law. No such change, alteration or amendment can be made, until the law-making power provides a mode in which they may be made. Since the decisions in regard to the famous Dorr rebellion in Rhode Island (7 How. 1) it has been settled that the people cannot change their form of government, except under and in pursuance of the provisions of some law, or by revolution. As before remarked, the people cannot directly exercise their political power in their aggregate capacity. They cannot in that capacity frame a constitution. The power of the people must be exercised by suffrage, and hence the necessity of a law prescribing the manner in which, the persons by whom, and the purposes for which the right may be exercised. Infants, females, and other persons, are not permitted to exercise the right of suffrage in person. Those who are permitted to exercise the right in person represent the whole community. The very nature of the right of suffrage requires a law prescribing who may exercise it, and the manner in which it shall be done. The law must not stop with these particulars. A law declaring that all male adults who had resided in the State one year, might vote on the first Tuesday of November, 1862, would not be sufficient to enable the people to exercise the right of suffrage. The law must go further and declare for what purpose the electors are to vote, and the manner in which the result of such voting shall be officially ascertained and made known. 7 How. 1.

Under such a law, and none other, those who are permitted to vote, may exercise the right of suffrage. Under such a law, and none other, the voters may vote for or against a given proposition submitted to them. Under such a law the voters may elect delegates for the purposes and with the powers specified in it. The law is the act of the people, and the delegates elected under it are clothed *by the people* with such powers as they are elected to exercise, and none others. They are elected to exercise such powers as are specified in the law, declaring the purpose for which they shall be elected. Under the law of 1861 the people elected delegates for the purpose of framing a constitution to be submitted to them for their adoption or rejection, and for no other purpose. The people granted to the delegates all the authority they ever had, and upon what principle can it be said that the people delegated to the members of the convention, authority to put a constitution in force, when the people never elected them for any such purpose? Until it is established that persons delegated to do a particular act, in a specified manner, have power to do what they please, and in such manner as they please, it will remain a self-evident proposition that persons elected to do a particular thing, in a particular manner, cannot do all things in such manner as they may think proper. The usual mode in which the people change their constitution is by a convention of delegates elected in conformity to some law for that purpose.

In the old thirteen States, the constitutions first adopted by them, with but two exceptions, contained no provision for their own amendment; and still, all of them have been amended in pursuance of laws passed by the legislative power. Such laws have uniformly prescribed the mode in which amendments might be made, and the requirements of such laws have been considered binding upon those who derived their authority under them. Whenever, in the course of events, it is supposed to be expedient to ascertain the will of the people on a new exigency, or on a new state of things, or of opinion, and there is no constitutional provision on the subject, the legislative power must be and is the sole judge

of such expediency; and if it judges such ascertainment of the will of the people to be expedient, it must provide by law, the mode and manner in which the will of the people shall be ascertained.

The first section of the twelfth article of the present constitution of the State, which has been in force since April 1, 1848, provides, that "whenever two-thirds of all the members elected to each branch of the general assembly shall "think it necessary to alter or amend this constitution, they "shall recommend to the electors, at the next election of "members of the general assembly, to vote for or against a "convention; and if it shall appear that a majority of all the "electors of the State voting for representatives, have voted "for a convention, the general assembly shall at their next "session call a convention, to consist of as many members "as the house of representatives at the time of making said "call, to be chosen in the same manner, at the same place, "and by the same electors, in the same districts that chose "the members of the house of representatives, and which "convention shall meet within three months after the said "election, for the purpose of revising, altering or amending "this constitution."

Under the provisions of this article of the constitution, it is not made the duty of the general assembly to recommend to the electors to vote for or against a convention until two-thirds of all the members of each branch of that body shall think it necessary to alter or amend the constitution. When there is no constitutional provision upon the subject, a duty is imposed upon the legislative power to provide by law for a change of the fundamental law, whenever, in the opinion of a majority of its members, it is necessary that such a change should be made. Although in this State the duty is not imposed until two-thirds of the members are of that opinion, still, whenever the time arrives, the nature of the duty is the same in the one case as in the other. Where there is no constitutional provision, the legislative power may prescribe such time, manner, and condition as it may think proper, in regard to making the change. In this State, the constitution

has expressed a particular manner in which the legislative power shall perform some of its duties, and thereby restrained it from performing them in these particulars in any other manner.

There is a wide difference between the legislature's exceeding its authority, and a neglect to perform its duties. In the former case, the law is void; while in the latter, no right or authority is derived, however clear and unquestioned the duty may be which should have been discharged. All constitutions impose certain duties upon those who represent the people in the several departments of the government. The representatives in the legislative department, in whom all legislative power is vested, are required to pass certain laws. The executive is required to do certain acts, and the judicial officers are required to do other acts. To secure the performance of these several duties, the people have required all of their representatives to take an oath, by which they solemnly oblige themselves to discharge the duties imposed upon them. But while the highest moral obligation is imposed upon such representatives to perform their duties, it is well settled that it rests solely upon their consciences. It is well understood, that constitutional provisions requiring the legislative power to pass laws, have no operation as laws. The legislative power may be required in the most imperative manner to pass a law, but if it neglects its duty in this regard, the rule which it should prescribe as a law can never become one.

The people of the State cannot legally vote for or against a convention, without a law authorizing them so to do. When such a law is passed, the people must vote in conformity to its provisions. They have no power in regard to voting for or against a convention, beyond the powers conferred by the law, and such powers must be exercised in the manner which it prescribes. The constitution directs the legislative power to pass a law calling a convention, if it shall appear that a majority of all the electors of the State voting for representatives have voted for it; but if the legislative power neglects to perform its duty in this regard, no delegates can be elected,

and no convention can be held. The law which the legislature is required to pass, is the only authority under which delegates can be elected. It is the only authority under which they can assemble. After the convention is assembled, it is a body whose powers are conferred upon it by the people, under the law calling it into existence, and are limited to the purpose for which its members were elected. The people elected the delegates to perform certain duties, and when they accepted of the office to which they were elected, they became bound to discharge those duties.

It is said that the law-making power did not confer upon the convention as much authority as it was entitled to exercise, and, therefore, it is claimed to have the right to assume such additional authority as ought to have been conferred upon it. But it is well settled, if the legislative power only performs its duty in part, the law which is such part performance, is the limit of the powers of those acting under it, and the duty which remains unperformed confers no power, or authority, upon those acting under the law.

A more plausible argument in favor of the assumed powers of the convention is, that when it had assembled it had full power to alter, revise, or amend the constitution, in such manner as it should think proper, under and by virtue of the provisions of the present constitution. The provisions of the present constitution are assumed to override the law of 1861 prescribing the duties and limiting the powers of the delegates of the convention. The argument assumes that the present constitution is a grant of power to such delegates as might be elected to exercise the power granted. The force of this argument is not perceived so long as it is admitted that the delegates were not elected for the purpose of exercising the powers supposed to be granted. If the delegates were elected for the purpose of exercising other powers than those supposed to be granted, it could not be pretended that they would have authority to exercise the power of amending the constitution and putting the amendments in force. So, if the people have elected delegates for the purpose of exercising a portion of the powers, and have not elected them to exercise

another portion which they might have exercised had they been elected for that purpose, it is not perceived upon what principle they can exercise that portion of the powers which they were not elected to exercise.

"If," say the Judges of the Supreme Court of Massachusetts, "however, the people should, by the terms of their "vote, decide to call a convention of delegates to consider "the expediency of altering the constitution in some partic- "ular part thereof, we are of opinion that such delegates "would derive their whole authority and commission from "such vote; and upon the general principles governing the "delegation of power and authority, they would have no "right under such vote to act upon and propose amendments "in other parts of the constitution not so specified."

6 Cushing, 575.

The idea of the people granting to themselves power is a novel one. The convention which framed the present constitution had no power to authorize a succeeding convention to put a constitution in force against the will of the people; and the people, in adopting the present constitution, did not, *and could not*, bind succeeding generations in that regard. While the people must exercise their sovereign powers in conformity to some law prescribing the time, place, and manner in which they shall be exercised, the sovereign power itself is inalienable. One generation cannot bind another so that it cannot, by its suffrages exercised according to law, define and limit the powers of its delegates; and it cannot be supposed that the framers of the present constitution intended to abridge the rights of the people in this respect, or that the people in its adoption so intended. The framers of the present constitution must be presumed to have intended that the legislature should call a convention to revise, alter, or amend the constitution, when the time mentioned should arrive, and to leave to the people to specify the purpose or purposes for which its delegates should be elected. The language of the instrument is to be construed according to the well-settled rules of construing like instruments. We have seen that the power to

amend the constitution was vested in the people in their amend the constitution was vested in the people in their aggregate capacity, to be exercised according to law, but an inalienable one. Hitherto, inalienable rights have not been supposed to be grantable, and it is not now perceived how the inalienable rights of the people could be so granted to their delegates as to make the delegates principals and the people agents. The people, from whom all authority is derived, have, according to the argument, become servants, and the delegates become masters. The rules in regard to grants of power are not applicable to such a case. If the people had elected the delegates to revise, alter, or amend the present constitution, and had not provided that such revision, alterations, or amendments should be submitted to them for their adoption or rejection, then the rules in regard to grants of power would have some application; but, even then, the well-settled rule would reserve to the people the power to adopt or reject the proposed constitution. The well-settled rule on this subject was again re-iterated by Senator Douglas in his speech delivered on the 22nd day of March, 1858. He says: "The convention assembled under "the authority of the Territorial legislature alone, and hence "was bound to conduct all of its proceedings in conformity "with and in subordination to the authority of the legisla- "ture. The moment the convention attempted to put its "constitution into operation against the authority of the Ter- "ritorial legislature, it committed an act of rebellion against "the government of the United States. A convention assem- "bled under the authority of the Territorial legislature could "do no act to subvert the legislature which brought the con- "vention into existence."

A careful examination of the provisions of the first section of the twelfth article of the constitution will show that they confer no powers whatever.

They are all of them in restraint of the exercise of powers which were vested in the legislature, and so far as those restraints do not operate, the power of the legislature is left untouched, and in full force. The legislature had ample

power, without the provision of the constitution, to call a convention for the purpose of revising, altering, or amending that instrument. It had power to make the call at such time, in such manner, and under such conditions as it should judge expedient. It also had full power to prescribe the powers and duties of the convention. The constitution, however, provides that it shall not be the duty of the legislature to make such a call, until two-thirds of each branch think it necessary, nor until it shall have recommended to the electors at the next election of the general assembly, to vote for or against a convention, nor until it shall appear that a majority of all the electors of the State voting for representatives, have voted for it. When these requirements are complied with, then the legislature shall exercise its inherent power of calling a convention, but not until then. So, as to the provisions of the constitution, in regard to the manner in which the call shall be made.

Unrestrained by those provisions, the legislature could have called the convention at such time as it pleased; have had it consist of as many members as was thought expedient; have had them chosen at such time, in such manner, by such persons, and in such districts as it might have prescribed. The only effect of the constitution was to restrain the legislature from making a call at any session except at its next session; to restrain it from fixing the number of delegates at a greater or smaller number than the number of representatives at the time of making the call, and to restrain it from prescribing any manner, place, electors or districts, than those that chose the members of the house of representatives. Unrestrained by the constitution, the legislature might have fixed such time for the convention to meet as it thought proper, and the only effect of its provision in this regard, is to restrain the legislature from fixing the time beyond three months after the election of the delegates. Thus it will be seen that every provision of the constitution is in restraint of the power of the legislature. These restrictions were complied with, and in every other respect the power of the legislature remained the same as though no restrictions had been im-

posed. It might fix the time when the election of delegates should be held. It might fix the time when the delegates should meet in convention, subject to the restriction which I have just mentioned. It might, in its discretion, exercise all of the powers vested in it where it was not restricted from so doing.

Having ascertained the true source of the power under which the convention assembled, and that such power is unlimited, except so far as it is restrained by the constitution, and there being no such restraint in this regard, it follows that the legislature had power to define the duties of the convention, and the purposes for which the delegates to that body should be elected.

The provisions of the present constitution are to be construed so as to harmonize one with another. All of them were adopted to transmit unimpaired to succeeding generations the blessings of civil, political and religious liberty; to secure a more perfect form of government; establish justice; insure domestic tranquility; provide for the common defense; promote the general welfare, and secure the blessings of liberty to the people and their posterity. I am unwilling to believe that the framers of the present constitution, having these ends in view, intended that a convention which should be assembled thereafter for its revision, alteration and amendment, with the same ends in view, should have power to abrogate one provision after another until every vestige of a constitutional government was destroyed, and then usurp the supreme authority of the government itself.

As before remarked, the people when they voted for and elected delegates to the convention, never intended that it should have any powers, other than what the law conferred upon it. The people never intended to delegate to the convention the supreme authority of the State, with power to repeal and pass laws at its will and pleasure. The people elected the delegates to frame a constitution under the law, and submit it to them for their adoption or rejection, and for no other purpose. The powers of the convention were neither legislative, executive nor judicial, but related to an

organic law, prescribing the form of the government, imposing duties upon its several departments and restraining them within certain limits. The office of such a law is to declare in whom the several powers of the government shall be vested, and to impose duties and restraints upon each of its departments. Beyond these provisions the convention had no power to go, and when it transcended these limits, its acts were void, even with the adoption of them by the people. If it could pass laws, and put them in force by a vote of the people, it could have tried cases and had its judgments become binding in the same manner. These are perhaps questions not necessary to be passed upon in the present case, as the section of the proposed constitution in controversy has not yet been submitted to the people of the State for their adoption or rejection. Taking well-established principles as our guide, they lead to the irresistible conclusion that the late convention was subject to the constitution and the laws, and its powers were limited to the purposes specified in the law calling it into existence. The amended constitution can only become the supreme law of the State in the manner specified in that act. No part of that instrument can become a law until it is submitted to the whole people of the State, nor until a majority of the whole people have voted in favor of it. The convention had no power to put the different sections in force by submitting one to the people of Chicago, another to the people of Union county, and a third to the people of Cairo, and so on, until each section was made to depend for its validity upon the vote of the people of a particular district selected by the convention. And it is confidently submitted, the convention had no power to pass or repeal any law in the manner mentioned in the thirty-fourth section of the schedule of the amended constitution, and its attempt so to do is a nullity.

C. BECKWITH,

Of Counsel for Respondents.

SUPREME COURT

OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
EX REL.
THE CITY OF CHICAGO,

VS.

ALEXANDER C. COVENTRY,
FREDERICK TUTTLE AND WILLIAM WAYMAN.

ARGUMENTS FOR THE RELATOR.

CHICAGO:
CHICAGO TIMES BOOK AND JOB PRINTING ESTABLISHMENT,
NO. 74 RANDOLPH STREET.
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ARGUMENT FOR THE RELATOR,

BY B. F. AYER.

MAY IT PLEASE YOUR HONORS:

The case presents the general question, whether the act of the General Assembly of this State, approved February 21, A. D. 1861, entitled, "An Act to establish a Board of Police "in and for the City of Chicago, and to prescribe their powers "and duties," has been annulled by the enactments of the Constitutional Convention recently assembled at Springfield, and the action of the legal voters of Chicago thereon.

On the 21st of March, 1862, the Convention adopted the following ordinance:

"*An ordinance, to secure to the citizens of Chicago and the corporate authorities thereof, the right to elect and appoint their own officers.*

Be it ordained, That, at the next municipal election, to be held in the City of Chicago on the third Tuesday of April, 1862, the legal voters of said city shall cause to be printed or written upon all their ballots the following words: '*For the City of Chicago electing its own officers;*' or the words:

'*Against the City of Chicago electing its own officers;*' which shall be canvassed and returned with the election returns of the ballots, as is now provided by law. And in case there shall be a majority of the legal voters, voting at said election, in favor of the people of said city electing their own officers, as indicated by said above mentioned words, then it shall not be lawful for any officers of that city to be chosen in any other manner than by a vote of the people of said city, or appointed in any other manner than by the Mayor and Alderman, as provided by present laws; and the act approved February 22, A. D. 1861, entitled 'An act regulating the custody and sale of 'personal property, under legal process, in the city of Chicago, 'and the towns of South Chicago, West Chicago and North 'Chicago, in Cook county;' also, 'An act to establish a board 'of police in and for the City of Chicago, and to prescribe 'their powers and duties,' approved, February 21, A. D. 1861; and, also, so much of an act approved February 18, A. D. 1861, as is embraced in section sixty-six and one-half, (66½) of an act to amend the city charter of Chicago, and creating three commissioners to examine into the finances of said city, be and the same are each and all of them hereby repealed; and the powers and duties of all officers appointed under and by virtue of said acts shall immediately cease; and, hereafter, neither the Governor nor General Assembly shall appoint any person to any office for said city of Chicago, but all officers shall be elected by the people of said city, or appointed by the Mayor and Aldermen, as provided by present laws, or by such general laws as may hereafter be passed by the General Assembly, under this constitution."

This ordinance was never repealed or re-considered by the Convention, but subsequent to its passage a provision, the same in terms, was inserted in the schedule attached to the new constitution, with this additional clause appended thereto, viz: "The provisions of this Constitution required to be executed prior to the adoption or rejection thereof, shall take effect and be in force immediately." The whole is embraced in section 34 of the schedule.

There can be no doubt, that the Convention intended this provision should take effect, immediately upon its ratification by

a majority of the legal voters voting at the municipal election held in Chicago on the third Tuesday of April last. Its force and validity were not to depend upon the result of the popular vote of the State to be taken upon the new constitution on the 17th of June, for another and different contingency is expressly mentioned. The general provisions for the submission of the constitution to the people of the State at large, for their adoption or rejection, are to be found in sections 4 to 10 of the schedule; and the journal of the Convention, of which the court will take judicial notice,* establishes the fact, that these sections were adopted and inserted in the schedule, prior to the insertion of the 34th section. The latter is the last section of the schedule, and was appended thereto at the heel of the session. The Convention omitted, in the haste and confusion of the moment, to note this exception specially in either of the seven sections above referred to, but, in order to remove all doubt as to their intention, they added to the 34th section the closing paragraph I have above quoted.

Independently of these considerations, it is manifest from the language employed, that the Convention did not design to subject this section to a double popular sanction. They submitted it to those who alone were specially interested, and in case of their approval it was to take immediate effect.

I do not suppose, however, that this view of the matter will be seriously, if at all, controverted. It is the view which has been taken not only by the public, but, so far as I know, by the members of the legal profession who have expressed an opinion in regard to it. Elaborate opinions in writing have been obtained by the Police Commissioners from several counsellors of distinction and acknowledged ability, touching the validity of this ordinance, with which the public have been generously favored. Those "opinions" will doubtless be laid before the court, and your Honors will find from a perusal of them, that though they conflict with each other very strangely in some of their reasoning, they all agree, I think I may say, without a sin-

*See, *Opinion of the Justices*, 35 *N. H. Rep.* 579; 1 *Kent's Comm.* 454, *note;* Prescott v. Canal Trustees, 19 Ills. 324; Spangler v. Jacoby, 14 Ills. 297; Schuyler County v. the People, 25 Ills. 181.

gle exception, with me in the view I have taken of the intention of the Convention to put this provision in force, without submitting it to the people of the State at large. Some of these gentlemen, if not all, are still acting as counsel for the Commissioners in this case, and I may, with very great propriety refer the court to what they have published upon the subject.

Mr. Beckwith says: "The framers of the proposed constitu-"tion have provided that the 34th section of the schedule shall, "upon a certain contingency, go into operation on the third "Tuesday of April, 1862, without its being previously submitted "to the people of the State, for their adoption or rejection."

He then goes on to argue the question, "whether the conven-"tion had power to pass and repeal laws in a manner not pro-"vided for by the act under which its delegates were elected, "but in such manner as the body, in its own judgment, thought "proper."

Mr. Fuller appears to argue that the convention did not succeed in effectuating their intention, but as I understand him, he does not doubt that their intention really was to make the repeal of the acts mentioned, contingent only upon the vote of the people of Chicago. For, after reciting the 34th section of the schedule, he says: "By this, it is attempted to provide "that if the majority of the legal voters of the city of Chicago, "shall, on the third Tuesday of April, 1862, vote in favor of "electing their own officers, then the several laws and parts "of laws named above 'are each and all of them hereby repealed.'"

Mr. Larned says: "The section in question is one which "the Convention have adopted, and sought to make a part of "the constitution, *by force of the action of the Convention* "*alone, and without any adoption thereof by the people.*" He then proceeds to argue, that the section can have no validity, because "it is appointed to take effect before the constitution is "adopted by the people of the State, and is, in fact, to continue "in force, although the constitution as a whole, may be repudi-"ated by the people of the State."

Judge Scates says that he concurs with Mr. Beckwith "in "the points of his argument," with a single exception. He does not concur with him in the opinion, that the legislature had power "to prescribe the powers and duties of the Convention."

Thus fortified in the views I entertain upon this particular question, by the matured opinions of these eminent counsel, I deem it quite unnecessary to pursue the discussion of it farther. After a single additional remark, therefore, I shall pass to another point in the case.

It is to be observed by your Honors, that whatever may be the construction which ought to be put upon this 34th section, as it stands in the schedule, the original ordinance, recited above, was never repealed or reconsidered by the Convention. It remains to-day one of the enactments of that body, possessing all its original vitality and force. If the Convention had the power to adopt it, it is now a part of the organic law of this State; for the case shows that it has been ratified by the almost unanimous vote of the people of Chicago. It stands alone, entirely independent of the other acts of that Convention, and its meaning is too plain to require any judicial construction.

Having thus ascertained what the Convention designed to accomplish by the enactments in question, the only remaining inquiry is: had the Convention the power to adopt them in the manner above indicated?

This authority has been denied, and the objections to it rest upon two grounds:

First. It is asserted that the Convention had no power to adopt any amendment to the existing constitution of the State, which should take effect by the mere vote of the Convention, without the adoption thereof by a majority of the legal voters of the State.

Second. It is maintained that the Convention could not exer-

cise legislative functions, and had, therefore, no power to repeal the above named acts of the general assembly.

Each of these objections will be considered in its order.

The first objection involves an inquiry respecting the powers and authority of a constitutional convention in this State, called pursuant to the first section of the 12th article of the constitution of 1848. It also involves a further inquiry respecting the power of the general assembly to limit or control the action of such a convention.

I agree with Mr. Fuller in the opinion he has expressed, that the late Convention was, in its organization, a constitutional, and not a revolutionary body; a part of the political system of the State, and that its powers are defined by the existing constitution.

Its powers and duties are peculiar, and, in one sense, anomalous. The very object of a convention is to revise and change the fundamental laws of the State—to alter the frame of its government. They transcend the powers committed to the ordinary legislative department, and are, therefore, delegated to a convention, which is the highest embodiment of sovereignty known to our constitution and laws.

The constitution of this State explicitly provides when and how such a body may be assembled, of how many members it shall consist and how they shall be chosen; and when thus chosen it requires them to meet "within three months after the "said election, for the purpose of *revising, altering or amend-* "*ing this constitution.*"

Its powers are thus defined by the constitution, with no declared limitation upon them. The convention, when lawfully assembled, is entirely untrammeled by any conditions or restrictions. No right of ratification or rejection is reserved to the people, nor is any right to annex conditions or limitations conferred upon the legislature. After the sense of the people has been expressed in favor of a convention, the legislature

have simply a ministerial duty to perform. They are "*to call a convention.*" The injunction is mandatory, and admits of no discretion. They cannot disregard it, without violating the constitution. They cannot annex conditions or set limitations to the powers of the convention, for the convention derives its powers from the constitution and not from the general assembly. Any attempt, therefore, on their part to hamper or trammel the convention, is simply usurpation. It was intended that the convention should be in all respects independent of the legislature, and when it assembles it is to look for instructions to the source of its authority, and not to the unwarrantable and intrusive requisitions of a subordinate department of the State government.

It is upon these grounds, that I pronounce that provision in the act of the General Assembly calling the Convention, which ~~the~~ required the amendments adopted by it to be submitted to the people, for their adoption or rejection, an absolute nullity. Mr. Beckwith, in his written opinion, attempts to sustain its validity upon the assumption, as I understand him, that the constitutional provisions relating to a convention "are all of them in res- "traint of the exercise of powers which were vested in the leg- "islature, and so far as those restraints do not operate, the power "of the legislature is left untouched, and in full force." But this assumption is wholly gratuitous and unfounded. It is a grave and palpable error to assert, that, in the absence of any constitutional provision on the subject, a State legislature has any authority, under our system of government, to change or annul the organic law, from which it derives not only all its powers, but its very existence. The power to make and unmake constitutions does not reside in the legislature. In the absence of any provision for its own amendment, the fundamental law can only be changed by the direct authority of the people acting in their primary and sovereign capacity, through their delegates lawfully chosen for that purpose. This is a power inherent in the people, and has never been delegated to their legislative assemblies.

But Mr. Beckwith further argues, that the legislature would have ample power, if unrestrained by the constitution, to call a

convention, and "to make the call at such time, in such manner, and under such conditions as it should judge expedient." It would also have, he says, full power "to prescribe the powers "and duties of the convention." The provisions of the constitution regulating the time and manner of making the call are, therefore, as he insists, simply restraints upon the power of the legislature, and when these restrictions are complied with, "in "every other respect the power of the legislature remains the same as though no restrictions had been imposed." His conclusion from these premises is, that inasmuch as the general assembly, in calling the recent Convention, complied with all the "restrictions," as he styles them, imposed by the constitution, it "had power to define the duties of the convention, "and to impose such limitations upon its authority as were "deemed expedient."

Now the simple statement of this proposition is, as I view it, a sufficient refutation of this whole theory. If the legislature may impose such limitations upon the authority of the Convention as it pleases, it may require that only particular articles or clauses shall be acted upon by the convention; it may prescribe that no alterations shall take effect, until ratified by the legislature, it may not only direct the submission of the amended constitution to the vote of the people, but it may prohibit such submission; it may dictate to the convention not only, what reforms it shall not inaugurate, but what changes it shall. Thus it would deprive the convention of all its powers and authority as a distinct and independent body, and reduce it from the dignified position it actually occupies as the highest and most august political assembly known to our constitution and laws, to that of a mere committee of the legislature convened to execute its will.

It is not surprising, in view of these considerations, that Judge Scates should have put in a *caveat* to this strange doctrine, that the legislature had authority "to prescribe the powers and duties of the convention." Mr. Fuller, also, hesitates not to say, there is no doubt in his mind, that the Convention "could alter or amend the constitution at its pleasure." "I "know," he adds, "of no limitations upon its powers in that res-

"pect, so long as it secured to the people some form of republi-
"can government."

But the premises assumed by Mr. Beckwith, in the above argument, are equally as faulty as his conclusion. In the first place, it is not true, that the legislature, in the absence of any constitutional provision on the subject, would have power to call a convention "and prescribe its powers and duties." To say nothing about the latter part of the proposition, it would be entirely irregular for a legislature to call a convention at all under such circumstances, without the previous sanction of the people. "The legislature," say the Supreme Court of New York, in a written opinion upon this very subject, furnished to the legislature of that State in 1846, which I have found published in the Debates of the Massachusetts Convention of 1853, vol. 1, p. 138: "The legislature is not supreme. "It is only one of the instruments of that absolute sovereignty "which resides in the whole body of the people. Like other "departments of the government, it acts under a delegation of "powers, and cannot rightfully go beyond the limits which "have been assigned to it. This delegation of powers has "been made by a fundamental law, which no one department "of the government, nor all the departments united, have au-"thority to change. That can only be done by the people "themselves. A power has been given to the legislature to pro-"pose amendments to the constitution, which, when approved "and ratified by the people, become a part of the fundamental "law. But no power has been delegated to the legislature to "call a convention to revise the constitution. This is a meas-"ure which must come from, and be the act of, the people "themselves. Neither the calling of a convention, nor the con-"vention itself, is a proceeding under the constitution. In-"stead of acting under the forms and within the limits prescrib-"ed by that instrument, the very business of a convention is to "change those forms and boundaries, as the public interests may "seem to require. A convention is not a government measure, "but a movement of the people, having for its object a change, "either in whole or in part, of the existing form of govern-"ment."

The Supreme Court of Massachusetts, (6 Cush. Rep. 573),

say upon the same subject: "Considering that the constitution "has vested no authority in the legislature, in its ordinary ac- "tion, to provide by law for submitting to the people the ex- "pediency of calling a convention of delegates, for the pur- "pose of revising or altering the constitution of the Common- "wealth, it is difficult to give an opinion upon the question, "what would be the power of such a convention, if called. If "however, the people should, by the terms of their vote, de- "cide to call a convention of delegates to consider the expedi- "ency of altering the constitution in some particular part there- "of, we are of opinion *that such delegates would derive their "whole authority and commission from such vote.*"

It is to be observed in reference to these decisions, that in neither New York or Massachusetts was there any constitutional provision for calling a convention.

Upon this same point, I refer the Court further to the opinion of Mr. Justice Patterson, quoted in 1 *Kent's Comm.* 452.

But if the legislature had, what they clearly have not, the power to call such a convention, under the circumstances supposed, without the popular sanction, it surely requires no argument to show that they could not "prescribe its powers and duties." Such a convention is a body entirely distinct from, and independent of, the legislature. It is above and beyond, not only the legislature, but, as the Court in New York say, the constitution itself. When no limitation is imposed upon it by the existing constitution, or by the vote of the people under which it is assembled, instead of being subordinate to the legislature and trammeled by its directions, it may, in the execution of its trust, dissolve the legislature, and "put up and "down government at its pleasure."

After what has been already said it is superfluous to add, that the provisions of the existing constitution regulating the time and manner of calling a convention, are not simply restraints upon the power of the legislature. They are grants of certain ennumerated powers to that body, relating to this special subject; and in such case, all powers not specified are impliedly ex-

cluded. 1 *Story on the Constitution*, §448 and 910. They contain also a grant, or perhaps it may be more properly styled a reservation, of power to the convention which is thus called into existence. This grant or reservation is general. "The con-"vention shall meet," "*for the purpose of revising, altering,* "*or amending this Constitution.*" No limitation, qualification, or condition, is attached to the grant. It follows irresistibly, that the convention, when lawfully assembled, may execute its trust according to its own will and pleasure, "subject "only to the constitution of the United States."

The principle I now contend for, is by no means new or unfamiliar to the courts and profession in this State. It has been more than once applied by your Honors in the decision of analagous questions which have come before you for adjudication.

In the cases of the *People* v. *Dubois* (23 *Ill. R.* 547.) and the *People* v. *Bangs*, (24 *Ills. R.* 184.) questions arose respecting the power of the legislature to deprive a circuit judge of his office by re-modeling his district, and to authorize the election of a new judge in his place. The court held in those cases, that it is the constitution, and not the act of the legislature, which creates the office of circuit judge, and that it was the intention of that instrument to place the judges entirely above and beyond the legislative control and interference, except by impeachment or address. It is the constitution, the court say, which creates the office of circuit judge, and not the legislature, and the constitution has not provided or authorized any mode of expelling him from the office which is thus created, if he conducts himself properly and does not become disqualified, until the expiration of his term.

Numerous other cases might be cited to the same point. When the constitution has created an office or a tribunal, and prescribed its powers and duties, it is not competent for the legislature either to circumscribe or take them away.

It is upon these grounds, I contend, that so much of the act of the general assembly calling the convention, as required

that body to submit its enactments to the vote of the people, for their adoption or rejection, is unconstitutional and void. The other provisions of the act, not repugnant to the constitution, of course, still remain valid. *Edwards* v. *Pope*, 3 *Scam.* R. 470.

There was no obligation, then, resting upon the Convention to submit any portion of the new constitution to the people. It was entirely discretionary with it whether it would do so or not; and there is no doubt that it was the intention of the framers of the existing constitution as well as of the original constitution of 1818, that this discretion should be left to the Convention. Neither of these instruments required any such submission. The practice upon this subject has never been uniform, and it is only within a recent period that such submissions have become frequent. Not more than one or two of the original thirteen States submitted their constitutions to a vote of the people. Our original constitution of 1818, was adopted by the Convention without the popular ratification. The same is true as to a portion of the constitution of 1848, and yet the act of the legislature calling that convention contained the same requirement upon this subject, as the act of 1861. Probably a majority of the States in this Union have adopted constitutions without submitting them to the popular vote. The constitutions of the following States are now in force, which were never formally ratified by the people:

Vermont adopted her constitution in 1793, in convention; Connecticut, by convention, in 1818; Delaware, by convention, in 1831; Pennsylvania, by convention, in 1838; North Carolina, by convention, in 1776; amendments in 1835; South Carolina, by convention, in 1790; Georgia, by convention, in 1798; Alabama, by convention, in 1819; Mississippi, by convention, in 1817; revised in like manner in 1832; Tennessee, by convention, in 1836; Kentucky, by convention, in 1799; Arkansas, by convention, in 1836; Missouri, by convention, in 1820.

The federal constitution, as is well known, was adopted by delegates in conventions in the several States, and was never submitted to the popular vote.

"From these conventions," says Chief-Justice Marshall, in *McCulloch* v. *Maryland*, (4 *Wheat.* 404,) "the constitution "derives its whole authority." He adds: "The government "proceeds directly from the people." They acted upon it, in "the only manner in which they can act safely, effectively, and "wisely, on such a subject, by assembling in convention."

It was in full view of all these facts and precedents, that our constitution of 1848 was adopted. The inference is almost irresistible, that the convention that framed it purposely omitted the insertion of any clause requiring future amendments, framed by a convention, to be submitted to the people. It designed to leave the whole question to the discretion of the convention, when it should be thereafter assembled.

There could, then, be no legal objection to the action of our recent Convention, if it had omitted to submit any of its acts for the popular ratification. But the fact is, that the Convention has, in the exercise of its discretion, submitted the entire constitution, with the exception of the section in question, to a direct vote of the whole people of the State; and that section it has submitted to the vote of those, who alone can be supposed to have any direct interest either in its adoption or rejection. And here I must not omit to notice the legal proposition, for which one of the before mentioned counsel very gravely and earnestly contends, that the article in question has not been submitted "*even to the legal voters of Chicago.*" The italics as well as the words are his own. The ratiocination by which he works out this surprising proposition, is as remarkable as the conclusion itself. He says: "They," (the voters thereby meaning,) "are not authorized to vote whether this section shall "become a part of the constitution. They are simply author-"ized to write upon certain ballots, 'For or against the city of "Chicago electing its own officers,' and if a majority of the "legal voters voting at said election, as indicated by said bal-"lots, shall be in favor of the people of said city electing their "own officers, *then the laws named are repealed and the pro-"visions of that section become operative.*" "There is a wide "difference," he adds, "between the question submitted to the "legal voters of Chicago, to be voted upon, and the question "*whether section thirty-four should be adopted* as an amend-

"ment to the constitution. It is one thing for the people to "be in favor, henceforth, of electing all municipal officers by "popular vote, and quite another thing for them to be in favor "of ejecting, before the expiration of their terms, all officers "who have been heretofore otherwise appointed under existing "laws."

The last sentence, I have quoted, is indicative, I think, of the fact, that for once the learned counsel's sympathy for friends in distress had got the better of his usual well-known discernment and acuteness. The proposition was submitted to the people in a form which admitted of no misconstruction, and was perfectly well understood. The fact that in a poll of less than fourteen thousand votes, eleven thousand nine hundred and seventy-seven legal voters of Chicago availed themselves of the opportunity to express their sentiments on the subject, of whom eleven thousand eight hundred and eighty-four voted in favor of the proposition, furnishes to my mind very convincing proof, not only that they felt an interest in the question, but that they also knew well what they were voting about. Had the legislature which adopted the objectionable acts, extended to them the same measure of justice they have received at the hands of the Convention, this case would never have arisen to disturb the municipal authorities or vex the court.

The same counsel has vividly depicted certain very grave and "alarming" consequences, which he supposes may be expected naturally to follow, if the doctrine acted upon by the late Convention, in submitting, in this instance, a local enactment to the ratification only of those residing in the locality affected by it, shall be tolerated by the court. "Rights," he says, "the most sacred could be swept away, political privileges destroyed, the people disfranchised and subjected to enormous burdens, and human slavery established on the soil of Illinois by the will of a few individuals."

If such momentous consequences as these, are really involved in the settlement of this question, the court will surely pause and ponder well, before committing themselves in favor of the action of the convention. If, however, no rights are likely to be swept

away, or political privileges destroyed, by a decision adverse to the defendants, except the right and privilege of half a dozen executive appointees to hold office in Chicago, against the expressed will of the people, I apprehend that neither the court, or any body else, will think the consequences very "alarming."

Another question may possibly be raised, though I am not aware that any such has yet been suggested by the counsel in this case, as to the power of the convention, to make this enactment contingent, for its effect, upon its adoption or rejection by a portion only of the people of the State.

A suggestion or two is all that is necessary upon this point.

If the convention may provide, that its amendments shall go into effect immediately and without being submitted to the people, there can be no doubt, so far as the question of power is concerned, that it may submit particular local provisions to the people of different localities interested. Nor is there any impropriety in such a course. The general assembly possesses similar powers and has frequently exercised them.

People v. *Reynolds.* 5 *Gilm.* 1.

Objections, however, have been raised, and in a few instances sustained, in other States, to general legislative enactments thus made dependent upon the popular vote for their validity, upon the ground that the *legislature* have no constitutional authority to delegate their trust in this manner. But such objections have never been urged, and they are wholly inapplicable, to the enactments of a constitutional convention.

If the theory for which I have contended be correct, that the late Convention in this State was restrained, in the execution of its trust, by no limitations whatever, save those to be found in the federal constitution, it is obvious, that it had full power to provide for such submission, either partial or general, as it might deem reasonable and proper. The authority of the Convention upon this, as upon all other subjects properly before it, was supreme, and its exercise of that authority cannot be called in question by any tribunal whatever.

But one additional point remains to be considered, and my discussion of it shall be brief.

It is insisted that the ordinance in question is invalid, because it is, in part, an act of ordinary legislation, and the Convention could rightfully exercise no such legislative functions.

It is not denied, that so much of the ordinance, as prohibits the appointment *hereafter* of any person to any office for the city of Chicago, by the Governor or General Assembly, is a provision which might be appropriately incorporated into the constitution. The power, at least, of the Convention to deliberate and act upon such a question, has not been disputed. This being admitted, it will be difficult to show, that the late Convention had not also the power to so far change or abrogate existing statutes, as to make the legislation of the State conform to the new order of things. This is what the Convention has attempted to do in this instance. The repealed acts were in palpable conflict with the principle of the new provision about to be adopted by the Convention as a part of the fundamental law. The Convention, therefore, declared, that "the "powers and duties of all officers appointed under and by virtue "of said acts shall immediately cease."

So far as respects the removal of those officers, the power is one which has been repeatedly exercised by constitutional conventions in this and other States. By the constitution of 1848, the Governor, Senators and Judges of the Courts, besides numerous other public officials, were *legislated* out of office, before the expiration of their terms. The same is true of the proposed new constitution. So far as I am aware, this power has never been questioned.

Again, it cannot be denied, that all previous statutes in conflict with any of the provisions of a new constitution, are thereby immediately annulled. And if the convention possess the authority to repeal the statutes of the State indirectly, by inserting in the constitution provisions to which they are repugnant, it is difficult to see why it may not do the same thing directly and in express terms.

But the position taken, that a constitutional convention has no legislative functions, is untenable. It is purely a legislative body. Its functions, at least in this State, are not merely "advisory and recommendatory," but legislative and governmental. Without legislative powers it could not execute its commission. It always exercises them, to the extent not only of repealing existing statutes, but also of re-enacting them. Express provisions are invariably inserted in every new constitution, that all laws in force at the adoption thereof and not inconsistent therewith, shall continue in force and be as valid as if the new constitution had not been adopted. This court has said in *Wood* v. *Blanchard*, (19 *Ills.* 40.) that "all laws thus "continued in force are, strictly speaking, *re-enactments by the* "*convention, and we, therefore, look to that for their validity.*" If a convention may thus, in express terms, re-enact statutes, or continue them in force for a prescribed period only, why may it not also in express terms repeal them?

Again, if it be admitted that a convention possesses legislative functions for any purpose, who is to assign a limit to its exercise of them? If it may exercise such as are necessary and proper to accomplish the object for which it is assembled, who is to judge of the necessity or propriety of its exercising them in a given case? The answer is obvious. The discretion is one confided to the convention itself, and when exercised, is not subject to be reviewed by any other tribunal whether legislative or judicial.

But the objection raised is susceptible of a still more satisfactory and conclusive answer than I have yet given. It is said that the business of a convention is to make a constitution—to ordain organic laws. But what are organic laws? Who is to decide? The answer is plain and free from difficulty. The convention has the sole power of determining what shall be the organic law, and *whatever it prescribes*, (subject in some cases to the ratification of the people,) becomes a part of the constitution. The courts cannot control or annul its decision. If, indeed, any of its enactments are repugnant to the Federal Constitution, which is the supreme law, the courts may so declare. But no provision inserted in the organic law can be an-

nulled, on any other ground, by any power on earth, except the PEOPLE, acting in their highest sovereign capacity and about to perform their highest possible act of sovereignty.

Our system of government is founded on the maxim, that "all "political power is inherent in the people." When they come together, by their representatives, under the sanction of law, to exercise their original rights, it is their inalienable privilege, to frame their organic law "in their own way;" and to deprive them of this privilege, is to take away from them the control of their own institutions.

I have proceeded in my argument of this case, upon the idea, assumed by the counsel for the defendants, that the act of 1861, calling the convention, absolutely required the constitution framed by that body, to be submitted to the people, and left no discretion upon that subject to be exercised by the convention. This, however, is an assumption subject, to say the least, to very serious question. The point has been elaborately argued by one of my learned associates, and I forbear to add anything to what has been by him so ably and forcibly enunciated.

Since the completion of the foregoing remarks, I have been favored by Mr. Beckwith with a copy of his very learned argument for the defendants. I have no time, nor do I conceive that there is any necessity, for a further reply to it. The main points he has endeavored to establish, are the same, substantially, which he makes in his written opinion previously published, to which I have adverted. Some additional considerations of a general character have been suggested, but none, I think, which at all change the previous aspect of the question discussed, or shake the positions I have attempted to enforce.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

ARGUMENT FOR THE RELATOR,

BY W. C. GOUDY.

May it please your Honors:

The petition and stipulation in this case present a single question.

The defendants are exercising the duties of Police Commissioners, as defined by the act of the General Assembly, passed February 21, 1861, (laws of 1861. 151.) They were appointed and qualified according to the provisions of that act, and are now entitled to the powers and franchise thereby conferred, *unless* the act has been annulled and superseded by the 34th section of the Schedule to the new constitution or by the same provisions adopted as an ordinance during the sitting of the convention.

Is the act of the legislature now in force? If it is, the writ of mandamus will be denied; if it is not, then the writ must be allowed.

I.

WHAT DID THE CONVENTION INTEND TO DO?

The vote directed by the ordinance passed in convention and afterwards by the 34th section of the schedule has been taken and resulted in an almost unanimous answer in favor of the people of Chicago electing their own officers. The vote directed by the schedule on the constitution and the separate articles on the subject of negroes, banking and congressional apportionment, has not been taken and will not be until the 17th of June next.

The 4th section of the schedule provides "that *this constitu-* "*tion* shall be submitted to the people of Illinois, for their "adoption or rejection, at an election to be held on the Tuesday "next after the third Monday of June, A. D. 1862, and there "shall be submitted at the same time for adoption or rejection "the separate sections," &c.

The 7th section provides that "If it shall appear that a ma- "jority of all the votes polled are for the adoption of *this con-* "*stitution*, it shall be the supreme law of the State from and "after the first day of September, A. D. 1862, except as other- "wise provided in this constitution: but if it shall appear that "a majority of the votes polled were given against *the consti-* "*tution, the same shall be null and void.* If it shall further "appear that a majority of the votes polled shall have been "given for the separate sections in relation, &c., * * then "the said sections or articles shall be and form a part of the "Constitution; otherwise, the said sections or articles shall be "null and void."

It may be argued that the 34th section of the schedule is a part of the Constitution, and, not being a separate article, is submitted as a part of the Constitution to the vote of the people on the 17th of June, and if the majority of the votes cast are against the Constitution, that this section becomes null and void. It may further be insisted, that from these premises it is

to be concluded that the convention did not *intend* to give force and effect to that section until the Constitution should be ratified by the people at the polls on the 17th of June.

The premises and conclusion are both alike false.

It is true that the words "this Constitution" embrace in their enlarged sense every article and section, together with the schedule and each of its sections, but it is perfectly clear that these words were not used in this connection in that sense, because the separate articles and the parts of the schedule providing for the vote would be included. A fair construction of all the provisions on this subject would be to declare that al those parts of the Constitution, not otherwise declared or directed to be in force, should depend on the vote taken on the 17th of June, and that such parts should be null and void, if a majority of the votes are cast against them.

The last clause of the thirty-fourth section, declares that "The provisions of this constitution required to be executed "prior to the adoption or rejection thereof, shall take effect "and be in force immediately."

Here the Convention expressly exercised the power, and manifested an intention to give force and effect to certain provisions of the proposed constitution, before the question of its rejection or adoption was submitted to the voters.

The power to declare a part of the constitution in force by the act of the Convention alone, was assumed in the 1st and 5th sections of article XVII. It is provided that those sections shall "take effect and be in force immediately, as a portion of "the constitution of this State, and the same shall be and re-"main in force as such, unless rejected by the people, upon the "vote hereafter to be taken for or against the adoption of the "same, as provided in this constitution."

Here the convention asserted the power to amend the constitution, without submitting the amendment to a vote of the

people, and provided that the specified provisions should remain a part of the organic law, unless "rejected by the people."

The Convention, on the 21st of March, passed an ordinance, with the same matter set out in the 34th section of the schedule, except the last clause, and declared it in force immediately.

In the early stage of the Convention the power of that body to alter, revise, and amend the constitution, without the ratification of the people, was declared by a vote of the Convention in adopting a report of its judiciary committee. It was exercised afterwards in electing a printer and passing ordinances.

The conclusion is irresistible, that the Convention claimed the power to alter and amend the constitution and laws passed thereunder, and give force and effect to part of the constitution without the ratification of the people, and that that body did not intend to include in the word "constitution," all its parts.

Having determined that point, the inquiry arises, whether the Convention intended to put the 34th section of the schedule in force, without submitting it to the vote of the people of the State on the 17th of June, and make it a part of the organic law, independent of the result of that election.

This is purely a question of *construction*, and the question is made easy by the conclusions at which we have arrived.

The last clause of the 34th section declares, that "The pro-"visions of this constitution, required to be executed prior to the "adoption or rejection thereof, shall take effect and be in force "immediately." This provision we maintain was intended to give immediate effect to the whole of the 34th section. That section provides for an election to be holden on the third Tuesday of April, 1862; this then was a provision of the constitution required to be executed prior to the adoption or rejection thereof. It proceeds further to declare, that "in case there

"shall be a majority of the legal voters, voting at said election, "in favor of the people of said city electing their own officers, as "indicated by said above mentioned words, *then* it shall not be "lawful for any officers of that city to be chosen in any other "manner than by a vote of the people of said city, or appoint- "ed in any other manner than by the Mayor and Aldermen, as "provided by present laws; and an act, etc., (naming three acts "of the legislature,) *be and the same are hereby repealed; and "the powers and duties of all officers*, appointed under and by "virtue of said acts *shall immediately cease.*"

When are these results to follow from the vote of the people of Chicago? Not till after the 1st of September, when the Constitution is to take effect, not till after the 17th of June, when the vote is to be taken? The answer is given by the terms of the section. The vote is to be taken at a city election, the returns to be canvassed and result declared at the next meeting of the council after the election; *then*, namely, at the first meeting of the council after the election, the officers are thereafter to be elected or appointedu nder the present laws, and the act (with others) under which the defendants exercise their office is declared, *to be and is hereby repealed and their powers and duties are to "immediately cease."*

The language of the section quoted above states in clear terms that the laws mentioned are to be repealed *from the time the Convention acted, provided* a majority of the people of Chicago voted in favor of electing their own officers, and that *when* the vote was taken and canvassed the powers aud duties of the defendan s as police commissioners should cease: *therefore*, the repeal of the acts, the suspension of the defendants from office, and the resumption of the powers of the mayor as the head of the police and the appointment of his corps, were also provisions of the Constitution required to be executed prior to the adoption or rejection thereof.

The fact that the last clause is added to the 34th section itself shows a purpose to have it apply to the provisions of that section.

The Convention exhibited a purpose to put the provisions of

this section in force without leaving it to depend on any vote except that of the people of Chicago, by passing it as a separate ordinance. It was afterwards embodied in the schedule so as to have the whole constitution in one instrument, but still with the express provision that it should take effect immediately.

I therefore conclude that the Convention intended to exercise the power to amend the Constitution by the adoption of this section without submitting it as a part of the constitution to a vote of the people on the 17th of June.

II.

The Power of the Convention to give immediate effect to the provisions of the 34th Section of the schedule.

1. *The power to give it effect on the contingency named.*

It may be urged that even if the Convention had power to make an amendment without ratification of the people, that it could not delegate that power to the voters of Chicago, that the vote directed was a delegation of such power, and therefore the section can have no effect until adopted as a part of constitution. An enlarged view of the powers of the Convention, which I take hereafter, necessarily includes the right to put the amendments in force in any way the delegates please. But if the convention has limited power, no more than its creature, the legislature, the provision in question is valid.

The courts of some of the states hold an act of legislation thus submitted to a vote as invalid. This court has settled the law the other way.

The People v. *Reynolds* 5 *Gilm.* 1.

2. *The power of the Convention to amend the Constitution without submitting the amendment for the ratification of the people at the polls.*

The question now presented for the consideration of your Honors is not political, but judicial. The public mind of this

nation has been agitated on this question in its political bearings, as presented by the Lecompton Constitution of Kansas, and the result in that case is a record of the sense of the people in favor of submitting an organic law, after it has been prepared by the delegates elected for that purpose, to the people for their adoption or rejection at the ballot box. The direct question presented to Congress was, whether this government would recognise Kansas as a sovereign State under the proposed constitution and admit her as one of the States of the Federal Union. The objection to such recognition and admission was that the people of Kansas did not ask admission under that constitution, that the delegates to the Convention were elected by fraud and did not represent the will of the people; on the other hand it was alleged that the delegates were fairly elected and reflected the will of the majority, and being thus elected, the Convention had the power to adopt a constitution or such part as they pleased without the ratification of the people. No issue was taken as to the power of a Convention fairly elected, but it was insisted that the proposed constitution did not embody the views of the people to be governed by it, and it was proposed to settle that issue by submitting the constitution to a vote at the polls; more, it was insisted that at an election ordered by the Territorial legislature, a majority of all the legal voters of Kansas had already condemned the instrument.

No man took more extreme grounds in favor of submitting the proposed organic law to the legal voters for their adoption or rejection, than the late Senator Douglas, yet even he, in the heat of political discussion, never denied the binding force of a constitution on the people when it was made by their delegates fairly elected.

Suppose that Congress had admitted Kansas as a State under the Lecompton constitution and recognised it as a State of the Union, could an inhabitant of Kansas resist its operation in the courts because it had not been submitted to the vote of the people? The Supreme Court of the United States in Luther v. Borden, 7 Howard 1, have decided that the government having been recognised by the local government and the United States authorities, that the constitution is binding on all its inhabitants, because it is a political and not a judicial question.

I trust that no convention will ever undertake to impose an organic law upon the people unless it is ratified by a majority of those interested. If the propriety and justice of such a proposition were under discussion I would urge the submission to a vote as a matter of political right.

In this case the section in controversy has been submitted to a vote of the people of Chicago who alone are interested in it, who have ratified it almost unanimously, but it is insisted that the section can have no force until this section together with all of the constitution has been submitted to a vote of the whole State. The people at large have no interest whatever in the execution of this section, there is no rule of expediency or political right that would dictate such a course, and if the position of the defendants can be maintained, it is because the convention was bound, by some authority superior to itself, to submit all of the constitution to a vote of the people of the State. Does any such superior authority exist? If it does, has that authority been exercised in this instance?

If there is a paramount power to that of the convention of delegates elected by the people to alter, revise, and amend the Constitution, it is to be found, as contended by different gentlemen who have given opinions on this question, in one of three places:

1. In the legal voters, who are limited themselves in giving their consent, and can only manifest that consent by a vote for the adoption or rejection of the proposed Constitution after it has been framed by the convention.

2. In the existing Constitution, which provides for its own amendment.

3. In the act of the General Assemby providing for the election of delegates.

If I succeed in satisfying your Honors that the Convention is not limited in any one of these three methods, then I will succeed in answering the arguments of counsel for defendants,

and establishing the proposition that the 34th section of the schedule is in full force.

I. (a) The American system of government is peculiar and without a precedent in the history of the world. The authority of the people has been recognized by other nations, but the manner of its exercise was different from the established practice in this country. We do not live in a democracy controlled by the people *en masse*, nor *per capita*, but in a republic, governed by the people through their representatives. The voice of the representatives of the people is the voice of the people themselves. It is true that direct propositions according to our practice and system may be submitted to the legal voters at the polls, but that method is no more the action of the people in a legal sense, than their declarations through their chosen representatives.

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness, and they have an inalienable right to alter, change, and reform their government in such manner as they think proper. These principles have their foundation in the Declaration of Independence, and were made sacred by the blood of our fathers; they have been asserted in the Federal Constitution, in the organic law of every State, and in every bill of rights. They stand undisputed.

The people who are endowed with this power are not a myth. Who are they? In the largest sense the people include every member of society, every man, woman, and child; in a more limited sense and in organized constitutional governments, the people are those who have the power to make laws —those who have the right to vote under the rules prescribed by the constitution and laws, and thus, through their representatives, make laws.

It is in the latter sense that the people are referred to in the Declaration of Independence and in the various constitutions. It has been said that the people have limited themselves by prescribing qualifications for voters. It is true that society is

bound by limits, but the people, being the voters themselves, are not limited. They are the governing power, exercising it over themselves and all other members of society who are not entitled to the elective franchise.

The people, that is the voters, make both constitutions and laws. The people expound the laws. The people execute the laws. The people establish their organic law, legislate, execute the fundamental and statute law, and determine the judicial rights of all the members of society.

But, in what manner? Not in their aggregate capacity, but by those selected by them as their representatives. Every statute enacted, every power executed, every judgment pronounced, is the act of the people.

In our system of government, the written constitution adopted by the people as a compact between themselves, to regulate their own rights, to establish the form of government, and provide for the regulation of their representatives, whether executive, judicial, or legislative, provides the manner in which laws are to be passed, and executive and judicial authority brought into existence. The people then exercise these functions of government in the manner prescribed by the written constitution.

How do the people make a constitution? How do the people alter and amend a constitution?

There is no written law defining the manner the people shall exercise that power. The existence of constitutions being confined to our own country, we must examine its history to learn how constitutions are made and altered. The power has been exercised repeatedly, whereby a common law has been established on the subject. The making of fundamental law is *sui generis*, and to be determined by reference to the rules applied only to that sovereign exercise of power.

There is no instance in which the people have made an organic law by a meeting *en masse*, nor by a vote at the polls. That has been an impracticability.

In every case the original constitution has been framed by delegates elected by those entitled to the elective franchise; and every amendment thereafter has been made by a convention of delegates, or submitted by the legislature to a vote at the polls. The people have exercised their power either in electing delegates or in ratifying the special amendments by their votes. So far the rules are universal, but just there the uniformity ceases.

The Federal Constitution recites in its preamble "*We the the people* of the United States, in order," &c,

It would be a work of supererogation to argue at this time that the Federal Government and Constitution, is the work of the people, and not a compact by the States. The blood of our people is flowing like water to vindicate this doctrine. The declaration is made in the "fore-front" of the constitution, that it is the act of the people, yet how did the people make that constitution? A convention of delegates, appointed by the legislatures, was held to frame the constitution, and on their recommendation, Congress resolved that the proposed constitution be transmitted to the several legislatures, in order to be submitted to a convention of delegates chosen in each State by the people thereof.

Story on Con., Book 3. *Ch.* 1.

The seventh article of the Constitution itself provides that it should take effect on the ratification of the *conventions* of nine States.

The United States Constitution was never submitted to a vote of the people, nor did the people elect the delegates that framed it; they elected the legislatures who appointed the delegates to construct the constitution, and the delegates of the several State conventions to ratify or reject it.

We find here a notable instance of the manner in which the people made a constitution.

Eleven of the thirteen original States, adopted constitutions by delegates to a convention, and their work was not submitted

to the people. The other two conducted their respective governments under the charters to them as colonies. One of them, Connecticut established her first constitution by a convention of delegates in 1818, without ratification by the people at the polls; the other, Rhode Island, made her first constitution in 1842, by a convention, which was ratified at the polls.

Vermont was admitted under a constitution in 1788, never submitted for popular ratification; she made a new constitution in 1793, by a convention, which was not submitted and yet conducts her government under that constitution.

Not a single State admitted since the creation of the government, and before the year 1846, submitted her first constitution for popular ratification.

If I am not mistaken, there was not a single new constitution framed by a convention of delegates before 1842, that was submitted to the people at the polls for adoption or rejection.

It is true that perhaps all of the new constitutions since that time have been submitted to the people for adoption or rejection, with the exception of certain parts which have been declared in force without.

Some have been required to be submitted by the act convening the delegates, and while the policy of asking the ratification of the voters has been pursued, I am not aware that it has been held to be a duty imposed on the convention that they could not avoid, still less, that the action of a convention is void unless it be ratified by the popular voice.

One of defendants' counsel takes the ground that the delegates are limited in all cases to making propositions to the people and that the people can only give their consent by the exercise of the elective franchise as to the adoption or rejection of the proposed instrument. Some abstractions of Robert J. Walker are quoted by Mr. Beckwith to sustain his position.

It is assumed that the delegates are not authorized to alter the constitution, because the authority under which they meet is silent, and some quotations are made from the *political* speeches of Senator Douglas, when hard pressed on the Toombs bill. Such an assnmption is against the history of American constitutions. It is also shown by the practice that the people have and do grant the power to make a fundamental law without any reservation as to approval. The custom and practice of the people shows they exercise their sovereignty through delegates as well as by their elective franchise at the polls.

I see no occasion to feel the alarm that some of the counsel for the defendants express, if it be held that a convention of delegates elected by the people for the express purpose of making a constitution can execute the power conferred on them without asking the subsequent endorsement of the people. This country has prospered and flourished for over sixty years under that rule, while the other practice was unknown twenty years ago. On the contrary if all provisions of the organic law are to be held void, because not submitted to a vote, all rights would be destroyed and universal anarchy reign.

I repeat, that the power to make and amend a constitution is vested in the people, who are not limited in its exercise by any written rule. The common practice of the country shows that the people have exercised this power for a longer period and in more instances through the final action of a delegated convention, than by ratifying the work of the delegates at the polls. Therefore I conclude that there is no limitation on the right or power of the people to make or alter their constitution without a ratification by a popular vote.

II. But it is said by the counsel for the defendants that the people of Illinois have provided for the amendment of their constitution adopted in 1848, and therefore limited their own power to alter the constitution; that the grant has been made and cannot be resumed; that the manner of amendment has been defined and cannot be departed from.

Even if the constitution itself required the amendment to be submitted to a vote, there would be grave doubts whether it would prevent the people from changing the constitution without such submission.

A distinguished jurist has said, "The people retains, the peo-"ple cannot divest themselves of the power to make alterations. "A moral power equal to and of the same nature with that "which made, alone can destroy. The laws of one legislature "may be repealed by another legislature, *and the power to re-"peal cannot be withheld by the power which enacted them.* So "the people may on the same principle, at any time alter or "abolish the constitution they have formed. This has frequent-"ly and peaceably been done by several of these States since "1776. If a particular mode of effecting such alterations has "been agreed upon, it is most convenient to adhere to it, *but "it is not exclusively binding.*"

Rawle on Const, 17.

Chief Justice Marshall speaking of the delegation of power by the people to their State governments says, "It has been "said, that the people had already surrendered all their powers "to the State sovereignties, and had nothing more to give. "But, surely, the question whether they may resume and modi-"fy the powers granted to government does not remain to be "settled in this country."

Mc Cullogh v. *State Maryland*, 4 Wheat, 404.

The first constitution of the State of Delaware provided for its own amendment as to parts and required the amendments to be approved of by five-sevenths of the assembly and seven-ninths of the council; as to the other parts it made them unalterable. Yet a convention was convened under an act of the legislature in 1792, and made a new constitution which continued to be the organic law until 1831.

The last constitution established in New York was made in violation of a prohibition in the previous constitution.

The last constitution adopted in Massachusetts was in disregard of the manner prescribed for amendments in the prior constitution.

Like instances are to be found in many of the State constitutions, where it has been provided that amendments were to be made through the submissions of specific propositions by the legislature, there being no provision for amending by a convention. Yet in all these cases conventions have assembled, and as the representatives of the people above the existing fundamental law and all its departments of government, have framed new constitutions.

The great principles of the declaration of independence lying at the foundation of American government declares the right of a people to alter their form of government, and that the right is *inalienable.*

There is, however, no requirement in the constitution of 1848 that the work of a convention called to revise, alter, or amend, should be submitted to the popular vote for ratification.

Such a provision is expressly inserted in that section providing for making specific amendments. Its omission in the first section *implies* that it was not required.

I therefore conclude that there is nothing in the law of making or altering constitutions that limits the action of the convention to the will of the voters to be expressed on the proposed constitution after it is framed, nor limits the voters themselves to the method of consenting to an alteration by a vote of ratification, but the delegates of a constitutional convention are the people in a representative form, superior to all the departments of the existing government and the fundamental law then in force.

The convention is to meet "for the purpose of revising, al-"tering or amending this constitution." What are they to do when convened and organized? The answer is revise, alter, or amend the constitution. There is no provision as to how it

shall be done, or how declared in force, because the convention was supposed to be an assemblage of the people themselves, the source of all power, who would have omnipotent power to proceed to revise, alter, or amend the constitution as they please. It was to be a convention of delegates to make a constitution, with like powers as other similar convention in the history of the country. The legislature assembles to make statute laws, and in the performance of that duty, subject to the limitations of the organic law imposed upon them by the people, the legislature are the people in a representative capacity. In like manner the convention convenes to make fundamental laws subject to no limitation whatever, and are the people in a representative capacity to alter their form of government. A just rule of policy requires that the delegates should go back to those who sent them with their work for approval, but it is not obligatory *as a binding rule, capable of being enforced by the judicial tribunals*, any more than upon the legislature to submit their work for approval. The legislature may do so; the convention may do so.

It will be conceded that the constitution can be so amended as to remove existing courts and judicial officers. Can these same judicial tribunals say to the delegates of the people, you shall not destroy and remove us from office until you submit the proposition to a vote? If such condition can be imposed, so can another. The courts may say certain persons must be allowed to vote before we will admit it to be the will of the people; the election must be conducted in a certain way before we will resign our offices. Such a doctrine would enable the mere creature of the governing power in our system to dictate to the people how and when they should alter their form of government.

The delegates of the people to amend the constitution is a re-assembling of the people themselves to re-arrange their fundamental law, when it is supposed that defects exist, that make it necessary to resort to the source of all government. That power assembles with all its original authority, to destroy that which it once created, to amend the legislative, executive and judicial power and to establish others. If a convention to

organize a government can perform its work without a ratification of the voters, then a convention to make a new constitution can do so: most certainly, if there is no provision on the subject in the existing constitution.

The doctrine that any one or all of the departments of a government under the constitution can maintain that instrument, or that it must be altered through or by their instrumentality, would in cases where the government became oppressive and its officers corrupt, prove a despotism, and leave no remedy for the people except a forcible revolution.

All the power exercised by the executive, legislative, or judicial authorities, is derived from the people through the written constitution; neither one becomes the people—all combined are not the people, except to represent them within prescribed limits. The stream cannot rise higher than its source. When constitutions are to be made the people have other organs, namely, delegates in a convention, and the very essence and object of such a body requires it be above the departments of government.

It is not now urged that the convention can exercise either legislative, judicial, or executive functions; I am simply discussing the nature of a convention and whether it is bound or can be compelled by any department of the existing government to submit its amendments to popular vote.

III. I proceed next to enquire whether there is any paramount authority in the act of the general assembly providing for the election of delegates, that requires the convention to submit all of the constitution to a vote of the whole people.

(*a*). The 5th section of the act, (Laws 1861, 86,) provides that the amendments shall be submitted by the convention to the people for their adoption or rejection, at an election to be called by said convention. It also provides who shall be entitled to vote, the place where voters may exercise their rights, and prescribes the manner of conducting the election and canvassing the result. The section then concludes with a proviso,

as follows: "*Provided*, That if the convention shall fix upon "any other manner of canvassing the votes for or against said "amended constitution, *and for its taking effect*, then such "manner as is pointed out by the convention shall be "adopted."

By this section the legislature first provided that the amendments shall take effect upon ratification by the people, and then say that if the convention shall fix upon any other manner for its taking effect, then such manner as is pointed out by the convention shall be adopted.

The convention disregarded the details of almost the whole of that section, either by virtue of the proviso, or because its directions were not considered binding. The whole of the constitution has been submitted to a vote of the people for ratification, as a condition for its taking effect, except certain parts required to be executed before the taking of the vote; but the 34th section has only been submitted to the people of Chicago. Such a submission is within the spirit, if not the letter.

The convention prescribed different qualifications for voters than those fixed by the act. The geographical limits in which the voter could exercise his privilege is different. The legislature required the voter to cast his *ballot* in the election precinct in which he should at the time reside and not elsewhere; the convention allows the vote to be cast in the county in which the voter resides, except as to volunteers; and as to volunteers, it provided that they could vote *viva voce* at any place, within or without the State where their regiment or company might be whenever visited by the commissioners. There are other material differences but these will present the question. There is an equal if not greater departure in these respects from the directions of the act, than in submitting the 34th section to the people of Chicago who alone are interested in it.

If the Convention had no power to disregard the act, as to the vote to be taken, and if the Convention has disregaaded

the act, then their work is a failure and this constitution can never take effect.

Before precipitating the State upon such a result, and, perhaps, a forcible revolution, it would be well to consider carefully, whether the Convention had not the power to order the vote as they have, either from the provisions of the act itself, or independently of it.

Are these deviations from the act another *manner for its taking effect?* If so, then the act itself, by the proviso, authorized the Convention to do what it did. If the provisions as to the qualification of voters, as to the place of voting, and as to taking the votes of the volunteers, are authorized by the proviso as another manner "for its taking effect," then the submission of the 34th section to the people of Chicago, is equally within the proviso, and is another manner for its taking effect.

(b.) Had the legislature the power to require the submission of the constitution to a popular vote, as a condition to its taking effect?

The learned counsel for the defendants, (Mr. Beckwith,) assumes that the constitution cannot be amended, except by the authority of an act of the General Assembly, and therefore considers that all the restrictions the legislature choose to make in the act, are binding on the convention.

The counsel, also, assumes that the legislature, like the parliament of England, is omnipotent except so far as restrained by the written constitution. He then construes the provision in the written constitution to be purely prohibitory, not granting, and therefore concludes, that the legislature in all other respects, could dictate to the convention and even the people themselves, how and what amendments can be made.

If the premises and construction are correct, the conclusions that he deduces are likewise correct.

While it is not necessary in this discussion to refer to the proposition, that the constitution can only be amended under the authority of a legislative act, yet, I cannot forbear questioning that proposition. Mr. Webster argued in favor of that doctrine with great force, in the case of Luther *vs.* Borden, 7 How. 1, in regard to the Rhode Island case, but the court decided that it was a political and not a judicial question, and the Dorr government having been repudiated by both the State and Federal governments, the Court would not enquire further.

It is very frequently said, that a State legislature has all the legislative power of the people, except so far as prohibited or directed by the written constitution; but it is not held that the making or altering such written fundamental law is legislative power in that sense.

In England parliament is the source of all power and acts without limitation. Blackstone says that it is "the place where "that absolute despotic power, which must in all governments "reside somewhere, is intrusted." He declares that it can regulate the sucession to the crown; it can alter the established religion; it can change and create afresh the constitution of the kingdom and of parliaments themselves; it can in short do anything that is not naturally impossible. 1 Blackstone, 160,

In this country the people are the source of all power, and they alone are without limitations. The legislature has no inherent authority, but its whole force is derived from the people by grant prescribed in the written organic law. It exercises a delegated power and cannot exceed its bounds. That delegated power is not irrevocable; the creature does not become superior to the creator; the power that made can destroy; the authority that granted can resume or modify that power.

McCulloch v. *Maryland*, 4 *Wheat*, 404.

These principles lie at the foundation of our republican form of government. Whenever they are destroyed, the liberty of the people is gone.

When, therefore, it is said that the legislature can exercise all power not prohibited, it is not because the legislature is the *source* of power, like Parliament, but it is because the entire legislative power has been granted to it by the people through the constitution, subject to the prohibitions, directions, and limitations therein.

Constitution of 1848. *Art.* 3, § 1.
Fireman's B. A. v. *Lounsbury* 21, *Ill.*, 213.

The legislature under this broad grant of power may pass any act of legislation, even if it be of the nature of an organic provision, unless restrained by the constitution making the grant. But it does not follow that it can make a constitution itself, because that is not included in the grant of the legislative power as construed and acted upon in this country. It is not true that the legislature can do everything not prohibited, it may be restrained by a direction or regulation.

The first section of article 12 of the constitution prescribes the duty of the general assembly when a convention is called to amend the organic law. Having undertaken to direct what shall be done to that end, such provisions are limitations on the general grant of legislative power in the 1st. s, art. 3.

The people having legislated in the fundamental law on the subject matter of calling the Convention to amend the constitution, that exhausts the subject, and is a limitation on the legislature to pass any law except to execute the directions of the constitution.

People ex rel, v. *Bangs*, 24 *Ill.*, 124.
Field v. *People*, 2 *Scam*, 83.
Sammis v. *Clark*, 13 *Ill.* 546.

Tested by these principles, the general assembly had no power to make any provision in the act providing for the election of delegates, except such as conformed to the directions of the first section of article 12.

The directions to the Convention as to what it should do after it met and organized were null and void, because in conflict with the constitution.

Therefore, there being no paramount authority to the convention of delegates found in the limitation of the people themselves, or in the constitution itself, or in the act of the general assembly, it follows that the Convention could give effect to the constitution, or any part thereof, as it thought proper.

III.

COULD THE CONVENTION LEGISLATE.

The most plausible argument presented in behalf of the defendants is that the Convention were called to revise, alter, and amend the constitution, that the provisions of the 34th section of the schedule are merely ordinary legislation, and, therefore, beyond the power of the Convention.

It is also insisted that the legislative judicial, and executive departments were in full force, and could not be interfered with by the convention, that no ordinary legislative act could be passed except in conformity to the existing constitution. This idea is enforced by the terror of the Convention exercising executive and judicial functions, as well as legislative.

No doubt is entertained of the power of the convention to so alter the constitution as to abolish the existing departments of government, to oust those holding office in them, and to remodel all the departments and assign duties to each.

It is not necessary to determine whether the convention could perform executive or judicial functions. No such power was exercised, nor is there any fear that it ever will be.

The only enquiry is, can the convention legislate? Who doubts or denies the power? It is a legislative body and performs all its functions in a legislative manner. But it is said

that it can only legislate on fundamental law—that it can only revise, alter, or amend the constitution. Where is the line dividing fundamental law from statute law? Who is to judge as to the limit of power? There can be but one answer. In the progress of this country, experience has suggested new provisions necessary to protect the people. The people themselves judge of the necessity and propriety of such amendments. All the later constitutions contain provisions that in the earlier history of the country were left to ordinary legislation. This is the first time that the doctrine has been maintained that the courts can say what is organic law and what is not, what are proper provisions in a constitution and what are not.

It is said that the section in question repeals in express terms certain acts of the legislature and therefore that it is beyond dispute not only ordinary but special legislation.

If a new constitution contains a provision that is inconsistent with previous statutes, that repeals them *ipso facto* without special mention. It not only repeals them but also arrests all acts *in fieri* under them.

Aspinwall v. Coms. 22 *How.* 364.

If the repeal can thus be made by *implication*, then it can be done *expressly*. If statutes can be annulled by wholesale, they can be destroyed by retail. The greater includes the less.

But this section is not ordinary legislation, but is a proper organic provision. It provides a general limitation on the Governor and General Assembly and that the officers of the people of Chicago shall be elected and appointed in a certain way. Having adopted this organic provision, it simply reduces the present officers to that rule. Its only effect is to terminate the term of office of the persons acting under these acts and provide for the election and appointment of others consistent with the general rule established.

This same power was exercised as to all the State officers, all the judges, and very many other officers. It has been as-

serted without question in every convention to amend the fundamental law and is necessarily involved in the right of the people to alter their own form of government.

All conventions legislate to preserve statutes, contracts, and rights under the former constitution, and thus re-enact statutes.

Wood v. Blanchard, 19 *Ill.* 68.

If they can enact, cannot they repeal?

IV.

THESE PRINCIPLES EXHIBITED IN THE STATE OF ILLINOIS.

I have purposely avoided reference to precedents as set by Illinois herself in order to present them perspicuously and together. All that the city of Chicago asks to-day is pronounced by the established law of this State.

Delegates were elected to a convention in 1818, under a law of Congress, to form a constitution and State government. *Scates Stat.* 41.

The convention when organized, passed an ordinance "on behalf of, and by the authority of the people of the State. *Scates Stat.* 44.

It then proceeded to adopt a preamble and constitution, in which it is declared that "The people of the Illinois Territory, "do by their representatives in convention, ordain and establish the following constitution and form of government." *Scates Stat.* 46.

The State was organized and governed under that constitution until 1848, and it was never submitted to the people for adoption or rejection.

Article VII of that constitution, provided for the calling of a convention precisely as the present constitution does, to amend it.

Under that provision, the General Assembly in 1847 passed an act, calling the convention. *Laws* 1847. 33.

This act, as to all the points in dispute now, is precisely the same as the law of 1861. Indeed the latter seems to be mainly a transcript of the law of 1847. It required the convention of 1847 to submit the proposed amendments to the people for adoption or rejection. The 6th section of that act is the same as the 5th section of the act of 1861, *with the same proviso*, as to its taking effect in a manner to be prescribed by the convention.

The convention assembled and framed a new constitution. In the schedule provision was made for a vote on "this constitution" and separate articles with the same language as now before the court. But there was no clause declaring that the parts to be executed prior to the vote, should take effect immediately. It seemed to be assumed that the convention could make provisions to be acted on without such express declaration.

Article XI, of that constitution is entitled "Commons," and the 4th section of the schedule says "That 'Article XI' entitled 'Commons' is hereby adopted as a part of the constitution of this State, without being submitted to be voted upon by the people."

The convention departed from the act of the legislature in giving effect to that constitution, as they have in regard to the proposed new constitution.

That constitution was adopted, and the government is now being conducted under it.

If the positions of the defendants are correct, then article eleven is *void*.

It can only be said that the article on commons was local in

its application; so is the 34th section of the schedule in the new constitution. The first was not even submitted to the people interested in it, while the section now under consideration has been.

Illinois has furnished all the precedents and established all the principles we need.

V.

CONCLUSION.

I do not desire that the parties should be placed in a false position. The plaintiffs are the people *ex rel.* the city of Chicago vs. the defendants, as individuals, in fact as well as in form.

The people of Chicago do not ask to establish the doctrine of Lecomptonism: they protest against it.

The legislature of 1861 without any demand from the people, and without any necessity therefor, passed the act under which the defendants have exercised their office, and the act creating the office of custodian, which has proved an oppression too grievous to be borne, and the act appointing the claims commissioners. There was no occasion to change the manner of regulating the police. Yet the present incumbents were appointed by the governor under that law. At the same session the legislature passed an act otherwise amending the city charter which they submitted to a popular vote, and it was rejected by a large majority. The act creating the office of police commissioners was not submitted; if it had been it would have perished with the other amendments.

The defendants were forced on the people against their will and have become odious beyond expression.

The convention have taken the sense of the people and the result shows "there are none so poor as to do them reverence."

Ninety-three votes only were cast for the defendants. An arithmetical calculation would demonstrate that these 93 votes just cover the police commissioners, their corps, and retainers. So that the voters may be said to be unanimous against the defendants.

In the face of all this they cling to these offices: they were forced on the people by a foreign appointing power and are now endeavoring to force themselves on the people by technical advantages.

The people of Chicago simply ask leave to elect their own officers.

W. C. GOUDY,
for Relator.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

ARGUMENT FOR THE RELATOR,

BY MELVILLE W. FULLER.

May it please your Honors:

Upon the 21st. day of March, A. D. 1862, the Constitutional Convention of the State of Illinois then in session at the capital, ordained and declared in the name of and as the people of the State of Illinois that if at the next municipal election to be held in the city of Chicago on the 3d Tuesday of April, 1862, a majority of the legal voters of the city of Chicago voting at that election should vote in favor of the people of said city electing their own officers that thereafterwards, neither the governor nor general assembly should appoint any person to any office for said city of Chicago, but all officers should be elected by the people of said city or appointed by the mayor and aldermen as provided by present laws or by such general laws as might be passed by the general assembly. And it was also provided that upon the vote aforesaid, certain specified laws inconsistent with the principle enunciated and the rule thereon established should be repealed.

This declaration of the convention was placed in the 34th section of the schedule of the constitution with the additional provision that the portions of the constitution required to be executed prior to the vote thereon, should take effect and be in force immediately.

The vote of the city of Chicago having been taken was nearly unanimous in favor of the fundamental right of the people to elect their own officers, and as a consequence that right became, by virtue of the previous action of the convention, embodied in and a part of the organic law, so far as the state and the particular locality mentioned are concerned, and the acts of the general assembly named as inconsistent with the principle in question became null and void. The respondents, holding office by appointment of the governor under one of the acts in question, resist this conclusion and insist that the action of the convention and the will of the people over whom they exercise their authority, as declared by a nearly unanimous vote, are of no force and effect.

I.

The principle which underlies and forms the basis upon which all republican forms of government rest is the right of the people to institute government and to reform, alter or totally change the same, when their protection, safety, prosperity and happiness, in their judgment, require it.

This is not a revolutionary but a constitutional right, and is embodied in the declaration of rights to be found in all our State constitutions as well as supported by the universal current of judicial and political exposition in this country.

"Of the right of a *majority* of the whole people to change their government *at will* there is no doubt." 1 Wilson, 418.

The people "*always retain* the right of abolishing, altering or amending their constitution, *at whatever time*, and *in whatever manner*, they shall deem expedient." Mr. Justice Wilson's Lectures on law, vol. 1, p. 10.

"At the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country; but they are sovereigns without subjects, (unless the African *slaves* among us may be so called) and have none to govern but themselves: *the citizens of America are equal as fellow citizens*, and as *joint tenants in the sovereignty*. JAY, C. J. 2 Dallas, 219.

"It has been said that the people had already surrendered "all their powers to the State sovereignties, and had nothing "more to give; but surely the question, whether they may *re-* "*sume* and modify the powers granted to government, does "not remain to be settled in this country." Marshall, C. J. 4 Wheaton, 405.

"The right and power of the people," says Washington, "is the basis of our system."

Madison speaks of it (Federalist, No. 40) as the "*transcend-* "*ent and precious right* of the people to abolish or alter their "government."

The general principle is conceded, for all must "admit what none deny" says Mr. Webster in his argument in the Dorr case, "that the only source of power in this country, is the people," but as to its application, or in other words, the mode and manner of the exercise of the right in question, some difference of opinion has existed.

1. Many eminent men have held that the people may, at any time, through the instrumentality of primary assemblies, choose and commission their delegates to and convene a convention and in the exercise of the ultimate authority and sovereignty which resides in them, change, through the convention, their form of government as they see fit. This, too, not only as regards the people of a State, the constitution of which contains no provision for its own amendment or supersedure, but also that no such provision can limit the right and power of the people acting in their primarily original capacity, to change their system of government when and as they please.

Thus it is said by Rawle in his commentaries on the constitution, p. 17, "If a particular mode of effecting such alterations "has been agreed upon, it is most convenient to adhere to it, "but it is not exclusively binding."

And this naturally enough follows from the views which have just been presented and which are still more felicitously expressed by an eminent writer on this subject as follows: "Per- "haps some politician who has not considered with sufficient ac- "curacy our political systems would answer that in our govern- "ment the supreme power was vested in the constitution. This "opinion approaches a step nearer to the truth (than the supposi- "tion that it resides in the legislature,) but does not reach it. "The truth is that our government, the supreme, absolute, and "uncontrollable power, *remains* in the people. As our constitu- "tions are superior to our legislatures, so the people are SUPE- "RIOR *to our constitutions.* Indeed, the superiority in this last "instance is much greater, for the people possess over our con- "stitutions control in *act* as well as right." Wilson's works, vol. 3, p. 292.

2. Another view has however been entertained, namely, that the people *may* limit themselves in their organic law as to the mode of its future alteration, and that such mode when so provided, and no other, must be pursued in order to effect desired changes.

It is unnecessary to determine which of these propositions is the more correct, since the convention by which the action in issue here was taken, was assembled in strict accordance with the provisions of the constitution of Illinois upon this subject. (Sec. 1, Art. 12, Const. Ill.)

3. But it has also been contended that in case no provision is made in a constitution for effecting a change therein, that the people cannot revise or amend such instrument, (established as it is by themselves,) except under and by virtue of a law of the legislature.

This position is examined here because the principal questions raised by the defendants, grow out of and are illustrated

by it, although, as is conceded, the Convention in question was assembled in strict accordance with the provisions of the constitution, and under a law valid so far as calling the Convention was concerned.

The proposition is hardly compatible with the views hitherto presented, and has been directly reviewed and pronounced untenable in the State of New York. In an opinion rendered to the General Assembly of that State, in April, 1846, in response to a resolution of inquiry from them, Judges Bronson, Beardsly and Jewett, say: "But no power has been delegated to the leg- "islature to call a convention to revise the constitution. That "is a measure which must come from and be the act of the "people themselves."

See also, opinion of McLean, J., in *Scott vs. Johnson*, 5 *Howard*, 380.

Still it might be conceded, so far as the argument here is concerned, that it would be consistent with the American system, for the legislature to provide the mode for authentically ascertaining the will of the people, as to holding a convention and also for the election of the delegates there to, but further than that they could not legally go.

A Convention so assembled would get no power from the legislature which called it together, on the contrary it would represent and be the people themselves, possessing all the power of the people in the premises, or if this were questionable, it could not at least be denied, that all the power it would have, would emanate *directly from* the people, and not from the people's servants acting in a subordinate and derivative capacity.

4. But in the case at bar, the position is assumed that as the act of the general assembly, under which the Convention assembled, prescribed that the new constitution when adopted by the Convention should be submitted to the vote of the people of the State, and as the action of the Convention under discussion here, was to take effect upon the vote of the people of

Chicago thereon, but not upon the vote upon the constitution; that this is a violation of the act in question, and that the action of the Convention in the premises is null and void. In other words, the broad proposition is laid down by one of the counsel that the general assembly can not only circumscribe the action of the people in amending or changing their organic law, where there is no provision in the constitution for its own amendment, but, that it can do this, even in cases where such provision is made, provided it be not in conflict with the express language thereof. The proposition is wholly inadmissible; and *firstly*, it is entirely unsustained, either upon sound reason or authority, even where the constitution contains no provision for its own amendment. It is equivalent to maintaining that sovereignty resides in the constituted authorities and not in the people at large, and making the legislature independent of the constituent body.

Because conventions are as a matter of convenience called in pursuance of laws of the legislature, it does not, therefore, follow that the law *confers* on such conventions their power. To hold this would be to determine that the legislature which derives its sole power from the people, as expressed in the organic law, could grant greater power than it possessed itself, and could control the exercise of that will through which alone it has and holds its existence. It is absurd to say that the people placed the power in the hands of any body of their agents to intervene between the people themselves and *their own acts.*

Indeed it would seem to follow inevitably from the establishment of such a proposition, that the legislature could themselves, amend or abolish the constitution contrary to the acknowledged "truth, that (Rawle on the constitution, p. 17,) "a moral power, "equal to, and of the same nature with that which made, alone "can destroy."

So Lockwood, justice, in *Phoebe* v. *Jay*, Breese 268, on p. "271, "the constitution can establish no tribunal with power "to abolish that which gave and continues such tribunal in ex-"istence."

It might be conceded that the people can limit themselves in their fundamental law, as to the mode of proceeding to make alterations or amendments thereof; and further, that in the absence of any provision in the constitution, for that purpose, the legislature might initiate proceedings to that end, but it is wholly inconsistent with the theory of our government to claim such omnipotence in the legislature, that after the people have indicated their will in favor of holding a Constitutional Convention, have selected their delegates, and such Convention has got together, the legislature can then, by its acts, control and direct the deliberations or conclusions of a body so assembled.

Under our political economy and written constitutions, Blackstone's omnipotence of parliament is comparatively an empty figure of speech.

Marbury v. Madison, 1 Cranch 137, 1 *Kent Comm.* 426.

"The legislature is not supreme. It is only one of the instruments of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government it acts under a delegation of powers, and cannot rightfully go beyond the limits which have been assigned to it. This delegation of powers has been made by a fundamental law which no one department of the government nor all the departments united have authority to change. That can only be done by the people themselves."

Opinion of the New York Judges to be found 1 *Debates in Mass. Conven.* 1853, *page* 138 *on page* 139.

"Under our form of government, the legislature is not su-
"preme; it is only one of the organs of that *absolute sovereign-*
"*ty which resides in the whole body of the people.*"

BRONSON, J. *Taylor v. Porter*, 4 *Hill* 140.
JEWETT, J. *Powers v. Bergen*, 2 *Seld*, 358.
STRONG, J. *People v. Edmonds*, 15 Barb. 529.
HOSMER, J. 4 Conn., 209.

"I cannot subscribe to the omnipotence of a State legisla-
"ture," says Chase, J. in *Calder v. Bull*, 3 Dall. 386, "or that
"it is absolute and without control, although its authority should
"not be expressly restrained by the constitution or fundamental
"law of the States."

"The General Assembly is a mere agent of the people en-
"trusted with certain delegated powers. The constitution is the
"letter of agency."

Maize v. State, 4 *Ind.* (Porter) 345.

"The constitution is their (the legislature's) commission and
"they must act within the pale of their authority."

LOCKWOOD, J. *in re Phoebe, Breese* 268.

And there are many decisions to the same effect, differing sometimes in the language used, but all pointing to the same result.

Thus in *Firemen's Benevolent Association v. Lounsbury*, 21 Ill. p. 511 on p. 513, CATON, C. J. says:

"The general *grant* of legislative power, found in the con-
"stitution confers upon the General Assembly all legislative
"power, and authorizes the law-makers to pass any laws and
"do any acts which are embraced in the broad and general
"word *legislation*, as known and defined in the English
"language. It authorizes the passage of any law which could
"be enacted in the most despotic government. It even author-
"izes everything which the people could enact *in their primary*
"*capacity*—anything which *they would have a right to embody*
"*in the constitution itself*. After this broad grant of legisla-
"tive power, the constitution in various provisions proceeds to
"limit and restrain its exercise."

The learned Judge is here speaking of legislative power in its ordinary acceptation, and he clearly indicates the existence of the distinction between the acts of a legislature and of the people *in their primary capacity*.

The legislative power of the State of Illinois is vested in the general assembly by section 1 of article III of the present constitution but what is that legislative power and how far does it extend? Does it reach the life, liberty or property of the citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? The people never intended to delegate to their agents the power of defeating those great ends of government, the protection of life, liberty and property. And how can it with reason be contended that the general assembly has been vested by the people with the power of *defeating* their "precious and trancendent right" as Madison called it, of altering and amending their government as they may deem best?

The bill of rights declares (section 2 article 13 Const. Ill.) "that all power is inherent in the people, and all free governments are founded on their authority and instituted for their "peace, safety and happiness." Has this authority departed from them? Have the people yielded the unalienable right of changing their form of government by virtue of the very instrument which in effect reiterates it?

The distinction between acts of the legislature and acts by the people in their primary capacity through the medium of a convention has always been recognized and acknowledged and the absurdity of the will of the legislature over-riding or controlling that of the people when about to change their form of government, clearly pointed out and insisted upon. "What is a constitution? It is the form of government *delineated* by the mighty hand of the people, in which certain fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people and is the supreme law of the land; it is paramount to the power of the legislature and can be revoked or altered only by the authority that made it. The life giving principle and the death doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they derive their powers from the constitution; it is their commsssion and therefore all their acts must be conformable with it, or else they will be void. The constitution

is the work or will of the people themselves, in their original *sovereign* and *unlimited* capacity. Law is the work or will of the legislature in their *derivative and subordinate* capacity. The one is the work of the creator and the other of the creature. The constitution fixes limits to the exercise of legislative authority within which it must move. In short the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve."

PATTERSON J. *Van Horn's Lessees* v. *Dorrance*, 2 Dallas (Circuit) p. 308.

And this admirable exposition is made the basis for the language of the court in *Phoebe's case*, Breese, 268, which decides that "a constitution can do what a legislative act cannot, "as it is the supreme, fixed and permanent will of the people "in their original, sovereign and unlimited capacity, and in it "are determined the conditions, rights and duties of every in- "dividual of the community. From its *decrees* there can be "no appeal, for it emanates from the highest source, the sover- "eign people."

How idle then to assert a proposition, which results in the position that the exercise of the right to change their power of government, is permitted to the people *ex gratia* by the legislature, rather than belongs to them *ex debito* under the constitution, which contains the declaration of the right as inherent in the people or even in the absence of that declaration, upon the fundamental doctrines of the social compact in the American Republic.

In the celebrated Rhode Island case, the argument of Mr. Webster, freely as it has been drawn upon to justify the positions of the defence, nowhere asserts the power in the legislature to control the action of the people when assembled in constitutional convention. "What do I contend for?" he says: "I say that the will of the people must prevail, when it is as- "certained, but there must be some legal and authentic mode of "ascertaining that will. and *then* the people *may* make what "government they please. * * * * All that is necessary

"here, is that the will of the people should be ascertained by "some regular rule of proceeding prescribed by previous law. "But when ascertained, that will is as sovereign as the will of "a despotic prince."

Mr. Webster was contending that the people could not assemble, and through primary meetings, call a convention, but that they ought to do so in accordance with a previous law of the legislature, by which it could be ascertained that a majority desired to change the organic law and under which the people could enjoy all the safeguards thrown, around the exercise of the right of suffrage, but he never contended that after they had so proceeded, that a convention so assembled could be limited by the act under which it met; but on the contrary says that "*then* the people may make what government they please."

It will be remembered too, that that argument was made under peculiar circumstances, and in a case arising in a State which had no written constitution, but was governed under the original charter. Nor did the decision of the court go to the length of sustaining the views presented by Mr. Webster, on this topic. The case turned simply on the ground that the question was a political one, and had been determined by the proper authorities of the State, and recognized as so settled by the General Government. *Luther* v. *Borden*, 7 Howard 1.

And the name of Daniel Webster can scarcely, with fairness, be invoked in aid of the assumption on the part of the respondents, of legislative over popular sovereignty when his language in his celebrated speech upon the Foote resolutions is remembered: "Gentlemen do not seem, (he said,) to recollect "that the people have any power to do anything for themselves—they imagine that there is no safety for them only un- "der the *close guardianship* of the State legislature."

Secondly. If in case of the absence in a State Convention of any provision for its own amendment, the legislature could initiate but not control the action of the people, in effecting such alterations therein as they might desire, it follows *a fortiori*, that where a mode is pointed out for proceedings

to that end, the legislature would have no power to limit the exercise of the peoples's right to change their organic law, in accordance with the mode provided.

Provisions of this character are restrictions imposed upon the people by themselves, (and are of doubtful validity even then,) and being such, they are predicated upon, and acknowledge to its fullest extent, the fundamental right of the people to change their form of government as they may think best, except as they have otherwise therein declared. Hence, also, the legislature in whatever it is called upon to do by and under such provisions, is confined within the boundaries prescribed, for the argument is entirely unsound, that the agent of the people could impose conditions upon them, which they themselves had declined to do.

In framing a constitution, the effort is always made to define as far as possible with accuracy, the powers delegated to government. This may be done by enumeration, by prohibition, or by both combined. All powers might be specifically granted, and of course all others would be prohibited, but this is generally considered too difficult a method to pursue. The course usually followed, is to prohibit the powers which are not to be exercised. This is effected either by *direct* prohibition or by *indirect* prohibition, as by a declaration of certain fundamental rights of the people which should never be infracted. "But after "all, absolute certainty could scarcely be attained in either way. "And even when both should be combined, much probably, would "still remain to be deduced from the fundamental doctrines of "the social compact." (Walker's American Law, p. 26.)

Upon the principles and authority already alluded to, we believe it necessarily followed that the legislature are prohibited by the declaration of rights, and by the "fundamental doctrines of the social compact," from in any manner intermeddling with the action of the people in the alteration of the government. We have seen, also, that such an act on their part would not be an exercise of the legislative power granted to them. They exercise that power under the constitution as it is, and to permit

them to set bounds to the action of the people, in the amendment thereof, would be to allow them the power themselves to make a new organic law, and thereby to destroy the charter under which alone they exist, or in other words to commit a *felo de se.*

"If the people desire to resume *directly* the law making power "which they have delegated to the General Assembly, they "have only to change the constitution accordingly," (STUART J. in Maize v. State 4 Ind. (Porter) 342 on p. 350.) but can the General Assembly in the exercise of the "legislative power" granted it, either turn that power over to any other department or compel a convention to do so? Or remit it to the people in their primary capacity?

But we have now advanced a step farther, and find that the constitution itself points out a mode to be pursued in this regard and it was this mode which was followed in this instance, and as we have already indicated, it seems difficult to perceive how the Legislature could impose conditions where the people had declined so to do.

We have hitherto adverted to the position that the legislature have no power in and of themselves even to initiate proceedings towards the amendment of a constitution which does not so provide; and we quote upon this point again from the opinion of the Judges in the New York case, which, after stating the manner in which a legislature acts, goes on:

"This delegation of powers has been made by fundamental "law which no one department of the government nor all the "departments united have authority to change. That can only "be done by the people themselves. A power has been given to "the legislature to *propose* amendments to the constitution which "when approved and ratified by the people, become a part of the "fundamental law. But no power has been delegated to the "legislature to call a convention to revise the constitution. That "is a measure which must come from and be the act of the peo-"ple themselves. Neither the calling of a convention nor the "convention itself is a proceeding under the constitution. It is "above and beyond the constitution. Instead of acting under

"the forms and within the limits prescribed by that instrument, "the very business of a convention is to change those forms "and boundaries as the public interests may seem to require. "A convention is not a government measure, but a movement "of the people, having for its object a change either in whole "or in part of the existing form of government. As the people "have not only omitted to confer any power on the legislature "to call a convention, but have also prescribed another mode of "amending the organic law, we are unable to see that the act "of 1848 had any obligatory force at the time of its enact- "ment. It could only operate by way of advice or recom- "mendation, and not as a law. It amounted to nothing more "than a proposition or suggestion to the people to decide "whether they would or would not have a convention. "That question the people have settled in the affirmative, "and the law derives its obligation from that act, and not from "the power of the legislature to pass it."

And in the supplement to 6th *Cushing's Reports* will be found an opinion emanating fron Judges Shaw, Putnam, Wilde, and Morton, in which they say "the constitution has vested no auhority in the legislature to provide by law for submitting to the people the expediency of calling a convention for revising or altering the constitution." These eminent judges did not believe the legislature got this authority under the grant of legislative power. And they further decided that a convention if called would derive its whole power from the *vote of the people.*

The constitution of Illinois does, however, provide for the calling of a convention by the legislature and how it shall be done. This provision is a grant of power to the legislature and not a restriction upon a power possessed before.

Wherever a power may be exercised exactly as it is given, no other or different power can be implied to carry out the power granted either on account of convenience or of being more effectual.

Field v. *People*, 2 Scam., 79.

The power granted in this case is distinctly defined and its exercise exceedingly simple. It is the power to ascertain the will of the people in the first instance as to whether they will have a convention or not and then to call such convention. Here the legislature must stop, as all their power in the premises is exhausted.

We therefore arrive at the conclusion that the general assembly has no power in any aspect to limit or control the people or their delegates in convention assembled as to what shall or shall not be done in the reformation of the organic law.

II.

Had the convention, if uncontrolled by the law of the general assembly, the power to put the constitution in force without submission to the people?

Without discussing the policy or expediency of such a course or its bearings as a political question in other points of view, it would seem that so far as the bare right to establish a constitution is concerned the convention had plenary power.

"The right of electing delegates to a convention," it has been said, "places the powers of the government as fully in the "mass of the community, as they would be had they assem- "bled, made, and executed the laws themselves without the in- "tervention of agents or representatives."

Conventions assembled as this one was, are meetings of the people, the delegates being for all practical purposes identical with the people, "in the majesty of their power, in that which "they may rightfully make or abolish constitutions and put up "and down government at their pleasure."

And it has been held by the most distinguished men in this country, that a convention for the purpose of framing an organic law, is an assemblage with no declared limitation upon their powers, save the constitution of the United States,

and that when their trust is executed, the constitution by their adoption becomes the supreme law of the land, changeable only by the power that ordained it. And upon careful consideration, the authorities already cited will be found to sustain this position. See also *Mc Culloch vs Maryland*, 4 *Wheat.* 404.

Even upon a different view of the powers of a convention it may be said that the acts of the authorised agent are not to be considered invalid, because not submitted to the ratification of the principal.

These conventions assemble to make or amend the organic law, and strictly speaking the submission of every enactment of the general assembly would seem as essential to their validity as the same requisition in respect to a new constitution.

At all events, there ought to be some binding and fundamental requirement to that effect, some "higher law" than the mandate of a legislature, emanating from authority superior to the convention before submission can be insisted on as essential or judicially decided to be so.

Precedents establish the fact that the path of custom for many years led to the adoption of constitutions by conventions merely. Thus Vermont, July 4, 1773; Connecticut in 1818; Delaware in 1831; Pennsylvania in 1838; North Carolina in 1776; South Carolina in 1790; Georgia in 1798 and others since these years, adopted their constitutions without submission to the people.

Illinois in 1818 did the same thing, and Article xi. of the present constitution was made to take effect and be in force immediately. And this article, it may be here remarked, was framed (it is said) for the benefit of a particular locality, and in that closely resembles the action in issue here. So far, then, as our own State is concerned, precedent as lately as 1847 establishes that submission was not considered essential.

At the same time, lest the people should be disappointed in their delegates and dissatisfied with their action, and that in a

matter so grave as the adoption of the fundamental law, the voice of the people should have full scope at each and every stage of the progress in the alteration of their form of government, it is not only desirable and expedient, but the correct principle, particularly in this day of high and unusually excited state of public feeling, that in all cases the proposed instrument should be submitted to the people for ratification.

This was the lofty position assumed by Senator DOUGLAS in the Lecompton struggle, though he and all the mighty host which stood at his back, would have probably been willing to waive it, had there not been indubitable evidence that the Kansas Constitution was not the act, and did not embody the will of the people of that distracted State.

The question is presented here, however, in a different form than it ordinarily assumes. The present constitution after providing for taking the vote of the people as to whether a convention should be called or not, then goes on to provide, in case of an affirmative declaration by the people, for the calling of the convention and the election of delegates; and the section concludes as follows: "and which Convention shall meet "within three months after the said election, for the purpose of "revising, altering, or amending this constitution."

The Convention were to revise, to alter, to amend. They were not to get up a lot of revisions, alterations and amendments, and submit them as separate propositions to the people for their action, (in which case the Convention would sit only as a kind of committee for the purpose,) but they were to perform the act of revision, alteration or amendment, *themselves.* This consideration when taken in connection with the views presented on the topics hereinbefore discussed, would seem to settle the power of the convention, in this regard, beyond further controversy.

But it is said that the delegates were elected under the act of 1861, to alter, revise, and amend the constitution, and to submit the alterations, etc., to the people; that they were not elected to put the new instrument in force, or any part thereof,

but to prepare it simply, and the decision of the Massachusetts judges, (cited *ante*,) 6 Cushing 575, is quoted from to show that the delegates, therefore, could not, in any manner, act in contradiction to the law of 1861. The force of this brilliant *Coup de grace* is not apprehended.

The case in Cushing did decide that if "the people should "*by the terms of their vote*, decide to call a convention of dele- "gates to consider the expediency of altering the constitution in "some particular part thereof, we are of opinion that such dele- "gates would derive their whole authority and commission from "such vote; and upon the general principles governing the de- "legation of power and authority, they would have no right, "under such vote, to act upon and propose amendments in other "parts of the constitution not so specified."

This has relation to the vote of the people as to calling a convention. The question there was what would be the effect of a vote of the people in favor of calling a convention to amend the constitution in a particular specified part thereof. In the case at bar the people in 1859 voted in favor of holding a convention to revise, alter and amend the constitution, *not* in a particular part thereof, but generally. In 1861 the legislature passed the act for the election of delegates. The people, as such, did not pass the latter act or vote thereon. The people never provided that the revision, alterations or amendments should be submitted to them for their adoption or rejection. The counsel for respondents has confounded what the people actually did vote for, to wit., a convention to amend the constitution, with the subsequent act of the legislature, which sought to impose conditions upon the action of the convention, which the people had never demanded or authorized.

The delegates were elected to revise and amend the constitution. Is it possible that the vote of the majority for A. or for B. as a delegate was influenced by the provision in the act of 1861, that the constitution as amended should be submitted to the people for ratification? Or, the provision that the Secretary of State should cause the printing of the convention to be done?

Did the electors instruct A. to amend the constitution but not to put it in force without submission, because they voted for him under an act which so provided? If the act were valid in that particular, the amendments would have to be submitted not by virtue of the vote of the people for A or B or C, but of the act itself. If the act were invalid as the people jealous of their rights well knew, since it sought in principle to circumscribe their power, though under the mask of protecting it, then it was of no force one way or the other; and in either event the vote of the electors for delegates bore no relation to it.

III.

But the convention did submit their action in the premises to the vote of the people within the spirit of all that has been insisted upon that subject.

The reason urged for such submission (waiving the question whether it is not in fact the people's own act) is that the people may be afforded the opportunity to examine the work as completed, and reject it if their views are not therein reflected. This reason in its spirit merely applies to the submission of the fundamental law to the people *to be affected by it*, and this was fully and fairly done in this instance. If our view of the powers of the constitution be correct, they could provide that their amendments should take effect without submission, but they could submit such amendments as they deemed best. And if some of the amendments affected a particular locality, they could submit them to the people of such locality. The General Assembly is held to have such power as to statute law (*People v. Reynolds* 5 *Gil.* 1) and in 1861 exercised it by the submission of certain amendments to the city charter of Chicago to a vote of its people. And had the law, the repeal of which is under discussion here, been likewise submitted, it would have probably been consigned to the tomb of the Capulets with the amendments which were voted on. And there is no difference in principle between organic and statute law so far as this particular question is concerned.

It is objected that the submission was not made squarely upon the repeal of the laws in question, but it should be remembered that it was the *principle* which the convention sought to establish, and which the citizens of Chicago were desirous of having established, and the repeal of the obnoxious laws was merely the incident to the action taken.

The vote in the premises was unmistakably significant, and it is suggested with entire courtesy, as a subject well worthy of the reflection of the respondents, that since the enforcement of a law upon an unwilling people is of the essence of Lecomptonism, (to which their counsel have incidentally referred), does it not also partake of a similar character, to proceed under a law which the people have overwhelmingly condemned?

IV.

This argument has thus far proceeded upon the basis that the opinion of the convention, as to their powers coincided with the views expressed, and that their intention in the premises was too plain to be misapprehended.

At an early day in the session, upon the question as to the election of a printer to the convention, a select committee was appointed composed of some of the ablest lawyers in that body "to examine into and report as to the obligatory force "of the law calling this convention, and as to its power to ap- "point a printer," which reported (a hesitating dissent being given by one member thereof,) as follows:

"Section one of article twelve of the constitution provides "that the general assembly shall recommend to the electors to "vote for or against a convention, and that if a majority of the "electors shall vote for the same, then the general assembly "shall call said convention. This is the extent of the power "granted to the legislature in the constitution. Thus the en- "tire power consists in the recommendation to the electors and "the calling of the convention. The number of delegates, the

"place at, and manner, and districts in which they shall be "chosen, the time of meeting and the qualifications of the elec- "tors are fixed in the constitution. * * * * All power "incident to the great object of the convention belongs to it. "It is a *virtual assemblage of the people* of a State, sovereign "within its boundaries as to all matters connected with the "happiness, prosperity and freedom of the citizens, and su- "preme in the exercise of all power necessary to the establish- "ment of free constitutional government except as restrained "by the constitution of the United States. Can the legisla- "ture trammel the action of a body selected for the purpose of "revising the very constitution which gives being to the legis- "lature? If so, then the legislature can make and unmake "constitutions; can set up and overturn governments. In the "discussion of this question in the constitutional convention of "1847, Judge LOGAN, one of the ablest jurists of this or any "other State, used the following language: 'An oath to sup- "'port the constitution of the United States had been propos- "'ed and taken because we can do nothing in contravention to "'that instrument, and because there was no other power to "'limit us. Where is the limitation of the power of this con- "'vention over the treasury? We have the power to prescribe "'the powers and duties and salaries of all officers.' * * * "* * * Your committee, therefore, have come to the con- "clusion that after due organization of the convention, the law "calling it is no longer binding, and that the convention then "has supreme power in regard to all matters necessary and in- "cident to the alteration and amendment of the constitution."

And this report was concurred in by a very large majority of the Convention.

The Convention also provided in the article on "banks," that sections one and five should take effect and be in force immediately as a part of the constitution of the State, and there is no doubt that they are now part of our fundamental law, though it is also provided that those sections may be voted on with the balance of the article, and if that be rejected they will cease to be binding.

Not only in these but in many other instances, the Convention asserted their possession of supreme power in regard to all matters necessary and incident to the alteration and amendment of the constitution, and of the power consequent thereon, of putting the constitution or any part or portion thereof into instantaneous operation.

The intention of the Convention as to the subject-matter here is equally unmistakable.

It was ordained that if the people of the city of Chicago should vote in favor of the principle of electing their own officers, that principle should at once become embodied in the organic law. The action of the Convention was complete, and went into operation upon the happening of a contingency which has already occurred.

And that the new constitution might contain every act of the Convention intended to pass into the fundamental covenant of the people, the action of the Convention, in this regard, was placed in the schedule, and to prevent the slightest misapprehension as to when it was to go into effect, the declaration at the end of the section was made, that it should take effect immediately.

It is true that a vote is to be taken on the constitution, and if it results in favor thereof, it will become the supreme law of the land from and after a given date; but this has no relation, one way or the other, to those parts of the constitution which are not submitted to a vote of the people of the whole State, and are not dependent thereon for their validity. As to these, the schedule declares that they shall take effect immediately. As to the sections intended to take effect at once, but to be subject to rejection, it is declared in the sections themselves that their force and effect is to cease if the article, of which they form a part, is rejected. Nothing could be clearer so far as the question of intention is concerned.

V.

But it is objected that in the action in question, the Convention exceeded their legitimate functions; that this ordinance was a piece of ordinary and even special legislation; that the repeal of the specified laws was not within the province of the Convention, even though it possessed supreme power as to the amending, etc.

The Convention assembled to make organic laws. It is difficult to see what tribunal has a right to say that any ordinance adopted by them, does not thereby become, *ipso facto*, the supreme law.

So far as their power is concerned they could adopt a code and make that the organic law. Where is the limitation? They met to frame a constitution, who shall say what shall or shall not be put into it?

Is the provision in regard to the Mechanics' lien unauthorizedly inserted because subjects of that kind have in times past, been left entirely with the General Assembly?

There is hardly a constitution of recent date, that does not contain more or less provisions which would formerly have been styled "special legislation." Who shall say, who can say, that they are not binding?

And it makes no difference whether the subject matter ordained and established, is divided into articles and sections or merely declared in express terms, and fairly adopted by a vote of the Convention. Still the entire action of the Convention should be presented in some authentic form to the people, and this was therefore wisely inserted in the schedule.

Nor is this action singular, for the schedule of many of our constitutions contain provisions of a similar character, creating new counties upon contingency, (see Ind. Const,) continuing courts, (see Ill. Const.) &c.

But there was no ordinary or special legislation about this

action of the convention. It was in the strictest sense, the establishment of organic law, within the meaning attempted to be assigned to the term "organic." The ordinance asserted a principle dear to the American mind, the right of the people to elect those who shall exercise authority over them. The *object* was to lay down as a fundamental rule this principle, in terms which would admit of no two constructions, and which could never be violated. It was confined in its operation to a locality, where alone it has been attempted to override the people in any considerable degree, but its influence will be felt everywhere throughout the State, and it will set an impressive example, which some communities in our sister States would, we doubt not, gladly embrace the opportunity to imitate.

It is equally well settled that the convention had power to repeal laws.

The adoption of a new constitution does in and of itself repeal all previous organic and statute laws. The American theory is that the government re-commences.

Hence it was necessary to provide in the schedule "that all "laws in force at the adoption of this constitution, *not inconsis-* "*tant therewith*, * * shall continue to be as valid as if this "constitution had not been adopted."

Were it not for this provision (to be found in the schedules of all constitutions, as far as we have examined), all laws in force at the time a new constitution is adopted, would be *ipso facto* repealed.

CATON, C. J. in *Wood vs Blanchard* 19 Ill. 38, in commenting on this section says: "all laws thus continued in force are, strictly speaking, *reenactments* by the convention, and we therefore look to that for their validity."

Laws inconsistent with the constitution were of course and in terms not continued and became repealed upon its adoption. Upon similar reasonning laws inconistent with any fundamental rule adopted by the convention as supreme organic

law, became repealed upon the taking effect of such action by the convention. The specified acts of the general assembly of which that in issue here was one were inconsistent with the right of the people to elect their own officers and became null and void when the ordinance establishing that right went into effect.

But assuredly if laws would be repealed by the adoption of the constitution unless "reenacted" by the convention, the convention had the right to specify certain laws as excepted from such reenactment and they would thereby become repealed.

In this case, however, the convention not only excepted the law in question from the operation of the first section of the schedule, or any implication arising therefrom, but declared that upon the vote of the electors of Chicago, this law should be and was thereby repealed. And the convention doubtless designed by this action to have it expressly understood that in their judgment, and according to their intention, they had established a fundamental law for the city of Chicago, all laws inconsistent with which should be repealed, and upon which the first section of the schedule as to the effect of the adoption of the constitution as such, was considered to have no sufficiently specific bearing since it might be said that that only related to the constitution as an entire and complete instrument and laws even designed to be, could not be, repealed until its adoption.

VI.

Certain arguments *ab inconvenienti* have been urged on behalf of the respondents.

With consequences the court has nothing to do, where the law is manifest, but even if this were not true, the language of the ordinance itself, the fact that it is only the repeal of a repealing act by the *General Assembly*, that does not revive the

original act and the reflection that the municipal government of Chicago has quite power enough vested in it to preserve the peace and order of the city even if deprived of the valuable services of the board of police, are considerations which will tend to quiet all apprehension upon this subject and render it unnecessary to pursue this branch of the case further.

VII.

The relator having presented itself before the Court in the name of that people, whose rights, so far as the citizens of Chicago are immediately concerned, (though the people of the whole State have an interest in the result,) are directly in issue, and having placed before this tribunal the action of the Constitutional Convention as embodied in the ordinance and repeated in the schedule, and the consequent unanimous vote of the electors of Chicago thereon, would seem upon the bare statement, without argument, to be entitled to the writ applied for. I have endeavored, however, to briefly review the grounds on which the defence, in this case, is supposed to rest, and to show the extraordinary misconceptions, as it appears to me, on which that defence is predicated. The arguments of my more experienced and learned associates, who have preceded me, with an inspection of which I am favored, as this is passing through the press, have left nothing to be added, yet I have not thought it best to withdraw this presentation of my own views, since, having been a participant in the action which is sought to be overthrown, I am quite willing that my reasons for the belief in its propriety and constitutionality should be placed upon the record.

MELVILLE W. FULLER,
of Counsel for Relator.

SUPREME COURT

OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
EX REL.
THE CITY OF CHICAGO,

VS.

ALEXANDER C. COVENTRY,
FREDERICK TUTTLE AND WILLIAM WAYMAN.

Filed May 22. 1862
E. Lelaud
Clk

ARGUMENTS FOR THE RELATOR.

CHICAGO:
CHICAGO TIMES BOOK AND JOB PRINTING ESTABLISHMENT,
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ARGUMENT FOR THE RELATOR,

BY B. F. AYER.

May it please your Honors:

The case presents the general question, whether the act of the General Assembly of this State, approved February 21, A. D. 1861, entitled, "An Act to establish a Board of Police "in and for the City of Chicago, and to prescribe their powers "and duties," has been annulled by the enactments of the Constitutional Convention recently assembled at Springfield, and the action of the legal voters of Chicago thereon.

On the 21st of March, 1862, the Convention adopted the following ordinance:

"*An ordinance, to secure to the citizens of Chicago and the corporate authorities thereof, the right to elect and appoint their own officers.*

Be it ordained, That, at the next municipal election, to be held in the City of Chicago on the third Tuesday of April, 1862, the legal voters of said city shall cause to be printed or written upon all their ballots the following words: '*For the City of Chicago electing its own officers;*' or the words:

'*Against the City of Chicago electing its own officers;*' which shall be canvassed and returned with the election returns of the ballots, as is now provided by law. And in case there shall be a majority of the legal voters, voting at said election, in favor of the people of said city electing their own officers, as indicated by said above mentioned words, then it shall not be lawful for any officers of that city to be chosen in any other manner than by a vote of the people of said city, or appointed in any other manner than by the Mayor and Alderman, as provided by present laws; and the act approved February 22, A. D. 1861, entitled 'An act regulating the custody and sale of 'personal property, under legal process, in the city of Chicago, 'and the towns of South Chicago, West Chicago and North 'Chicago, in Cook county;' also, 'An act to establish a board 'of police in and for the City of Chicago, and to prescribe 'their powers and duties,' approved, February 21, A. D. 1861; and, also, so much of an act approved February 18, A. D. 1861, as is embraced in section sixty-six and one-half, (66½) of an act to amend the city charter of Chicago, and creating three commissioners to examine into the finances of said city, be and the same are each and all of them hereby repealed; and the powers and duties of all officers appointed under and by virtue of said acts shall immediately cease; and, hereafter, neither the Governor nor General Assembly shall appoint any person to any office for said city of Chicago, but all officers shall be elected by the people of said city, or appointed by the Mayor and Aldermen, as provided by present laws, or by such general laws as may hereafter be passed by the General Assembly, under this constitution."

This ordinance was never repealed or re-considered by the Convention, but subsequent to its passage a provision, the same in terms, was inserted in the schedule attached to the new constitution, with this additional clause appended thereto, viz: "The provisions of this Constitution required to be executed prior to the adoption or rejection thereof, shall take effect and be in force immediately." The whole is embraced in section 34 of the schedule.

There can be no doubt, that the Convention intended this provision should take effect, immediately upon its ratification by

a majority of the legal voters voting at the municipal election held in Chicago on the third Tuesday of April last. Its force and validity were not to depend upon the result of the popular vote of the State to be taken upon the new constitution on the 17th of June, for another and different contingency is expressly mentioned. The general provisions for the submission of the constitution to the people of the State at large, for their adoption or rejection, are to be found in sections 4 to 10 of the schedule; and the journal of the Convention, of which the court will take judicial notice,* establishes the fact, that these sections were adopted and inserted in the schedule, prior to the insertion of the 34th section. The latter is the last section of the schedule, and was appended thereto at the heel of the session. The Convention omitted, in the haste and confusion of the moment, to note this exception specially in either of the seven sections above referred to, but, in order to remove all doubt as to their intention, they added to the 34th section the closing paragraph I have above quoted.

Independently of these considerations, it is manifest from the language employed, that the Convention did not design to subject this section to a double popular sanction. They submitted it to those who alone were specially interested, and in case of their approval it was to take immediate effect.

I do not suppose, however, that this view of the matter will be seriously, if at all, controverted. It is the view which has been taken not only by the public, but, so far as I know, by the members of the legal profession who have expressed an opinion in regard to it. Elaborate opinions in writing have been obtained by the Police Commissioners from several counsellors of distinction and acknowledged ability, touching the validity of this ordinance, with which the public have been generously favored. Those "opinions" will doubtless be laid before the court, and your Honors will find from a perusal of them, that though they conflict with each other very strangely in some of their reasoning, they all agree, I think I may say, without a sin-

*See, *Opinion of the Justices*, 35 *N. H. Rep.* 579; 1 *Kent's Comm.* 454, *note*; Prescott v. Canal Trustees, 19 Ills. 324; Spangler v. Jacoby, 14 Ills. 297; Schuyler County v. the People, 25 Ills. 181.

gle exception, with me in the view I have taken of the intention of the Convention to put this provision in force, without submitting it to the people of the State at large. Some of these gentlemen, if not all, are still acting as counsel for the Commissioners in this case, and I may, with very great propriety refer the court to what they have published upon the subject.

Mr. Beckwith says: "The framers of the proposed constitu-"tion have provided that the 34th section of the schedule shall, "upon a certain contingency, go into operation on the third "Tuesday of April, 1862, without its being previously submitted "to the people of the State, for their adoption or rejection."

He then goes on to argue the question, "whether the conven-"tion had power to pass and repeal laws in a manner not pro-"vided for by the act under which its delegates were elected, "but in such manner as the body, in its own judgment, thought "proper."

Mr. Fuller appears to argue that the convention did not succeed in effectuating their intention, but as I understand him, he does not doubt that their intention really was to make the repeal of the acts mentioned, contingent only upon the vote of the people of Chicago. For, after reciting the 34th section of the schedule, he says: "By this, it is attempted to provide "that if the majority of the legal voters of the city of Chicago, "shall, on the third Tuesday of April, 1862, vote in favor of "electing their own officers, then the several laws and parts "of laws named above 'are each and all of them hereby repealed.'"

Mr. Larned says: "The section in question is one which "the Convention have adopted, and sought to make a part of "the constitution, *by force of the action of the Convention "alone, and without any adoption thereof by the people.*" He then proceeds to argue, that the section can have no validity, because "it is appointed to take effect before the constitution is "adopted by the people of the State, and is, in fact, to continue "in force, although the constitution as a whole, may be repudi-"ated by the people of the State."

Judge Scates says that he concurs with Mr. Beckwith "in "the points of his argument," with a single exception. He does not concur with him in the opinion, that the legislature had power "to prescribe the powers and duties of the Convention."

Thus fortified in the views I entertain upon this particular question, by the matured opinions of these eminent counsel, I deem it quite unnecessary to pursue the discussion of it farther. After a single additional remark, therefore, I shall pass to another point in the case.

It is to be observed by your Honors, that whatever may be the construction which ought to be put upon this 34th section, as it stands in the schedule, the original ordinance, recited above, was never repealed or reconsidered by the Convention. It remains to-day one of the enactments of that body, possessing all its original vitality and force. If the Convention had the power to adopt it, it is now a part of the organic law of this State; for the case shows that it has been ratified by the almost unanimous vote of the people of Chicago. It stands alone, entirely independent of the other acts of that Convention, and its meaning is too plain to require any judicial construction.

Having thus ascertained what the Convention designed to accomplish by the enactments in question, the only remaining inquiry is: had the Convention the power to adopt them in the manner above indicated?

This authority has been denied, and the objections to it rest upon two grounds:

First. It is asserted that the Convention had no power to adopt any amendment to the existing constitution of the State, which should take effect by the mere vote of the Convention, without the adoption thereof by a majority of the legal voters of the State.

Second. It is maintained that the Convention could not exer-

cise legislative functions, and had, therefore, no power to repeal the above named acts of the general assembly.

Each of these objections will be considered in its order.

The first objection involves an inquiry respecting the powers and authority of a constitutional convention in this State, called pursuant to the first section of the 12th article of the constitution of 1848. It also involves a further inquiry respecting the power of the general assembly to limit or control the action of such a convention.

I agree with Mr. Fuller in the opinion he has expressed, that the late Convention was, in its organization, a constitutional, and not a revolutionary body; a part of the political system of the State, and that its powers are defined by the existing constitution.

Its powers and duties are peculiar, and, in one sense, anomalous. The very object of a convention is to revise and change the fundamental laws of the State—to alter the frame of its government. They transcend the powers committed to the ordinary legislative department, and are, therefore, delegated to a convention, which is the highest embodiment of sovereignty known to our constitution and laws.

The constitution of this State explicitly provides when and how such a body may be assembled, of how many members it shall consist and how they shall be chosen; and when thus chosen it requires them to meet "within three months after the "said election, for the purpose of *revising, altering or amend-* "*ing this constitution.*"

Its powers are thus defined by the constitution, with no declared limitation upon them. The convention, when lawfully assembled, is entirely untrammeled by any conditions or restrictions. No right of ratification or rejection is reserved to the people, nor is any right to annex conditions or limitations conferred upon the legislature. After the sense of the people has been expressed in favor of a convention, the legislature

have simply a ministerial duty to perform. They are "*to call a convention.*" The injunction is mandatory, and admits of no discretion. They cannot disregard it, without violating the constitution. They cannot annex conditions or set limitations to the powers of the convention, for the convention derives its powers from the constitution and not from the general assembly. Any attempt, therefore, on their part to hamper or trammel the convention, is simply usurpation. It was intended that the convention should be in all respects independent of the legislature, and when it assembles it is to look for instructions to the source of its authority, and not to the unwarrantable and intrusive requisitions of a subordinate department of the State government.

It is upon these grounds, that I pronounce that provision in the act of the General Assembly calling the Convention, which the required amendments adopted by it to be submitted to the people, for their adoption or rejection, an absolute nullity. Mr. Beckwith, in his written opinion, attempts to sustain its validity upon the assumption, as I understand him, that the constitutional provisions relating to a convention "are all of them in res- "traint of the exercise of powers which were vested in the leg- "islature, and so far as those restraints do not operate, the power "of the legislature is left untouched, and in full force." But this assumption is wholly gratuitous and unfounded. It is a grave and palpable error to assert, that, in the absence of any constitutional provision on the subject, a State legislature has any authority, under our system of government, to change or annul the organic law, from which it derives not only all its powers, but its very existence. The power to make and unmake constitutions does not reside in the legislature. In the absence of any provision for its own amendment, the fundamental law can only be changed by the direct authority of the people acting in their primary and sovereign capacity, through their delegates lawfully chosen for that purpose. This is a power inherent in the people, and has never been delegated to their legislative assemblies.

But Mr. Beckwith further argues, that the legislature would have ample power, if unrestrained by the constitution, to call a

convention, and "to make the call at such time, in such manner, and under in such conditions as it should judge expedient." It would also have, he says, full power "to prescribe the powers "and duties of the convention." The provisions of the constitution regulating the time and manner of making the call are, therefore, as he insists, simply restraints upon the power of the legislature, and when these restrictions are complied with, "in "every other respect the power of the legislature remains the same as though no restrictions had been imposed." His conclusion from these premises is, that inasmuch as the general assembly, in calling the recent Convention, complied with all the "restrictions," as he styles them, imposed by the constitution, it "had power to define the duties of the convention, "and to impose such limitations upon its authority as were "deemed expedient."

Now the simple statement of this proposition is, as I view it, a sufficient refutation of this whole theory. If the legislature may impose such limitations upon the authority of the Convention as it pleases, it may require that only particular articles or clauses shall be acted upon by the convention; it may prescribe that no alterations shall take effect, until ratified by the legislature, it may not only direct the submission of the amended constitution to the vote of the people, but it may prohibit such submission; it may dictate to the convention not only, what reforms it shall not inaugurate, but what changes it shall. Thus it would deprive the convention of all its powers and authority as a distinct and independent body, and reduce it from the dignified position it actually occupies as the highest and most august political assembly known to our constitution and laws, to that of a mere committee of the legislature convened to execute its will.

It is not surprising, in view of these considerations, that Judge Scates should have put in a *caveat* to this strange doctrine, that the legislature had authority "to prescribe the powers and duties of the convention." Mr. Fuller, also, hesitates not to say, there is no doubt in his mind, that the Convention "could alter or amend the constitution at its pleasure." "I "know," he adds, "of no limitations upon its powers in that res-

"pect, so long as it secured to the people some form of republi-
"can government."

But the premises assumed by Mr. Beckwith, in the above argument, are equally as faulty as his conclusion. In the first place, it is not true, that the legislature, in the absence of any constitutional provision on the subject, would have power to call a convention "and prescribe its powers and duties." To say nothing about the latter part of the proposition, it would be entirely irregular for a legislature to call a convention at all under such circumstances, without the previous sanction of the people. "The legislature," say the Supreme Court of New York, in a written opinion upon this very subject, furnished to the legislature of that State in 1846, which I have found published in the Debates of the Massachusetts Convention of 1853, vol. 1, p. 138: "The legislature is not supreme. "It is only one of the instruments of that absolute sovereignty "which resides in the whole body of the people. Like other "departments of the government, it acts under a delegation of "powers, and cannot rightfully go beyond the limits which "have been assigned to it. This delegation of powers has "been made by a fundamental law, which no one department "of the government, nor all the departments united, have au-"thority to change. That can only be done by the people "themselves. A power has been given to the legislature to pro-"pose amendments to the constitution, which, when approved "and ratified by the people, become a part of the fundamental "law. But no power has been delegated to the legislature to "call a convention to revise the constitution. This is a meas-"ure which must come from, and be the act of, the people "themselves. Neither the calling of a convention, nor the con-"vention itself, is a proceeding under the constitution. In-"stead of acting under the forms and within the limits prescrib-"ed by that instrument, the very business of a convention is to "change those forms and boundaries, as the public interests may "seem to require. A convention is not a government measure, "but a movement of the people, having for its object a change, "either in whole or in part, of the existing form of govern-"ment."

The Supreme Court of Massachusetts, (6 Cush. Rep. 573),

say upon the same subject: "Considering that the constitution "has vested no authority in the legislature, in its ordinary ac- "tion, to provide by law for submitting to the people the ex- "pediency of calling a convention of delegates, for the pur- "pose of revising or altering the constitution of the Common- "wealth, it is difficult to give an opinion upon the question, "what would be the power of such a convention, if called. If "however, the people should, by the terms of their vote, de- "cide to call a convention of delegates to consider the expedi- "ency of altering the constitution in some particular part there- "of, we are of opinion *that such delegates would derive their "whole authority and commission from such vote.*"

It is to be observed in reference to these decisions, that in neither New York or Massachusetts was there any constitutional provision for calling a convention.

Upon this same point, I refer the Court further to the opinion of Mr. Justice Patterson, quoted in 1 *Kent's Comm.* 452.

But if the legislature had, what they clearly have not, the power to call such a convention, under the circumstances supposed, without the popular sanction, it surely requires no argument to show that they could not "prescribe its powers and duties." Such a convention is a body entirely distinct from, and independent of, the legislature. It is above and beyond, not only the legislature, but, as the Court in New York say, the constitution itself. When no limitation is imposed upon it by the existing constitution, or by the vote of the people under which it is assembled, instead of being subordinate to the legislature and trammeled by its directions, it may, in the execution of its trust, dissolve the legislature, and "put up and "down government at its pleasure."

After what has been already said it is superfluous to add, that the provisions of the existing constitution regulating the time and manner of calling a convention, are simply not restraints upon the power of the legislature. They are grants of certain ennumerated powers to that body, relating to this special subject; and in such case, all powers not specified are impliedly ex-

cluded. 1 *Story on the Constitution*, §448 and 910. They contain also a grant, or perhaps it may be more properly styled a reservation, of power to the convention which is thus called into existence. This grant or reservation is general. "The con-"vention shall meet," "*for the purpose of revising, altering,* "*or amending this Constitution.*" No limitation, qualification, or condition, is attached to the grant. It follows irresistibly, that the convention, when lawfully assembled, may execute its trust according to its own will and pleasure, "subject "only to the constitution of the United States."

The principle I now contend for, is by no means new or unfamiliar to the courts and profession in this State. It has been more than once applied by your Honors in the decision of analagous questions which have come before you for adjudication.

In the cases of the *People* v. *Dubois* (23 *Ill. R.* 547.) and the *People* v. *Bangs*, (24 *Ills. R.* 184.) questions arose respecting the power of the legislature to deprive a circuit judge of his office by re-modeling his district, and to authorize the election of a new judge in his place. The court held in those cases, that it is the constitution, and not the act of the legislature, which creates the office of circuit judge, and that it was the intention of that instrument to place the judges entirely above and beyond the legislative control and interference, except by impeachment or address. It is the constitution, the court say, which creates the office of circuit judge, and not the legislature, and the constitution has not provided or authorized any mode of expelling him from the office which is thus created, if he conducts himself properly and does not become disqualified, until the expiration of his term.

Numerous other cases might be cited to the same point. When the constitution has created an office or a tribunal, and prescribed its powers and duties, it is not competent for the legislature either to circumscribe or take them away.

It is upon these grounds, I contend, that so much of the act of the general assembly calling the convention, as required

that body to submit its enactments to the vote of the people, for their adoption or rejection, is unconstitutional and void. The other provisions of the act, not repugnant to the constitution, of course, still remain valid. *Edwards* v. *Pope*, 3 *Scam.* R. 470.

There was no obligation, then, resting upon the Convention to submit any portion of the new constitution to the people. It was entirely discretionary with it whether it would do so or not; and there is no doubt that it was the intention of the framers of the existing constitution as well as of the original constitution of 1818, that this discretion should be left to the Convention. Neither of these instruments required any such submission. The practice upon this subject has never been uniform, and it is only within a recent period that such submissions have become frequent. Not more than one or two of the original thirteen States submitted their constitutions to a vote of the people. Our original constitution of 1818, was adopted by the Convention without the popular ratification. The same is true as to a portion of the constitution of 1848, and yet the act of the legislature calling that convention contained the same requirement upon this subject, as the act of 1861. Probably a majority of the States in this Union have adopted constitutions without submitting them to the popular vote. The constitutions of the following States are now in force, which were never formally ratified by the people:

Vermont adopted her constitution in 1793, in convention; Connecticut, by convention, in 1818; Delaware, by convention, in 1831; Pennsylvania, by convention, in 1838; North Carolina, by convention, in 1776; amendments in 1835; South Carolina, by convention, in 1790; Georgia, by convention, in 1798; Alabama, by convention, in 1819; Mississippi, by convention, in 1817; revised in like manner in 1832; Tennessee, by convention, in 1836; Kentucky, by convention, in 1799; Arkansas, by convention, in 1836; Missouri, by convention, in 1820.

The federal constitution, as is well known, was adopted by delegates in conventions in the several States, and was never submitted to the popular vote.

"From these conventions," says Chief-Justice Marshall, in *McCulloch* v. *Maryland*, (4 *Wheat.* 404,) "the constitution "derives its whole authority." He adds: "The government "proceeds directly from the people. They acted upon it, in "the only manner in which they can act safely, effectively, and "wisely, on such a subject, by assembling in convention."

It was in full view of all these facts and precedents, that our constitution of 1848 was adopted. The inference is almost irresistible, that the convention that framed it purposely omitted the insertion of any clause requiring future amendments, framed by a convention, to be submitted to the people. It designed to leave the whole question to the discretion of the convention, when it should be thereafter assembled.

There could, then, be no legal objection to the action of our recent Convention, if it had omitted to submit any of its acts for the popular ratification. But the fact is, that the Convention has, in the exercise of its discretion, submitted the entire constitution, with the exception of the section in question, to a direct vote of the whole people of the State; and that section it has submitted to the vote of those, who alone can be supposed to have any direct interest either in its adoption or rejection. And here I must not omit to notice the legal proposition, for which one of the before mentiond counsel very gravely and earnestly contends, that the article in question has not been submitted "*even to the legal voters of Chicago.*" The italics as well as the words are his own. The ratiocination by which he works out this surprising proposition, is as remarkable as the conclusion itself. He says: "They," (the voters thereby meaning,) "are not authorized to vote whether this section shall "become a part of the constitution. They are simply author-"ized to write upon certain ballots, 'For or against the city of "Chicago electing its own officers,' and if a majority of the "legal voters voting at said election, as indicated by said bal-"lots, shall be in favor of the people of said city electing their "own officers, *then the laws named are repealed and the pro-"visions of that section become operative.*" "There is a wide "difference," he adds, "between the question submitted to the "legal voters of Chicago, to be voted upon, and the question "*whether section thirty-four should be adopted* as an amend-

"ment to the constitution. It is one thing for the people to "be in favor, henceforth, of electing all municipal officers by "popular vote, and quite another thing for them to be in favor "of ejecting, before the expiration of their terms, all officers "who have been heretofore otherwise appointed under existing "laws."

The last sentence, I have quoted, is indicative, I think, of the fact, that for once the learned counsel's sympathy for friends in distress had got the better of his usual well-known discernment and acuteness. The proposition was submitted to the people in a form which admitted of no misconstruction, and was perfectly well understood. The fact that in a poll of less than fourteen thousand votes, eleven thousand nine hundred and seventy-seven legal voters of Chicago availed themselves of the opportunity to express their sentiments on the subject, of whom eleven thousand eight hundred and eighty-four voted in favor of the proposition, furnishes to my mind very convincing proof, not only that they felt an interest in the question, but that they also knew well what they were voting about. Had the legislature which adopted the objectionable acts, extended to them the same measure of justice they have received at the hands of the Convention, this case would never have arisen to disturb the municipal authorities or vex the court.

The same counsel has vividly depicted certain very grave and "alarming" consequences, which he supposes may be expected naturally to follow, if the doctrine acted upon by the late Convention, in submitting, in this instance, a local enactment to the ratification only of those residing in the locality affected by it, shall be tolerated by the court. "Rights," he says, "the most sacred could be swept away, political privileges destroyed, the people disfranchised and subjected to enormous burdens, and human slavery established on the soil of Illinois by the will of a few individuals."

If such momentous consequences as these, are really involved in the settlement of this question, the court will surely pause and ponder well, before committing themselves in favor of the action of the convention. If, however, no rights are likely to be swept

But one additional point remains to be considered, and my discussion of it shall be brief.

It is insisted that the ordinance in question is invalid, because it is, in part, an act of ordinary legislation, and the Convention could rightfully exercise no such legislative functions.

It is not denied, that so much of the ordinance, as prohibits the appointment *hereafter* of any person to any office for the city of Chicago, by the Governor or General Assembly, is a provision which might be appropriately incorporated into the constitution. The power, at least, of the Convention to deliberate and act upon such a question, has not been disputed. This being admitted, it will be difficult to show, that the late Convention had not also the power to so far change or abrogate existing statutes, as to make the legislation of the State conform to the new order of things. This is what the Convention has attempted to do in this instance. The repealed acts were in palpable conflict with the principle of the new provision about to be adopted by the Convention as a part of the fundamental law. The Convention, therefore, declared, that "the "powers and duties of all officers appointed under and by virtue "of said acts shall immediately cease."

So far as respects the removal of those officers, the power is one which has been repeatedly exercised by constitutional conventions in this and other States. By the constitution of 1848, the Governor, Senators and Judges of the Courts, besides numerous other public officials, were *legislated* out of office, before the expiration of their terms. The same is true of the proposed new constitution. So far as I am aware, this power has never been questioned.

Again, it cannot be denied, that all previous statutes in conflict with any of the provisions of a new constitution, are thereby immediately annulled. And if the convention possess the authority to repeal the statutes of the State indirectly, by inserting in the constitution provisions to which they are repugnant, it is difficult to see why it may not do the same thing directly and in express terms.

But the position taken, that a constitutional convention has no legislative functions, is untenable. It is purely a legislative body. Its functions, at least in this State, are not merely "ad-"visory and recommendatory," but legislative and governmental. Without legislative powers it could not execute its commission. It always exercises them, to the extent not only of repealing existing statutes, but also of re-enacting them. Express provisions are invariably inserted in every new constitution, that all laws in force at the adoption thereof and not inconsistent therewith, shall continue in force and be as valid as if the new constitution had not been adopted. This court has said in *Wood* v. *Blanchard*, (19 *Ills.* 40.) that "all laws thus "continued in force are, strictly speaking, *re-enactments by the* "*convention, and we, therefore, look to that for their validity.*" If a convention may thus, in express terms, re-enact statutes, or continue them in force for a prescribed period only, why may it not also in express terms repeal them?

Again, if it be admitted that a convention possesses legislative functions for any purpose, who is to assign a limit to its exercise of them? If it may exercise such as are necessary and proper to accomplish the object for which it is assembled, who is to judge of the necessity or propriety of its exercising them in a given case? The answer is obvious. The discretion is one confided to the convention itself, and when exercised, is not subject to be reviewed by any other tribunal whether legislative or judicial.

But the objection raised is susceptible of a still more satisfactory and conclusive answer than I have yet given. It is said that the business of a convention is to make a constitution—to ordain organic laws. But what are organic laws. Who is to decide? The answer is plain and free from difficulty. The convention has the sole power of determining what shall be the organic law, and *whatever it prescribes*, (subject in some cases to the ratification of the people,) becomes a part of the constitution. The courts cannot control or annul its decision. If, indeed, any of its enactments are repugnant to the Federal Constitution, which is the supreme law, the courts may so declare. But no provision inserted in the organic law can be an-

nulled, on any other ground, by any power on earth, except the PEOPLE, acting in their highest sovereign capacity and about to perform their highest possible act of sovereignty.

Our system of government is founded on the maxim, that "all "political power is inherent in the people." When they come together, by their representatives, under the sanction of law, to exercise their original rights, it is their inalienable privilege, to frame their organic law "in their own way;" and to deprive them of this privilege, is to take away from them the control of their own institutions.

I have proceeded in my argument of this case, upon the idea, assumed by the counsel for the defendants, that the act of 1861, calling the convention, absolutely required the constitution framed by that body, to be submitted to the people, and left no discretion upon that subject to be exercised by the convention. This, however, is an assumption subject, to say the least, to very serious question. The point has been elaborately argued by one of my learned associates, and I forbear to add anything to what has been by him so ably and forcibly enunciated.

Since the completion of the foregoing remarks, I have been favored by Mr. Beckwith with a copy of his very learned argument for the defendants. I have no time, nor do I conceive that there is any necessity, for a further reply to it. The main points he has endeavored to establish, are the same, substantially, which he makes in his written opinion previously published, to which I have adverted. Some additional considerations of a general character have been suggested, but none, I think, which at all change the previous aspect of the question discussed, or shake the positions I have attempted to enforce.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

ARGUMENT FOR THE RELATOR,

BY W. C. GOUDY.

May it please your Honors:

The petition and stipulation in this case present a single question.

The defendants are exercising the duties of Police Commissioners, as defined by the act of the General Assembly, passed February 21, 1861, (laws of 1861. 151.) They were appointed and qualified according to the provisions of that act, and are now entitled to the powers and franchise thereby conferred, *unless* the act has been annulled and superseded by the 34th section of the Schedule to the new constitution or by the same provisions adopted as an ordinance during the sitting of the convention.

Is the act of the legislature now in force? If it is, the writ of mandamus will be denied; if it is not, then the writ must be allowed.

I.

WHAT DID THE CONVENTION INTEND TO DO?

The vote directed by the ordinance passed in convention and afterwards by the 34th section of the schedule has been taken and resulted in an almost unanimous answer in favor of the people of Chicago electing their own officers. The vote directed by the schedule on the constitution and the separate articles on the subject of negroes, banking and congressional apportionment, has not been taken and will not be until the 17th of June next.

The 4th section of the schedule provides "that *this constitution* shall be submitted to the people of Illinois, for their "adoption or rejection, at an election to be held on the Tuesday "next after the third Monday of June, A. D. 1862, and there "shall be submitted at the same time for adoption or rejection "the separate sections," &c.

The 7th section provides that "If it shall appear that a majority of all the votes polled are for the adoption of *this constitution*, it shall be the supreme law of the State from and "after the first day of September, A. D. 1862, except as otherwise provided in this constitution: but if it shall appear that "a majority of the votes polled were given against *the constitution, the same shall be null and void.* If it shall further "appear that a majority of the votes polled shall have been "given for the separate sections in relation, &c., * * then "the said sections or articles shall be and form a part of the "Constitution; otherwise, the said sections or articles shall be "null and void."

It may be argued that the 34th section of the schedule is a part of the Constitution, and, not being a separate article, is submitted as a part of the Constitution to the vote of the people on the 17th of June, and if the majority of the votes cast are against the Constitution, that this section becomes null and void. It may further be insisted, that from these premises it is

to be concluded that the convention did not *intend* to give force and effect to that section until the Constitution should be ratified by the people at the polls on the 17th of June.

The premises and conclusion are both alike false.

It is true that the words "this Constitution" embrace in their enlarged sense every article and section, together with the schedule and each of its sections, but it is perfectly clear that these words were not used in this connection in that sense, because the separate articles and the parts of the schedule providing for the vote would be included. A fair construction of all the provisions on this subject would be to declare that al those parts of the Constitution, not otherwise declared or directed to be in force, should depend on the vote taken on the 17th of June, and that such parts should be null and void, if a majority of the votes are cast against them.

The last clause of the thirty-fourth section, declares that "The provisions of this constitution required to be executed "prior to the adoption or rejection thereof, shall take effect "and be in force immediately."

Here the Convention expressly exercised the power, and manifested an intention to give force and effect to certain provisions of the proposed constitution, before the question of its rejection or adoption was submitted to the voters.

The power to declare a part of the constitution in force by the act of the Convention alone, was assumed in the 1st and 5th sections of article XVII. It is provided that those sections shall "take effect and be in force immediately, as a portion of "the constitution of this State, and the same shall be and re-"main in force as such, unless rejected by the people, upon the "vote hereafter to be taken for or against the adoption of the "same, as provided in this constitution."

Here the convention asserted the power to amend the constitution, without submitting the amendment to a vote of the

people, and provided that the specified provisions should remain a part of the organic law, unless "rejected by the people."

The Convention, on the 21st of March, passed an ordinance, with the same matter set out in the 34th section of the schedule, except the last clause, and declared it in force immediately.

In the early stage of the Convention the power of that body to alter, revise, and amend the constitution, without the ratification of the people, was declared by a vote of the Convention in adopting a report of its judiciary committee. It was exercised afterwards in electing a printer and passing ordinances.

The conclusion is irresistible, that the Convention claimed the power to alter and amend the constitution and laws passed thereunder, and give force and effect to part of the constitution without the ratification of the people, and that that body did not intend to include in the word "constitution," all its parts.

Having determined that point, the inquiry arises, whether the Convention intended to put the 34th section of the schedule in force, without submitting it to the vote of the people of the State on the 17th of June, and make it a part of the organic law, independent of the result of that election.

This is purely a question of *construction*, and the question is made easy by the conclusions at which we have arrived.

The last clause of the 34th section declares, that "The provisions of this constitution, required to be executed prior to the adoption or rejection thereof, shall take effect and be in force immediately." This provision we maintain was intended to give immediate effect to the whole of the 34th section. That section provides for an election to be holden on the third Tuesday of April, 1862; this then was a provision of the constitution required to be executed prior to the adoption or rejection thereof. It proceeds further to declare, that "in case there

"shall be a majority of the legal voters, voting at said election, "in favor of the people of said city electing their own officers, as "indicated by said above mentioned words, *then* it shall not be "lawful for any officers of that city to be chosen in any other "manner than by a vote of the people of said city, or appoint- "ed in any other manner than by the Mayor and Aldermen, as "provided by present laws; and an act, etc., (naming three acts "of the legislature,) *be and the same are hereby repealed; and "the powers and duties of all officers*, appointed under and by "virtue of said acts *shall immediately cease.*"

When are these results to follow from the vote of the people of Chicago? Not till after the 1st of September, when the Constitution is to take effect, not till after the 17th of June, when the vote is to be taken? The answer is given by the terms of the section. The vote is to be taken at a city election, the returns to be canvassed and result declared at the next meeting of the council after the election; *then*, namely, at the first meeting of the council after the election, the officers are thereafter to be elected or appointedu nder the present laws, and the act (with others) under which the defendants exercise their office is declared, *to be and is hereby repealed and their powers and duties are to "immediately cease."*

The language of the section quoted above states in clear terms that the laws mentioned are to be repealed *from the time the Convention acted, provided* a majority of the people of Chicago voted in favor of electing their own officers, and that *when* the vote was taken and canvassed the powers aud duties of the defendan s as police commissioners should cease: *therefore*, the repeal of the acts, the suspension of the defendants from office, and the resumption of the powers of the mayor as the head of the police and the appointment of his corps, were also provisions of the Constitution required to be executed prior to the adoption or rejection thereof.

The fact that the last clause is added to the 34th section itself shows a purpose to have it apply to the provisions of that section.

The Convention exhibited a purpose to put the provisions of

this section in force without leaving it to depend on any vote except that of the people of Chicago, by passing it as a separate ordinance. It was afterwards embodied in the schedule so as to have the whole constitution in one instrument, but still with the express provision that it should take effect immediately.

I therefore conclude that the Convention intended to exercise the power to amend the Constitution by the adoption of this section without submitting it as a part of the constitution to a vote of the people on the 17th of June.

II.

THE POWER OF THE CONVENTION TO GIVE IMMEDIATE EFFECT TO THE PROVISIONS OF THE 34TH SECTION OF THE SCHEDULE.

1. *The power to give it effect on the contingency named.*

It may be urged that even if the Convention had power to make an amendment without ratification of the people, that it could not delegate that power to the voters of Chicago, that the vote directed was a delegation of such power, and therefore the section can have no effect until adopted as a part of constitution. An enlarged view of the powers of the Convention, which I take hereafter, necessarily includes the right to put the amendments in force in any way the delegates please. But if the convention has limited power, no more than its creature, the legislature, the provision in question is valid.

The courts of some of the states hold an act of legislation thus submitted to a vote as invalid. This court has settled the law the other way.

The People v. *Reynolds* 5 *Gilm.* 1.

2. *The power of the Convention to amend the Constitution without submitting the amendment for the ratification of the people at the polls.*

The question now presented for the consideration of your Honors is not political, but judicial. The public mind of this

nation has been agitated on this question in its political bearings, as presented by the Lecompton Constitution of Kansas, and the result in that case is a record of the sense of the people in favor of submitting an organic law, after it has been prepared by the delegates elected for that purpose, to the people for their adoption or rejection at the ballot box. The direct question presented to Congress was, whether this government would recognise Kansas as a sovereign State under the proposed constitution and admit her as one of the States of the Federal Union. The objection to such recognition and admission was that the people of Kansas did not ask admission under that constitution, that the delegates to the Convention were elected by fraud and did not represent the will of the people; on the other hand it was alleged that the delegates were fairly elected and reflected the will of the majority, and being thus elected, the Convention had the power to adopt a constitution or such part as they pleased without the ratification of the people. No issue was taken as to the power of a Convention fairly elected, but it was insisted that the proposed constitution did not embody the views of the people to be governed by it, and it was proposed to settle that issue by submitting the constitution to a vote at the polls; more, it was insisted that at an election ordered by the Territorial legislature, a majority of all the legal voters of Kansas had already condemned the instrument.

No man took more extreme grounds in favor of submitting the proposed organic law to the legal voters for their adoption or rejection, than the late Senator Douglas, yet even he, in the heat of political discussion, never denied the binding force of a constitution on the people when it was made by their delegates fairly elected.

Suppose that Congress had admitted Kansas as a State under the Lecompton constitution and recognised it as a State of the Union, could an inhabitant of Kansas resist its operation in the courts because it had not been submitted to the vote of the people? The Supreme Court of the United States in Luther v. Borden, 7 Howard 1, have decided that the government having been recognised by the local government and the United States authorities, that the constitution is binding on all its inhabitants, because it is a political and not a judicial question.

I trust that no convention will ever undertake to impose an organic law upon the people unless it is ratified by a majority of those interested. If the propriety and justice of such a proposition were under discussion I would urge the submission to a vote as a matter of political right.

In this case the section in controversy has been submitted to a vote of the people of Chicago who alone are interested in it, who have ratified it almost unanimously, but it is insisted that the section can have no force until this section together with all of the constitution has been submitted to a vote of the whole State. The people at large have no interest whatever in the execution of this section, there is no rule of expediency or political right that would dictate such a course, and if the position of the defendants can be maintained, it is because the convention was bound, by some authority superior to itself, to submit all of the constitution to a vote of the people of the State. Does any such superior authority exist? If it does, has that authority been exercised in this instance?

If there is a paramount power to that of the convention of delegates elected by the people to alter, revise, and amend the Constitution, it is to be found, as contended by different gentlemen who have given opinions on this question, in one of three places:

1. In the legal voters, who are limited themselves in giving their consent, and can only manifest that consent by a vote for the adoption or rejection of the proposed Constitution after it has been framed by the convention.

2. In the existing Constitution, which provides for its own amendment.

3. In the act of the General Assemby providing for the election of delegates.

If I succeed in satisfying your Honors that the Convention is not limited in any one of these three methods, then I will succeed in answering the arguments of counsel for defendants,

and establishing the proposition that the 34th section of the schedule is in full force.

I. (a) The American system of government is peculiar and without a precedent in the history of the world. The authority of the people has been recognized by other nations, but the manner of its exercise was different from the established practice in this country. We do not live in a democracy controlled by the people *en masse*, nor *per capita*, but in a republic, governed by the people through their representatives. The voice of the representatives of the people is the voice of the people themselves. It is true that direct propositions according to our practice and system may be submitted to the legal voters at the polls, but that method is no more the action of the people in a legal sense, than their declarations through their chosen representatives.

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness, and they have an inalienable right to alter, change, and reform their government in such manner as they think proper. These principles have their foundation in the Declaration of Independence, and were made sacred by the blood of our fathers; they have been asserted in the Federal Constitution, in the organic law of every State, and in every bill of rights. They stand undisputed.

The people who are endowed with this power are not a myth. Who are they? In the largest sense the people include every member of society, every man, woman, and child; in a more limited sense and in organized constitutional governments, the people are those who have the power to make laws —those who have the right to vote under the rules prescribed by the constitution and laws, and thus, through their representatives, make laws.

It is in the latter sense that the people are referred to in the Declaration of Independence and in the various constitutions. It has been said that the people have limited themselves by prescribing qualifications for voters. It is true that society is

bound by limits, but the people, being the voters themselves, are not limited. They are the governing power, exercising it over themselves and all other members of society who are not entitled to the elective franchise.

The people, that is the voters, make both constitutions and laws. The people expound the laws. The people execute the laws. The people establish their organic law, legislate, execute the fundamental and statute law, and determine the judicial rights of all the members of society.

But, in what manner? Not in their aggregate capacity, but by those selected by them as their representatives. Every statute enacted, every power executed, every judgment pronounced, is the act of the people.

In our system of government, the written constitution adopted by the people as a compact between themselves, to regulate their own rights, to establish the form of government, and provide for the regulation of their representatives, whether executive, judicial, or legislative, provides the manner in which laws are to be passed, and executive and judicial authority brought into existence. The people then exercise these functions of government in the manner prescribed by the written constitution.

How do the people make a constitution? How do the people alter and amend a constitution?

There is no written law defining the manner the people shall exercise that power. The existence of constitutions being confined to our own country, we must examine its history to learn how constitutions are made and altered. The power has been exercised repeatedly, whereby a common law has been established on the subject. The making of fundamental law is *sui generis*, and to be determined by reference to the rules applied only to that sovereign exercise of power.

There is no instance in which the people have made an organic law by a meeting *en masse*, nor by a vote at the polls. That has been an impracticability.

In every case the original constitution has been framed by delegates elected by those entitled to the elective franchise; and every amendment thereafter has been made by a convention of delegates, or submitted by the legislature to a vote at the polls. The people have exercised their power either in electing delegates or in ratifying the special amendments by their votes. So far the rules are universal, but just there the uniformity ceases.

The Federal Constitution recites in its preamble " *We the the people* of the United States, in order," &c,

It would be a work of supererogation to argue at this time that the Federal Government and Constitution, is the work of the people, and not a compact by the States. The blood of our people is flowing like water to vindicate this doctrine. The declaration is made in the " fore-front" of the constitution, that it is the act of the people, yet how did the people make that constitution? A convention of delegates, appointed by the legislatures, was held to frame the constitution, and on their recommendation, Congress resolved that the proposed constitution be transmitted to the several legislatures, in order to be submitted to a convention of delegates chosen in each State by the people thereof.

Story on Con., Book 3. *Ch.* 1.

The seventh article of the Constitution itself provides that it should take effect on the ratification of the *conventions* of nine States.

The United States Constitution was never submitted to a vote of the people, nor did the people elect the delegates that framed it; they elected the legislatures who appointed the delegates to construct the constitution, and the delegates of the several State conventions to ratify or reject it.

We find here a notable instance of the manner in which the people made a constitution.

Eleven of the thirteen original States, adopted constitutions by delegates to a convention, and their work was not submitted

to the people. The other two conducted their respective governments under the charters to them as colonies. One of them, Connecticut established her first constitution by a convention of delegates in 1818, without ratification by the people at the polls; the other, Rhode Island, made her first constitution in 1842, by a convention, which was ratified at the polls.

Vermont was admitted under a constitution in 1788, never submitted for popular ratification; she made a new constitution in 1793, by a convention, which was not submitted and yet conducts her government under that constitution.

Not a single State admitted since the creation of the government, and before the year 1846, submitted her first constitution for popular ratification.

If I am not mistaken, there was not a single new constitution framed by a convention of delegates before 1842, that was submitted to the people at the polls for adoption or rejection.

It is true that perhaps all of the new constitutions since that time have been submitted to the people for adoption or rejection, with the exception of certain parts which have been declared in force without.

Some have been required to be submitted by the act convening the delegates, and while the policy of asking the ratification of the voters has been pursued, I am not aware that it has been held to be a duty imposed on the convention that they could not avoid, still less, that the action of a convention is void unless it be ratified by the popular voice.

One of defendants' counsel takes the ground that the delegates are limited in all cases to making propositions to the people and that the people can only give their consent by the exercise of the elective franchise as to the adoption or rejection of the proposed instrument. Some abstractions of Robert J. Walker are quoted by Mr. Beckwith to sustain his position.

It is assumed that the delegates are not authorized to alter the constitution, because the authority under which they meet is silent, and some quotations are made from the *political* speeches of Senator Douglas, when hard pressed on the Toombs bill. Such an assnmption is against the history of American constitutions. It is also shown by the practice that the people have and do grant the power to make a fundamental law without any reservation as to approval. The custom and practice of the people shows they exercise their sovereignty through delegates as well as by their elective franchise at the polls.

I see no occasion to feel the alarm that some of the counsel for the defendants express, if it be held that a convention of delegates elected by the people for the express purpose of making a constitution can execute the power conferred on them without asking the subsequent endorsement of the people. This country has prospered and flourished for over sixty years under that rule, while the other practice was unknown twenty years ago. On the contrary if all provisions of the organic law are to be held void, because not submitted to a vote, all rights would be destroyed and universal anarchy reign.

I repeat, that the power to make and amend a constitution is vested in the people, who are not limited in its exercise by any written rule. The common practice of the country shows that the people have exercised this power for a longer period and in more instances through the final action of a delegated convention, than by ratifying the work of the delegates at the polls. Therefore I conclude that there is no limitation on the right or power of the people to make or alter their constitution without a ratification by a popular vote.

II. But it is said by the counsel for the defendants that the people of Illinois have provided for the amendment of their constitution adopted in 1848, and therefore limited their own power to alter the constitution; that the grant has been made and cannot be resumed; that the manner of amendment has been defined and cannot be departed from.

Even if the constitution itself required the amendment to be submitted to a vote, there would be grave doubts whether it would prevent the people from changing the constitution without such submission.

A distinguished jurist has said, "The people retains, the peo-"ple cannot divest themselves of the power to make alterations. "A moral power equal to and of the same nature with that "which made, alone can destroy. The laws of one legislature "may be repealed by another legislature, *and the power to re-"peal cannot be withheld by the power which enacted them.* So "the people may on the same principle, at any time alter or "abolish the constitution they have formed. This has frequent-"ly and peaceably been done by several of these States since "1776. If a particular mode of effecting such alterations has "been agreed upon, it is most convenient to adhere to it, *but "it is not exclusively binding.*"

Rawle on Const, 17.

Chief Justice Marshall speaking of the delegation of power by the people to their State governments says, "It has been "said, that the people had already surrendered all their powers "to the State sovereignties, and had nothing more to give. "But, surely, the question whether they may resume and modi-"fy the powers granted to government does not remain to be "settled in this country."

Mc Cullogh v. *State Maryland*, 4 Wheat, 404.

The first constitution of the State of Delaware provided for its own amendment as to parts and required the amendments to be approved of by five-sevenths of the assembly and seven-ninths of the council; as to the other parts it made them unalterable. Yet a convention was convened under an act of the legislature in 1792, and made a new constitution which continued to be the organic law until 1831.

The last constitution established in New York was made in violation of a prohibition in the previous constitution.

The last constitution adopted in Massachusetts was in disregard of the manner prescribed for amendments in the prior constitution.

Like instances are to be found in many of the State constitutions, where it has been provided that amendments were to be made through the submissions of specific propositions by the legislature, there being no provision for amending by a convention. Yet in all these cases conventions have assembled, and as the representatives of the people above the existing fundamental law and all its departments of government, have framed new constitutions.

The great principles of the declaration of independence lying at the foundation of American government declares the right of a people to alter their form of government, and that the right is *inalienable.*

There is, however, no requirement in the constitution of 1848 that the work of a convention called to revise, alter, or amend, should be submitted to the popular vote for ratification.

Such a provision is expressly inserted in that section providing for making specific amendments. Its omission in the first section *implies* that it was not required.

I therefore conclude that there is nothing in the law of making or altering constitutions that limits the action of the convention to the will of the voters to be expressed on the proposed constitution after it is framed, nor limits the voters themselves to the method of consenting to an alteration by a vote of ratification, but the delegates of a constitutional convention are the people in a representative form, superior to all the departments of the existing government and the fundamental law then in force.

The convention is to meet "for the purpose of revising, al-"tering or amending this constitution." What are they to do when convened and organized? The answer is revise, alter, or amend the constitution. There is no provision as to how it

shall be done, or how declared in force, because the convention was supposed to be an assemblage of the people themselves, the source of all power, who would have omnipotent power to proceed to revise, alter, or amend the constitution as they please. It was to be a convention of delegates to make a constitution, with like powers as other similar convention in the history of the country. The legislature assembles to make statute laws, and in the performance of that duty, subject to the limitations of the organic law imposed upon them by the people, the legislature are the people in a representative capacity. In like manner the convention convenes to make fundamental laws subject to no limitation whatever, and are the people in a representative capacity to alter their form of government. A just rule of policy requires that the delegates should go back to those who sent them with their work for approval, but it is not obligatory *as a binding rule, capable of being enforced by the judicial tribunals*, any more than upon the legislature to submit their work for approval. The legislature may do so; the convention may do so.

It will be conceded that the constitution can be so amended as to remove existing courts and judicial officers. Can these same judicial tribunals say to the delegates of the people, you shall not destroy and remove us from office until you submit the proposition to a vote? If such condition can be imposed, so can another. The courts may say certain persons must be allowed to vote before we will admit it to be the will of the people; the election must be conducted in a certain way before we will resign our offices. Such a doctrine would enable the mere creature of the governing power in our system to dictate to the people how and when they should alter their form of government.

The delegates of the people to amend the constitution is a re-assembling of the people themselves to re-arrange their fundamental law, when it is supposed that defects exist, that make it necessary to resort to the source of all government. That power assembles with all its original authority, to destroy that which it once created, to amend the legislative, executive and judicial power and to establish others. If a convention to

as follows: "*Provided*, That if the convention shall fix upon "any other manner of canvassing the votes for or against said "amended constitution, *and for its taking effect*, then such "manner as is pointed out by the convention shall be "adopted."

By this section the legislature first provided that the amendments shall take effect upon ratification by the people, and then say that if the convention shall fix upon any other manner for its taking effect, then such manner as is pointed out by the convention shall be adopted.

The convention disregarded the details of almost the whole of that section, either by virtue of the proviso, or because its directions were not considered binding. The whole of the constitution has been submitted to a vote of the people for ratification, as a condition for its taking effect, except certain parts required to be executed before the taking of the vote; but the 34th section has only been submitted to the people of Chicago. Such a submission is within the spirit, if not the letter.

The convention prescribed different qualifications for voters than those fixed by the act. The geographical limits in which the voter could exercise his privilege is different. The legislature required the voter to cast his *ballot* in the election precinct in which he should at the time reside and not elsewhere; the convention allows the vote to be cast in the county in which the voter resides, except as to volunteers; and as to volunteers, it provided that they could vote *viva voce* at any place, within or without the State where their regiment or company might be whenever visited by the commissioners. There are other material differences but these will present the question. There is an equal if not greater departure in these respects from the directions of the act, than in submitting the 34th section to the people of Chicago who alone are interested in it.

If the Convention had no power to disregard the act, as to the vote to be taken, and if the Convention has disregaaded

the act, then their work is a failure and this constitution can never take effect.

Before precipitating the State upon such a result, and, perhaps, a forcible revolution, it would be well to consider carefully, whether the Convention had not the power to order the vote as they have, either from the provisions of the act itself, or independently of it.

Are these deviations from the act another *manner for its taking effect?* If so, then the act itself, by the proviso, authorized the Convention to do what it did. If the provisions as to the qualification of voters, as to the place of voting, and as to taking the votes of the volunteers, are authorized by the proviso as another manner "for its taking effect," then the submission of the 34th section to the people of Chicago, is equally within the proviso, and is another manner for its taking effect.

(b.) Had the legislature the power to require the submission of the constitution to a popular vote, as a condition to its taking effect?

The learned counsel for the defendants, (Mr. Beckwith,) assumes that the constitution cannot be amended, except by the authority of an act of the General Assembly, and therefore considers that all the restrictions the legislature choose to make in the act, are binding on the convention.

The counsel, also, assumes that the legislature, like the parliament of England, is omnipotent except so far as restrained by the written constitution. He then construes the provision in the written constitution to be purely prohibitory, not granting, and therefore concludes, that the legislature in all other respects, could dictate to the convention and even the people themselves, how and what amendments can be made.

If the premises and construction are correct, the conclusions that he deduces are likewise correct.

While it is not necessary in this discussion to refer to the proposition, that the constitution can only be amended under the authority of a legislative act, yet, I cannot forbear questioning that proposition. Mr. Webster argued in favor of that doctrine with great force, in the case of Luther *vs.* Borden, 7 How. 1, in regard to the Rhode Island case, but the court decided that it was a political and not a judicial question, and the Dorr government having been repudiated by both the State and Federal governments, the Court would not enquire further.

It is very frequently said, that a State legislature has all the legislative power of the people, except so far as prohibited or directed by the written constitution; but it is not held that the making or altering such written fundamental law is legislative power in that sense.

In England parliament is the source of all power and acts without limitation. Blackstone says that it is "the place where "that absolute despotic power, which must in all governments "reside somewhere, is intrusted." He declares that it can regulate the sucession to the crown; it can alter the established religion; it can change and create afresh the constitution of the kingdom and of parliaments themselves; it can in short do anything that is not naturally impossible. 1 Blackstone, 160,

In this country the people are the source of all power, and they alone are without limitations. The legislature has no inherent authority, but its whole force is derived from the people by grant prescribed in the written organic law. It exercises a delegated power and cannot exceed its bounds. That delegated power is not irrevocable; the creature does not become superior to the creator; the power that made can destroy; the authority that granted can resume or modify that power.

McCulloch v. *Maryland*, 4 *Wheat*, 404.

These principles lie at the foundation of our republican form of government. Whenever they are destroyed, the liberty of the people is gone.

When, therefore, it is said that the legislature can exercise all power not prohibited, it is not because the legislature is the *source* of power, like Parliament, but it is because the entire legislative power has been granted to it by the people through the constitution, subject to the prohibitions, directions, and limitations therein.

Constitution of 1848. *Art.* 3, § 1.
Fireman's B. A. v. *Lounsbury* 21, *Ill.*, 213.

The legislature under this broad grant of power may pass any act of legislation, even if it be of the nature of an organic provision, unless restrained by the constitution making the grant. But it does not follow that it can make a constitution itself, because that is not included in the grant of the legislative power as construed and acted upon in this country. It is not true that the legislature can do everything not prohibited, it may be restrained by a direction or regulation.

The first section of article 12 of the constitution prescribes the duty of the general assembly when a convention is called to amend the organic law. Having undertaken to direct what shall be done to that end, such provisions are limitations on the general grant of legislative power in the 1st. s, art. 3.

The people having legislated in the fundamental law on the subject matter of calling the Convention to amend the constitution, that exhausts the subject, and is a limitation on the legislature to pass any law except to execute the directions of the constitution.

People ex rel, v. *Bangs*, 24 *Ill.*, 124.
Field v. *People*, 2 *Scam*, 83.
Sammis v. *Clark*, 13 *Ill.* 546.

Tested by these principles, the general assembly had no power to make any provision in the act providing for the election of delegates, except such as conformed to the directions of the first section of article 12.

The directions to the Convention as to what it should do after it met and organized were null and void, because in conflict with the constitution.

Therefore, there being no paramount authority to the convention of delegates found in the limitation of the people themselves, or in the constitution itself, or in the act of the general assembly, it follows that the Convention could give effect to the constitution, or any part thereof, as it thought proper.

III.

COULD THE CONVENTION LEGISLATE.

The most plausible argument presented in behalf of the defendants is that the Convention were called to revise, alter, and amend the constitution, that the provisions of the 34th section of the schedule are merely ordinary legislation, and, therefore, beyond the power of the Convention.

It is also insisted that the legislative judicial, and executive departments were in full force, and could not be interfered with by the convention, that no ordinary legislative act could be passed except in conformity to the existing constitution. This idea is enforced by the terror of the Convention exercising executive and judicial functions, as well as legislative.

No doubt is entertained of the power of the convention to so alter the constitution as to abolish the existing departments of government, to oust those holding office in them, and to remodel all the departments and assign duties to each.

It is not necessary to determine whether the convention could perform executive or judicial functions. No such power was exercised, nor is there any fear that it ever will be.

The only enquiry is, can the convention legislate? Who doubts or denies the power? It is a legislative body and performs all its functions in a legislative manner. But it is said

that it can only legislate on fundamental law—that it can only revise, alter, or amend the constitution. Where is the line dividing fundamental law from statute law? Who is to judge as to the limit of power? There can be but one answer. In the progress of this country, experience has suggested new provisions necessary to protect the people. The people themselves judge of the necessity and propriety of such amendments. All the later constitutions contain provisions that in the earlier history of the country were left to ordinary legislation. This is the first time that the doctrine has been maintained that the courts can say what is organic law and what is not, what are proper provisions in a constitution and what are not.

It is said that the section in question repeals in express terms certain acts of the legislature and therefore that it is beyond dispute not only ordinary but special legislation.

If a new constitution contains a provision that is inconsistent with previous statutes, that repeals them *ipso facto* without special mention. It not only repeals them but also arrests all acts *in fieri* under them.

Aspinwall v. Coms. 22 *How.* 364.

If the repeal can thus be made by *implication*, then it can be done *expressly*. If statutes can be annulled by wholesale, they can be destroyed by retail. The greater includes the less.

But this section is not ordinary legislation, but is a proper organic provision. It provides a general limitation on the Governor and General Assembly and that the officers of the people of Chicago shall be elected and appointed in a certain way. Having adopted this organic provision, it simply reduces the present officers to that rule. Its only effect is to terminate the term of office of the persons acting under these acts and provide for the election and appointment of others consistent with the general rule established.

This same power was exercised as to all the State officers, all the judges, and very many other officers. It has been as-

serted without question in every convention to amend the fundamental law and is necessarily involved in the right of the people to alter their own form of government.

All conventions legislate to preserve statutes, contracts, and rights under the former constitution, and thus re-enact statutes.

Wood v. Blanchard, 19 *Ill.* 38.

If they can enact, cannot they repeal?

IV.

THESE PRINCIPLES EXHIBITED IN THE STATE OF ILLINOIS.

I have purposely avoided reference to precedents as set by Illinois herself in order to present them perspicuously and together. All that the city of Chicago asks to-day is pronounced by the established law of this State.

Delegates were elected to a convention in 1818, under a law of Congress, to form a constitution and State government. *Scates Stat.* 41.

The convention when organized, passed an ordinance "on behalf of, and by the authority of the people of the State. *Scates Stat.* 44.

It then proceeded to adopt a preamble and constitution, in which it is declared that "The people of the Illinois Territory, "do by their representatives in convention, ordain and establish the following constitution and form of government." *Scates Stat.* 46.

The State was organized and governed under that constitution until 1848, and it was never submitted to the people for adoption or rejection.

Article VII of that constitution, provided for the calling of a convention precisely as the present constitution does, to amend it.

Under that provision, the General Assembly in 1847 passed an act, calling the convention. *Laws* 1847. 33.

This act, as to all the points in dispute now, is precisely the same as the law of 1861. Indeed the latter seems to be mainly a transcript of the law of 1847. It required the convention of 1847 to submit the proposed amendments to the people for adoption or rejection. The 6th section of that act is the same as the 5th section of the act of 1861, *with the same proviso*, as to its taking effect in a manner to be prescribed by the convention.

The convention assembled and framed a new constitution. In the schedule provision was made for a vote on "this constitution" and separate articles with the same language as now before the court. But there was no clause declaring that the parts to be executed prior to the vote, should take effect immediately. It seemed to be assumed that the convention could make provisions to be acted on without such express declaration.

Article XI, of that constitution is entitled "Commons," and the 4th section of the schedule says "That 'Article XI' en-
'titled 'Commons' is hereby adopted as a part of the constitu-
"tion of this State, without being submitted to be voted upon
" by the people."

The convention departed from the act of the legislature in giving effect to that constitution, as they have in regard to the proposed new constitution.

That constitution was adopted, and the government is now being conducted under it.

If the positions of the defendants are correct, then article eleven is *void*.

It can only be said that the article on commons was local in

its application; so is the 34th section of the schedule in the new constitution. The first was not even submitted to the people interested in it, while the section now under consideration has been.

Illinois has furnished all the precedents and established all the principles we need.

V.

CONCLUSION.

I do not desire that the parties should be placed in a false position. The plaintiffs are the people *ex rel.* the city of Chicago vs. the defendants, as individuals, in fact as well as in form.

The people of Chicago do not ask to establish the doctrine of Lecomptonism: they protest against it.

The legislature of 1861 without any demand from the people, and without any necessity therefor, passed the act under which the defendants have exercised their office, and the act creating the office of custodian, which has proved an oppression too grievous to be borne, and the act appointing the claims commissioners. There was no occasion to change the manner of regulating the police. Yet the present incumbents were appointed by the governor under that law. At the same session the legislature passed an act otherwise amending the city charter which they submitted to a popular vote, and it was rejected by a large majority. The act creating the office of police commissioners was not submitted; if it had been it would have perished with the other amendments.

The defendants were forced on the people against their will and have become odious beyond expression.

The convention have taken the sense of the people and the result shows "there are none so poor as to do them reverence."

Ninety-three votes only were cast for the defendants. An arithmetical calculation would demonstrate that these 93 votes just cover the police commissioners, their corps, and retainers. So that the voters may be said to be unanimous against the defendants.

In the face of all this they cling to these offices: they were forced on the people by a foreign appointing power and are now endeavoring to force themselves on the people by technical advantages.

The people of Chicago simply ask leave to elect their own officers.

W. C. GOUDY,
for Relator.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

ARGUMENT FOR THE RELATOR,

BY MELVILLE W. FULLER.

MAY IT PLEASE YOUR HONORS:

Upon the 21st. day of March, A. D. 1862, the Constitutional Convention of the State of Illinois then in session at the capital, ordained and declared in the name of and as the people of the State of Illinois that if at the next municipal election to be held in the city of Chicago on the 3d Tuesday of April, 1862, a majority of the legal voters of the city of Chicago voting at that election should vote in favor of the people of said city electing their own officers that thereafterwards, neither the governor nor general assembly should appoint any person to any office for said city of Chicago, but all officers should be elected by the people of said city or appointed by the mayor and aldermen as provided by present laws or by such general laws as might be passed by the general assembly. And it was also provided that upon the vote aforesaid, certain specified laws inconsistent with the principle enunciated and the rule thereon established should be repealed.

This declaration of the convention was placed in the 34th section of the schedule of the constitution with the additional provision that the portions of the constitution required to be executed prior to the vote thereon, should take effect and be in force immediately.

The vote of the city of Chicago having been taken was nearly unanimous in favor of the fundamental right of the people to elect their own officers and as a consequence that right became by virtue of the previous action of the convention embodied in and a part of the organic law so far as the state and the particular locality mentioned are concerned and the acts of the general assembly named as inconsistent with the principle in question became null and void. The respondents, holding office by appointment of the governor under one of the acts in question, resist this conclusion and insist that the action of the convention and the will of the people over whom they exercise their authority, as declared by a nearly unanimous vote, are of no force and effect.

I.

The principle which underlies and forms the basis upon which all republican forms of government rest is the right of the people to institute government and to reform, alter or totally change the same, when their protection, safety, prosperity and happiness, in their judgment, require it.

This is not a revolutionary but a constitutional right, and is embodied in the declaration of rights to be found in all our State constitutions as well as supported by the universal current of judicial and political exposition in this country.

"Of the right of a *majority* of the whole people to change their government *at will* there is no doubt." 1 Wilson, 418.

The people "*always retain* the right of abolishing, altering or amending their constitution, *at whatever time*, and *in whatever manner*, they shall deem expedient." Mr. Justice Wilson's Lectures on law, vol. 1, p. 10.

"At the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country; but they are sovereigns without subjects, (unless the African *slaves* among us may be so called) and have none to govern but themselves: *the citizens of America are equal as fellow citizens*, and as *joint tenants in the sovereignty*. JAY, C. J. 2 Dallas, 219.

"It has been said that the people had already surrendered "all their powers to the State sovereignties, and had nothing "more to give; but surely the question, whether they may *re-* "*sume* and modify the powers granted to government, does "not remain to be settled in this country." Marshall, C. J. 4 Wheaton, 405.

"The right and power of the people," says Washington, "is the basis of our system."

Madison speaks of it (Federalist, No. 40) as the "*transcend-* "*ent and precious right* of the people to abolish or alter their "government."

The general principle is conceded, for all must "admit what none deny" says Mr. Webster in his argument in the Dorr case, "that the only source of power in this country, is the people," but as to its application, or in other words, the mode and manner of the exercise of the right in question, some difference of opinion has existed.

1. Many eminent men have held that the people may, at any time, through the instrumentality of primary assemblies, choose and commission their delegates to and convene a convention and in the exercise of the ultimate authority and sovereignty which resides in them, change, through the convention, their form of government as they see fit. This, too, not only as regards the people of a State, the constitution of which contains no provision for its own amendment or supersedure, but also that no such provision can limit the right and power of the people acting in their primarily original capacity, to change their system of government when and as they please.

Thus it is said by Rawle in his commentaries on the constitution, p. 17, "If a particular mode of effecting such alterations "has been agreed upon, it is most convenient to adhere to it, "but it is not exclusively binding."

And this naturally enough follows from the views which have just been presented and which are still more felicitously expressed by an eminent writer on this subject as follows: "Per- "haps some politician who has not considered with sufficient ac- "curacy our political systems would answer that in our govern- "ment the supreme power was vested in the constitution. This "opinion approaches a step nearer to the truth (than the supposi- "tion that it resides in the legislature,) but does not reach it. "The truth is that our government, the supreme, absolute, and "uncontrollable power, *remains* in the people. As our constitu- "tions are superior to our legislatures, so the people are SUPE- "RIOR *to our constitutions.* Indeed, the superiority in this last "instance is much greater, for the people possess over our con- "stitutions control in *act* as well as right." Wilson's works, vol. 3, p. 292.

2. Another view has however been entertained, namely, that the people *may* limit themselves in their organic law as to the mode of its future alteration, and that such mode when so provided, and no other, must be pursued in order to effect desired changes.

It is unnecessary to determine which of these propositions is the more correct, since the convention by which the action in issue here was taken, was assembled in strict accordance with the provisions of the constitution of Illinois upon this subject. (Sec. 1, Art. 12, Const. Ill.)

3. But it has also been contended that in case no provision is made in a constitution for effecting a change therein, that the people cannot revise or amend such instrument, (established as it is by themselves,) except under and by virtue of a law of the legislature.

This position is examined here because the principal questions raised by the defendants, grow out of and are illustrated

by it, although, as is conceded, the Convention in question was assembled in strict accordance with the provisions of the constitution, and under a law valid so far as calling the Convention was concerned.

The proposition is hardly compatible with the views hitherto presented, and has been directly reviewed and pronounced untenable in the State of New York. In an opinion rendered to the General Assembly of that State, in April, 1846, in response to a resolution of inquiry from them, Judges Bronson, Beardsly and Jewett, say: "But no power has been delegated to the legislature to call a convention to revise the constitution. That "is a measure which must come from and be the act of the "people themselves."

See also, opinion of McLean, J., in *Scott vs. Johnson*, 5 *Howard*, 380.

Still it might be conceded, so far as the argument here is concerned, that it would be consistent with the American system, for the legislature to provide the mode for authentically ascertaining the will of the people, as to holding a convention and also for the election of the delegates there to, but further than that they could not legally go.

A Convention so assembled would get no power from the legislature which called it together, on the contrary it would represent and be the people themselves, possessing all the power of the people in the premises, or if this were questionable, it could not at least be denied, that all the power it would have, would emanate *directly from* the people, and not from the people's servants acting in a subordinate and derivative capacity.

4. But in the case at bar, the position is assumed that as the act of the general assembly, under which the Convention assembled, prescribed that the new constitution when adopted by the Convention should be submitted to the vote of the people of the State, and as the action of the Convention under discussion here, was to take effect upon the vote of the people of

Chicago thereon, but not upon the vote upon the constitution; that this is a violation of the act in question, and that the action of the Convention in the premises is null and void. In other words, the broad proposition is laid down by one of the counsel that the general assembly can not only circumscribe the action of the people in amending or changing their organic law, where there is no provision in the constitution for its own amendment, but, that it can do this, even in cases where such provision is made, provided it be not in conflict with the express language thereof. The proposition is wholly inadmissible; and *firstly*, it is entirely unsustained, either upon sound reason or authority, even where the constitution contains no provision for its own amendment. It is equivalent to maintaining that sovereignty resides in the constituted authorities and not in the people at large, and making the legislature independent of the constituent body.

Because conventions are as a matter of convenience called in pursuance of laws of the legislature, it does not, therefore, follow that the law *confers* on such conventions their power. To hold this would be to determine that the legislature which derives its sole power from the people, as expressed in the organic law, could grant greater power than it possessed itself, and could control the exercise of that will through which alone it has and holds its existence. It is absurd to say that the people placed the power in the hands of any body of their agents to intervene between the people themselves and *their own acts.*

Indeed it would seem to follow inevitably from the establishment of such a proposition, that the legislature could themselves, amend or abolish the constitution contrary to the acknowledged "truth, that (Rawle on the constitution, p. 17,) "a moral power, "equal to, and of the same nature with that which made, alone "can destroy."

So Lockwood, justice, in *Phoebe* v. *Jay*, Breese 268, on p. "271, "the constitution can establish no tribunal with power "to abolish that which gave and continues such tribunal in ex-"istence."

It might be conceded that the people can limit themselves in their fundamental law, as to the mode of proceeding to make alterations or amendments thereof; and further, that in the absence of any provision in the constitution, for that purpose, the legislature might initiate proceedings to that end, but it is wholly inconsistent with the theory of our government to claim such omnipotence in the legislature, that after the people have indicated their will in favor of holding a Constitutional Convention, have selected their delegates, and such Convention has got together, the legislature can then, by its acts, control and direct the deliberations or conclusions of a body so assembled.

Under our political economy and written constitutions, Blackstone's omnipotence of parliament is comparatively an empty figure of speech.

Marbury v. Madison, 1 Cranch 137, 1 *Kent Comm.* 426.

"The legislature is not supreme. It is only one of the instruments of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government it acts under a delegation of powers, and cannot rightfully go beyond the limits which have been assigned to it. This delegation of powers has been made by a fundamental law which no one department of the government nor all the departments united have authority to change. That can only be done by the people themselves."

Opinion of the New York Judges to be found 1 *Debates in Mass. Conven.* 1853, *page* 138 *on page* 139.

"Under our form of government, the legislature is not su-
"preme; it is only one of the organs of that *absolute sovereign-*
"*ty which resides in the whole body of the people.*"

BRONSON, J. *Taylor v. Porter*, 4 *Hill* 140.
JEWETT, J. *Powers v. Bergen*, 2 *Seld*, 358.
STRONG, J. *People v. Edmonds*, 15 Barb. 529.
HOSMER, J. 4 Conn., 209.

"I cannot subscribe to the omnipotence of a State legisla-
"ture," says Chase, J. in *Calder v. Bull*, 3 Dall. 386, "or that
"it is absolute and without control, although its authority should
"not be expressly restrained by the constitution or fundamental
"law of the States."

"The General Assembly is a mere agent of the people en-
"trusted with certain delegated powers. The constitution is the
"letter of agency."

Maize v. State, 4 *Ind.* (Porter) 345.

"The constitution is their (the legislature's) commission and
"they must act within the pale of their authority."

LOCKWOOD, J. *in re Phoebe, Breese* 268.

And there are many decisions to the same effect, differing sometimes in the language used, but all pointing to the same result.

Thus in *Firemen's Benevolent Association v. Lounsbury*, 21 Ill. p. 511 on p. 513, CATON, C. J. says:

"The general *grant* of legislative power, found in the con-
"stitution confers upon the General Assembly all legislative
"power, and authorizes the law-makers to pass any laws and
"do any acts which are embraced in the broad and general
"word *legislation*, as known and defined in the English
"language. It authorizes the passage of any law which could
"be enacted in the most despotic government. It even author-
"izes everything which the people could enact *in their primary*
"*capacity*—anything which *they would have a right to embody*
"*in the constitution itself*. After this broad grant of legisla-
"tive power, the constitution in various provisions proceeds to
"limit and restrain its exercise."

The learned Judge is here speaking of legislative power in its ordinary acceptation, and he clearly indicates the existence of the distinction between the acts of a legislature and of the people *in their primary capacity*.

The legislative power of the State of Illinois is vested in the general assembly by section 1 of article III of the present constitution but what is that legislative power and how far does it extend? Does it reach the life, liberty or property of the citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? The people never intended to delegate to their agents the power of defeating those great ends of government, the protection of life, liberty and property. And how can it with reason be contended that the general assembly has been vested by the people with the power of *defeating* their "precious and trancendent right" as Madison called it, of altering and amending their government as they may deem best?

The bill of rights declares (section 2 article 13 Const. Ill.) "that all power is inherent in the people, and all free govern-"ments are founded on their authority and instituted for their "peace, safety and happiness." Has this authority departed from them? Have the people yielded the unalienable right of changing their form of government by virtue of the very instrument which in effect reiterates it?

The distinction between acts of the legislature and acts by the people in their primary capacity through the medium of a convention has always been recognized and acknowledged and the absurdity of the will of the legislature over-riding or controlling that of the people when about to change their form of government, clearly pointed out and insisted upon. "What is a constitution? It is the form of government *delineated* by the mighty hand of the people, in which certain fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people and is the supreme law of the land; it is paramount to the power of the legislature and can be revoked or altered only by the authority that made it. The life giving principle and the death doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they derive their powers from the constitution; it is their commsssion and therefore all their acts must be conformable with it, or else they will be void. The constitution

is the work or will of the people themselves, in their original *sovereign* and *unlimited* capacity. Law is the work or will of the legislature in their *derivative and subordinate* capacity. The one is the work of the creator and the other of the creature. The constitution fixes limits to the exercise of legislative authority within which it must move. In short the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve."

PATTERSON J. *Van Horn's Lessees* v. *Dorrance*, 2 Dallas (Circuit) p. 308.

And this admirable exposition is made the basis for the language of the court in *Phoebe's case*, Breese, 268, which decides that "a constitution can do what a legislative act cannot, "as it is the supreme, fixed and permanent will of the people "in their original, sovereign and unlimited capacity, and in it "are determined the conditions, rights and duties of every in- "dividual of the community. From its *decrees* there can be "no appeal, for it emanates from the highest source, the sover- "eign people."

How idle then to assert a proposition, which results in the position that the exercise of the right to change their power of government, is permitted to the people *ex gratia* by the legislature, rather than belongs to them *ex debito* under the constitution, which contains the declaration of the right as inherent in the people or even in the absence of that declaration, upon the fundamental doctrines of the social compact in the American Republic.

In the celebrated Rhode Island case, the argument of Mr. Webster, freely as it has been drawn upon to justify the positions of the defence, nowhere asserts the power in the legislature to control the action of the people when assembled in constitutional convention. "What do I contend for?" he says: "I say that the will of the people must prevail, when it is as- "certained, but there must be some legal and authentic mode of "ascertaining that will. and *then* the people *may* make what "government they please. * * * * All that is necessary

"here, is that the will of the people should be ascertained by "some regular rule of proceeding prescribed by previous law. "But when ascertained, that will is as sovereign as the will of "a despotic prince."

Mr. Webster was contending that the people could not assemble, and through primary meetings, call a convention, but that they ought to do so in accordance with a previous law of the legislature, by which it could be ascertained that a majority desired to change the organic law and under which the people could enjoy all the safeguards thrown, around the exercise of the right of suffrage, but he never contended that after they had so proceeded, that a convention so assembled could be limited by the act under which it met; but on the contrary says that "*then* the people may make what government they please."

It will be remembered too, that that argument was made under peculiar circumstances, and in a case arising in a State which had no written constitution, but was governed under the original charter. Nor did the decision of the court go to the length of sustaining the views presented by Mr. Webster, on this topic. The case turned simply on the ground that the question was a political one, and had been determined by the proper authorities of the State, and recognized as so settled by the General Government. *Luther* v. *Borden*, 7 Howard 1.

And the name of Daniel Webster can scarcely, with fairness, be invoked in aid of the assumption on the part of the respondents, of legislative over popular sovereignty when his language in his celebrated speech upon the Foote resolutions is remembered: "Gentlemen do not seem, (he said,) to recollect "that the people have any power to do anything for themselves—they imagine that there is no safety for them only un- "der the *close guardianship* of the State legislature."

Secondly. If in case of the absence in a State Convention of any provision for its own amendment, the legislature could initiate but not control the action of the people, in effecting such alterations therein as they might desire, it follows *a fortiori*, that where a mode is pointed out for proceedings

to that end, the legislature would have no power to limit the exercise of the peoples's right to change their organic law, in accordance with the mode provided.

Provisions of this character are restrictions imposed upon the people by themselves, (and are of doubtful validity even then,) and being such, they are predicated upon, and acknowledge to its fullest extent, the fundamental right of the people to change their form of government as they may think best, except as they have otherwise therein declared. Hence, also, the legislature in whatever it is called upon to do by and under such provisions, is confined within the boundaries prescribed, for the argument is entirely unsound, that the agent of the people could impose conditions upon them, which they themselves had declined to do.

In framing a constitution, the effort is always made to define as far as possible with accuracy, the powers delegated to government. This may be done by enumeration, by prohibition, or by both combined. All powers might be specifically granted, and of course all others would be prohibited, but this is generally considered too difficult a method to pursue. The course usually followed, is to prohibit the powers which are not to be exercised. This is effected either by *direct* prohibition or by *indirect* prohibition, as by a declaration of certain fundamental rights of the people which should never be infracted. "But after "all, absolute certainty could scarcely be attained in either way. "And even when both should be combined, much probably, would "still remain to be deduced from the fundamental doctrines of "the social compact." (Walker's American Law, p. 26.)

Upon the principles and authority already alluded to, we believe it necessarily followed that the legislature are prohibited by the declaration of rights, and by the "fundamental doctrines of the social compact," from in any manner intermeddling with the action of the people in the alteration of the government. We have seen, also, that such an act on their part would not be an exercise of the legislative power granted to them. They exercise that power under the constitution as it is, and to permit

them to set bounds to the action of the people, in the amendment thereof, would be to allow them the power themselves to make a new organic law, and thereby to destroy the charter under which alone they exist, or in other words to commit a *felo de se.*

"If the people desire to resume *directly* the law making power "which they have delegated to the General Assembly, they "have only to change the constitution accordingly," (STUART J. in Maize v. State 4 Ind. (Porter) 342 on p. 350.) but can the General Assembly in the exercise of the "legislative power" granted it, either turn that power over to any other department or compel a convention to do so? Or remit it to the people in their primary capacity?

But we have now advanced a step farther, and find that the constitution itself points out a mode to be pursued in this regard and it was this mode which was followed in this instance, and as we have already indicated, it seems difficult to perceive how the Legislature could impose conditions where the people had declined so to do.

We have hitherto adverted to the position that the legislature have no power in and of themselves even to initiate proceedings towards the amendment of a constitution which does not so provide; and we quote upon this point again from the opinion of the Judges in the New York case, which, after stating the manner in which a legislature acts, goes on:

"This delegation of powers has been made by fundamental "law which no one department of the government nor all the "departments united have authority to change. That can only "be done by the people themselves. A power has been given to "the legislature to *propose* amendments to the constitution which "when approved and ratified by the people, become a part of the "fundamental law. But no power has been delegated to the "legislature to call a convention to revise the constitution. That "is a measure which must come from and be the act of the peo-"ple themselves. Neither the calling of a convention nor the "convention itself is a proceeding under the constitution. It is "above and beyond the constitution. Instead of acting under

"the forms and within the limits prescribed by that instrument, "the very business of a convention is to change those forms "and boundaries as the public interests may seem to require. "A convention is not a government measure, but a movement "of the people, having for its object a change either in whole "or in part of the existing form of government. As the people "have not only omitted to confer any power on the legislature "to call a convention, but have also prescribed another mode of "amending the organic law, we are unable to see that the act "of 1848 had any obligatory force at the time of its enact- "ment. It could only operate by way of advice or recom- "mendation, and not as a law. It amounted to nothing more "than a proposition or suggestion to the people to decide "whether they would or would not have a convention. "That question the people have settled in the affirmative, "and the law derives its obligation from that act, and not from "the power of the legislature to pass it."

And in the supplement to 6th *Cushing's Reports* will be found an opinion emanating fron Judges Shaw, Putnam, Wilde, and Morton, in which they say "the constitution has vested no auhority in the legislature to provide by law for submitting to the people the expediency of calling a convention for revising or altering the constitution." These eminent judges did not believe the legislature got this authority under the grant of legislative power. And they further decided that a convention if called would derive its whole power from the *vote of the people.*

The constitution of Illinois does, however, provide for the calling of a convention by the legislature and how it shall be done. This provision is a grant of power to the legislature and not a restriction upon a power possessed before.

Wherever a power may be exercised exactly as it is given, no other or different power can be implied to carry out the power granted either on account of convenience or of being more effectual.

Field v. *People*, 2 Scam., 79.

The power granted in this case is distinctly defined and its exercise exceedingly simple. It is the power to ascertain the will of the people in the first instance as to whether they will have a convention or not and then to call such convention. Here the legislature must stop, as all their power in the premises is exhausted.

We therefore arrive at the conclusion that the general assembly has no power in any aspect to limit or control the people or their delegates in convention assembled as to what shall or shall not be done in the reformation of the organic law.

II.

Had the convention, if uncontrolled by the law of the general assembly, the power to put the constitution in force without submission to the people?

Without discussing the policy or expediency of such a course or its bearings as a political question in other points of view, it would seem that so far as the bare right to establish a constitution is concerned the convention had plenary power.

"The right of electing delegates to a convention," it has been said, "places the powers of the government as fully in the "mass of the community, as they would be had they assem- "bled, made, and executed the laws themselves without the in- "tervention of agents or representatives."

Conventions assembled as this one was, are meetings of the people, the delegates being for all practical purposes identical with the people, "in the majesty of their power, in that which "they may rightfully make or abolish constitutions and put up "and down government at their pleasure."

And it has been held by the most distinguished men in this country, that a convention for the purpose of framing an organic law, is an assemblage with no declared limitation upon their powers, save the constitution of the United States,

and that when their trust is executed, the constitution by their adoption becomes the supreme law of the land, changeable only by the power that ordained it. And upon careful consideration, the authorities already cited will be found to sustain this position. See also *McCulloch vs Maryland*, 4 *Wheat.* 404.

Even upon a different view of the powers of a convention it may be said that the acts of the authorised agent are not to be considered invalid, because not submitted to the ratification of the principal.

These conventions assemble to make or amend the organic law, and strictly speaking the submission of every enactment of the general assembly would seem as essential to their validity as the same requisition in respect to a new constitution.

At all events, there ought to be some binding and fundamental requirement to that effect, some "higher law" than the mandate of a legislature, emanating from authority superior to the convention before submission can be insisted on as essential or judicially decided to be so.

Precedents establish the fact that the path of custom for many years led to the adoption of constitutions by conventions merely. Thus Vermont, July 4, 1773; Connecticut in 1818; Delaware in 1831; Pennsylvania in 1838; North Carolina in 1776; South Carolina in 1790; Georgia in 1798 and others since these years, adopted their constitutions without submission to the people.

Illinois in 1818 did the same thing, and Article xi. of the present constitution was made to take effect and be in force immediately. And this article, it may be here remarked, was framed (it is said) for the benefit of a particular locality, and in that closely resembles the action in issue here. So far, then, as our own State is concerned, precedent as lately as 1847 establishes that submission was not considered essential.

At the same time, lest the people should be disappointed in their delegates and dissatisfied with their action, and that in a

matter so grave as the adoption of the fundamental law, the voice of the people should have full scope at each and every stage of the progress in the alteration of their form of government, it is not only desirable and expedient, but the correct principle, particularly in this day of high and unusually excited state of public feeling, that in all cases the proposed instrument should be submitted to the people for ratification.

This was the lofty position assumed by Senator DOUGLAS in the Lecompton struggle, though he and all the mighty host which stood at his back, would have probably been willing to waive it, had there not been indubitable evidence that the Kansas Constitution was not the act, and did not embody the will of the people of that distracted State.

The question is presented here, however, in a different form than it ordinarily assumes. The present constitution after providing for taking the vote of the people as to whether a convention should be called or not, then goes on to provide, in case of an affirmative declaration by the people, for the calling of the convention and the election of delegates; and the section concludes as follows: "and which Convention shall meet "within three months after the said election, for the purpose of "revising, altering, or amending this constitution."

The Convention were to revise, to alter, to amend. They were not to get up a lot of revisions, alterations and amendments, and submit them as separate propositions to the people for their action, (in which case the Convention would sit only as a kind of committee for the purpose,) but they were to perform the act of revision, alteration or amendment, *themselves.* This consideration when taken in connection with the views presented on the topics hereinbefore discussed, would seem to settle the power of the convention, in this regard, beyond further controversy.

But it is said that the delegates were elected under the act of 1861, to alter, revise, and amend the constitution, and to submit the alterations, etc., to the people; that they were not elected to put the new instrument in force, or any part thereof,

but to prepare it simply, and the decision of the Massachusetts judges, (cited *ante*,) 6 Cushing 575, is quoted from to show that the delegates, therefore, could not, in any manner, act in contradiction to the law of 1861. The force of this brilliant *Coup de grace* is not apprehended.

The case in Cushing did decide that if "the people should "*by the terms of their vote*, decide to call a convention of dele- "gates to consider the expediency of altering the constitution in "some particular part thereof, we are of opinion that such dele- "gates would derive their whole authority and commission from "such vote; and upon the general principles governing the de- "legation of power and authority, they would have no right, "under such vote, to act upon and propose amendments in other "parts of the constitution not so specified."

This has relation to the vote of the people as to calling a convention. The question there was what would be the effect of a vote of the people in favor of calling a convention to amend the constitution in a particular specified part thereof. In the case at bar the people in 1859 voted in favor of holding a convention to revise, alter and amend the constitution, *not* in a particular part thereof, but generally. In 1861 the legislature passed the act for the election of delegates. The people, as such, did not pass the latter act or vote thereon. The people never provided that the revision, alterations or amendments should be submitted to them for their adoption or rejection. The counsel for respondents has confounded what the people actually did vote for, to wit., a convention to amend the constitution, with the subsequent act of the legislature, which sought to impose conditions upon the action of the convention, which the people had never demanded or authorized.

The delegates were elected to revise and amend the constitution. Is it possible that the vote of the majority for A. or for B. as a delegate was influenced by the provision in the act of 1861, that the constitution as amended should be submitted to the people for ratification? Or, the provision that the Secretary of State should cause the printing of the convention to be done?

Did the electors instruct A. to amend the constitution but not to put it in force without submission, because they voted for him under an act which so provided? If the act were valid in that particular, the amendments would have to be submitted not by virtue of the vote of the people for A or B or C, but of the act itself. If the act were invalid as the people jealous of their rights well knew, since it sought in principle to circumscribe their power, though under the mask of protecting it, then it was of no force one way or the other; and in either event the vote of the electors for delegates bore no relation to it.

III.

But the convention did submit their action in the premises to the vote of the people within the spirit of all that has been insisted upon that subject.

The reason urged for such submission (waiving the question whether it is not in fact the people's own act) is that the people may be afforded the opportunity to examine the work as completed, and reject it if their views are not therein reflected. This reason in its spirit merely applies to the submission of the fundamental law to the people *to be affected by it*, and this was fully and fairly done in this instance. If our view of the powers of the constitution be correct, they could provide that their amendments should take effect without submission, but they could submit such amendments as they deemed best. And if some of the amendments affected a particular locality, they could submit them to the people of such locality. The General Assembly is held to have such power as to statute law (*People v. Reynolds* 5 *Gil.* 1) and in 1861 exercised it by the submission of certain amendments to the city charter of Chicago to a vote of its people. And had the law, the repeal of which is under discussion here, been likewise submitted, it would have probably been consigned to the tomb of the Capulets with the amendments which were voted on. And there is no difference in principle between organic and statute law so far as this particular question is concerned.

It is objected that the submission was not made squarely upon the repeal of the laws in question, but it should be remembered that it was the *principle* which the convention sought to establish, and which the citizens of Chicago were desirous of having established, and the repeal of the obnoxious laws was merely the incident to the action taken.

The vote in the premises was unmistakably significant, and it is suggested with entire courtesy, as a subject well worthy of the reflection of the respondents, that since the enforcement of a law upon an unwilling people is of the essence of Lecomptonism, (to which their counsel have incidentally referred), does it not also partake of a similar character, to proceed under a law which the people have overwhelmingly condemned?

IV.

This argument has thus far proceeded upon the basis that the opinion of the convention, as to their powers coincided with the views expressed, and that their intention in the premises was too plain to be misapprehended.

At an early day in the session, upon the question as to the election of a printer to the convention, a select committee was appointed composed of some of the ablest lawyers in that body "to examine into and report as to the obligatory force "of the law calling this convention, and as to its power to ap- "point a printer," which reported (a hesitating dissent being given by one member thereof,) as follows:

"Section one of article twelve of the constitution provides "that the general assembly shall recommend to the electors to "vote for or against a convention, and that if a majority of the "electors shall vote for the same, then the general assembly "shall call said convention. This is the extent of the power "granted to the legislature in the constitution. Thus the en- "tire power consists in the recommendation to the electors and "the calling of the convention. The number of delegates, the

"place at, and manner, and districts in which they shall be "chosen, the time of meeting and the qualifications of the elec- "tors are fixed in the constitution. * * * * All power "incident to the great object of the convention belongs to it. "It is a *virtual assemblage of the people* of a State, sovereign "within its boundaries as to all matters connected with the "happiness, prosperity and freedom of the citizens, and su- "preme in the exercise of all power necessary to the establish- "ment of free constitutional government except as restrained "by the constitution of the United States. Can the legisla- "ture trammel the action of a body selected for the purpose of "revising the very constitution which gives being to the legis- "lature? If so, then the legislature can make and unmake "constitutions; can set up and overturn governments. In the "discussion of this question in the constitutional convention of "1847, Judge LOGAN, one of the ablest jurists of this or any "other State, used the following language: 'An oath to sup- "'port the constitution of the United States had been propos- "'ed and taken because we can do nothing in contravention to "'that instrument, and because there was no other power to "'limit us. Where is the limitation of the power of this con- "'vention over the treasury? We have the power to prescribe "'the powers and duties and salaries of all officers.' * * * "* * * Your committee, therefore, have come to the con- "clusion that after due organization of the convention, the law "calling it is no longer binding, and that the convention then "has supreme power in regard to all matters necessary and in- "cident to the alteration and amendment of the constitution."

And this report was concurred in by a very large majority of the Convention.

The Convention also provided in the article on "banks," that sections one and five should take effect and be in force immediately as a part of the constitution of the State, and there is no doubt that they are now part of our fundamental law, though it is also provided that those sections may be voted on with the balance of the article, and if that be rejected they will cease to be binding.

Not only in these but in many other instances, the Convention asserted their possession of supreme power in regard to all matters necessary and incident to the alteration and amendment of the constitution, and of the power consequent thereon, of putting the constitution or any part or portion thereof into instantaneous operation.

The intention of the Convention as to the subject-matter here is equally unmistakable.

It was ordained that if the people of the city of Chicago should vote in favor of the principle of electing their own officers, that principle should at once become embodied in the organic law. The action of the Convention was complete, and went into operation upon the happening of a contingency which has already occurred.

And that the new constitution might contain every act of the Convention intended to pass into the fundamental covenant of the people, the action of the Convention, in this regard, was placed in the schedule, and to prevent the slightest misapprehension as to when it was to go into effect, the declaration at the end of the section was made, that it should take effect immediately.

It is true that a vote is to be taken on the constitution, and if it results in favor thereof, it will become the supreme law of the land from and after a given date; but this has no relation, one way or the other, to those parts of the constitution which are not submitted to a vote of the people of the whole State, and are not dependent thereon for their validity. As to these, the schedule declares that they shall take effect immediately. As to the sections intended to take effect at once, but to be subject to rejection, it is declared in the sections themselves that their force and effect is to cease if the article, of which they form a part, is rejected. Nothing could be clearer so far as the question of intention is concerned.

V.

But it is objected that in the action in question, the Convention exceeded their legitimate functions; that this ordinance was a piece of ordinary and even special legislation; that the repeal of the specified laws was not within the province of the Convention, even though it possessed supreme power as to the amending, etc.

The Convention assembled to make organic laws. It is difficult to see what tribunal has a right to say that any ordinance adopted by them, does not thereby become, *ipso facto*, the supreme law.

So far as their power is concerned they could adopt a code and make that the organic law. Where is the limitation? They met to frame a constitution, who shall say what shall or shall not be put into it?

Is the provision in regard to the Mechanics' lien unauthorizedly inserted because subjects of that kind have in times past, been left entirely with the General Assembly?

There is hardly a constitution of recent date, that does not contain more or less provisions which would formerly have been styled "special legislation." Who shall say, who can say, that they are not binding?

And it makes no difference whether the subject matter ordained and established, is divided into articles and sections or merely declared in express terms, and fairly adopted by a vote of the Convention. Still the entire action of the Convention should be presented in some authentic form to the people, and this was therefore wisely inserted in the schedule.

Nor is this action singular, for the schedule of many of our constitutions contain provisions of a similar character, creating new counties upon contingency, (see Ind. Const,) continuing courts, (see Ill. Const.) &c.

But there was no ordinary or special legislation about this

action of the convention. It was in the strictest sense, the establishment of organic law, within the meaning attempted to be assigned to the term "organic." The ordinance asserted a principle dear to the American mind, the right of the people to elect those who shall exercise authority over them. The *object* was to lay down as a fundamental rule this principle, in terms which would admit of no two constructions, and which could never be violated. It was confined in its operation to a locality, where alone it has been attempted to override the people in any considerable degree, but its influence will be felt everywhere throughout the State, and it will set an impressive example, which some communities in our sister States would, we doubt not, gladly embrace the opportunity to imitate.

It is equally well settled that the convention had power to repeal laws.

The adoption of a new constitution does in and of itself repeal all previous organic and statute laws. The American theory is that the government re-commences.

Hence it was necessary to provide in the schedule "that all "laws in force at the adoption of this constitution, *not inconsis-* "*tant therewith*, * * shall continue to be as valid as if this "constitution had not been adopted."

Were it not for this provision (to be found in the schedules of all constitutions, as far as we have examined), all laws in force at the time a new constitution is adopted, would be *ipso facto* repealed.

CATON, C. J. in *Wood vs Blanchard* 19 Ill. 38, in commenting on this section says: "all laws thus continued in force are, strictly speaking, *reenactments* by the convention, and we therefore look to that for their validity."

Laws inconsistent with the constitution were of course and in terms not continued and became repealed upon its adoption. Upon similar reasonning laws inconistent with any fundamental rule adopted by the convention as supreme organic

law, became repealed upon the taking effect of such action by the convention. The specified acts of the general assembly of which that in issue here was one were inconsistent with the right of the people to elect their own officers and became null and void when the ordinance establishing that right went into effect.

But assuredly if laws would be repealed by the adoption of the constitution unless "reenacted" by the convention, the convention had the right to specify certain laws as excepted from such reenactment and they would thereby become repealed.

In this case, however, the convention not only excepted the law in question from the operation of the first section of the schedule, or any implication arising therefrom, but declared that upon the vote of the electors of Chicago, this law should be and was thereby repealed. And the convention doubtless designed by this action to have it expressly understood that in their judgment, and according to their intention, they had established a fundamental law for the city of Chicago, all laws inconsistent with which should be repealed, and upon which the first section of the schedule as to the effect of the adoption of the constitution as such, was considered to have no sufficiently specific bearing since it might be said that that only related to the constitution as an entire and complete instrument and laws even designed to be, could not be, repealed until its adoption.

VI.

Certain arguments *ab inconvenienti* have been urged on behalf of the respondents.

With consequences the court has nothing to do, where the law is manifest, but even if this were not true, the language of the ordinance itself, the fact that it is only the repeal of a repealing act by the *General Assembly*, that does not revive the

original act and the reflection that the municipal government of Chicago has quite power enough vested in it to preserve the peace and order of the city even if deprived of the valuable services of the board of police, are considerations which will tend to quiet all apprehension upon this subject and render it unnecessary to pursue this branch of the case further.

VII.

The relator having presented itself before the Court in the name of that people, whose rights, so far as the citizens of Chicago are immediately concerned, (though the people of the whole State have an interest in the result,) are directly in issue, and having placed before this tribunal the action of the Constitutional Convention as embodied in the ordinance and repeated in the schedule, and the consequent unanimous vote of the electors of Chicago thereon, would seem upon the bare statement, without argument, to be entitled to the writ applied for. I have endeavored, however, to briefly review the grounds on which the defence, in this case, is supposed to rest, and to show the extraordinary misconceptions, as it appears to me, on which that defence is predicated. The arguments of my more experienced and learned associates, who have preceded me, with an inspection of which I am favored, as this is passing through the press, have left nothing to be added, yet I have not thought it best to withdraw this presentation of my own views, since, having been a participant in the action which is sought to be overthrown, I am quite willing that my reasons for the belief in its propriety and constitutionality should be placed upon the record.

MELVILLE W. FULLER,
of Counsel for Relator.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.
} Application for a Mandamus.

ARGUMENT FOR THE RELATOR,

BY F. H. KALES.

May it please your Honors:

The general question involved in this case is, the power of a constitutional convention—called in accordance with the provisions of the existing constitution—to revise, alter or change the organic law of the State; and to give effect to the changes made, at a time and in a manner wholly different from that prescribed by the legislature calling the convention.

The question thus presented is not altogether a new one; but has generally arisen with reference to two classes of cases:

1st. Where the State constitutions have provided no mode for their change or amendment, and

2d. Where a mode of proceeding for their amendment has been prescribed by the State constitutions.

In determining the authority of the legislature to limit the powers of the convention either to draft or to give effect to the fundamental law, it is necessary to keep distinct the two classes of cases, and the reasoning applicable to each.

The constitutions of the original thirteen States belonged to the first class of cases, providing no mode of change, nor yet any express prohibition upon the power of the legislatures to make a change. The whole legislative power of those States capable of being exercised was vested in one branch; the executive power in another, and the judicial power in another.

Under these circumstances the State legislatures were powerless to alter or change the organic law: the legislature could not make the change, because, that being conceded, every law which it might have passed in conflict with the constitution might have been enacted under the color and pretense of an amendment to the organic law, so that the constitution would soon have ceased to exist only in name, leaving the legislative body in possession of the whole power of the State without limitation; nor had the executive or judiciary departments any power to effect a change. Indeed, all branches of these State governments held their power, and the right to exercise it, in subordination to the existence of the constitution which gave them authority to act, and to bind the people of the State by their acts. However much the power of altering these constitutions might have been claimed as an inherent right vested in the legislature by implication, yet the legislature, as a source of political power could claim no authority by implication to change or destroy the fundamental law; such a claim if allowed would have been the death-blow to every State constitution not containing an express prohibition upon the legislature forbidding it from making or authorizing such changes.

On the other hand the people were powerless to act in a body, independent of the forms of law, to effect such changes as should be desired; since the legally constituted government might justly deem the proceeding revolutionary, and subversive of the existing constitution. But at length when amend-

ments and changes in these constitutions did become a necessity, a mode of proceeding was adopted by the legislature and the people acting in concert, which obviated the whole difficulty in the way of amendments. It was this: the legislative body recognized an established principle of our system of government, that it derived its power from the people of the State; and that by ABDICATING that power, it would return it to the source from which it came, to be again fashioned into a new organic law. And accordingly the legislatures of the old states from time to time passed acts by which they consented to abdicate all authority vested in them by virtue of the existing constitutions, and thereby the power of the state vested in them would revert to the people at large; to make such abdication effective it was only necessary to procure the assent of the the people; and they consented to it by adopting the terms of abdication imposed by the legislature, as the condition upon which its power should be surrendered.

That a legislature under these circumstances could dictate the terms upon which it would surrender to the people the legislative power vested in it by them, there can be no doubt. True, the people might refuse the terms, and in that event the state government would go on as before, without any change whatever.

In short the people of the old states were compelled to abide by the constitutions which they had; or obtain a change only in the manner and upon the terms which the Abdicating Power chose to impose. It was to avoid these difficulties that special provisions were made in most of the new constitutions, for their alteration and amendment. These provisions were ordained for the purpose of depriving the legislative department of the state from dictating the terms and mode by which it should be freed from the constitutional trammels that bound it, or upon which it would consent to abdicate its power, and give way to a new state government.

The embarrassments attending a change of the constitution were fully understood and appreciated by the framers of the existing constitution of our State, which went into operation

on the first day of April, 1848, and they inserted a provision therein as follows:

"Whenever two-thirds of all the members elected to each "branch of the General Assembly shall think it necessary to "alter or amend this constitution, they shall recommend to the "electors, at the next election of members of the general as- "sembly, to vote for or against a convention; and if it shall "appear that a majority of all the electors of the State voting "for representatives, have voted for a convention, the general "assembly shall at their next session call a convention, to con- "sist of as many members as the house of representatives at "the time of making said call, to be chosen in the same man- "ner, at the same place, and by the same electors, in the same "districts that chose the members of the house of representa- "tives, and which convention shall meet within three months "after the said election, for the purpose of revising, altering "or amending this constitution."—§ 1, Art. XII.

This section on the one hand defines the power of the legislature to be the mere power OF CALLING the convention in a particular manner; and on the other it defines the power of the convention when called by the legislature to be, TO ALTER, TO CHANGE, or TO AMEND the constitution.

By this section the framers of the constitution, for the purpose of amending or altering it, limited the power of the legislature to the calling of a convention in a specified mode; and from what has already been shown respecting the nature and purpose of this provision, the legislature can derive no power by implication from the silence of the constitution in regard to the time or manner in which the changes therein shall become the supreme law.

Expressum, facit cessare tacitum.

Therefore all the sections of the act of the legislature relating to the late convention, further than the mere calling of the convention in the manner prescribed by § 1, Art. XII., are *ultra vires*—beyond the power of the legislature, and therefore

void. The section of the law calling the convention was constitutional; the other sections have no force except as recommendations on the part of the legislature to the convention; regarded in any other light they are encroachments on the powers confided by the constitution to the convention. The legislature and the people, performing the constitutional duties assigned them, begot the convention, "to "meet for the purpose of revising, altering, or amending the "constitution."

In this connection it may be well to reply to a suggestion of the respondents' counsel that the delegates to the convention were not elected to exercise the power of altering or amending the constitution absolutely, but only on such terms and conditions as the legislature calling the convention had chosen to impose.

The best answer to this position is found in the law under which the convention was created: the first sections of that law provide for the CALLING of the convention—that was the extent of the power on that subject vested in the legislature; the other parts of the act do not profess to be a limitation of the call thus made, but assume to control the convention as to the mode and time in which it shall give effect to the changes which it may ordain.

But it has been already shown that the *calling* of the convention was in accordance with the existing constitution, and that all other provisions of the act were assumptions of power unauthorized by the constitution and therefore void; the convention acted under the call, but rejected that portion of the law which attempted to usurp its power of giving effect to the changes ordained by it.

The delegates to the Constitutional Convention were elected and met in the manner provided by law: and in the performance of their duties they so altered the constitution that the powers and duties of the respondents as Police Commissioners of the city of Chicago, have now ceased if § 34 of the schedule of the new Constitution is valid.

This section is as follows:

"At the next municipal election, to be held in the City of "Chicago on the third Tuesday of April, 1862, the legal "voters of said city shall cause to be printed or written upon "all their ballots the following words: '*For the City of* "*Chicago electing its own officers;*' or the words: '*Against* "*the City of Chicago electing its own officers;*' which shall "be canvassed and returned with the election returns of the "ballots, as is now provided by law. And in case there shall "be a majority of the legal voters, voting at said election, in favor of the people of said city electing their own officers, as "indicated by said above mentioned words, then it shall not "be lawful for any officers of that city to be chosen in any "other manner than by a vote of the people of said city, or "appointed in any other manner than by the Mayor and Alder-"man, as provided by present laws; and the act approved "February 22, A. D. 1861, entitled 'An act regulating the "custody and sale of personal property, under legal process, "in the city of Chicago, and the towns of South Chicago, "West Chicago and North Chicago, in Cook county;' also, "'An act to establish a board of police in and for the City "of Chicago, and to prescribe their powers and duties,' ap-"proved, February 21, A. D. 1861; and, also, so much of an "act approved February 18, A. D. 1861, as is embraced in "section sixty-six and one-half, (66½) of an act to amend the "city charter of Chicago, and creating three commissioners to "examine into the finances of said city, be and the same are "each and all of them hereby repealed; and the powers and "duties of all officers appointed under and by virtue of said "acts shall immediately cease; and, hereafter, neither the "Governor nor General Assembly shall appoint any person to "any office for said city of Chicago, but all officers shall be "elected by the people of said city, or appointed by the May-"or and Aldermen, as provided by present laws, or by such "general laws as may hereafter be passed by the General As-"sembly, under this constitution. The provisions of this con-"stitution required to be executed prior to the adoption or "rejection thereof, shall take effect and be in force immediate-"ly."

The contingency upon which the respondents' powers and duties should cease, happened at our late election, by an almost unanimous vote of the people of the city; but they still claim the right to continue in office, and to perform the the duties prescribed by the act of the legislature under which they were appointed; and they now insist that said § 34 of the schedule is invalid.

The grounds of objection to this section seem to be:

1st. That it extinguishes the powers of the respondents as Police Commissioners before being submitted to, and adopted by the people of the state; and

2d. That it is an assumption of power on the part of the Convention to pass and repeal laws in such manner as it deemed proper.

These objections derive all their strength from false assumptions concerning the respective powers of the legislature, and of the Convention called into existence by the agency of the legislature as provided by the constitution.

The argument in support of the validity of these objections is:

That the legislature can exercise all power not prohibited to it by the State Constitution: that the State Constitution does not prohibit the Legislature from prescribing the time and manner in which the changes sought to be made by the convention shall take effect, and that therefore it can in these particulars limit and control the convention.

It may be readily granted that the Legislature possesses all the legislative power of the State except such as is taken away by prohibitions express or implied, contained in the Constitution; it cannot be doubted, however, that there is an implied prohibition upon the legislature forbidding it from exercising any power destructive of the constitution from which it obtains its authority to act. But it will be seen by reference to section 1 of article XII of the Constitution under which this Convention was called, that the Legislature is prohibited from

exercising the general power of amending that instrument; by that section the general power of revising, altering or amending the whole Constitution is withheld from the Legislature, and confided to a Convention: which in the language of the Constitution "shall meet for the purpose of revising, altering, or amending" that instrument

The power which this body exercises when called in the manner specified by the constitution is, the inherent right of the people of the State to alter or change their organic law in any particular not inconsistent with the constitution of the United States. It will be seen on an examination of the section quoted, and of the section following, that the power of amendment, etc., as between the Convention and the legislature, is not divisible: it is wholly with one body or the other, as the legislature shall determine; but when it has decided on the Convention system, and provided the means for carrying that system into execution, in the mode prescribed by the Constitution, it has exhausted all its power under the Constitution, and for the purpose of revising, altering, or amending the organic law, it is *functus officio.* And the power of revising, altering and amending the constitution, when vested in the Convention, includes as a necessary incident the power to give effect to such alterations as may be proposed, and to prescribe the mode and manner in which the proposed amendments shall become the executed acts of the Convention, so as, in fact, to alter the existing constitution; otherwise the Convention would find itself in the dilemma of being called together for the purpose of altering the constitution without the power of doing any such thing. What then becomes of the proposition, that this body is a mere instrument of the legislature to execute its will and pleasure, when the constitution has in effect provided that under such circumstances the legislature shall have no voice in the subject matter of the alterations; and, as a consequence, none as to the mode or manner of giving the amendments legal effect?

If the legislature had the constitutional right, as is contended to say, under what circumstances the labors of the Convention should be binding and effective as the supreme law, it might have provided that the alterations and amendments agreed upon

should first be submitted to itself, and not to the people, before they should become valid: more than this, it might have provided, that unless the Convention should incorporate into the constitution some special section, such as section thirty-four, now in controversy, that its labors should be null and void: thereby virtually itself altering the constitution.

Thus the legislature, after having, as the agent of the people of the State, created another body to exercise the power of alteration, would indirectly do what under such circumstances it is prohibited from doing directly. A convention thus called, and with such limitations upon the power of altering the constitution, would be reduced to the position of a mere scrivener of the legislature to do its will. This certainly is not the meaning of Article XII. of the constitution, now in force.

Admitted that the convention is a mere agent exercising delegated powers; still when it is duly constituted, it is invested with the full power of revising, altering or amending the constitution; whatever is within the purview of these objects it has unlimited power to do, and to make its acts effective and binding; but beyond that it has no power whatever: and this view of its powers disposes of some fanciful suppositions put forth in behalf of the respondents to show the necessity of putting the convention under legislative control in regard to the powers to be exercised by it when convened.

From what has been said it will be readily seen that any provisions of the act of the legislature relating to the question whether the alterations and amendments made by the convention should be valid or not, are unconstitutional; and that the convention alone had the power as a necessary incident to the purpose for which it was created, of giving effect to its labors. Hence it might have provided that the amendments and alterations agreed upon should go into effect immediately, and without being submitted to the people for rejection or approval; or for a partial submission; or for a submission to the people of different localities. This was a power exclusively belonging to the convention, and it was to be exercised as that body might itself determine.

In regard to the 34th section, the convention disregarded the the recommendations of the legislature, as to the time and mode of giving effect thereto; in so doing it violated no provision of the constitution of the State or of the United States, but only vindicated its own authority and power.

It is not denied that this section contains proper subject matter to be inserted in a Constitution for the people of this State; and such an admission must be decisive of the question whether the Convention had power to alter the *existing Constitution or laws*, to make them conform to this section—the mere form adopted to effect this object is purely a matter for the Convention to fix upon.

It is however claimed that the Convention had no power to engraft in the Constitution a section repealing former acts of the Legislature, rendering them null and void: and this position is thought to be established upon the hypothesis that the whole legislative power of the State, including the right to repeal laws as well as to enact them, is vested exclusively in the State Legislature.

But when it is considered that the Constitution is the only warrant of authority from the people whereby the Legislature can bind them by its acts—that the people in that warrant of authority have in effect reserved the right to change or revoke it in a particular way—that the mode of change or revocation pointed out therein has been strictly followed—that the Convention, when called into being, is itself a legislature of the people, so far as it is necessary to make, and as a consequence to make binding, as the supreme law of the State, any revision, alteration, or amendment of the existing Constitution—and further, that the effect of such revision or alteration is to repeal all laws of the State which are inconsistent with the changes thus made; when all this is considered, it at once becomes apparent how utterly untenable is the position that the Convention cannot incorporate provisions into the Constitution which it has the power to make and establish, that shall repeal existing laws enacted by the State Legislature. Such laws when passed, were as well subject to be repealed or annulled by a Con-

stitutional Convention duly organized, as by the Legislature itself,—they were passed by the Legislature upon the implied condition that their effect might be entirely destroyed by the Constitutional Convention, so far as it might be necessary to give effect to its alterations of the organic law. This is all that has been done by the Convention in repealing the laws in question; and its action in this regard must therefore be binding as the organic law of the State.

F. H. KALES,

Of Counsel for the Relator.

358

SUPREME COURT.

Third Grand Division.

THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
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ARGUMENT OF JOHN M. ROUNTREE,

Of Counsel for Respondents.

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ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

APRIL TERM, 1862.

IF the court please, the issue involved in this cause presents to your Honors, in many of its aspects, a novel question for judicial arbitrament. In the history of our government, the powers vested in conventions, in any way relating to the government, of any character, have almost always been considered from a political stand point; and their conduct has been deemed rather the basis of political organization than a question for judicial determination. They fill a much larger space in the archives of the government than in the reports of judicial decisions. This only furnishes the inconvenience of being unable to produce, for the consideration of the court, a collection of precedents usually so pertinent in the consideration of questions of law, but leaves us rather to determine from history, and the spirit of our government, the true relation of the issues involved.

The legislature of the State of Illinois, at its regular ses-

sion, A. D. 1861, enacted a law establishing a board of police in and for the city of Chicago, prescribing their duties, which law was approved February 21, A. D. 1861. The system established by that law has been the more commonly known by the name of the metropolitan police system.

Among other things, the act of the legislature conferred the power upon the board of police, "whenever "any crime should be committed in the city of Chicago, "or within the county of Cook, and the person or persons, "accused or suspected of being guilty, shall flee from jus- "tice, the said board of police may, in their discretion, "authorize any person or persons to pursue and arrest such "accused or suspected person or persons, and return them "to the proper criminal court, having jurisdiction of the "offense, for trial."

And in the ninth section of the act: "The members of "the police force of the said city of Chicago shall possess- "in every part of the county of Cook, all the common law "and statutory powers of constables, except for the service "of civil process; and any warrant for search or arrest, by "any magistrate of the State of Illinois, may be executed "in any part of the county of Cook, by any member of the "police force of the said city of Chicago, without any back- "ing or endorsement of the said warrant, and according to "the terms thereof."

And in the seventeenth section of the act: "The board "of supervisors of Cook county, assembled, may call upon "the board of police to appoint for duty, within the said "county, as many men as it shall enumerate and describe, "upon appropriating to the police fund the necessary ex- "penses and salaries to be incurred thereby. Any of the "village or town authorities, within the said county, may "also make such demand upon the board of police, upon "making the like provisions of pay. And it shall be the

" duty of the board of police to appoint such officers, who " shall thereafter become regular members of the police " force of the city of Chicago, and subject to all the rules " and regulations of the board, discharge the duties, and pos- " sess powers and privileges, as such members. The super- " visors of the county of Cook are hereby authorized, from " time to time, to levy and raise, by tax upon the real and " personal property taxable, within said county, such sum " or sums of money as may be required to carry into effect " the provisions of this section, or the police purposes of " this act."

" And, by the thirtieth section of said act, all statutes, " parts of statutes and provisions of law, inconsistent with " the provisions of this act, are hereby repealed, together " with all modes and qualifications of appointment to " office, as members of police departments, or of elections " to office therein, inconsistent with the provisions of this " act."

By the provisions of these sections, and parts of sections, it will be discovered that the powers, privileges and duties are not confined to the limits of the city of Chicago, but extend throughout the county of Cook, and upon certain contingencies, throughout the entire State of Illinois.

The first section of the twelfth article of the constitution of the State of Illinois, which has been in force since April 1st, 1848, provides, that " whenever two-thirds of all the " the members elected to each branch of the general assem- " bly, shall think it necessary to alter or amend this consti- " tution, they shall recommend to the electors at the next " election of members of the general assembly, to vote " for or against a convention; and if it shall appear that a " majority of all the electors of the State, voting for repre- " sentatives, have voted for a convention, the general assem- " bly shall at their next session, call a convention, to consist " of as many members as the house of representatives at the

" time of making said call, to be chosen in the same manner, " at the same place, and by the same electors, in the sme " districts that choose the members of the house of repre- " sentatives, and which convention shall meet within three " months after the said election, for the purpose of revising, " altering or amending this constitution."

As appears by the house journal, 1859, p. 386, the general assembly of the State by a joint resolution, adopted February, 1859, recomended to the electors at the next election of members of the general assembly, to vote for or against a convention, and a majority of such electors having voted in favor of it, the legislature, by an act approved January 31st, 1861, called a convention to alter or amend the constitution, to meet at Springfield, on the first Tuesday of January, 1862. The act provided that the number of delegates should be the same as the number of the members of the house of representatives, and that they should be chosen on the Tuesday, next after the first Monday of November, 1861, in the same manner, at the same place, and by the same electors, in the same districts that choose the members of the house of representatives.

The act further provides, that the amendments, revisions, or alterations of the constitution, agreed to by the convention, shall be submitted to the people, for their adoption or rejection, at an election to be called by the convention. Provision is made for holding such election, and for ascertaining the result. If a majority of the votes cast at such election are in favor of accepting the alterations or amendments, or any part thereof, they are to become the supreme law of the State; but if a majority of the votes cast at such election, are against the alterations or amendments, or any part thereof, the same are to be null and void.

The thirty-fourth section of the schedule of the constitution, framed by the convention, held in pursuance of the resolution and act of the general assembly, and the election in pursuance thereof, provides:

"That, at the next municipal election, to be held in the "city of Chicago, on the third Tuesday of April, 1862, the "legal voters of said city shall cause to be printed or written "upon all their ballots, the following words: 'For the city of "Chicago electing its own officers;' or the words: 'against "the city of Chicago electing its own officers;' which shall "be canvassed and returned with the election returns of the "ballots, as is now provided by law. And, in case there shall "be a majority of the legal voters, voting at said election, "in favor of the people of said city electing their own "officers, as indicated by said above mentioned words, then "it shall not be lawful for any officers of that city to be "chosen in any other manner, than by a vote of the people "of said city, or appointed in any other manner than by "the mayor and aldermen, as provided by present laws; "and the act approved February 2nd, 1861, entitled, 'an "act regulating the custody and sale of personal property "under legal process, in the city of Chicago, and the towns "of South Chicago, West Chicago, and North Chicago, in "Cook county;' also, an act to 'establish a board of po-"lice in and for the city of Chicago, and to prescribe their "powers and duties,' approved, February 21st, 1861, and "also, so much of 'an act approved, February 18th, 1861; "as is embraced in section sixty-six and one half, (66½) of "an act to amend the city charter of Chicago, and creating "three commissioners to examine into the finances of said "city,' be, and the same are, each and all of them, hereby "repealed; and the powers and duties of all officers ap-"pointed under and by virtue of said acts, shall im-"mediately cease; and, hereafter, neither the governor nor "general assembly, shall appoint any person to any office "for said city of Chicago; but all officers shall be elect-"ed by the people of said city, or appointed by the mayor "and aldermen, as provided by present laws, or by such "general laws as may hereafter be passed by the general "assembly, under the constitution."

This section of the schedule finally provides: "The pro-
"visions of this constitution, required to be executed pri-
"or to the adoption or rejection thereof, shall take effect
"and be in force immediately."

The fourth section of the schedule provides, that the constitution shall be submitted to the people for their adoption or rejection, at an election to be held on the Tuesday next, after the third Monday of June, A. D., 1862.

The sixth section of the schedule, provides the manner in which the result of such election shall be ascertained. And the seventh section provides, that if a majority of the votes polled are for the adoption of the proposed constitution, it shall become the supreme law of the State, from and after September, A. D., 1862; but if a majority of the votes polled are given against the proposed constitution, the same shall be null and void.

As I understand the case now, the existing municipal authorities of the city of Chicago claim, that under the thirty-fourth section of the schedule of the proposed constitution, (or, as in the course of this argument I shall term it, the new constitution, to distinguish it from the constitution of 1848, and for that purpose only) and in pursuance of the submission to the people of the city of Chicago, at their last municipal election, the question, whether they were in favor of, or against the people of the city of Chicago electing their own officers, and the majority vote of the voters at that election in favor of the people of the city of Chicago electing their own officers, they are entitled to the insignia of office obtained and retained by the police commissioners, and that the commissioners no longer possess any of the powers or privileges granted them by the act of the legislalature establishing the board of police. This claim the police commissioners deny.

I shall present what I have to say in this case, in the following propositions.

First. I say, that if it is sought to alter, revise, or amend an organic or fundamental law, and the fundamental law sought to be altered, revised or amended, prescribes the manner of its alteration, revision, or amendment, such alteration, revision, or amendment can be legally effected, only by conformity to the established fundamental law.

Second. In case there is no provision in an existing fundamental law, prescribing the method of its alteration or amendment, under our form of government, any alterations or amendments, obtain no vitality until ratified by the whole people affected by it, who alone possess sovereign power.

Third. That a constitutional convention can possess no executive, judicial, or legislative powers; but can only submit to the people for their adoption or rejection, an organic law, which must be general and universal in its application and provisions.

Fourth. Legislative enactments are not proper subjects for the exercise of the right of suffrage.

Fifth. The enactment of the thirty-fourth section of the schedule of the new constitution, is contrary to public policy, in that, if it is affirmed, the city of Chicago is without a police force.

And first, alterations, revisions, and amendments, can be legally made, only in conformity to established law.

Any other mode is anarchy. It disarranges the whole body politic. It is subversive of all law and all order. It reverses the wheels of government, and produces an utter destruction of its entire machinery, breaking up the harmonious whole. It tends to convulsion; and in case of approximating to an equality of numbers, favoring each system, the only remedy is a resort to arms, and the establishment of a system by force. Not a single State in the Union has undertaken a change of its organic law, without previous legislative action. The uniformity of such action has established a precedent, which has been recognized as

binding as positive law, and has always received judicial sanction.

The people, in assembling together to exercise the right of suffrage, to which they are entitled, at the time, and place, and in the manner prescribed by law, thereby express, as distinctly as they can, their ratification or rejection of the law. They affirm or reject the law enacted by their representatives. They approve or disapprove the conduct of their representatives in enacting a law in pursuance of the organic law of the land, and although the expression cannot be distinctly, the law is or is not approved, yet the duties enjoined upon those who are to exercise powers under the law, are reiterated and reaffirmed by the people. This system preserves the balance. It equalizes the duties and powers of the various departments of government. It recognizes one established source of power, and subjects all rights, and wrongs, to their proper source of determination. The power that is delegated, can peaceably, and legally, and lawfully be exercised. All others, from the very nature of the case, are reserved. The people only seek to re-clothe.

That this has been the understanding of the policy and system of our government, I think cannot be denied. All other policies and systems produce revolution and anarchy. Mr. Webster, in his argument before the Supreme court in the case of *Luther vs. Borden*, found in the 6th volume of Webster's works, page 226, most forcibly illustrates the rule. He says:

"Is it not obvious enough, that men cannot get together "and count themselves, and say they are so many hun- "dreds and so many thousands, and judge of their own "qualifications and call themselves the people, and set up "a government? Why, another set of men forty miles off, "on the same day, with the same propriety, with as good "qualifications, and in as large numbers, may meet and set

"up another government; one may meet at Newport and "another at Chepachet, and both may call themselves the "people. What is this but anarchy? What liberty is "there here but a tumultuary, tempestuous, violent, stormy "liberty; a sort of South American liberty, without power "except in its spasms; a liberty supported by arms to-day, "crushed by arms to-morrow? Is that *our* liberty? "The regular action of popular power on the other "hand, places upon public liberty the most beautiful face "that ever adorned that angel form. All is regular and "harmonious in its features, and gentle in its operation. "The stream of public authority, under American liberty "running in this channel, has the strength of the Missouri, "while its waters are as transparent as those of a crystal "lake. It is powerful for good. It produces no violence, "no tumult, and no wrong.

> "Though deep, yet clear; though gentle, yet not dull;
> Strong, without rage; without o'erflowing, full."

And in the same argument, he says:

"In the exercise of political power, through representa- "tives, we know nothing; we never have known anything, "but such an exercise as should take place through the "prescribed forms of law. When we depart from that, we "shall wander as widely from the American track as the "pole is from the track of the sun."

And again, he says:

"There must be some authentic mode of ascertaining the "will of the people, else all is anarchy. It resolves itself "into the law of the strongest, or, what is the same thing, "of the most numerous for the moment, and all con- "stitutions and all legislative rights are prostrated and "disregarded."

I have quoted thus at length from the argument of Mr. Webster, deeming him as high authority as any we have, upon political questions and the source of power. His

views were those of a man, who had devoted his life to the consideration of natural rights, and the theory of our government.

The Supreme court of Massachusetts, as reported in 6th Cushing, page 574, in considering this same question, say:

"That there is no authority given by any reasonable con-
"struction, or necessary implication, by which any specific
"and particular amendment, or amendments, of the consti-
"tution can be made, in any other manner than that pre-
"scribed in the ninth article of the amendments, adopted in
"1820. Considering, that previous to 1820, no mode was
"provided by the constitution for its own amendment; that
"no other power for that purpose, than in the mode alluded
"to, is anywhere given in the constitution, by implication
"or otherwise, and that the mode thereby provided ap-
"pears manifestly to have been carefully considered, and
"the power of altering the constitution thereby conferred,
"to have been cautiously restrained and guarded, we think
"a strong implication arises against the existence of any
"other power under the constitution, for the same pur-
"pose."

"Upon the first question, considering that the constitu-
"tion has vested no authority in the legislature, in its or-
"dinary action, to provide by law for submitting to the
"people the expediency of calling a convention of dele-
"gates, for the purpose of revising or altering the consti-
"tution of the commonwealth, it is difficult to give an
"opinion upon the question, what would be the power of
"such a convention, if called. If, however, the people,
"should, by the terms of their vote, decide to call a con-
"vention of delegates to consider the expediency of alter-
"ing the constitution, in some particular part thereof, *we*
"*are of opinion that such delegates would derive their whole*
,' *authority and commission from such vote:* and upon the

"general principles governing the delegation of power and "authority, they would have no right, under such vote, to "act upon and propose amendments in other parts of the "constitution not so specified."

The italics are mine. The Supreme court here say: "that such delegates would derive their *whole authority and* "*commission from such vote.*" What does it mean? That they must act in conformity with the power granted them. There is no other power granted them—all others are reserved—reserved to the people, withheld from the delegates; and the exercise of any other power by them is a nullity. It is entirely outside of the duties they were commissioned to discharge, and their exercise of any other powers, is of as little effect as though they had never exercised them..

In the case at hearing, the legislature of Illinois, in pursuance of the provisions of the old constitution, offered to the electors of the State the opportunity of determining, whether they would, or would not, change their organic law. They elected to change it. In pursuance of this election, the legislature passed an act providing for the holding of a convention to alter the constitution; and by this act, provided the number of delegates to consist of the same number as the house of representatives, the time and place of holding the election, prescribing the qualifications of electors; and further providing, that the amendments, revisions or alterations of the constitution agreed to by the convention, *should be submitted by it to the people*, not a part of the people, nor the people of any particular district, city or county, but to the people—*the whole people of the State*—for their adoption or rejection, at an election to be called by the convention. In pursuance of the provisions of that law, the electors, at the proper time and places, and in the manner prescribed in the law, held an election, and elected their delegates to discharge the duties enjoined upon them,

and granted them by that law; and necessarily reserved to themselves all other powers. Reserved all other powers, because they were not specified or granted in the law they voted under and upon, and by their voting ratified and re-affirmed.

I submit to this court, had the people understood at that election, held in pursuance of that law, that they were thereby clothing their delegates with full power and authority to frame such a constitution, as, in their discretion, they might deem proper; or having framed one, they would exercise their discretion in submitting it to the people for rejection, or adoption, or they would submit such parts of it as they deemed necessary, and in such manner, and to such districts, as, in their wisdom, they might elect—how many delegates, unpledged to submitting the whole constitution, as a whole, to *all the people of the entire State*, without regard to districts, cities, counties, or localities, of any nature, would have been elected? I venture the assertion, not one.

The people of the State of Illinois have had enough of that thing. The heated political animosity, awakened by the endeavor to bring Kansas into the Union, under the Lecompton constitution, has not yet subsided; and the persecution, almost to the death, of their great idol, the lamented Douglas, by reason of his vindication of the inherent, inalienable right of self government, and reserved powers, by the advocates of conventional dictation and dictatorial power, has not yet been forgotten, nor will it be, while lake Michigan kisses the shore where he lies sleeping. Too many pledges have been made, too much feeling embittered, too much animosity aroused, too much of human nature convulsed, by reason of the reckless disregard of law and natural rights, by those who attempted to force upon a people, a system of government over whose control they had no expression.

The delegates to the convention were elected under the law; the people voted for them under the law, and voted upon the law, and in the language of the Supreme court of Massachusetts, "such delegates derive their whole authority and commission from such vote; and upon the general principles governing the delegation of power and authority, they would have no right, under such vote," to transcend the limits of the law. This is the doctrine of reason and common sense. The law contained words of limitation, and specified the particular acts and things the convention were to perform. The convention was brought into existence, by the ratification of that law by the people. It did not contain an implication of discretionary power, but having been enacted strictly in pursuance of the existing fundamental law, it defined the powers the convention should possess, and prescribed the duties the convention should perform. I do not mean to say, that by the law as originally enacted, the convention was to be governed; but the law which gave the convention existence having been voted upon by the people, and re-affirmed by them, and there being no authority given the delegates, the delegates were to be controlled by the law.

The convention, which framed this new constitution, was the regular succession of the provisions of the old constitution; and the legislature of the State, and the people by their adoption of the action of the legislature, undertook to follow the prescribed form in altering their constitution. Up to the time of the meeting of the convention, all the successive steps are strictly in conformity to the fundadamental law of the land. There the divergence begins. This power to diverge, I deny the convention possessed. In the case, *Collier, Governor, &c., vs. Frierson, et al.*, reported in the 24th Alabama, page 100, the Supreme court declares the proper rule to be: "The State constitution can only be changed by the people in convention, or in the mode prescribed in the instrument itself; and if the latter

mode is adopted, every requisition of the constitution must be adopted". In that case the amendments were proposed by the general assembly, joint resolutions were adopted at the next succeeding session, reciting in the preamble that, "Whereas, the General Assembly of this State, at the last session of the same, duly submitted to the people of said State, proposed amendments to the constitution: and whereas, the people of this State, in manner and form provided by the constitution, have accepted the said amendments, which are in the words and figures following, &c.," setting them all out except one, which was entirely omitted; and the usual clause was then added, enacting "that the aforesaid amendments to the constitution, proposed as aforesaid, and accepted by the people as aforesaid, be ratified, and that the same from and after the passage of this resolution, be and form a part of the constitution of the State of Alabama." It was held by the court, that the amendment, which was entirely omitted from the ratifying resolution, was not constitutionally ratified, and therefore failed. Now if this be the proper rule of law, and I contend it is, how can it be said that the prescribed form may be followed in part, and disregarded in part; and that, too, when the people have, as distinctly as the opportunity allowed, directed the prescribed form to be pursued.

In addition to the judicial decisions made upon the issue here, we have the opinions of eminent statesmen, as expressed in a case directly in point. The late distinguished statesman and eminent jurist, Stephen A. Douglas, whose name should only be mentioned with reverence, who once occupied the same seat your Honors now hold, and whose judicial opinions are quoted at every term of this honorable court, and treated with that profound veneration and respect they deserve, in his great speech, upon the Lecompton constitution, made in the Senate of the United States, March 22, 1858, says, of the convention that framed that instrument of iniquity and fraud:

"The convention assembled under the authority of the "Territorial legislature alone, and hence was bound to "conduct all its proceedings in conformity with, and in "subordination to, the authority of the legislature. The "moment the convention attempted to put its constitution "into operation, against the authority of the Territorial "legislature, it committed an act of rebellion against the "government of the United States."

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"But, sir, is it true, that this constitution may be changed "immediately by the people of Kansas? The President of "the United States tells us the people can make and "unmake constitutions at pleasure; that the people have "no right to tie their own hands and prohibit a change of "the constitution until 1864, or any other period; that the "right of change always exists, and that the change may "be made by the people at any time, in their own way, at "pleasure, by the consent of the legislature. I do not "agree, that the people cannot tie their own hands. I "hold that a constitution is a social compact between all "the people of the State that adopt it; between each man "in the State and every other man, binding upon all, and "they have the right to say it shall only be changed at a "particular time, and in a particular manner, and then "only after such and such periods of deliberation. Not "only have they a right to do this, but it is wise that the "fundamental law should have some stability; some per-"manency, and not be liable to fluctuation and change by "every ebullition of passion."

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"There are two modes of changing the constitution of a "State; one lawful, the other revolutionary. The lawful "mode is the one prescribed in the instrument. The revo-"lutionary mode is one in violation of the instrument. "The revolutionary mode may be peaceful, or may be "forcible; that depends on whether there is resistance.

"If the people are unanimous in favor of a change, if no-
"body opposes it, the revolutionary means may be a
"peaceful remedy; but if, in the progress of the revolution,
"while you are making the change, you meet with resist-
"ance, then it becomes civil war, treason, rebellion, if you
"fail, and a successful revolution if you succeed."

There is the doctrine clearly, logically and truthfully expressed: "Rebellion if you fail, and a successful revolu-
"tion if you succeed." In either case, illegal, unlawful; if successful, the right of might; if unsuccessful, the rope, the dungeon. All unlawful, all illegal.

Mr. Douglas' theory of self-government; the rule by him prescribed for the formation of the fundamental law, is to-day the recognized theory and rule throughout all loyal portions of the land; and his enunciation of that theory and rule stands pre-eminently higher, and deservedly so, in the minds of courts, judges, legislative and executive departments, than any authority I could cite. The people of the loyal States have adopted his views by universal consent, and have awarded him the title of the Great Champion of Popular Sovereignty.

Now, let us see to what extent the conduct of the convention, as regards the thirty-fourth section of the schedule, accords with these principles. The schedule provides, that upon the happening of a certain contingency, to wit, if the people of the city of Chicago, at their municipal election, shall, by a majority vote, vote in favor of the people of the city of Chicago electing its own officers, then in that case certain acts of the legislature, therein named, shall be, and the same were, thereby repealed. Are the people of the city of Chicago the people of the State of Illinois, or are they a part of the people of the State? Are the people of the city of Chicago to determine for the people of the entire State, what the organic law of the State shall be? Are the people of the city of Chicago to determine rights

and privileges affecting the inhabitants of the county of Cook, and in certain cases, the people of the entire State? The powers and duties of the board of police are not confined to the city of Chicago, but extend throughout the county of Cook, and in the service of certain kinds of process, throughout the entire State.

Can it be contended that the convention, in submitting the question to the city of Chicago, whether it should elect its own officers, and in case they voted in the affirmative, certain statutes should be, and were, repealed, conformed to the prescribed form of law, requiring the constitution to be submitted to the people? The convention did not even submit the proposition to those affected by it, much less to the people of the State. Have the inhabitants of Cook county, without the city of Chicago, no rights that the convention were bound to respect? Are the convention the proper judges of what city, district, or county, contains the people of the State of Illinois? Are the people of Cook county; of the State of Illinois, outside of the city of Chicago, to be deprived of their rights and privileges, granted them by law, by the exercise of the suffrages of the inhabitants of Chicago? If so, why not create the people of Chicago the government of the State, and invest them with all the attributes of sovereignty, and permit them, at their municipal elections, to make and unmake laws, frame constitutions, try cases, execute mesne and final process, and grant divorces? The proposition is not more absurd than the one at bar. If this supreme power of enactment or repeal of laws rests in the expression of the people of Chicago, at their annual municipal elections, then they may as properly and rightfully and lawfully be invested with all legislative, executive and judicial authority. It is the principle. If the principle holds good in part, it holds good in whole. Where shall we draw the line of distinction? The convention possessed as much power

to invest the people of Chicago with the right to determine that existing banking laws, general incorporation laws, and the statute of wills should be repealed, as they did to invest them with power to determine that the police act should be repealed.

Even, if the police bill related to the city of Chicago alone, there could not be a plausible argument framed in favor of the power of the convention. But the bill extends beyond the city limits. It goes outside, and confers powers, and enjoins duties upon the commissioners and policemen throughout the county of Cook, and says to an injured man from Massac county, in Chicago is an officer to serve process, enabling you to obtain redress. This being so, as is expressed by the ninth and seventeenth sections of the police act, why not, with as much propriety, have submitted to the city of Chicago, the right to determine the location of the county seat of Cook county, or of Massac county? Why not have submitted to the city of Chicago the legislative power to repeal *all* existing statutes, or to constitute themselves at the polls a court of final resort, or expel the State officers, and approve bills, audit the public accounts, disburse the public funds, and preserve the archives of the government? Why not commission the voters of Chicago a jury *de lunatico inquirendo*, to try the sanity of the county officers, court-house clique, and John Wentworth.

2. In case there is no provision in an existing fundamental law, prescribing the method of its alteration or amendment, under our form of government, any alterations or amendments obtain no vitality until ratified by the whole people affected by it, who alone possess sovereign power.

Of the old thirteen States, the constitutions, with but one exception, contained no provision for their own amendment. Yet, not one of those constitutions preserves its original

form. The necessities of progressing time have demanded a change. This change has been effected by the ordinary legislative action, providing for the calling a convention, and the election of delegates to alter, amend or revise the constitution. This legislative action has been deemed an ordinary legislative power. The usage has become law. In no other way can an authoritative convention be obtained. The people, in their primary capacity, possess no legislative power. That can be exercised only in their aggregate or representative capacity. Mass meetings possess no legislative power; they are but the means of delegating power. I know of no constitution or laws, framed or enacted by mass meetings, or self-constituted bodies, that have ever been held binding, or operative, since the formation of the general government.

In Rhode Island, this was attempted, and excited the tumult commonly known as the Dorr Rebellion. It was suppressed by the then existing, regularly constituted charter government, and its suppression has ever served as a precedent against the powers of self-constituted bodies. Territories, or rather the people of territories, possess no such power, nor has the right to exercise such power been conceded them since the time of the admission of Arkansas into the Union. Congress must pass enabling acts for their benefit, or they must assume the character of petitions. It could not be otherwise, else we should find, as in the Rhode Island case, two governments in existence at the same time, and each claiming the right to exercise the powers and duties of the other. Judicial determination could not readily settle the rights of the contending claimants, for the court assuming to act, would necessarily determine in favor of the government under which they are constituted, or they stultify themselves.

The only remedy, then, is the executive power, and the stronger the executive arm of the government, the greater

is the probability of success. Now, this must be revolution—one must be wrong, the other right. And if the government, originally existing, has done no act to bring into being the contending government, the latter is without governmental authority. Hence, the necessity of this legislative action; and hence, the reason for adopting legislative action as the only means for providing for amending a fundamental law, where it makes no provision for its own amendment or alteration.

This having been done, what powers does the convention possess? I contend, only such powers as are delegated and *surrendered.* That the people are the source of all sovereign power, all political writers admit. I contend, that the people alone are sovereign, and sovereignty rests alone with the people. Under our system, from the people emanate all the powers to be exercised in the various departments of government. Without their expression, government itself has no existence. They breathe into it the vitality which puts it in motion. Government is not sovereign, but is the creature of sovereignty. The people, in the creation of the various departments, reserve to themselves the right to alter, amend, or destroy the creature they have put into existence. It is a reservation not necessary to be expressed, under our theory. It is reserved as a matter of course, and its exercise is dependent upon the people alone. This right of revision, or amendment, the people exercise at their pleasure. They may *surrender* this absolute power by prescribing the manner and mode of revision, so that they cannot lawfully, nor consistently, with ethics and morality, nor by any other means, than power and force, adopt any other mode; but they cannot delegate the power of finally establishing government, or invest another with the absolute sovereignty they alone possess.

The constitution of the United States provides that "the powers not delegated to the United States by the constitu-

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In accordance with this provision, has it been contended, congress can only legislate on such subjects as are expressly authorized by the constitution. And for the same reason can a legislature legislate uuon all subjects within the range of ordinary legislative action, not forbidden by the constitution. They come within the rule. So all bodies act unrestrained within their sphere, when not expressly restrained. They perform the duties incident to their office. But behind them all, lie the reserved rights of the people, which rights they can lawfully exercise, when not surrendered. When the people have thus elected delegates to represent them in any capacity, they impliedly reserve to themselves the right of reviewing the conduct of their representatives; and if it be by the legislature any unpopular laws are enacted, the right is reserved to them to elect, for their successors, such representatives as will repeal objectionable statutes. The docteine is well settled in this country, that a legislature cannot pass irrevocable laws. The power of the Parliament of England in that respect, has always been denied to legislative bodies in America, and has not now an advocate. As regards the conduct of their representatives in legislatures, so the right exists and is reserved to review and act upon the conduct of conventions in framing fundamental laws. When the people have not expressly surrendered this sovereign right of adoption or rejection, they cannot, lawfully, be deprived of that right. It is only by having the fundamental law submitted, that their pleasure can be ascertained in a lawful way.

And why not have it submitted? What objection can exist to obtaining the expression of the popular will, upon the law which binds and controls them? The very attempt to prevent its submission is an evidence of the inclination to despotism. Is it fear of its rejection, that prompts its

framers to force it upon the people, and bind them by a fundamental law obnoxious to them? That is despotic and the only claim of kings and princes. If the power rests in a constitutional convention to frame a fundamental law, and put it into existence, and under it, overthrow the existing government, and abolish existing laws, then the power rests with them to constitute themselves, or any of their number, the government, and preserve their existence for an interminable length of time, unless removed by force. They are revolutionists and dangerous, and should be suppressed. If they possess this absolute power of making and unmaking governments, without having the power expressly surrendered by the people, then they can assume the powers of all the departments of government, and enact laws, expound laws, and execute laws. This court would be blotted out of existence, the executive mansion vacated, and the legislative halls closed by this sovereign body, who claim to be the people. With as much propriety might they claim all this, as to claim the right to adopt a fundamental law, without consulting the popular will.

In effect, the constitutional convention have arrogated to themselves these sovereign powers, in the adoption of the thirty-fourth section of the schedule. And the method they have adopted to repeal the police bill, notwithstanding that bill affects the rights of the people of the entire county of Cook, and of the State of Illinois, in a certain class of cases, and under various circumstances, they seek its repeal by a method as despotic as though they themselves had repealed it, without consulting any portion of the people. The method by the convention selected to effect its repeal, has not a parallel in history. It is too ridiculous to be considered worthy of adoption.

I do not understand that the people outside of the city of Chicago, elected delegates to the constitutional convention, to submit to the people of Chicago the manner in which

they should be governed; that they constituted the people of that city, the keepers of their consciences, or the judges of laws that were tasteful or distasteful to them. As they did not attempt to clothe the convention with this absolutism, and did not surrender the inherent, inalienable right of revising their acts, I do not understand that they vested in the convention, the power to clothe the people of Chicago with absolute power. When the people of Illinois, without the city limits, have so much faith in the integrity, purity and wisdom of the people of Chicago, I anticipate a more distinct and decided expression of their confidence, than was uttered at the November election.

I am not attempting to ridicule the action of the convention. If the illustration of the principle sought to be established in this case, and the claim here sought to be substantiated, renders the principle ridiculous, I can only reply—that is no funeral of ours. If the principle is a correct principle, it will withstand, and successfully withstand, even an attempt at ridicule. The fault lies in the principle.

If the convention possessed the power of submitting to the people of Chicago, whether a law like the police bill, which affects the people of the entire State, as well as the people of Chicago, should, or should not, be repealed, why not have submitted to the people of Jo Davies County, whether the general banking law should be repealed; and to the people of Cook county, without the city limits, whether the general railroad law should be repealed; and to the people of Springfield, whether the penitentiary, in Joliet, should be destroyed, and one erected in Chicago?

These are as clearely within the province of the convention, as the case under consideration. These acts affect the people of the State no more than does the police bill. They all have rights, under each of these laws, and are all more or less affected by them.

This discretionary power of adopting a fundamental law, or of submitting one portion of a fundamental law, affecting the rights of the whole people, to the people of one section—and another portion, to the people of another section—and vesting in the people of the several sections, powers, the convention itself did not possess, is contrary to the whole theory of our government, subversive of its principles, and destructive to the sovereign power, and reserved rights of the people. Its advocates, in the great struggle before the American people, when the popular expression was sought upon the subject in the case of the application for the admission of Kansss into the Union, were those, who, at the time, were plotting treason and rebellion, and whose souls were black with the infamy of traitors. Men, whose names are infamous in American history; men, against whom the curses of twenty millions of people are uttered, and whose memory is a curse to America.

3rd. A constitutional convention can posses no executive, judicial or legislative powers; but can only submit to the people, for their adoption, or rejection, an organic law, which must be general and universal in its application and provisions.

That a constitutional convention should undertake to legislate, is a novel exercise of power. Framing a fundamental law as the basis of government, prescribing the form of government, and separating government into the various departments it should properly have, in conformity to the spirit of republican government, and imposing general limitations upon the power the several departments shall exercise, making those limitations universal in their application, I conceive to be the true purpose of constitutional conventions. Otherwise, there is no rule that can be prescribed, whereby a limitation can be imposed upon a convention. It would possess the power to infringe upon every department of government, usurps all its functions, and extend throughout all its ramifications. If we do not

bind conventions to the framing an organic act, which shall affect the people of one section of the State in the same manner, and to the same effect, by the same means that it shall affect the people of another section, why can they not partition the State into so many given sections, and frame for the benefit of one section, to the exclusion of another, a certain portion of a fundamental law—and for the benefit of another section, another portion—and so continue districting the State and partitioning the constitution? Then, when this has all been done, submit to the people of the several sections of the State, the several portions of the constitution, regardless of the rights affected by it, and subject one section to the popular will of another portion.

The constitutional convention claimed to itself a rare combination of powers. It first undertakes the power of legislative action, and having partially exercised that power, then undertakes to clothe the people in their primary capacity with the same power. They who derived all the authority they possessed, from the people, as the people expressed themselves, and as the people granted or surrendered power, undertook to clothe the people with a power, that even the people, in a representative government, can only exercise through representatives. The convention not only made itself a legislature, but made a legislature out of the people of Chicago. I know of but one government in the world, where the people, in their primary capacity, make and unmake laws. I believe, in one of the cantons of Switzerland, all the citizens meet in council and there frame their laws. But that is not a republican government. It is a democracy in the pure, literal, analytical definition of the term.

If this convention possessed these powers of legislation, why did it not possess the powers of every department of government? The legislative department is but a single department of republican government. We commonly

speak of three departments of government—the legislative, executive, and judicial; and all the written constitutions in this country, now in existence, with which I am familiar, form these three departments, and leave to each of them the exercise of the ordinary duties incident to their organ ism. So common is this, that it is a precedent adopted heretofore in the framing of all constitutions. This very convention, in article three of the new constitution, section one, adopted this precedent, and declared:

"The powers of the government of the State of Illinois shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another."

"SEC. 2. No person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted; and all acts in contravention of this section shall be void."

Now can it be that this convention created itself one of these departments. If the claim here made is correct, and legal and lawful, the convention certainly claimed to exercise the powers belonging to one of these departments; and as the new constitution provides, that no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, there can be no such thing in the State of Illinois as a legislature, for the body who framed that constitution made themselves one of the departments, leaving only the executive and judicial unappropriated.

If the convention did not appropriate to themselves the legislative department, created by the constitution, they then created themselves a legislature *pro hac vice*. Now,

as I have before said, if this power to create themselves a *legislature* existed within the convention, the power to create themselves a court existed, as did the power to assume executive powers. And if this power existed to any degree, it also existed to an entire degree, and the constitutional convention could have created themselves the government of the State of Illinois, and could have exercised all the powers of government, and discharged all its functions. Their authority was as complete in one sense as in the other.

How would this have resulted? All our courts of inferior and superior jurisdiction might have become obsolete for lack of business. This convention could have directed their clerk to issue summons upon *praecipe* being filed, and direct the door-keeper to serve the process. The declaration and pleadings might have been filed with their clerk, and the issues made up. The chairman of the convention acts as chief justice, and litigants appear for trial. The jury, summoned upon the venire, served by the door-keeper, appear, and are qualified; or the convention details a certain number of their members to serve as jury-men, or it constitutes itself a court and jury, and proceeds with the trial. The evidence is introduced, case argued and submitted. The verdict is rendered, and judgment rendered upon the verdict. Clerk issues execution, door-keeper levies, advertises and sells. Delivers possession of property, or records certificate. Finally, makes deed, and rights are adjusted, and wrongs redressed. How beautiful! How lovely!

"Change places," says Lear, "and *handy-dandy*, which "is the justice, and which is the thief?" Change places, and *handy-dandy*, which is the court and which is the legislature? The convention is assembled, and the chairman is speaker, governor and lieutenant governor. The clerk is clerk and private secretary. Assistant and enroll-

ing clerks are deputies. The door-keeper is sergeant-at-arms. Some honorable member introduces a bill, and it is referred. Committee reports, and the bill is read or passed by, reading its title. The chairman approves, and the clerk, being the keeper of the archives, files it. Its a law.

Mr. Douglas, in his 22nd of March, 1858, speech, denied a Constitutional convention *any power* of legislation. He asserted it to be the creature of the power that brought it into existence. That it possessed only the authority it was invested with, and any attempt at an exercise of power not expressly delegated, was without the province of the convention, and, in contemplation of law, a nullity. Can it be contended, the delegates are elected by the people to legislate, and exercise all the powers of legislative action? Why not, with as much reason, contend, that the people surrendered to the delegates *all* their sovereignty, and surrendered to them the entire authority to make and unmake all laws, and to establish and execute the entire government? The claim in the one case is as reasonable as in the other.

4. Legislative enactments are not proper subjects for the exercise of the right of suffrage.

If the convention itself possessed no power of legislation, I cannot conceive how they can invest the people, in their primary capacity, with any such power. Legislatures cannot do it. The exercise of legislative power with us, is confined to representatives elected for that purpose. They are the people in their aggregate capacity, and exercise the powers incident to that capacity, subject at all times to approval or disapproval of their conduct by the people. Legislatures cannot divest themselves of the responsibilty by a reference of the question of the passage of laws to their constituents.

Barto vs. Himrod, 4 Seld. 485.
Thorne vs. Cramer, 15 Barb. 112.

A law which affects the people of a particular section alone, it has been decided, may be referred to the people of that section; but a general law, affecting the entire people of a commonwealth, cannot be submitted to that people for them to exercise the legislative power. How, then, can it be contended that a law, affecting the entire people of the State, can be submitted to the people of a single city in that State, for them to exercise the legislative power?

5. The enactment of the thirty-fourth section of the schedule of the new constitution is contrary to public policy, in that, if it is affirmed, the city of Chicago is without a police force.

If, for the sake of argument, we should concede to the convention the legislative authority sought to be enforced here, the result of such concession would not authorize the establishment of a police force in the city. The section undertakes, upon a certain contingency, to repeal existing laws, without making any provision for reviving laws repealed by the police bill. The statutes of the State (Scates' Comp. p. 722) expressly declare: "No act, or part of an act, re-"pealed by another act of the General Assembly, shall be decreed to be revived by the repeal of such repealing act." It is true this section of the schedule is not the act of the general assembly, but the convention has not undertaken to restore the common law rule, either expressly or by implication, nor could it do so until the statute was repealed. If the commisioners are out of office, by the action of the convention, and the vote of the people of Chicago, then there is no appointing power in existence, and persons assuming to exercise that power, and those attempting to discharge the duties of policemen, are acting without authority of law, and their acts are no more binding than as though a private individual should assume to perform them.

I do not undertake to discuss what the effect of this

schedule would be, in case the constitution should be adopted at the same election. That question is not now before this court. When it is properly before the court, then will be the proper time to determine it.

JOHN M. ROUNTREE,

For Respondents.

358

SUPREME COURT.

Third Grand Division.

THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

APRIL TERM, 1862.

ARGUMENT OF JOHN M. ROUNTREE,

Of Counsel for Respondents.

BEACH & BARNARD, PRINTERS.

Filed May 19 1862
C Leland
Clk

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THE PEOPLE *ex rel.* THE CITY OF CHICAGO,
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APRIL TERM, 1862.

IF the court please, the issue involved in this cause presents to your Honors, in many of its aspects, a novel question for judicial arbitrament. In the history of our government, the powers vested in conventions, in any way relating to the government, of any character, have almost always been considered from a political stand point; and their conduct has been deemed rather the basis of political organization than a question for judicial determination. They fill a much larger space in the archives of the government than in the reports of judicial decisions. This only furnishes the inconvenience of being unable to produce, for the consideration of the court, a collection of precedents usually so pertinent in the consideration of questions of law, but leaves us rather to determine from history, and the spirit of our government, the true relation of the issues involved.

The legislature of the State of Illinois, at its regular ses-

sion, A. D. 1861, enacted a law establishing a board of police in and for the city of Chicago, prescribing their duties, which law was approved February 21, A. D. 1861. The system established by that law has been the more commonly known by the name of the metropolitan police system.

Among other things, the act of the legislature conferred the power upon the board of police, "whenever "any crime should be committed in the city of Chicago, "or within the county of Cook, and the person or persons, "accused or suspected of being guilty, shall flee from jus- "tice, the said board of police may, in their discretion, "authorize any person or persons to pursue and arrest such "accused or suspected person or persons, and return them "to the proper criminal court, having jurisdiction of the "offense, for trial."

And in the ninth section of the act: "The members of "the police force of the said city of Chicago shall possess- "in every part of the county of Cook, all the common law "and statutory powers of constables, except for the service "of civil process; and any warrant for search or arrest, by "any magistrate of the State of Illinois, may be executed "in any part of the county of Cook, by any member of the "police force of the said city of Chicago, without any back- "ing or endorsement of the said warrant, and according to "the terms thereof."

And in the seventeenth section of the act: "The board "of supervisors of Cook county, assembled, may call upon "the board of police to appoint for duty, within the said "county, as many men as it shall enumerate and describe, "upon appropriating to the police fund the necessary ex- "penses and salaries to be incurred thereby. Any of the "village or town authorities, within the said county, may "also make such demand upon the board of police, upon "making the like provisions of pay. And it shall be the

" duty of the board of police to appoint such officers, who " shall thereafter become regular members of the police " force of the city of Chicago, and subject to all the rules " and regulations of the board, discharge the duties, and pos- " sess powers and privileges, as such members. The super- " visors of the county of Cook are hereby authorized, from " time to time, to levy and raise, by tax upon the real and " personal property taxable, within said county, such sum " or sums of money as may be required to carry into effect " the provisions of this section, or the police purposes of " this act."

" And, by the thirtieth section of said act, all statutes, " parts of statutes and provisions of law, inconsistent with " the provisions of this act, are hereby repealed, together " with all modes and qualifications of appointment to " office, as members of police departments, or of elections " to office therein, inconsistent with the provisions of this " act."

By the provisions of these sections, and parts of sections, it will be discovered that the powers, privileges and duties are not confined to the limits of the city of Chicago, but extend throughout the county of Cook, and upon certain contingencies, throughout the entire State of Illinois.

The first section of the twelfth article of the constitution of the State of Illinois, which has been in force since April 1st, 1848, provides, that " whenever two-thirds of all the " the members elected to each branch of the general assem- " bly, shall think it necessary to alter or amend this consti- " tution, they shall recommend to the electors at the next " election of members of the general assembly, to vote " for or against a convention ; and if it shall appear that a " majority of all the electors of the State, voting for repre- " sentatives, have voted for a convention, the general assem- " bly shall at their next session, call a convention, to consist " of as many members as the house of representatives at the

" time of making said call, to be chosen in the same manner,
" at the same place, and by the same electors, in the sme
" districts that choose the members of the house of repre-
" sentatives, and which convention shall meet within three
" months after the said election, for the purpose of revising,
" altering or amending this constitution."

As appears by the house journal, 1859, p. 386, the general assembly of the State by a joint resolution, adopted February, 1859, recomended to the electors at the next election of members of the general assembly, to vote for or against a convention, and a majority of such electors having voted in favor of it, the legislature, by an act approved January 31st, 1861, called a convention to alter or amend the constitution, to meet at Springfield, on the first Tuesday of January, 1862. The act provided that the number of delegates should be the same as the number of the members of the house of representatives, and that they should be chosen on the Tuesday, next after the first Monday of November, 1861, in the same manner, at the same place, and by the same electors, in the same districts that choose the members of the house of representatives.

The act further provides, that the amendments, revisions, or alterations of the constitution, agreed to by the convention, shall be submitted to the people, for their adoption or rejection, at an election to be called by the convention. Provision is made for holding such election, and for ascertaining the result. If a majority of the votes cast at such election are in favor of accepting the alterations or amendments, or any part thereof, they are to become the supreme law of the State; but if a majority of the votes cast at such election, are against the alterations or amendments, or any part thereof, the same are to be null and void.

The thirty-fourth section of the schedule of the constitution, framed by the convention, held in pursuance of the resolution and act of the general assembly, and the election in pursuance thereof, provides:

"That, at the next municipal election, to be held in the "city of Chicago, on the third Tuesday of April, 1862, the "legal voters of said city shall cause to be printed or written "upon all their ballots, the following words: 'For the city of "Chicago electing its own officers;' or the words: 'against "the city of Chicago electing its own officers;' which shall "be canvassed and returned with the election returns of the "ballots, as is now provided by law. And, in case there shall "be a majority of the legal voters, voting at said election, "in favor of the people of said city electing their own "officers, as indicated by said above mentioned words, then "it shall not be lawful for any officers of that city to be "chosen in any other manner, than by a vote of the people "of said city, or appointed in any other manner than by "the mayor and aldermen, as provided by present laws; "and the act approved February 2nd, 1861, entitled, 'an "act regulating the custody and sale of personal property "under legal process, in the city of Chicago, and the towns "of South Chicago, West Chicago, and North Chicago, in "Cook county;' also, an act to 'establish a board of po- "lice in and for the city of Chicago, and to prescribe their "powers and duties,' approved, February 21st, 1861, and "also, so much of 'an act approved, February 18th, 1861; "as is embraced in section sixty-six and one half, (66½) of "an act to amend the city charter of Chicago, and creating "three commissioners to examine into the finances of said "city,' be, and the same are, each and all of them, hereby "repealed; and the powers and duties of all officers ap- "pointed under and by virtue of said acts, shall im- "mediately cease; and, hereafter, neither the governor nor "general assembly, shall appoint any person to any office "for said city of Chicago; but all officers shall be elect- "ed by the people of said city, or appointed by the mayor "and aldermen, as provided by present laws, or by such "general laws as may hereafter be passed by the general "assembly, under the constitution."

This section of the schedule finally provides: "The pro-"visions of this constitution, required to be executed pri-"or to the adoption or rejection thereof, shall take effect "and be in force immediately."

The fourth section of the schedule provides, that the constitution shall be submitted to the people for their adoption or rejection, at an election to be held on the Tuesday next, after the third Monday of June, A. D., 1862.

The sixth section of the schedule, provides the manner in which the result of such election shall be ascertained. And the seventh section provides, that if a majority of the votes polled are for the adoption of the proposed constitution, it shall become the supreme law of the State, from and after September, A. D., 1862; but if a majority of the votes polled are given against the proposed constitution, the same shall be null and void.

As I understand the case now, the existing municipal authorities of the city of Chicago claim, that under the thirty-fourth section of the schedule of the proposed constitution, (or, as in the course of this argument I shall term it, the new constitution, to distinguish it from the constitution of 1848, and for that purpose only) and in pursuance of the submission to the people of the city of Chicago, at their last municipal election, the question, whether they were in favor of, or against the people of the city of Chicago electing their own officers, and the majority vote of the voters at that election in favor of the people of the city of Chicago electing their own officers, they are entitled to the insignia of office obtained and retained by the police commissioners, and that the commissioners no longer possess any of the powers or privileges granted them by the act of the legislalature establishing the board of police. This claim the police commissioners deny.

I shall present what I have to say in this case, in the following propositions.

First. I say, that if it is sought to alter, revise, or amend an organic or fundamental law, and the fundamental law sought to be altered, revised or amended, prescribes the manner of its alteration, revision, or amendment, such alteration, revision, or amendment can be legally effected, only by conformity to the established fundamental law.

Second. In case there is no provision in an existing fundamental law, prescribing the method of its alteration or amendment, under our form of government, any alterations or amendments, obtain no vitality until ratified by the whole people affected by it, who alone possess sovereign power.

Third. That a constitutional convention can possess no executive, judicial, or legislative powers; but can only submit to the people for their adoption or rejection, an organic law, which must be general and universal in its application and provisions.

Fourth. Legislative enactments are not proper subjects for the exercise of the right of suffrage.

Fifth. The enactment of the thirty-fourth section of the schedule of the new constitution, is contrary to public policy, in that, if it is affirmed, the city of Chicago is without a police force.

And first, alterations, revisions, and amendments, can be legally made, only in conformity to established law.

Any other mode is anarchy. It disarranges the whole body politic. It is subversive of all law and all order. It reverses the wheels of government, and produces an utter destruction of its entire machinery, breaking up the harmonious whole. It tends to convulsion; and in case of approximating to an equality of numbers, favoring each system, the only remedy is a resort to arms, and the establishment of a system by force. Not a single State in the Union has undertaken a change of its organic law, without previous legislative action. The uniformity of such action has established a precedent, which has been recognized as

binding as positive law, and has always received judicial sanction.

The people, in assembling together to exercise the right of suffrage, to which they are entitled, at the time, and place, and in the manner prescribed by law, thereby express, as distinctly as they can, their ratification or rejection of the law. They affirm or reject the law enacted by their representatives. They approve or disapprove the conduct of their representatives in enacting a law in pursuance of the organic law of the land, and although the expression cannot be distinctly, the law is or is not approved, yet the duties enjoined upon those who are to exercise powers under the law, are reiterated and reaffirmed by the people. This system preserves the balance. It equalizes the duties and powers of the various departments of government. It recognizes one established source of power, and subjects all rights, and wrongs, to their proper source of determination. The power that is delegated, can peaceably, and legally, and lawfully be exercised. All others, from the very nature of the case, are reserved. The people only seek to re-clothe.

That this has been the understanding of the policy and system of our government, I think cannot be denied. All other policies and systems produce revolution and anarchy. Mr. Webster, in his argument before the Supreme court in the case of *Luther vs. Borden*, found in the 6th volume of Webster's works, page 226, most forcibly illustrates the rule. He says:

"Is it not obvious enough, that men cannot get together "and count themselves, and say they are so many hun- "dreds and so many thousands, and judge of their own "qualifications and call themselves the people, and set up "a government? Why, another set of men forty miles off, "on the same day, with the same propriety, with as good "qualifications, and in as large numbers, may meet and set

"up another government; one may meet at Newport and "another at Chepachet, and both may call themselves the "people. What is this but anarchy? What liberty is "there here but a tumultuary, tempestuous, violent, stormy "liberty; a sort of South American liberty, without power "except in its spasms; a liberty supported by arms to-day, "crushed by arms to-morrow? Is that *our* liberty? "The regular action of popular power on the other "hand, places upon public liberty the most beautiful face "that ever adorned that angel form. All is regular and "harmonious in its features, and gentle in its operation. "The stream of public authority, under American liberty "running in this channel, has the strength of the Missouri, "while its waters are as transparent as those of a crystal "lake. It is powerful for good. It produces no violence, "no tumult, and no wrong.

> "Though deep, yet clear; though gentle, yet not dull;
> Strong, without rage; without o'erflowing, full."

And in the same argument, he says:

"In the exercise of political power, through representa- "tives, we know nothing; we never have known anything, "but such an exercise as should take place through the "prescribed forms of law. When we depart from that, we "shall wander as widely from the American track as the "pole is from the track of the sun."

And again, he says:

"There must be some authentic mode of ascertaining the "will of the people, else all is anarchy. It resolves itself "into the law of the strongest, or, what is the same thing, "of the most numerous for the moment, and all con- "stitutions and all legislative rights are prostrated and "disregarded."

I have quoted thus at length from the argument of Mr. Webster, deeming him as high authority as any we have, upon political questions and the source of power. His

views were those of a man, who had devoted his life to the consideration of natural rights, and the theory of our government.

The Supreme court of Massachusetts, as reported in 6th Cushing, page 574, in considering this same question, say :

"That there is no authority given by any reasonable construction, or necessary implication, by which any specific "and particular amendment, or amendments, of the constitution can be made, in any other manner than that prescribed in the ninth article of the amendments, adopted in "1820. Considering, that previous to 1820, no mode was "provided by the constitution for its own amendment; that "no other power for that purpose, than in the mode alluded "to, is anywhere given in the constitution, by implication "or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and "the power of altering the constitution thereby conferred, "to have been cautiously restrained and guarded, we think "a strong implication arises against the existence of any "other power under the constitution, for the same purpose."

"Upon the first question, considering that the constitution has vested no authority in the legislature, in its ordinary action, to provide by law for submitting to the "people the expediency of calling a convention of delegates, for the purpose of revising or altering the constitution of the commonwealth, it is difficult to give an "opinion upon the question, what would be the power of "such a convention, if called. If, however, the people, "should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the constitution, in some particular part thereof, *we "are of opinion that such delegates would derive their whole "authority and commission from such vote :* and upon the

"general principles governing the delegation of power and "authority, they would have no right, under such vote, to "act upon and propose amendments in other parts of the "constitution not so specified."

The italics are mine. The Supreme court here say: "that such delegates would derive their *whole authority and* "*commission from such vote.*" What does it mean? That they must act in conformity with the power granted them. There is no other power granted them—all others are reserved—reserved to the people, withheld from the delegates; and the exercise of any other power by them is a nullity. It is entirely outside of the duties they were commissioned to discharge, and their exercise of any other powers, is of as little effect as though they had never exercised them.

In the case at hearing, the legislature of Illinois, in pursuance of the provisions of the old constitution, offered to the electors of the State the opportunity of determining, whether they would, or would not, change their organic law. They elected to change it. In pursuance of this election, the legislature passed an act providing for the holding of a convention to alter the constitution; and by this act, provided the number of delegates to consist of the same number as the house of representatives, the time and place of holding the election, prescribing the qualifications of electors; and further providing, that the amendments, revisions or alterations of the constitution agreed to by the convention, *should be submitted by it to the people*, not a part of the people, nor the people of any particular district, city or county, but to the people—*the whole people of the State*—for their adoption or rejection, at an election to be called by the convention. In pursuance of the provisions of that law, the electors, at the proper time and places, and in the manner prescribed in the law, held an election, and elected their delegates to discharge the duties enjoined upon them,

and granted them by that law; and necessarily reserved to themselves all other powers. Reserved all other powers, because they were not specified or granted in the law they voted under and upon, and by their voting ratified and re-affirmed.

I submit to this court, had the people understood at that election, held in pursuance of that law, that they were thereby clothing their delegates with full power and authority to frame such a constitution, as, in their discretion, they might deem proper; or having framed one, they would exercise their discretion in submitting it to the people for rejection, or adoption, or they would submit such parts of it as they deemed necessary, and in such manner, and to such districts, as, in their wisdom, they might elect—how many delegates, unpledged to submitting the whole constitution, as a whole, to *all the people of the entire State*, without regard to districts, cities, counties, or localities, of any nature, would have been elected? I venture the assertion, not one.

The people of the State of Illinois have had enough of that thing. The heated political animosity, awakened by the endeavor to bring Kansas into the Union, under the Lecompton constitution, has not yet subsided; and the persecution, almost to the death, of their great idol, the lamented Douglas, by reason of his vindication of the inherent, inalienable right of self government, and reserved powers, by the advocates of conventional dictation and dictatorial power, has not yet been forgotten, nor will it be, while lake Michigan kisses the shore where he lies sleeping. Too many pledges have been made, too much feeling embittered, too much animosity aroused, too much of human nature convulsed, by reason of the reckless disregard of law and natural rights, by those who attempted to force upon a people, a system of government over whose control they had no expression.

The delegates to the convention were elected under the law; the people voted for them under the law, and voted upon the law, and in the language of the Supreme court of Massachusetts, "such delegates derive their whole authority and commission from such vote; and upon the general principles governing the delegation of power and authority, they would have no right, under such vote," to transcend the limits of the law. This is the doctrine of reason and common sense. The law contained words of limitation, and specified the particular acts and things the convention were to perform. The convention was brought into existence, by the ratification of that law by the people. It did not contain an implication of discretionary power, but having been enacted strictly in pursuance of the existing fundamental law, it defined the powers the convention should possess, and prescribed the duties the convention should perform. I do not mean to say, that by the law as originally enacted, the convention was to be governed; but the law which gave the convention existence having been voted upon by the people, and re-affirmed by them, and there being no authority given the delegates, the delegates were to be controlled by the law.

The convention, which framed this new constitution, was the regular succession of the provisions of the old constitution; and the legislature of the State, and the people by their adoption of the action of the legislature, undertook to follow the prescribed form in altering their constitution. Up to the time of the meeting of the convention, all the successive steps are strictly in conformity to the fundadamental law of the land. There the divergence begins. This power to diverge, I deny the convention possessed. In the case, *Collier, Governor, &c., vs. Frierson, et al.*, reported in the 24th Alabama, page 100, the Supreme court declares the proper rule to be: "The State constitution can only be changed by the people in convention, or in the mode prescribed in the instrument itself; and if the latter

mode is adopted, every requisition of the constitution must be adopted". In that case the amendments were proposed by the general assembly, joint resolutions were adopted at the next succeeding session, reciting in the preamble that, "Whereas, the General Assembly of this State, at the last session of the same, duly submitted to the people of said State, proposed amendments to the constitution: and whereas, the people of this State, in manner and form provided by the constitution, have accepted the said amendments, which are in the words and figures following, &c.," setting them all out except one, which was entirely omitted; and the usual clause was then added, enacting "that the aforesaid amendments to the constitution, proposed as aforesaid, and accepted by the people as aforesaid, be ratified, and that the same from and after the passage of this resolution, be and form a part of the constitution of the State of Alabama." It was held by the court, that the amendment, which was entirely omitted from the ratifying resolution, was not constitutionally ratified, and therefore failed. Now if this be the proper rule of law, and I contend it is, how can it be said that the prescribed form may be followed in part, and disregarded in part; and that, too, when the people have, as distinctly as the opportunity allowed, directed the prescribed form to be pursued.

In addition to the judicial decisions made upon the issue here, we have the opinions of eminent statesmen, as expressed in a case directly in point. The late distinguished statesman and eminent jurist, Stephen A. Douglas, whose name should only be mentioned with reverence, who once occupied the same seat your Honors now hold, and whose judicial opinions are quoted at every term of this honorable court, and treated with that profound veneration and respect they deserve, in his great speech, upon the Lecompton constitution, made in the Senate of the United States, March 22, 1858, says, of the convention that framed that instrument of iniquity and fraud:

"The convention assembled under the authority of the "Territorial legislature alone, and hence was bound to "conduct all its proceedings in conformity with, and in "subordination to, the authority of the legislature. The "moment the convention attempted to put its constitution "into operation, against the authority of the Territorial "legislature, it committed an act of rebellion against the "government of the United States."

* * * * * * *

"But, sir, is it true, that this constitution may be changed "immediately by the people of Kansas? The President of "the United States tells us the people can make and "unmake constitutions at pleasure; that the people have "no right to tie their own hands and prohibit a change of "the constitution until 1864, or any other period; that the "right of change always exists, and that the change may "be made by the people at any time, in their own way, at "pleasure, by the consent of the legislature. I do not "agree, that the people cannot tie their own hands. I "hold that a constitution is a social compact between all "the people of the State that adopt it; between each man "in the State and every other man, binding upon all, and "they have the right to say it shall only be changed at a "particular time, and in a particular manner, and then "only after such and such periods of deliberation. Not "only have they a right to do this, but it is wise that the "fundamental law should have some stability; some per-"manency, and not be liable to fluctuation and change by "every ebullition of passion."

* * * * * * *

"There are two modes of changing the constitution of a "State; one lawful, the other revolutionary. The lawful "mode is the one prescribed in the instrument. The revo-"lutionary mode is one in violation of the instrument. "The revolutionary mode may be peaceful, or may be "forcible; that depends on whether there is resistance.

"If the people are unanimous in favor of a change, if no-
"body opposes it, the revolutionary means may be a
"peaceful remedy; but if, in the progress of the revolution,
"while you are making the change, you meet with resist-
"ance, then it becomes civil war, treason, rebellion, if you
"fail, and a successful revolution if you succeed."

There is the doctrine clearly, logically and truthfully expressed: "Rebellion if you fail, and a successful revolu-
"tion if you succeed." In either case, illegal, unlawful; if successful, the right of might; if unsuccessful, the rope, the dungeon. All unlawful, all illegal.

Mr. Douglas' theory of self-government; the rule by him prescribed for the formation of the fundamental law, is to-day the recognized theory and rule throughout all loyal portions of the land; and his enunciation of that theory and rule stands pre-eminently higher, and deservedly so, in the minds of courts, judges, legislative and executive departments, than any authority I could cite. The people of the loyal States have adopted his views by universal consent, and have awarded him the title of the Great Champion of Popular Sovereignty.

Now, let us see to what extent the conduct of the convention, as regards the thirty-fourth section of the schedule, accords with these principles. The schedule provides, that upon the happening of a certain contingency, to wit, if the people of the city of Chicago, at their municipal election, shall, by a majority vote, vote in favor of the people of the city of Chicago electing its own officers, then in that case certain acts of the legislature, therein named, shall be, and the same were, thereby repealed. Are the people of the city of Chicago the people of the State of Illinois, or are they a part of the people of the State? Are the people of the city of Chicago to determine for the people of the entire State, what the organic law of the State shall be? Are the people of the city of Chicago to determine rights

and privileges affecting the inhabitants of the county of Cook, and in certain cases, the people of the entire State? The powers and duties of the board of police are not confined to the city of Chicago, but extend throughout the county of Cook, and in the service of certain kinds of process, throughout the entire State.

Can it be contended that the convention, in submitting the question to the city of Chicago, whether it should elect its own officers, and in case they voted in the affirmative, certain statutes should be, and were, repealed, conformed to the prescribed form of law, requiring the constitution to be submitted to the people? The convention did not even submit the proposition to those affected by it, much less to the people of the State. Have the inhabitants of Cook county, without the city of Chicago, no rights that the convention were bound to respect? Are the convention the proper judges of what city, district, or county, contains the people of the State of Illinois? Are the people of Cook county; of the State of Illinois, outside of the city of Chicago, to be deprived of their rights and privileges, granted them by law, by the exercise of the suffrages of the inhabitants of Chicago? If so, why not create the people of Chicago the government of the State, and invest them with all the attributes of sovereignty, and permit them, at their municipal elections, to make and unmake laws, frame constitutions, try cases, execute mesne and final process, and grant divorces? The proposition is not more absurd than the one at bar. If this supreme power of enactment or repeal of laws rests in the expression of the people of Chicago, at their annual municipal elections, then they may as properly and rightfully and lawfully be invested with all legislative, executive and judicial authority. It is the principle. If the principle holds good in part, it holds good in whole. Where shall we draw the line of distinction? The convention possessed as much power

to invest the people of Chicago with the right to determine that existing banking laws, general incorporation laws, and the statute of wills should be repealed, as they did to invest them with power to determine that the police act should be repealed.

Even, if the police bill related to the city of Chicago alone, there could not be a plausible argument framed in favor of the power of the convention. But the bill extends beyond the city limits. It goes outside, and confers powers, and enjoins duties upon the commissioners and policemen throughout the county of Cook, and says to an injured man from Massac county, in Chicago is an officer to serve process, enabling you to obtain redress. This being so, as is expressed by the ninth and seventeenth sections of the police act, why not, with as much propriety, have submitted to the city of Chicago, the right to determine the location of the county seat of Cook county, or of Massac county? Why not have submitted to the city of Chicago the legislative power to repeal *all* existing statutes, or to constitute themselves at the polls a court of final resort, or expel the State officers, and approve bills, audit the public accounts, disburse the public funds, and preserve the archives of the government? Why not commission the voters of Chicago a jury *de lunatico inquirendo*, to try the sanity of the county officers, court-house clique, and John Wentworth.

2. In case there is no provision in an existing fundamental law, prescribing the method of its alteration or amendment, under our form of government, any alterations or amendments obtain no vitality until ratified by the whole people affected by it, who alone possess sovereign power.

Of the old thirteen States, the constitutions, with but one exception, contained no provision for their own amendment. Yet, not one of those constitutions preserves its original

form. The necessities of progressing time have demanded a change. This change has been effected by the ordinary legislative action, providing for the calling a convention, and the election of delegates to alter, amend or revise the constitution. This legislative action has been deemed an ordinary legislative power. The usage has become law. In no other way can an authoritative convention be obtained. The people, in their primary capacity, possess no legislative power. That can be exercised only in their aggregate or representative capacity. Mass meetings possess no legislative power; they are but the means of delegating power. I know of no constitution or laws, framed or enacted by mass meetings, or self-constituted bodies, that have ever been held binding, or operative, since the formation of the general government.

In Rhode Island, this was attempted, and excited the tumult commonly known as the Dorr Rebellion. It was suppressed by the then existing, regularly constituted charter government, and its suppression has ever served as a precedent against the powers of self-constituted bodies. Territories, or rather the people of territories, possess no such power, nor has the right to exercise such power been conceded them since the time of the admission of Arkansas into the Union. Congress must pass enabling acts for their benefit, or they must assume the character of petitions. It could not be otherwise, else we should find, as in the Rhode Island case, two governments in existence at the same time, and each claiming the right to exercise the powers and duties of the other. Judicial determination could not readily settle the rights of the contending claimants, for the court assuming to act, would necessarily determine in favor of the government under which they are constituted, or they stultify themselves.

The only remedy, then, is the executive power, and the stronger the executive arm of the government, the greater

is the probability of success. Now, this must be revolution—one must be wrong, the other right. And if the government, originally existing, has done no act to bring into being the contending government, the latter is without governmental authority. Hence, the necessity of this legislative action; and hence, the reason for adopting legislative action as the only means for providing for amending a fundamental law, where it makes no provision for its own amendment or alteration.

This having been done, what powers does the convention possess? I contend, only such powers as are delegated and *surrendered.* That the people are the source of all sovereign power, all political writers admit. I contend, that the people alone are sovereign, and sovereignty rests alone with the people. Under our system, from the people emanate all the powers to be exercised in the various departments of government. Without their expression, government itself has no existence. They breathe into it the vitality which puts it in motion. Government is not sovereign, but is the creature of sovereignty. The people, in the creation of the various departments, reserve to themselves the right to alter, amend, or destroy the creature they have put into existence. It is a reservation not necessary to be expressed, under our theory. It is reserved as a matter of course, and its exercise is dependent upon the people alone. This right of revision, or amendment, the people exercise at their pleasure. They may *surrender* this absolute power by prescribing the manner and mode of revision, so that they cannot lawfully, nor consistently, with ethics and morality, nor by any other means, than power and force, adopt any other mode; but they cannot delegate the power of finally establishing government, or invest another with the absolute sovereignty they alone possess.

The constitution of the United States provides that "the powers not delegated to the United States by the constitu-

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In accordance with this provision, has it been contended, congress can only legislate on such subjects as are expressly authorized by the constitution. And for the same reason can a legislature legislate uuon all subjects within the range of ordinary legislative action, not forbidden by the constitution. They come within the rule. So all bodies act unrestrained within their sphere, when not expressly restrained. They perform the duties incident to their office. But behind them all, lie the reserved rights of the people, which rights they can lawfully exercise, when not surrendered. When the people have thus elected delegates to represent them in any capacity, they impliedly reserve to themselves the right of reviewing the conduct of their representatives; and if it be by the legislature any unpopular laws are enacted, the right is reserved to them to elect, for their successors, such representatives as will repeal objectionable statutes. The docteine is well settled in this country, that a legislature cannot pass irrevocable laws. The power of the Parliament of England in that respect, has always been denied to legislative bodies in America, and has not now an advocate. As regards the conduct of their representatives in legislatures, so the right exists and is reserved to review and act upon the conduct of conventions in framing fundamental laws. When the people have not expressly surrendered this sovereign right of adoption or rejection, they cannot, lawfully, be deprived of that right. It is only by having the fundamental law submitted, that their pleasure can be ascertained in a lawful way.

And why not have it submitted? What objection can exist to obtaining the expression of the popular will, upon the law which binds and controls them? The very attempt to prevent its submission is an evidence of the inclination to despotism. Is it fear of its rejection, that prompts its

framers to force it upon the people, and bind them by a fundamental law obnoxious to them? That is despotic and the only claim of kings and princes. If the power rests in a constitutional convention to frame a fundamental law, and put it into existence, and under it, overthrow the existing government, and abolish existing laws, then the power rests with them to constitute themselves, or any of their number, the government, and preserve their existence for an interminable length of time, unless removed by force. They are revolutionists and dangerous, and should be suppressed. If they possess this absolute power of making and unmaking governments, without having the power expressly surrendered by the people, then they can assume the powers of all the departments of government, and enact laws, expound laws, and execute laws. This court would be blotted out of existence, the executive mansion vacated, and the legislative halls closed by this sovereign body, who claim to be the people. With as much propriety might they claim all this, as to claim the right to adopt a fundamental law, without consulting the popular will.

In effect, the constitutional convention have arrogated to themselves these sovereign powers, in the adoption of the thirty-fourth section of the schedule. And the method they have adopted to repeal the police bill, notwithstanding that bill affects the rights of the people of the entire county of Cook, and of the State of Illinois, in a certain class of cases, and under various circumstances, they seek its repeal by a method as despotic as though they themselves had repealed it, without consulting any portion of the people. The method by the convention selected to effect its repeal, has not a parallel in history. It is too ridiculous to be considered worthy of adoption.

I do not understand that the people outside of the city of Chicago, elected delegates to the constitutional convention, to submit to the people of Chicago the manner in which

they should be governed; that they constituted the people of that city, the keepers of their consciences, or the judges of laws that were tasteful or distasteful to them. As they did not attempt to clothe the convention with this absolutism, and did not surrender the inherent, inalienable right of revising their acts, I do not understand that they vested in the convention, the power to clothe the people of Chicago with absolute power. When the people of Illinois, without the city limits, have so much faith in the integrity, purity and wisdom of the people of Chicago, I anticipate a more distinct and decided expression of their confidence, than was uttered at the November election.

I am not attempting to ridicule the action of the convention. If the illustration of the principle sought to be established in this case, and the claim here sought to be substantiated, renders the principle ridiculous, I can only reply—that is no funeral of ours. If the principle is a correct principle, it will withstand, and successfully withstand, even an attempt at ridicule. The fault lies in the principle.

If the convention possessed the power of submitting to the people of Chicago, whether a law like the police bill, which affects the people of the entire State, as well as the people of Chicago, should, or should not, be repealed, why not have submitted to the people of Jo Davies County, whether the general banking law should be repealed; and to the people of Cook county, without the city limits, whether the general railroad law should be repealed; and to the people of Springfield, whether the penitentiary, in Joliet, should be destroyed, and one erected in Chicago?

These are as clearely within the province of the convention, as the case under consideration. These acts affect the people of the State no more than does the police bill. They all have rights, under each of these laws, and are all more or less affected by them.

This discretionary power of adopting a fundamental law, or of submitting one portion of a fundamental law, affecting the rights of the whole people, to the people of one section—and another portion, to the people of another section—and vesting in the people of the several sections, powers, the convention itself did not possess, is contrary to the whole theory of our government, subversive of its principles, and destructive to the sovereign power, and reserved rights of the people. Its advocates, in the great struggle before the American people, when the popular expression was sought upon the subject in the case of the application for the admission of Kansss into the Union, were those, who, at the time, were plotting treason and rebellion, and whose souls were black with the infamy of traitors. Men, whose names are infamous in American history; men, against whom the curses of twenty millions of people are uttered, and whose memory is a curse to America.

3rd. A constitutional convention can posses no executive, judicial or legislative powers; but can only submit to the people, for their adoption, or rejection, an organic law, which must be general and universal in its application and provisions.

That a constitutional convention should undertake to legislate, is a novel exercise of power. Framing a fundamental law as the basis of government, prescribing the form of government, and separating government into the various departments it should properly have, in conformity to the spirit of republican government, and imposing general limitations upon the power the several departments shall exercise, making those limitations universal in their application, I conceive to be the true purpose of constitutional conventions. Otherwise, there is no rule that can be prescribed, whereby a limitation can be imposed upon a convention. It would possess the power to infringe upon every department of government, usurps all its functions, and extend throughout all its ramifications. If we do not

bind conventions to the framing an organic act, which shall affect the people of one section of the State in the same manner, and to the same effect, by the same means that it shall affect the people of another section, why can they not partition the State into so many given sections, and frame for the benefit of one section, to the exclusion of another, a certain portion of a fundamental law—and for the benefit of another section, another portion—and so continue districting the State and partitioning the constitution? Then, when this has all been done, submit to the people of the several sections of the State, the several portions of the constitution, regardless of the rights affected by it, and subject one section to the popular will of another portion.

The constitutional convention claimed to itself a rare combination of powers. It first undertakes the power of legislative action, and having partially exercised that power, then undertakes to clothe the people in their primary capacity with the same power. They who derived all the authority they possessed, from the people, as the people expressed themselves, and as the people granted or surrendered power, undertook to clothe the people with a power, that even the people, in a representative government, can only exercise through representatives. The convention not only made itself a legislature, but made a legislature out of the people of Chicago. I know of but one government in the world, where the people, in their primary capacity, make and unmake laws. I believe, in one of the cantons of Switzerland, all the citizens meet in council and there frame their laws. But that is not a republican government. It is a democracy in the pure, literal, analytical definition of the term.

If this convention possessed these powers of legislation, why did it not possess the powers of every department of government? The legislative department is but a single department of republican government. We commonly

speak of three departments of government—the legislative, executive, and judicial; and all the written constitutions in this country, now in existence, with which I am familiar, form these three departments, and leave to each of them the exercise of the ordinary duties incident to their organ ism. So common is this, that it is a precedent adopted heretofore in the framing of all constitutions. This very convention, in article three of the new constitution, section one, adopted this precedent, and declared:

"The powers of the government of the State of Illinois shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another."

"SEC. 2. No person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted; and all acts in contravention of this section shall be void."

Now can it be that this convention created itself one of these departments. If the claim here made is correct, and legal and lawful, the convention certainly claimed to exercise the powers belonging to one of these departments; and as the new constitution provides, that no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, there can be no such thing in the State of Illinois as a legislature, for the body who framed that constitution made themselves one of the departments, leaving only the executive and judicial unappropriated.

If the convention did not appropriate to themselves the legislative department, created by the constitution, they then created themselves a legislature *pro hac vice*. Now,

as I have before said, if this power to create themselves a *legislature* existed within the convention, the power to create themselves a court existed, as did the power to assume executive powers. And if this power existed to any degree, it also existed to an entire degree, and the constitutional convention could have created themselves the government of the State of Illinois, and could have exercised all the powers of government, and discharged all its functions. Their authority was as complete in one sense as in the other.

How would this have resulted? All our courts of inferior and superior jurisdiction might have become obsolete for lack of business. This convention could have directed their clerk to issue summons upon *praecipe* being filed, and direct the door-keeper to serve the process. The declaration and pleadings might have been filed with their clerk, and the issues made up. The chairman of the convention acts as chief justice, and litigants appear for trial. The jury, summoned upon the venire, served by the door-keeper, appear, and are qualified; or the convention details a certain number of their members to serve as jury-men, or it constitutes itself a court and jury, and proceeds with the trial. The evidence is introduced, case argued and submitted. The verdict is rendered, and judgment rendered upon the verdict. Clerk issues execution, door-keeper levies, advertises and sells. Delivers possession of property, or records certificate. Finally, makes deed, and rights are adjusted, and wrongs redressed. How beautiful! How lovely!

"Change places," says Lear, "and *handy-dandy*, which "is the justice, and which is the thief?" Change places, and *handy-dandy*, which is the court and which is the legislature? The convention is assembled, and the chairman is speaker, governor and lieutenant governor. The clerk is clerk and private secretary. Assistant and enroll-

ing clerks are deputies. The door-keeper is sergeant-at-arms. Some honorable member introduces a bill, and it is referred. Committee reports, and the bill is read or passed by, reading its title. The chairman approves, and the clerk, being the keeper of the archives, files it. Its a law.

Mr. Douglas, in his 22nd of March, 1858, speech, denied a Constitutional convention *any power* of legislation. He asserted it to be the creature of the power that brought it into existence. That it possessed only the authority it was invested with, and any attempt at an exercise of power not expressly delegated, was without the province of the convention, and, in contemplation of law, a nullity. Can it be contended, the delegates are elected by the people to legislate, and exercise all the powers of legislative action? Why not, with as much reason, contend, that the people surrendered to the delegates *all* their sovereignty, and surrendered to them the entire authority to make and unmake all laws, and to establish and execute the entire government? The claim in the one case is as reasonable as in the other.

4. Legislative enactments are not proper subjects for the exercise of the right of suffrage.

If the convention itself possessed no power of legislation, I cannot conceive how they can invest the people, in their primary capacity, with any such power. Legislatures cannot do it. The exercise of legislative power with us, is confined to representatives elected for that purpose. They are the people in their aggregate capacity, and exercise the powers incident to that capacity, subject at all times to approval or disapproval of their conduct by the people. Legislatures cannot divest themselves of the responsibilty by a reference of the question of the passage of laws to their constituents.

Barto vs. Himrod, 4 Seld. 485.
Thorne vs. Cramer, 15 Barb. 112.

schedule would be, in case the constitution should be adopted at the same election. That question is not now before this court. When it is properly before the court, then will be the proper time to determine it.

JOHN M. ROUNTREE,

For Respondents.

To the Honorable the JUSTICES OF THE SUPREME COURT, *at a term thereof begun and holden at Ottawa, in and for the Third Grand Division of the State of Illinois, on the first Tuesday after the third Monday of April, in the year of our Lord One Thousand Eight Hundred and Sixty-two :*

Respectfully represents unto your Honors, your relator, the City of Chicago, a municipal corporation, in the County of Cook and State of Illinois, that at the municipal election holden in and for the said City, on the third Tuesday of April, A. D. 1862, Francis C. Sherman was duly elected Mayor for the municipal year commencing on the first Monday of May, A. D. 1862; that said Sherman has accepted said office, and at the date last mentioned, was duly qualified, and entered upon the discharge of its duties.

Your relator further represents, that heretofore, to wit., on the twenty-first day of February, A. D. 1861, an act was passed by the General Assembly of the State of Illinois, and approved upon the same day, entitled "An Act to establish a Board of Police in and for the City of Chicago, and to prescribe their powers and duties;" whereby it was, among other things, provided that the Governor should nominate, and by and with the advice and consent of the Senate, appoint three Commissioners, who should be the first Commissioners of said Board of Police, and who should respectively hold their offices for two, four, and six years from and after the municipal election in said City of Chicago then next ensuing, and until their successors were duly elected and qualified; that said Commissioners, when appointed, should proceed to organize said Board, and after such organization should assume control of the police force of said City; and that all public police property, books, records, and accoutrements then in the possession of the Police Department of Chicago should be transferred to said Commissioners for the use of said Board of Police; but the ownership of the same, and the use thereof, as aforesaid, should be according to the ordinances

which the Common Council of the City of Chicago had enacted, or might thereafter enact.

Your relator further represents, that afterwards, pursuant to the provisions of the said act, Alexander C. Coventry, Frederick Tuttle, and William Wayman were duly nominated by the Governor, and by and with the advice and consent of the Senate, appointed commissioners of said Board of Police; that they severally accepted their said appointments, were duly qualified, and on the twenty-sixth day of March, A. D. 1861, entered upon the duties of their said office.

Your relator further represents that immediately after the organization of the said Board of Police, to wit., on the day and year last mentioned, all the public Police property, books, records and accoutrements in the possession of the Police Department of said City of Chicago, including among other things the following described articles, to wit: Seventy-five stars, five hundred and nineteen badges, three hundred batons, (which said stars, badges and batons are the insignia of office of the officers and members of the police force of said city), and four volumes of police records, (the same being records of property stolen, and of arrests made prior to the passage of the act above mentioned), were delivered over to the said commissioners for the use of said Board of Police, agreeably to the requirement of the act aforesaid; and the same have ever since remained and still do remain in the possession of the said commissioners.

Your relator further represents that since the organization of the said Police Board, the said commissioners have caused to be made and kept, pursuant to the provisions of the act aforesaid, certain other volumes of police records, to wit: One complaint book for each of the three natural divisions of said city; one general complaint book for the office of the Superintendent of Police; one record book of stolen property, and one registry of lost or stolen property; all of which records are still in possession of the said commissioners, and are essential and necessary to the proper administration of the police department of said city.

Your relator further represents that on the twenty-first day of March A. D. 1862, an ordinance was duly passed by the Constitutional Convention of the State of Illinois, then lawfully assembled at Springfield, in said State, for the purpose of revising, altering or amending the Constitution of this State, which said ordinance is in the words and of the tenor following, that is to say:

"*An ordinance, to secure to the citizens of Chicago and the corporate authorities thereof, the right to elect and appoint their own officers.*

Be it ordained, That, at the next municipal election, to be held in the City of Chicago on the third Tuesday of April, 1862, the legal voters of said city shall cause to be printed or written upon all their ballots the following words: "*For the city of Chicago electing its own officers,*" or the words: "*Against the city of Chicago electing its own officers,*" which shall be canvassed and returned with the election returns of the ballots, as is now provided by law. And in case there shall be a majority of the legal voters, voting at said election, in favor of the people of said city electing their own officers, as indicated by said above mentioned words, then it shall not be lawful for any officers of that city to be chosen in any other manner than by a vote of the people of said city, or appointed in any other manner than by the Mayor and Aldermen, as provided by present laws; and the act approved February 22, A. D. 1861, entitled "An act regulating the custody and sale of personal property, under legal process, in the city of Chicago, and the towns of South Chicago, West Chicago and North Chicago, in Cook county;" also, "An act to establish a board of police in and for the City of Chicago, and to prescribe their powers and duties," approved February 21, A. D. 1861; and, also, so much of an act approved February 18, A. D. 1861, as is embraced in section sixty-six and one-half, (66½) of an act to amend the city charter of Chicago, and creating three commissioners to examine into the finances of said city, be and the same are each and all of them hereby repealed; and the powers and duties of all officers appointed under and by virtue of said acts shall immediately cease; and, hereafter, neither the Governor nor General Assembly shall appoint any person to any office for said city of Chicago, but all officers shall be elected by the people of said city, or appointed by the Mayor and Aldermen, as provided by present laws, or by such general laws as may hereafter be passed by the General Assembly, under this constitution."

Your relator further represents, that afterwards, to wit., on the twenty-fourth day of March, A. D. 1862, a provision, the same in terms as the aforesaid ordinance, was by the said Convention attached to and made a part of the schedule appended to the new Constitution adopted by the said Convention, and the following additional provision was subjoined thereto, to wit: "The provisions of this constitution required to be executed prior to the adoption or rejection thereof, shall take effect and be in force immediately;" as by section 34 of said Schedule, reference being thereunto made, will fully appear.

Your relator further represents that afterwards, at the municipal election, held in and for the City of Chicago, on the third Tuesday of April, A. D., 1862, agreeably to the provisions of the aforesaid ordinance and of the thirty-fourth section of the schedule appended to the new constitution and adopted by the said Convention as aforesaid, the question was submitted to the legal voters of the said City of Chicago, in manner and form as therein provided, whether the City of Chicago should elect its own officers; and afterwards, to-wit., on the twenty-first day of April, A. D., 1862, the result of the votes returned and canvassed, upon the said question, was found and duly declared to be as follows, to-wit:

"For the City of Chicago electing its own officers," 11,884 votes.

"Against the City of Chicago electing its own officers," 93 votes.

The whole number of legal voters voting at said election, was found not to exceed fourteen thousand; whereupon it was found and declared that a majority of the legal voters voting at said election had voted in favor of said proposition.

Your relator further represents, that it is advised by counsel, and verily believes, that by reason of the several acts and proceedings aforesaid, the functions, powers and authority of the said Commissioners of the Board of Police expired from and after the said twenty-first day of April, A. D., 1862, and that afterwards they had no right to retain possession of the said public police property, records and accoutrements hereinbefore mentioned, but were in duty bound to surrender the same to the said City of Chicago upon demand being made therefor.

Your relator further represents, that afterwards, to-wit., on the tenth day of May, A. D., 1862, at said County of Cook, said Francis C. Sherman, acting as Mayor of said City, and in that behalf duly authorized by law and by the Common Council of said City, demanded possession, from the said Alexander C. Coventry, Frederick Tuttle and William Wayman, of the said property, records and accoutrements above enumerated, but they refused to deliver such possession and still retain the same.

Your relator further represents, that if the office of said Commissioners has expired, as hereinbefore stated, said Francis C. Sherman, as Mayor of said City, was, at the time of making said demand, and still is entitled to the possession and custody of the property, records and accoutrements aforesaid.

Wherefore, and inasmuch as your relator has no other specific and adequate remedy at law in the premises, your relator prays your Honors to grant a writ of *mandamus*, under the seal of this Court, directed to the said Alexander C. Coventry, Frederick Tuttle and William Wayman, commanding them to appear on some day to be named therein, before this Honorable Court, to show cause why a peremptory writ of *mandamus* should not be awarded by said Court, requiring them to deliver to the Mayor of your relator, all the said property, records and accoutrements hereinbefore specified; and, as in duty bound, your relator will ever pray, etc.

FRANCIS C. SHERMAN, *Mayor.*

[L. S.] SAMUEL D. WARD, *City Comptroller.*

ATTEST, ANDREW J. MARBLE, *City Clerk.*

GEORGE A. MEECH, *Attorney for Relator.*

B. F. AYER, *of Counsel.*

The oath of the proper officer of the relator is hereby waived, and the said petition is to have the same force and effect as if the same were duly verified by affidavit.

ALEXANDER C. COVENTRY,
FREDERICK TUTTLE,
WILLIAM WAYMAN.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A.D., 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

In the above cause the parties agree that the petition for a mandamus therein shall be filed at the present term of said court, and a rule taken to show cause without further notice. That the respondents shall show cause at the same time said rule is entered, therein admitting the facts set forth in said petition, and waiving an alternative mandamus, and submitting that a peremptory mandamus may issue if relator is adjudged to be entitled to the same for any part of the property mentioned in said petition. The only question to be raised upon said application is whether the office of said commissioners has been abolished by the proceedings of the constitutional convention, and the action of the legal voters of the City of Chicago thereon.

ALEXANDER C. COVENTRY,
FREDERICK TUTTLE,
WILLIAM WAYMAN,
FRANCIS C. SHERMAN, *Mayor*,
SAMUEL D. WARD, *City Comptroller.*

358

The People, ex rel.
The City of Chicago
v.
Alexander C. Coventry
et al.

Copy of Record.

Filed May 19, 1862
G. Gleason
Clk

To the Honorable the JUSTICES OF THE SUPREME COURT, *at a term thereof begun and holden at Ottawa, in and for the Third Grand Division of the State of Illinois, on the first Tuesday after the third Monday of April, in the year of our Lord One Thousand Eight Hundred and Sixty-two :*

Respectfully represents unto your Honors, your relator, the City of Chicago, a municipal corporation, in the County of Cook and State of Illinois, that at the municipal election holden in and for the said City, on the third Tuesday of April, A. D. 1862, Francis C. Sherman was duly elected Mayor for the municipal year commencing on the first Monday of May, A. D. 1862; that said Sherman has accepted said office, and at the date last mentioned, was duly qualified, and entered upon the discharge of its duties.

Your relator further represents, that heretofore, to wit., on the twenty-first day of February, A. D. 1861, an act was passed by the General Assembly of the State of Illinois, and approved upon the same day, entitled "An Act to establish a Board of Police in and for the City of Chicago, and to prescribe their powers and duties;" whereby it was, among other things, provided that the Governor should nominate, and by and with the advice and consent of the Senate, appoint three Commissioners, who should be the first Commissioners of said Board of Police, and who should respectively hold their offices for two, four, and six years from and after the municipal election in said City of Chicago then next ensuing, and until their successors were duly elected and qualified; that said Commissioners, when appointed, should proceed to organize said Board, and after such organization should assume control of the police force of said City; and that all public police property, books, records, and accoutrements then in the possession of the Police Department of Chicago should be transferred to said Commissioners for the use of said Board of Police; but the ownership of the same, and the use thereof, as aforesaid, should be according to the ordinances

which the Common Council of the City of Chicago had enacted, or might thereafter enact.

Your relator further represents, that afterwards, pursuant to the provisions of the said act, Alexander C. Coventry, Frederick Tuttle, and William Wayman were duly nominated by the Governor, and by and with the advice and consent of the Senate, appointed commissioners of said Board of Police; that they severally accepted their said appointments, were duly qualified, and on the twenty-sixth day of March, A. D. 1861, entered upon the duties of their said office.

Your relator further represents that immediately after the organization of the said Board of Police, to wit., on the day and year last mentioned, all the public Police property, books, records and accoutrements in the possession of the Police Department of said City of Chicago, including among other things the following described articles, to wit: Seventy-five stars, five hundred and nineteen badges, three hundred batons, (which said stars, badges and batons are the insignia of office of the officers and members of the police force of said city), and four volumes of police records, (the same being records of property stolen, and of arrests made prior to the passage of the act above mentioned), were delivered over to the said commissioners for the use of said Board of Police, agreeably to the requirement of the act aforesaid; and the same have ever since remained and still do remain in the possession of the said commissioners.

Your relator further represents that since the organization of the said Police Board, the said commissioners have caused to be made and kept, pursuant to the provisions of the act aforesaid, certain other volumes of police records, to wit: One complaint book for each of the three natural divisions of said city; one general complaint book for the office of the Superintendent of Police; one record book of stolen property, and one registry of lost or stolen property; all of which records are still in possession of the said commissioners, and are essential and necessary to the proper administration of the police department of said city.

Your relator further represents that on the twenty-first day of March A. D. 1862, an ordinance was duly passed by the Constitutional Convention of the State of Illinois, then lawfully assembled at Springfield, in said State, for the purpose of revising, altering or amending the Constitution of this State, which said ordinance is in the words and of the tenor following, that is to say:

"*An ordinance, to secure to the citizens of Chicago and the corporate authorities thereof, the right to elect and appoint their own officers.*

Be it ordained, That, at the next municipal election, to be held in the City of Chicago on the third Tuesday of April, 1862, the legal voters of said city shall cause to be printed or written upon all their ballots the following words: "*For the city of Chicago electing its own officers;*" or the words: "*Against the city of Chicago electing its own officers;*" which shall be canvassed and returned with the election returns of the ballots, as is now provided by law. And in case there shall be a majority of the legal voters, voting at said election, in favor of the people of said city electing their own officers, as indicated by said above mentioned words, then it shall not be lawful for any officers of that city to be chosen in any other manner than by a vote of the people of said city, or appointed in any other manner than by the Mayor and Aldermen, as provided by present laws; and the act approved February 22, A. D. 1861, entitled "An act regulating the custody and sale of personal property, under legal process, in the city of Chicago, and the towns of South Chicago, West Chicago and North Chicago, in Cook county;" also, "An act to establish a board of police in and for the City of Chicago, and to prescribe their powers and duties," approved February 21, A. D. 1861; and, also, so much of an act approved February 18, A. D. 1861, as is embraced in section sixty-six and one-half, (66½) of an act to amend the city charter of Chicago, and creating three commissioners to examine into the finances of said city, be and the same are each and all of them hereby repealed; and the powers and duties of all officers appointed under and by virtue of said acts shall immediately cease; and, hereafter, neither the Governor nor General Assembly shall appoint any person to any office for said city of Chicago, but all officers shall be elected by the people of said city, or appointed by the Mayor and Aldermen, as provided by present laws, or by such general laws as may hereafter be passed by the General Assembly, under this constitution."

Your relator further represents, that afterwards, to wit., on the twenty-fourth day of March, A. D. 1862, a provision, the same in terms as the aforesaid ordinance, was by the said Convention attached to and made a part of the schedule appended to the new Constitution adopted by the said Convention, and the following additional provision was subjoined thereto, to wit: "The provisions of this constitution required to be executed prior to the adoption or rejection thereof, shall take effect and be in force immediately;" as by section 34 of said Schedule, reference being thereunto made, will fully appear.

Your relator further represents that afterwards, at the municipal election, held in and for the City of Chicago, on the third Tuesday of April, A. D., 1862, agreeably to the provisions of the aforesaid ordinance and of the thirty-fourth section of the schedule appended to the new constitution and adopted by the said Convention as aforesaid, the question was submitted to the legal voters of the said City of Chicago, in manner and form as therein provided, whether the City of Chicago should elect its own officers; and afterwards, to-wit., on the twenty-first day of April, A. D., 1862, the result of the votes returned and canvassed, upon the said question, was found and duly declared to be as follows, to-wit:

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"Against the City of Chicago electing its own officers," 93 votes.

The whole number of legal voters voting at said election, was found not to exceed fourteen thousand; whereupon it was found and declared that a majority of the legal voters voting at said election had voted in favor of said proposition.

Your relator further represents, that it is advised by counsel, and verily believes, that by reason of the several acts and proceedings aforesaid, the functions, powers and authority of the said Commissioners of the Board of Police expired from and after the said twenty-first day of April, A. D., 1862, and that afterwards they had no right to retain possession of the said public police property, records and accoutrements hereinbefore mentioned, but were in duty bound to surrender the same to the said City of Chicago upon demand being made therefor.

Your relator further represents, that afterwards, to-wit., on the tenth day of May, A. D., 1862, at said County of Cook, said Francis C. Sherman, acting as Mayor of said City, and in that behalf duly authorized by law and by the Common Council of said City, demanded possession, from the said Alexander C. Coventry, Frederick Tuttle and William Wayman, of the said property, records and accoutrements above enumerated, but they refused to deliver such possession and still retain the same.

Your relator further represents, that if the office of said Commissioners has expired, as hereinbefore stated, said Francis C. Sherman, as Mayor of said City, was, at the time of making said demand, and still is entitled to the possession and custody of the property, records and accoutrements aforesaid.

Wherefore, and inasmuch as your relator has no other specific and adequate remedy at law in the premises, your relator prays your Honors to grant a writ of *mandamus*, under the seal of this Court, directed to the said Alexander C. Coventry, Frederick Tuttle and William Wayman, commanding them to appear on some day to be named therein, before this Honorable Court, to show cause why a peremptory writ of *mandamus* should not be awarded by said Court, requiring them to deliver to the Mayor of your relator, all the said property, records and accoutrements hereinbefore specified; and, as in duty bound, your relator will ever pray, etc.

FRANCIS C. SHERMAN, *Mayor.*

[L. S.] SAMUEL D. WARD, *City Comptroller.*

ATTEST, ANDREW J. MARBLE, *City Clerk.*

GEORGE A. MEECH, *Attorney for Relator.*

B. F. AYER, *of Counsel.*

The oath of the proper officer of the relator is hereby waived, and the said petition is to have the same force and effect as if the same were duly verified by affidavit.

ALEXANDER C. COVENTRY,
FREDERICK TUTTLE,
WILLIAM WAYMAN.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A.D., 1862.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. THE CITY OF CHICAGO,
vs.
ALEXANDER C. COVENTRY, FREDERICK TUTTLE, AND WILLIAM WAYMAN.

In the above cause the parties agree that the petition for a mandamus therein shall be filed at the present term of said court, and a rule taken to show cause without further notice. That the respondents shall show cause at the same time said rule is entered, therein admitting the facts set forth in said petition, and waiving an alternative mandamus, and submitting that a peremptory mandamus may issue if relator is adjudged to be entitled to the same for any part of the property mentioned in said petition. The only question to be raised upon said application is whether the office of said commissioners has been abolished by the proceedings of the constitutional convention, and the action of the legal voters of the City of Chicago thereon.

ALEXANDER C. COVENTRY,
FREDERICK TUTTLE,
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FRANCIS C. SHERMAN, *Mayor*,
SAMUEL D. WARD, *City Comptroller.*

The People, ex rel.
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