in the corporate limits of Lehi it would have been several minutes longer than it was in reaching the crossing on Fourth South street, and that Lewis would have passed over the crossing in safety, and would have been some distance from the track when the train arrived at the crossing. Ward v. Chicago, B. & Q. R. Co., 97 Iowa, 50, 65 N. W. 999; Louisville, N. O. & T. R. Co. v. Caster (Miss.) 5 South. 388.

Complaint is made that the court erred in its charge to the jury, and erred in refusing to give certain instructions requested by appellant. We have carefully examined the charge as given and the rejected instructions asked for by appellant, and find no error. The charge of the court, when considered in its entirety, was as favorable to appellant as the facts warranted.

The judgment is affirmed, with costs to respondents.

STRAUP, J., concurs.

FRICK, C. J. I concur. My first impressions, however, were, that the evidence was of such a nature as unavoidably led to the conclusion that, if the deceased had exercised ordinary care in either looking or listening for an approaching train, he should have seen or heard it in time to have avoided the collision. Upon a careful reading of the record I have, however, become convinced that under all the facts and circumstances the question of contributory negligence was a question of fact for the jury. As suggested by my Associate, the decision upon this question is therefore controlled by the principles announced in the case of Evans v. O. S. L. R. Co., 37 Utah, 431, 108 Pac. 638, and not by the rule laid down in the more recent case of Bates v. S. P., L. A. & S. L. Ry. Co., 114 Pac. 527.

MAUFF et al., Election Commission, v. PEOPLE ex rel. CLAY.

(Supreme Court of Colorado. April 16, 1912.)

1. ELECTIONS (§ 197*) — CONSTITUTIONAL PROVISIONS—ELECTIONS IN DENVER CITY—STATUTES APPLICABLE.

Const. art. 20, relates to the city and county of Denver, but the only special powers given such city and county on the subject of elections are contained in the provision authorizing the use of automatic voting registers, fixing the term, time of election, and designating officers, who, as agents, shall perform the city and county governmental functions. *Held* that, since the purpose of the article was to give the people of the city and county of Denver exclusive control in matters of local concern only, the Election Commission of the city and county of Denver should be controlled by the state statutes in performing its duties at elections held in the city and county.

[Ed. Note.—For other case, see Elections, Cent. Dig. § 169; Dec. Dig. § 197.*]

2. CONSTITUTIONAL LAW (§ 26*) — STATE CONSTITUTION—LIMITATION OF POWERS.

The state Constitution is a limitation upon the powers of the General Assembly, which has plenary power except as it be limited by the Constitution.

[Ed. Note.—For other case, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

Musser, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Mandamus by the People, on the relation of Christopher F. Clay, as Chairman of the Republican City Central Committee of the Republican Party of the City and County of Denver and State of Colorado, against Albert E. Mauff and others, constituting the Election Commission of the City and County of Denver. Judgment for relator, and defendants bring error. Affirmed.

W. H. Bryant, John A. Rush, and John H. Gabriel, for plaintiffs in error. John W. Sleeper and Dayton & Denious, for defendant in error.

BAILEY, J. The suit is in mandamus by the People on the relation of the Chairman of the Republican City Central Committee of the Republican Party of the City and County of Denver, wherein the Chairman of the Democratic Central Committee of the Democratic Party of the same municipality, by proper averments, is shown to have a like interest, and entitled to the same relief to which the Republican Chairman is entitled, if any, against Albert E. Mauff and others, constituting the Election Commission of the City and County of Denver. It is sought to compel the commission to select, from names submitted by the respective above-named chairman, a temporary registration committee of three for each precinct in that territory, the members of which will become election judges at the May, 1912, election, under the law of 1911 (Laws 1911, p. 336) governing such matters, which a majority of the commission declined to do. The question is whether the commission is subject to and shall be guided by the state statutes, respecting the performance of its duties regarding the control and conduct of elections. Plaintiff had judgment below and the defendants bring the case here on error, seeking a reversal thereof. Disregarding technical objections, as both parties desire and public interest requires, that the controversy be disposed of promptly on its merits, we proceed to thus consider and determine it.

[1] If by article 20 of the Constitution the city and county of Denver is freed from the Constitution and general laws of the state concerning elections, then by charter the people of that political body may proceed to fix the qualifications of electors therein, provide a complete system for the conduct

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of elections, declare what shall constitute an offense against the laws so enacted, prescribe punishment therefor, say how and in what courts election contests shall be waged, and in short, upon the entire subject of elections, which it requires no argument to show, in the very nature of things, is of more than local concern, may act independently of the provisions of the state Constitution and the general laws relating thereto. A construction of this article that leads to a result so absurd and utterly impossible is palpably wrong and should not have the sanction or approval of the courts. That the entire state is interested in having the qualifications of electors, offenses against election laws and punishments therefor, methods of conducting election contests, provisions for the preservation of the purity of the ballot, fixed and defined throughout the state by uniform laws, and that the sovereign power of the state alone can do this, seems so plain as to amount practically to a demonstration.

The state Constitution declares that the General Assembly shall pass laws to guard against abuses of the elective franchise and to secure the purity of elections, and statutes have been enacted in compliance with this mandate. It is not possible that in the city and county of Denver this provision of the Constitution, and the wise, wholesome and beneficent laws passed pursuant thereto, have been swept aside, that they are no longer in force there, and that the people of that locality are in this respect freed therefrom and have ceased to be subject thereto. Those laws, and the above referred to provision of the Constitution, with others thereof, concerning elections and the exercise of the elective franchise, were in force in that territory prior to the adoption of article 20, and unless we find something therein setting them aside they are still so in force.

In People ex rel. v. Sours, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34, it was contended that article 20 displaces and was intended to displace the Constitution and the laws of the General Assembly, and to give to the people of the city and county of Denver a free hand in all things, with the exclusive power to make, alter and revise their charter in any and every particular, but in the opinion in that case, emphatically denying that contention, this court, speaking through Mr. Justice Steele, said:

"Even by constitutional amendment, the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city, government. * * * Under the Constitution of the United States, the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state, such officers as may be necessary to perform the duties assumed by the state government, under the general laws as they now exist or as they may hereafter exist. * * * The provision that 'every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable,' completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control. The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States."

And in People ex rel. v. Cassiday, 50 Colo. 503, at page 509, 117 Pac. 357, at page 359, discussing matters bearing directly on this same proposition, it is said:

"The people of the city and county of Denver have not been given, and do not have, the power by charter to in any way change the duties of governmental officers, so far as they relate to state and county affairs, and there can be no ground for such contention if article 20 be properly read and understood. The city and county of Denver has not been freed from the Constitution. It is as much subject to it as any other part of the state. Article 20 is a part of the Constitution. Upon its adoption certain portions of the Constitution, as it theretofore existed, became inapplicable to this particular territory, because of the express provision of the new article. This article, to the extent which it undertook to do so, being the last expression of the people upon the subject, modified the Constitution so far as it applied to the territory in question, and certain provisions thereof became inapplicable therein. Article 20 is a grant of power to the people of the city and county of Denver, where theretofore no power in that respect existed, to do certain specific things, relative to the designation of agencies to discharge in that territory governmental duties fixed by the Constitution and general laws. They have just such power and authority in this behalf as the article gives them, no more, no less."

And again, at page 514 (50 Colo., 117 Pac. 360), in that opinion, it is said:

"As matters now stand, there is nothing whatever in article 20 which gives to the people of the city and county of Denver power to legislate upon anything whatever, concerning matters of state and county governmental import, except merely the designa-

tion of certain agents to perform therein the acts and duties incident thereto. It may be that the people of the city and county of Denver have, in some particulars, by their charter provisions, exceeded the grant of power given them, and if so, those matters are for correction in proper proceedings to that end. No such questions are now before this court, either for consideration or decision."

Also again, at page 509 (50 Colo., 117 Pac. 359) of that opinion, it is said:

"All that article 20 purports to do relative to county offices is to provide that the people of the city and county of Denver, through their charter, shall designate the agencies, which are to discharge the respective duties and functions which pertain to them. There is no warrant or authority in article 20 to the people of the city and county of Denver to alter, change or dispense with such acts and duties. They remain, as before, subject to the Constitution and general laws, and are exclusively under the control of the Legislature."

It is manifest, from these excerpts from former opinions of this court, that no part of the Constitution of the state has been set aside by article 20, unless directly so, or by necessary implication, through some one or more provisions of that article. Where the Constitution and general laws of the state have not been, either by direct provision or necessary implication, set aside, they are as much in force in the city and county of Denver as they are in other portions of the state. The purpose of article 20 was to give to the people of the city and county of Denver exclusive control in matters of local concern only. The people of the city and county of Denver have no power whatever to legislate by their charter upon matters of state and county governmental import and character. The fact that the authority given by article 20 to the people of the city and county of Denver to legislate was confined and limited solely to local matters was the precise thing that made it possible for the courts to uphold and enforce it. If by article 20 it had been undertaken to free the people of the city and county of Denver from the state Constitution, from statute law, and from the authority of the General Assembly, respecting matters other than those purely of local concern, that article could not have been upheld.

[2] Keeping in mind the fact that the state Constitution is a limitation upon the powers of the General Assembly, and that but for inhibitions found therein its legislative power is plenary, let us examine article 20 and see whether by its express terms, or by implication, necessary or otherwise, a limit of any sort is placed upon the General Assembly respecting the enactment of laws to govern and control the conduct of elections in the city and county of Denver. We search this article in vain for a single expression which hints at or even suggests any such limitation. There is no provision in article 20 by which, upon any pretext, either directly or indirectly, it can be said that it is sought thereby to in any respect change the Constitution of the state, or the laws in force under it, upon the subject of elections, except as hereinafter pointed out. The only special power thereby given the city and county of Denver upon this subject, beside permitting therein the use at elections of the automatic voting register, is to fix the term, which includes the time of election, and to designate the officers who, as agents, are to perform in that municipality state and county governmental functions. Except as thus modified, the state Constitution and general laws concerning elections remain in full force and effect, and are as much applicable to the city and county of Denver as to any other section of the state.

The contention is that the exclusive power having been given to the citizens of the city and county of Denver, by article 20, to amend their charter, or to adopt a new charter, or to adopt any measure as therein provided, the power is with the people to provide for the conduct and control of elections as they may see fit. By every decision of this court, from the Sours Case, supra, down to and including the case of Hilts et al. v. Markey et al., 122 Pac. 394, decided February 21, 1912, which is the last expression upon this subject, it has been held that this power extends to nothing except matters of local concern. All elections are public in character, and are of governmental and state-wide importance, rather than of local or municipal interest merely, hence must be under the control and regulation of the state Constitution and general laws. The right to vote comes from the sovereign authority of the state, and that right can only be fully preserved and enforced by the same authority. Every citizen of the commonwealth is interested in the purity of elections, which consists chiefly in affording qualified electors an opportunity to vote and have their votes counted, and in preventing those not qualified from voting. It means protection, in the exercise of this right, to those entitled to have it. The right of the elector to be thus safeguarded carries with it the corresponding duty on the part of the state to furnish all needed protection. It is a matter of general public concern that, at all elections, such safeguards be afforded. The state at large is interested in the purity of every election, municipal or otherwise, and it must be apparent that it is only through the power of the sovereign state itself that purity in elections can be obtained. In determining what is of local, and what is of state interest in this connection, the right of the elector to the protection of the state, which cannot be fairly doubted, is a potent factor.

The distinction between the subject-matter of this suit and the matters involved in Den-

ver v. Hallett, 34 Colo. 393, 83 Pac. 1066, and Londoner v. City, 119 Pac. 156, is that in the latter cases purely local matters were under consideration, while here the matter involved is one of public and general interest. That the people of the city and county of Denver cannot legislate through their charter upon the latter subject is settled by all of our decisions.

The vital question here involved is whether the regulation, control and management of elections is of governmental state import and character. This being answered in the affirmative, and the judgment of the court below, being in harmony with that view, is affirmed.

Judgment affirmed.

CAMPBELL, C. J., not participating. MUSSER, J., dissenting.

WHITE, J., (concurring). We have repeatedly held that article 20 of the Constitution vests in the people of the city and county of Denver supreme legislative power in municipal matters, and frees them from legislative interference by the General Assembly in respect thereto. But we have never held that the control and conduct of elections of public officers at any time or place within the state is solely of municipal or local concern. On the contrary, it seems clear, under the express provisions of the Constitution, that the exercise of the elective franchise must necessarily be under the control of the sovereign power. The power vested in the people of the city and county of Denver can in no wise infringe upon or invade the power retained by all the people of the state to themselves, or to the General Assembly, which is the representative of all the people. So, if we take the Constitution as it stands, with article 20 written therein, and construe it as a whole, we may readily ascertain and distinguish the legislative powers of all the people to be exercised by and through the General Assembly, and the legislative powers of a portion of the people which may be exercised by the people of the municipality known as the city and county of Denver. Let us briefly consider some of the provisions of the Constitution as it now is.

Section 2 of article 20, inter alia, declares that: "The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable." The language quoted is the sole basis of the contention that power is vested in the people of the city and county of Denver to control and conduct elections therein. Even if this provision stood alone, we think it doubtful if such construction could be properly ascribed to it. The purpose of the section is apparently plain. It deals with officers of the city and county of Denver, and, inter alia, declares that they "shall be such as by appointment or election may be provided for by the charter." Now, the subject dealt with is officers, not elections or appointments. Under the provision, two classes of officers may exist: one, an appointed class; and the other, an elected class. The mandate of the Constitution is that the charter shall provide as to the two classes. It does not undertake to vest the control or conduct of such elections in the framers of a charter. If this be not the meaning of the section when standing alone, it certainly is its meaning when considered in connection with other constitutional provisions. Section 11 of article 7 says: "The General Assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise." If the General Assembly has no power over the control and conduct of elections within the city and county of Denver, how can it pass laws to secure the purity of elections and guard against abuses of the elective franchise therein? How can the General Assembly secure the purity of elections in which it has no concern or over which it has no jurisdiction? How can it guard against abuses of the elective franchise when exercised upon matters not within the scope of its legislative power? How can it perform the constitutional duty, by general law, to regulate the manner of trial and designate the courts and judges by whom all classes of election contests, not otherwise provided for in the Constitution, shall be tried?

It is sought to answer this by the assertion that the constitutional command to the General Assembly to pass laws to secure the purity of elections and to provide for election contests passed to the people of the city and county of Denver so far as municipal elections are concerned, and the duty in that respect rests upon the municipality, and there is no evidence to indicate that the people of the city and county of Denver are more likely to ignore these provisions than the Legislature. For many reasons readily apparent, such argument is logically defective and unsound. The Constitution places the particular duty upon the General Assembly, not upon a municipality. Moreover, the argument assumes a false premise, to wit, that the control and conduct of elections for public officers of a municipality has only a local or municipal significance. The character of power that controls and regulates in such matters is the crux of the controversy here. As a crime or misdemeanor in this state is the intentional violation of a public law, and can only be punished as a crime by the sovereign power, in the

name of the people of the state, how can the municipality of the city and county of Denver pass laws to secure the purity of elections? So, contrary to the assertion on behalf of plaintiffs in error, there is evidence to indicate that the people of the city and county of Denver are more likely than the General Assembly to ignore those provisions of the Constitution. The evidence is that the latter, having the power, can perform the duty imposed; the former, having no such power, are impotent in that respect.

But it is next said that article 20 does not deprive the General Assembly from passing laws with respect to the purity of elections which will cover municipal elections in the city and county of Denver; that it may declare an act committed in any place in the state a crime; that murder, larceny, and all other crimes committed in the city and county of Denver are defined and punished under the general laws of the state, and so illegal voting, ballot box stuffing, and other election crimes in municipal elections therein may be defined and punished under the general laws of the state. The assertion is evidently true, but cannot be so if the exclusive power to regulate and control such municipal elections is vested by the article in the people of the city and county of Denver. While it is true the General Assembly may declare an act committed in any place in the state a crime, the act constituting the crime must be against a state law, not a law applicable alone to a municipality. It is also true that murder, larceny, and all other crimes committed in the city and county of Denver are defined and punished under the general laws of the state, but it is equally true that every element which it takes to constitute murder or larceny in one portion of the state is essential to constitute such offenses respectively in every other part of the state. So what constitutes illegal voting, ballot box stuffing, or other crimes against the election law in the city and county of Denver must necessarily be an essential element in such crimes elsewhere throughout the state. This is necessarily true because the Constitution inhibits the enactment of a special or local law where a general law can be made applicable. Article 5, § 25.

A further argument is that in the various charters under which the municipality known as Denver operated prior to the adoption of article 20 of the Constitution the General Assembly provided for the appointment and election of municipal officers, and the preparation for and conduct of municipal elections, and, that the General Assembly having previously exercised such power, the people of the municipality of the city and county of Denver can exercise like power after the adoption of the article, because this court has repeatedly declared that the article conferred upon them "every power possessed by the Legislature in the making of a charter for Denver." The argument is based upon the assumption that "before the adoption of article 20 Denver operated under charters granted by the General Assembly." Herein lies the error of the argument. Prior to the adoption of article 20 Denver operated under a charter granted by the territorial Legislature, not acting under the Constitution, with such amendments to that charter as the General Assembly, under the Constitution, enacted. As the rights of the municipality then known as Denver were under a charter unaffected by the Constitution, the General Assembly presumably acted upon the theory that a general law was inapplicable, and under the constitutional provision (section 25, art. 7, supra) embodied in a special law the constitutional requirement imposed upon it to control and regulate the elective franchise.

Moreover, it was the General Assembly that made such provisions, and thus the power exercised was within the strict letter and spirit of the Constitution. When it is conceded, as it is, that the state is concerned in municipal elections in Denver in the same regard that it is to the police regulations thereof, the unsubstantial character of the position of plaintiffs in error is made more apparent. The regulation or prohibition of the sale of intoxicating liquors is essentially a police regulation, yet we have declared that the sovereign power of the state by the adoption of article 20 of the Constitution in no wise surrendered the control thereof to the people of the city and county of Denver, and that such matters are to be governed by general law enacted by the General Assembly. Is it possible that the exercise of the elective franchise in such territory is of less concern to the sovereign power, to wit, the people at large, than is the regulation or sale of intoxicating liquors therein? The wrongful exercise of either engenders disrespect for law, uproots the conscience of the people, and may subvert the foundations of government. Both essentially concern the state in its entirety. We should neither add to, subtract from, nor subvert the Constitution of the state, and for that reason the judgment of the trial court should be affirmed.

MUSSER, J. (dissenting). Were the question of the appointment of a registration committee and judges of election for the state election in November before this court, the reasoning and conclusion of the majority, as it appears to me, would be more pertinent. The duties to be performed in Denver in the preparation for and conduct of the November election are duties to be performed by county officers. They are such duties as have been frequently called by this court state governmental duties, concerning which the people of Denver cannot legislate except to designate in their charter who shall perform them. People v. Sours, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34; People v. Cassidy, 50 Colo. 503, 117 Pac. 357; Hilts v.

Markey, 122 Pac. 394. It was made plain in the Cassidy Case that there are no county offices in Denver as such, but that the duties appertaining to such offices remain as before to be performed by agencies designated in the charter. In other cities the line of demarcation between county offices and the duties appertaining thereto and municipal offices and their duties is sharply defined. In Denver, while there are no county offices as such, but only municipal offices, the line of demarcation between the duties appertaining to county offices and those appertaining to municipal offices is just as sharply defined. For instance, in other cities there is a county treasurer and a municipal treasurer. The duties to be performed by the county treasurer are prescribed by statute, while those to be performed by the municipal treasurer are prescribed by the charter, whether that charter is the general law appertaining to towns and cities, a special charter granted by the General Assembly, or one adopted under the provisions of article 20, and the line between the two classes of duties is clear. In Denver there is a municipal treasurer only, and the charter, in obedience to the mandate of article 20, requiring the charter to designate the officers who shall perform the duties of county officers, provides that the municipal treasurer shall perform the duties of county treasurer. While the duties appertaining to each office are to be performed by the same person, yet the line between them is as well defined as when they are performed by two persons. For state elections, at which state, district, and county officers are to be elected, the General Assembly may prescribe certain duties to be performed with respect thereto by certain county officers, and it has prescribed in the act of 1911 that certain duties shall be performed by the county clerk and county commissioners. These are state governmental duties referred to in the cases cited above. They cannot be changed or regulated by charter, but in Denver, in obedience to the mandate of article 20, the charter shall designate who shall perform these state governmental duties. That is as far as the charter can go with respect to them. The Denver charter, in section 156, has designated who shall perform these duties by providing that the election commission shall perform "the acts and duties required of a board of county commissioners, county clerks and justices of the peace in all matters pertaining to registration and elections." With respect to these duties, the election commission performs the duties of county officers, which duties are prescribed by the Legislature, and cannot be interfered with by the charter. To my mind the performance of these duties is not before us in this case. Those duties relate to another and different registration committee and set of election judges to be appointed under the provisions of the state laws governing state and county elections.

The reasoning and conclusion of the majority, it appears to me, are not applicable to the case now before the court. The election commissioners are municipal officers, and as such are charged with certain municipal duties as well as the state governmental duties aforesaid. It is plain from the decisions of this court appertaining to the right and power of the people of Denver to legislate in their charter that the General Assembly has no control over municipal duties. These municipal duties of the election commission are prescribed by section 174 of the charter, and can relate only to municipal elections, at which the municipal officers of Denver are to be elected in May. The case before us relates to the appointment of election judges for the municipal election in May. The duties to be performed by the election commission in preparation for and in the conduct of the municipal election in May pertains to local and municipal government, over which the General Assembly has no control under article 20 of the Constitution if the prior decisions of this court are followed, any more than it has control over the municipal duties of a municipal treasurer, or the municipal duties of a municipal clerk in Denver. Therefore, in the appointment of a registration committee and a set of election judges for the state election the election commission performs the duties of county officers, and should appoint such judges from the lists furnished by the chairmen of the respective political parties as provided in the act of 1911; but in the appointment of a set of judges for the municipal election in May the commission performs the duties of municipal officers only, and should appoint such judges in the manner provided in the charter, which does not provide for any list from the chairmen of the respective political parties. If the act of 1911 attempts by legislative interference to regulate and control the local municipal election, it is to that extent ineffective. In his dissenting opinion in the case of People v. Johnson, 34 Colo. 189, 86 Pac. 247, the reasoning of which dissenting opinion was adopted in the Cassidy Case and is now the express pronouncement of this court, Mr. Justice Steele said: "For when the people of the state granted to Denver by article 20 power to select public officers, fix their salaries, designate a time for their election, although they relinquished a power theretofore retained by them or delegated to the Legislature, they but granted Denver power to legislate in matters of local concern." Section 2 of article 20 says: "The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided." To me that language clearly means that the charter may provide what officers the municipality may have and

may provide for their appointment or election. How can it be said under that section 2 that the charter may provide what officers the city and county of Denver shall have and may not provide that such officers be appointed or elected, but that the General Assembly may provide by law for their appointment or election? Certainly, under this section, the charter may provide, not only what officers the municipality may have, but also for their appointment or election. It is obvious that, if the charter should provide that certain municipal officers of Denver shall be appointed, the General Assembly could not step in, and say by whom, or how, or when they shall be appointed. This being true with respect to appointments, it is equally true with respect to the election of such officers as the charter may provide shall be selected by election. How can it be said that, if the municipal officers shall be selected by election, they shall be selected as the General Assembly may provide, and, when they are to be selected by appointment, they shall be selected as the charter may provide, when the words "appointment" and "election" are used in the same clause and in the same connection?

It is plain from the above quotation from People v. Johnson, supra, that the people of the state granted to Denver power to select its public officers, and, when the people did so, they but granted to Denver power to legislate in matters of local concern. In the case of People v. Sours, supra, 31 Colo. at page 387, 74 Pac. at page 172, 102 Am. St. Rep. 34, it was said: "The amendment (article 20) is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States." It is thus plain to me, as a matter already determined by this court, and as a fact flowing from the very nature of the thing itself, that the selection of the public municipal officers of Denver is a matter of local concern—a local municipal affair, concerning which article 20 has secured to the people of Denver absolute freedom from legislative interference. In cities and towns organized and operating under the general statutes, or a special charter from the General Assembly, there is no doubt that the General Assembly may and does legislate concerning matters pertaining to municipal elections within constitutional limits. By general law, applicable alike to all towns and cities operating thereunder, it may prescribe a different time, a different ballot, different rules and regulations for the conduct of municipal elections therein than are prescribed for state and county elections in November, except as it may be limited by the Constitution. These town and city elections are municipal local elections and pertain to local government in the municipalities where held, and the general election law for state and county elections does not apply to them except in so far as is expressly provided by statute. The duties to be performed by the city or town officers with respect to these elections, are purely municipal, and not state governmental, duties. By the adoption of article 20 of the Constitution the entire population of the state conferred upon the people of Denver all the powers concerning their local municipal government theretofore possessed by the Legislature. This court has said so emphatically. In Denver v. Hallett, 34 Colo. 393, 398, 399, 83 Pac. 1066, 1068, Mr. Justice Steele, delivering the opinion of this court, said: "The purpose of the twentieth article was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the Legislature; and so it was declared in the article that until the adoption of a new charter by the people that the charter as it then existed should be the charter of the municipality, and, further, that the people of Denver shall always have the exclusive power of making, altering, revising, or amending their charter; and, further, that the charter, when adopted by the people, should be the organic law of the municipality, and should supersede all other charters. It was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver every power possessed by the Legislature in the making of a charter for Denver." In Londoner v. City and County of Denver, 119 Pac. 156, at 158, 159, this court said: "By that decision we determined that the powers enumerated in section 1 of article 20 of the Constitution do not constitute a limitation of the powers conferred on the municipality; and, moreover, the article conferred upon such people 'every power possessed by the Legislature in the making of a charter for Denver.'"

Before the adoption of article 20, Denver operated under charters granted by the General Assembly. In the various charters thus granted the Legislature provided for the appointment and election of municipal officers and the preparation for and conduct of municipal elections. Sess. Laws 1883, p. 72; Sess. Laws 1885, p. 98; Sess. Laws 1883, p. 190. There is no doubt that the preparation for and the conduct of municipal elections in Denver were had in accordance with the provisions of these charters and the Constitution. While, after making specific provisions, these charters generally provided that the matters provided for by the general state law should be used as far as applicable when no other provision was made in the charters, yet the state election law came in to govern in these elections so far as it did govern, only because the charter spe-

cifically provided that it should. Any provision in the charter thus granted by the General Assembly, providing for a different method or detail than that provided for in the general state law, prevailed over the latter. There is no doubt that the General Assembly could have provided for all details and methods with regard to elections in Denver in the charter which it had the power to grant entirely different from the state law, keeping, of course, within the limits of the Constitution. The judges of election were appointed in accordance with the provisions of these charters, and the general state law was never regarded, unless the charter specifically provided that it should be, so far as applicable when no other provision was made. That was the power possessed by the Legislature or General Assembly with respect to elections in Denver under the legislative charter, and, as is seen from the decisions of this court quoted above, that power, under article 20, descended to the people of Denver, and they were given the power to legislate with respect to their municipal elections which the General Assembly or Legislature theretofore possessed.

While article 20 freed the people of Denver from legislative interference by the General Assembly, so far as their local government was concerned, I do not wish to be understood as holding that this article freed them from the Constitution. The legislative power theretofore possessed by the General Assembly over such matters was, of course, subject to the limitations of the Constitution, and when the people of Denver succeeded to the legislative powers of the General Assembly, with respect to their local affairs, as has been determined by this court, of necessity they took such powers subject to the same constitutional limitations.

I cannot notice specifically each of these general constitutional limitations, but will refer to them somewhat generally to illustrate what I mean. For instance, section 5 of article 2 provides that all elections shall be free and open, and no power shall interfere to prevent the free exercise of the right of suffrage. There can be no doubt that the people of Denver, in legislating for their municipal elections, must observe that section the same as the General Assembly. Article 7 of the Constitution relates to suffrage and elections. It provides the qualification of electors, privilege of voters, eligibility for office, that elections shall be by ballot and other general provisions. No argument is necessary to show that the qualification of electors, and the other general provisions as fixed in that article limited the power of the General Assembly to legislate concerning elections in towns and cities whether by general law or special charter, and it necessarily follows that the people of Denver who took the power theretofore possessed by the General Assembly to legislate concerning municipal affairs in Denver took it subject to the same constitutional limitations. Of course, section 7 of article 7, which fixes the time for the general state and county election, is and always has been inapplicable to Denver or to any other city in its municipal capacity. If the people of Denver succeeded to the powers of the General Assembly to legislate with regard to their local affairs, then section 11 and section 12 of that article, which provides that the General Assembly shall pass laws to secure the purity of elections, and to provide for election contests, must have passed to the people of Denver so far as their power to legislate with regard to their local affairs is concerned. There is no evidence to indicate that the people of Denver are more likely to ignore these provisions than the Legislature. On the contrary, it must be assumed that any officer or body of people charged with the performance of a duty will discharge it, and the fact that they may not discharge it is not a contingency within the meaning of the law that will tend to nullify the power of performance. People v. Sours, supra, 31 Colo. 388, 74 Pac. 167, 102 Am. St. Rep. 34. The fact is that the people of Denver, in their charter, have legislated to secure the purity of elections in their city. Furthermore, article 20 does not deprive the General Assembly from passing laws with respect to the purity of elections that will cover municipal elections in Denver. The General Assembly may declare an act committed in any place in the state a crime. Murder, larceny, and all other crimes committed in Denver are defined and punished under the general laws of the state. So equally can illegal voting, ballot box stuffing, or other election crimes in any election, including municipal elections in Denver or elsewhere, be defined and punished under the general law of the state making them crimes, and prescribing the punishment therefor. The same act that constitutes a crime under the state law is frequently made a violation of a town or city ordinance, and the actor is made to suffer the penalty prescribed by the state law as well as that prescribed by the ordinance.

It is strongly urged that the people of the whole state are concerned in municipal elections in Denver because the state is interested in the purity of elections, and that, therefore, the state should have the power to regulate all elections, and municipal elections in Denver are put on a different basis in this regard than other municipal affairs. It appears to me conclusively from what I have said that the state gave the people of Denver exclusive power, subject to constitutional limitations, over their municipal elections, and, having given such power, it thereby manifested that what concern it had it was willing to and did trust to the people of Den-

ver. There is no doubt that the state is concerned in municipal elections in Denver, but it has the same concern in that regard that it has with respect to the police regulations in Denver, the same concern that it has with respect to the material welfare and prosperity of Denver, the same concern that it has that everything the people of Denver do in the management of their local affairs will be for the best, and for the advancement of good morals and good government. If such concern is regarded as sufficient to deprive the people of Denver of the power, expressly given them, to regulate and control by charter their municipal elections, then, for the like reason, these people can be deprived of most, if not all, of the powers given them in article 20, the article wiped out, and home rule for Denver, which has been accepted as real and substantial and which this court has said was intended to be accomplished by that article, will exist no more.

It is also urged that, because the charter shall designate the persons who shall perform the duties of county officers, the state has such interest that it should control the municipal election. The power to so designate was expressly given to the people of Denver in article 20 by the people of the entire state by constitutional amendment. It was thus bestowed without qualification, reservation, or limitation. The language used in giving it is plain and unambiguous. That the people of the state had a constitutional right to grant this power to the people of Denver was finally and conclusively settled by this court in the Cassidy Case. By granting this power as they did, the people of the entire state manifested and declared that it was their concern and policy that the people of Denver should have this right and power freed from legislative interference by the General Assembly, until the same people that gave it shall take it away by constitutional amendment. What right has any court to say that it is the concern of the state that the General Assembly shall control the matter of municipal elections in Denver, when the people of the whole state have declared that it is their concern that the people of Denver in their charter shall control such elections, subject only to such constitutional limitations as are applicable? Speaking of article 20, this court in the Cassidy Case, 50 Colo. at page 507, 117 Pac. at page 358, said: "It (article 20) is not only a part of the Constitution, but it is there to stay, until the authority which voted it in shall vote it out. It, as any other part of the Constitution, is to be given force and effect according to its plain intent, purpose, and meaning. When the whole people speak through a fundamental law, or by amendment thereto, not in conflict with the federal Constitution, all should hear and heed, more especially the courts, whose function is to interpret, and, where possible, uphold and enforce, not nullify, overthrow, and destroy, the law." And in 50 Colo. on page 508, 117 Pac. on page 359, speaking directly with reference to section 2 of article 20, which I have quoted above and which relates to the power of the people of Denver to provide in their charter for the appointment or election of their municipal officers, and that the charter shall designate the officers who shall respectively perform the acts and duties required of county officers, this court said: "There is no element of uncertainty about this provision. It needs no construction. It interprets itself. The question is, Shall it be given its plain, obvious, and common-sense meaning, and enforced accordingly, as other provisions of the Constitution are interpreted and enforced? There is no apparent reason for doing otherwise. Why scrutinize article 20 in hostile spirit, or treat it as an interloper? It is a child of the same parentage as the original Constitution. This court has again and again held it to be a part thereof, and it is so in all its provisions, and for all purposes, according to its clear intent." I say now, in speaking with reference to the matter in point, there is no element of uncertainty about this provision. It needs no construction and it interprets itself. The question is, Shall it be given its plain, obvious, and common-sense meaning and enforced accordingly? Why ingraft upon it something that is not there? Why say, when the people of the state have declared that the people of Denver should appoint or elect their officers as provided in their charter, that the people of Denver shall not do it, but that they shall do it as the General Assembly may provide? And in 50 Colo. on page 509, 117 Pac. on page 359, speaking with reference to the duties of county officers, and of the provision that the charter shall designate the persons who shall perform them, this court said: "The whole people of the state have declared by their fundamental law that this may be done. That was a question of governmental policy for the people to determine, and this policy, when once declared, may not be ruthlessly set aside by the courts, except it is shown to violate in some way the federal compact with the state." If the people of the state have settled as a question of governmental policy that the people of Denver may designate in their charter who shall perform the duties of county officers, what right has the court to say now that that is not the governmental policy declared by the people, but that the policy declared by the people is that the General Assembly shall step in and control in this matter?

Enough has been said to conclusively convince me that I must dissent from the opinion and conclusion of the majority of this court, and it is my opinion that the election judges for the municipal election in

Denver should be appointed by the election commission in accordance with the terms of the charter.

It follows from this that the judgment of the district court was wrong, and should be reversed, that the cause should be remanded, and the complaint dismissed.

NISBET, Sheriff (WORK, Intervener), v. SIGEL-CAMPION LIVE STOCK COMMISSION CO.

(Court of Appeals of Colorado. Feb. 13, 1912. Rehearing Denied April 8, 1912.)

1. FRAUDULENT CONVEYANCES (§ 222*)—ATTACHMENT.

Where property has been taken by an officer, claiming to act under an attachment, from the possession of a stranger to the action in which the writ was issued, who claims title, before the officer can attack the title of the person in possession, on the ground that it was fraudulent as to creditors of defendant in the attachment action, he must show not only a writ regular on its face, but also that the required preliminary steps were taken to authorize the issuance of the writ, and that it was issued upon a bona fide existing indebtedness.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 649, 652; Dec. Dig. § 222.*]

2. FACTORS (§ 47*)—LIEN—PRIORITIES.

A factor's lien is superior to the claims of subsequent purchasers and creditors, and is not subject to be defeated by attachment or execution against the principal.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65–71; Dec. Dig. § 47.*]

3. FACTORS (§ 47*)—LIEN—EXISTENCE AND EXTENT.

Where horses were consigned to a factor, who made advances by drafts, pursuant to an agreement to that effect, and paid certain expenses of receiving, feeding and caring for them, the factor, if in possession of them, was entitled to a lien to the extent of his advances and his expenses legitimately incurred and paid in connection with receiving and preserving the consignment.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65–71; Dec. Dig. § 47.*]

4. FACTORS (§ 47*)—LIEN—POSSESSION.

A factor's lien does not come into existence or take effect until the property on which it is claimed has lawfully and in good faith come into his actual or constructive possession.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65–71; Dec. Dig. § 47.*]

5. FACTORS (§ 47*)—LIEN—POSSESSION—DELIVERY TO CARRIER.

The delivery of property to a carrier consigned to a factor who pays drafts against the consignment in pursuance of an agreement is a constructive possession in the factor, sufficient to invest him with a lien.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65–71; Dec. Dig. § 47.*]

6. FRAUDULENT CONVEYANCES (§ 286*)—EVIDENCE.

A factor and consignee was in actual possession of a lot of horses consigned for sale, under claim of right in himself to hold and dispose of them and to repay himself out of the proceeds for advances and expenses on the consignment, and defendant, a sheriff, with knowledge of the factor's possession, seized them on attachment against the consignor and on summons and garnishment against the factor, and in the factor's action to recover possession and for damages attempted to be set up that the title of the factor was fraudulent as to the creditors of the attachment debtor. *Held* that the writ of attachment and accompanying return, regular on its face and reciting that the necessary preliminary steps were taken, was inadmissible as against the factor on the issue whether the writ was authorized, and was issued upon a bona fide existing indebtedness.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 822–834, 863–866; Dec. Dig. § 286.*]

7. EVIDENCE (§ 60*)—PRESUMPTION—CONDUCT OF BUSINESS.

The claim of a factor to be reimbursed out of property consigned to him in the usual course of his business for advances actually made on the credit of the consignment is entitled to the general presumption of honesty and good faith applicable to other commercial transactions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.*]

8. APPEAL AND ERROR (§ 934*)—REVIEW—PRESUMPTIONS—FINDINGS.

Where a question of fact is withdrawn from the jury and submitted to the court by request of each party for a directed verdict, and there is evidence to justify a finding in favor of plaintiff, it will be conclusively presumed, on appeal from the judgment for plaintiff, that the court so found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781; Dec. Dig. § 934.*]

9. BANKRUPTCY (§ 295*)—ACTION BY TRUSTEE—JURISDICTION OF STATE COURTS.

The state courts are open to a trustee in bankruptcy seeking to enforce or protect the interests pertaining to his trust to the same extent generally as in the case of any other litigant properly invoking their jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 414, 417; Dec. Dig. § 295.*]

10. PARTIES (§ 44*)—INTERVENTION—APPLICATION.

Under Code Civ. Proc. 1887, §§ 22, 23, which entitle any person who has an interest in the matter in litigation in the success of either of the parties thereto, or an interest against both, to intervene in the action, and providing that intervention shall be by petition setting forth the grounds upon which it rests, the petition must show some interest in the matter in litigation in common either with the plaintiff or the defendant, or adverse to both, of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 72; Dec. Dig. § 44.*]

11. BANKRUPTCY (§ 156*)—ACTION BY TRUSTEE.

In an action by a factor to recover personal property from a sheriff by whom it had been seized by writ of attachment against its consignor with service of garnishment summons on the factor, the consignor's trustee in bankruptcy, in proceedings begun within four months of the consignment intervened by petition, but did not aver that the consignor had been adjudged a bankrupt, nor that intervenor had been appointed trustee. *Held*, that by answering the petition the factor waived any