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## Montana Municipalities: Local Self Government

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Annual Meetings at the Canyon in Yellowstone during the period of the Regional Meeting. The Montana Bar expects to dispose of most of its association business on Tuesday, June 17th.

Committees are being activated in publicity, transportation, reception, registration, entertainment and Junior Bar Conference matters. In the January issue of the American Bar Association Journal the Regional Meetings at Louisville and Yellowstone have been publicized and it is stated that the meetings will sparkle with timely and useful institutes and entertainment for the lawyers and their ladies; and that Judge Harold R. Medina, Chairman of the Section of Judicial Administration, has assured both Regional Directors that there will be a fine program on minimum standards of judicial administration. Each morning will feature a world affairs program.

All law students and all lawyers, regardless of membership in the American Bar Association, are urged to attend the Regional Meeting. There will be a registration fee of \$5.00 for members of the bar, and \$1.00 for law students.

The Regional Meeting will have exclusive occupancy of Canyon Hotel and Canyon Lodge. Any overflow will be accommodated at Lake. Full information regarding rates and accommodations can be obtained from Mr. Jameson.

Other officers chosen at the last Montana Bar Association meeting are: Howard J. Luxan, Secretary; James T. Finlen, James H. Morrow, Jr., Fred L. Gibson, George J. Hutton, and Julius J. Wuerthner, Executive Committee.

### **MONTANA MUNICIPALITIES: LOCAL SELF GOVERNMENT**

The doctrine that municipal corporations<sup>1</sup> have a right to govern their strictly municipal affairs has had a long and controversial history in the United States, stemming from Judge Cooley's opinion in the famed Michigan case of *People v. Hurl-*

<sup>1</sup>Public corporations consist of true municipal corporations and *quasi* municipal corporations. *Quasi* municipal corporations have some of the attributes of municipal corporations but lack some of the more important municipal characteristics, such as a concentration of population in a small area and the power to pass local legislation, and are formed almost exclusively with a view to the local administration of state policy. Counties, school districts, drainage districts, etc., fall within the term of *quasi* municipal corporations. Local self government, if it applies at all, applies only to true municipal corporations. *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 P. 1092 (1899); *Independent Publishing Company v. County of Lewis & Clark*, 30 Mont. 83, 75 P. 860 (1904); *Yellowstone County v. First Trust & Savings Bank*,

*but.*<sup>3</sup> The controversy has been over the legal soundness of the doctrine rather than over the desirability of giving municipalities a free rein in the management of their local affairs. In fact, most writers and judicial authorities concede that municipal self government is very desirable. Some even go so far as to say that a vigorous and independent system of municipal government is the strength and foundation of American democracy; that it is the basic training place, so to speak, for democratic thought, and that only in municipal affairs does the common citizen have an opportunity to participate in government.<sup>4</sup>

McQuillin lists as advantages flowing from municipal self government: (1) that each community is free to select the form of government which best suits its needs; (2) that the inhabitants become educated in the principles of municipal government; (3) that unhampered local control is better adapted to meet fresh municipal problems; (4) that the state legislature is relieved of a myriad of detailed municipal legislation, and thus avoids conflict and uncertainty in municipal affairs; (5) that a simple and scientific government is provided for at once which is not subject to change at the whim of zealous political and economic interests; and (6) that the temptation to interfere with municipalities for reasons of party politics, spoils, or corruption is removed from the legislature.<sup>4</sup> Much of what Mr. McQuillin and the other writers say is no doubt true; and many states, in recognition of the desirability of local self government, have adopted constitutional amendments giving municipal corporations the right of local self government.<sup>5</sup>

A big storm has raged, however, over the assertion by some authorities that local self government is a right existing in mu-

46 Mont. 439, 128 P. 596 (1912); *Hersey v. Nielson*, 47 Mont. 132, 131 P. 30 (1900); *Edwards v. County of Lewis & Clark*, 53 Mont. 359, 165 P. 297 (1917); *Sullivan v. Bighorn County*, 66 Mont. 45, 212 P. 1105 (1923); *Frank v. Fergus County*, 76 Mont. 150, 245 P. 962 (1926); *Lewis v. Petroleum County*, 92 Mont. 563, 17 P. (2d) 60 (1932); *DILLON MUN. CORPS.* § 35 (4th ed.); 1 *MCQUILLIN MUN. CORPS.* §§ 126-136. (2d ed.).

<sup>3</sup>24 Mich. 44, 9 Am. Rep. 103 (1871).

<sup>4</sup>*People v. Hurlbut supra*, note 2; *People v. Albertson*, 55 N. Y. 50 (1873); *Attorney General v. Detroit*, 53 Mich. 213 (1885); *State v. Denny*, 118 Ind. 382, 402, 449, 21 N.E. 274, 4 L.R.A. 65, 24 Am. & Eng. Corp. Cas., 223 (1889); *Markley v. Mineral City*, 58 Ohio St. 430, 440, 51 N.E. 28, 65 Am. St. Rep. 776 (1898); De Tocqueville's *DEMOCRACY IN AMERICA* ch. 5; 1 *MCQUILLIN MUNICIPAL CORPORATIONS* pp. 264-266 (2d ed.).

<sup>5</sup>1. *MUNICIPAL CORPORATIONS* p. 277 (2d ed.).

<sup>6</sup>*MCQUILLIN* lists sixteen states 1. *MUNICIPAL CORPORATIONS* § 162; (2d ed.); a later writer finds two more, Harvey Walker in *Let Cities Manage Themselves*, NAT. MUN. REV., Dec. 1947, p. 625.

municipal corporations independently of express provisions therefor in the written constitutions of the respective states. That issue will be the primary interest of this paper, with particular emphasis on the question in Montana. It is well to state here that there are really two theories offered in support of local self government: (1) that self government of strictly local affairs is a right which was reserved in the people when they granted to the states their constitutional powers,<sup>6</sup> and (2) that municipal corporations are protected as private corporations in the management of their proprietary or private affairs by the due process clauses of the state constitutions.<sup>7</sup> The two theories are entirely different but are not always recognized or distinguished by the cases.

The extent of local self government will vary depending upon which theory is used. If we were to find that self government in strictly local affairs is a right reserved in the people, then logically it would extend to all local affairs, both proprietary and governmental, so long as the state as a whole has no interest. And that is what the cases which purport to follow the reserved right theory say.<sup>8</sup> If, on the other hand, we find that municipal corporations are to be treated as private corporations under the due process clauses of the constitutions, then necessarily, as *private* legal entities, they can have no autonomy in *governmental* affairs. Local self government under the latter theory must be limited to those local affairs denominated as proprietary or private. Moreover, if the people of the state reserved out of the constitution the right to local self government with respect to strictly local affairs, then municipalities would themselves be sovereign in these matters. The state could never presume to interfere by imposing the least duty or regulation on the conduct of such affairs. On the other hand, if we find municipal corporations to be agents of the state in *all governmental* matters and matters of general concern, and to be private corporations in their conduct of local proprietary matters, entirely different results will follow. As the principal, the state may restrict the authority of its agents in any manner it wishes, except as limited by specific constitutional provisions. And, as the sovereign, the state may impose any reasonable duty and regulation

<sup>6</sup>62 C.J.S. *Mun. Corps.* § 184; 12 C.J. *Const. Law* § 174; 43 C.J. *Mun. Corps.* § 289.

<sup>7</sup>62 C.J.S. *Mun. Corps.* § 110; 43 C.J. *Mun. Corps.* § 178.

<sup>8</sup>People v. Hurlbut *supra*, note 2; People v. Albertson *supra*, note 3; State v. Denny *supra*, note 3; Bartlesville Water Company v. Brann, 166 Okla. 251, 27 P. (2d) 345 (1933).

upon municipalities that it may impose on any private corporation. The only limitation upon the state is that it cannot deprive the municipalities of property without due process of law. Since the theories and the results are so different, each will be discussed separately below.

The reasoning of the first theory stated above, hereinafter referred to as the "reserved right theory," is that, since municipal self government existed and was recognized in the boroughs of England and the colonial towns prior to the existence of any of the state constitutions, and since it is so fundamental to American democracy, it is a basic right of the people which is reserved in them under the hypothesis that written constitutions are grants of power to the state.<sup>9</sup>

The defect in the argument is in the misconception of the republican theory of the origin and nature of the state constitutions—more particularly in the misconception of constitutions as grants of power from the *people* who are taken to be the ultimate sovereign. The theory behind our constitutional form of government, and the theory demanded by the United States Constitution,<sup>10</sup> is that the states are republics, which Webster's New International Dictionary defines as: "a state in which the sovereign power resides in a certain *body* of the people (*the electorate*) and is exercised by representatives elected by and responsible to them." (Italics supplied.) Judge Cooley himself accepts this theory,<sup>11</sup> and the whole idea of Rousseau's theory of a social contract between man and the state, upon which our democratic form of government rests, is that, except for contrary provisions in the state constitutions, the *general will* of the people should prevail.<sup>12</sup> Thus, "*the people*"—the ultimate sovereign—does not refer to individual persons, to classes of people, or to communities of people; it refers to the *general will* of the *electorate*.<sup>13</sup> Therefore, a republican form of government being a wielding of sovereignty by the agents of the people, the conclusion must follow that the constitution is a limitation placed upon those agents. Judge Cooley, in his work on *Constitutional Limitations*,<sup>14</sup> quotes

<sup>9</sup>Cf. Montana Constitution Art. III, §§ 1, 2. *People v. Hurlbut supra*, note 1 (at 24 Mich. pp. 96-99); *State v. Denny supra*, note 3; 62 C.J.S. *Mun. Corps.* § 184; 43 C.J. *Mun. Corps.* 289.

<sup>10</sup>U. S. Constitution, Art. IV, Sec. 4.

<sup>11</sup>The point was conceded to be the generally prevailing view in Cooley's opinion in *People v. Hurlbut supra*, note 2.

<sup>12</sup>Ebenstein *MAN AND THE STATE*, p. 21, quoting Jean Jacques Rousseau, *The Social Contract* (1762), Everyman's Library Edition.

<sup>13</sup>BLACK CONSTITUTIONAL LAW § 30 (3d ed.), ROTTSCHAEFFER CONSTITUTIONAL LAW, p. 165.

<sup>14</sup>(8th ed. 1927) Vol. 1, p. 96.

with approval the case of *Hamilton v. St. Louis County Court*<sup>15</sup> for this proposition:

“A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all of the latent powers which lie dormant in every nation and are boundless in extent and incapable of definition.”

Montana also subscribes to this theory of the constitution as a *limitation* on power. In the case of *McClintock v. Great*

: the court said “*Id.*”

“Generally speaking our Constitution is not a grant of powers but a limitation upon the powers which may be exercised by the various branches of state government . . . . Except in so far as it is restricted by the constitution, the Legislature has all the law making power possessed by any sovereign state.”<sup>16</sup>

We must grant that the sovereign power is in the people—in the electorate; but *the people*, under the social contract theory of the state, did not grant away a few paltry rights and powers to their agent, the government. Rather, they granted *all* their rights and powers, *limited* only by the provisions of the particular state constitution. Any idea that a right of local self government is reserved in the people because it was not granted away must fall at once when this proposition becomes clear.

Moreover, if municipalities were “little republics” with respect to all strictly local affairs, they could not be subjected to suit for acts done in connection with their proprietary affairs, as they commonly are.<sup>17</sup> Nor would they be subject to regulations laid down by administrative bodies such as public service commissions, as they commonly are.<sup>18</sup> Indeed, how could the states’ courts ever take jurisdiction of another “sovereign,” as they commonly do. The absurdities to which the reserved right theory leads point up its untenable position.

The fact is that many of the cases which purport to find such a reserved right theory actually go off on some express

<sup>15</sup>15 Mo. 13 (1851).

<sup>16</sup>53 Mont. 221, 163 P. 99 (1921).

<sup>17</sup>Citing *State v. Sullivan*, 48 Mont. 320, 137 P. 392 (1913); *State v. Dodd*, 51 Mont. 100, 149 P. 481 (1915).

<sup>18</sup>*Infra*, note 40.

<sup>19</sup>*Public Service Commission v. City of Helena*, *infra*, note 32; McQUILLIN *MUN. CORPS*. §§ 249-252 (2d ed.).

constitutional limitation or statute.<sup>20</sup> Even the leading authority for the theory, Judge Cooley's opinion in *People v. Hurlbut*,<sup>21</sup> is found to be only *dictum* in one of four Judges' opinions and hence not even strong *dictum*. After discussing the existence of a reserved right to local self government, Judge Cooley said: "But I think that so far as is important to the decision of this case there is an express recognition of the right of local authority by the constitution."<sup>22</sup> He then proceeded to find invalid the legislative interference complained of<sup>23</sup> by construing an express constitutional provision<sup>24</sup> *in the light of the local self government which existed when the constitution was framed*, and concluded that as a *matter of construction* the framers must have intended by that constitutional provision to protect local self government. It is this latter proposition which he reaffirmed in *People v. Detroit*<sup>25</sup> where he said, speaking of the *Hurlbut* case, ". . . and what we said in that case we here repeat, that while it is a fundamental principle in this State, *recognized and perpetuated by express provisions of the constitution*, that the people of every hamlet, city, or town of this State are entitled to the benefits of local self government . . . the precise extent . . . has been left to be determined by the legislature." (Emphasis supplied.) And in his work on *Constitutional Limitations* he asserts this principle of constitutional construction and not that of a reserved right.<sup>26</sup>

Although the Montana Supreme Court has in several cases cited those parts of Cooley's opinions in the *Hurlbut* and *Detroit* cases, *supra*, which seem to support a reserved right theory, there will be found not one case decided upon that basis. The case of *Helena Consolidated Water Company v. Steele*,<sup>27</sup> the first considering the theory in Montana, quoted from those Michigan cases passages which support this and the private corporation theory, but the actual decision was rested on express constitu-

<sup>20</sup>*Brown v. Galveston*, 97 Tex. 1, 75 S.W. 488 (1903), speaking of the *Hurlbut* case and cases cited; 43 C.J. *Mun. Corps.* § 289 n. 26, 27; 62 C.J.S. *Mun. Corps.* § 184 n. 96, 97; 19 R.C.L. *Mun. Corps.* § 35.

<sup>21</sup>*Supra*, note 2.

<sup>22</sup>24 Mich. 108.

<sup>23</sup>The Michigan legislature attempted to appoint the members of boards of city water and sewer commissioners. 3 SESSION LAWS (Mich. 1871) p. 273.

<sup>24</sup>Michigan Constitution, Art. 15, § 14: "Judicial officers of cities and villages shall be elected and all other officers shall be elected *or appointed* at such time and in such manner as the legislature shall direct." (Emphasis supplied.)

<sup>25</sup>28 Mich. 228, 15 Am. Rep. 202 (1873).

<sup>26</sup>(8th ed. 1927) pp. 389, 391.

<sup>27</sup>20 Mont. 1, 49 P. 382, 37 L.R.A. 412 (1897).

tional limitations against legislative taxation for municipal purposes<sup>28</sup> and against imposing any new liability on any county or municipal corporation with respect to past transactions.<sup>29</sup> And a later case, *Gerry v. Edwards*,<sup>30</sup> also citing the *Hurlbut* and *Detroit* cases and citing the *Helena Consolidated Water Company* case, was also decided on one of the same limitations.<sup>31</sup> Several later cases purported to affirm this reserved right theory but were not faced with the question.<sup>32</sup> To repeat, the Montana Supreme Court has yet to decide a case upon the basis of this theory.

The second more limited but sounder theory of local self government, hereinafter termed the "private corporation theory," merely applies the principle that a state constitution must be construed in the light of conditions which existed when the constitution was framed and with a view to what the framers intended. The doctrine is this: that municipal corporations are more than mere political subdivisions of the state; that they have proprietary or private functions, in addition to governmental functions as political subdivisions or agents of the state, and that as to proprietary or private functions they have as much right to self control or management as have private corporations; and that this right is protected by the due process clauses of the state constitutions.

It must be conceded that such functions as supplying water,<sup>33</sup> electricity,<sup>34</sup> and steam heat<sup>35</sup> to its inhabitants, ownership and management of municipal property,<sup>36</sup> operation of municipal swimming pools,<sup>37</sup> maintenance of parks,<sup>38</sup> etc.,<sup>39</sup> do not come

<sup>28</sup>Montana Constitution, Art. XII, § 4.

<sup>29</sup>Montana Constitution, Art. XV, § 13.

<sup>30</sup>42 Mont. 135, 111 P. 734, 100 A.L.R. 581 (1910).

<sup>31</sup>*Supra*, note 28.

<sup>32</sup>*Hersey v. Nielson supra*, note 1; *Stange v. Esval*, 67 Mont. 301, 215 P. 807 (1923); *State ex rel. Woare v. Bd. of Commissioners of Liberty County*, 70 Mont. 252, 225 P. 389 (1924); *Public Service Comm. v. Helena*, 52 Mont. 527, 159 P. 24 (1916); *Griffith v. City of Butte*, 72 Mont. 552, 234 P. 829 (1924); *Campbell v. Helena*, 92 Mont. 366, 16 P. (2d) 1 (1932).

<sup>33</sup>*Public Service Comm. of Montana v. Helena supra*, note 32.

<sup>34</sup>*Millegan v. Miles City*, 51 Mont. 374, 153 P. 276 (1915).

<sup>35</sup>*Millegan v. Miles City supra*, note 34.

<sup>36</sup>*State v. Holmes*, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581 (1935).

<sup>37</sup>*Felton v. City of Great Falls*, 118 Mont. 586, 169 P. (2d) 229 (1946).

<sup>38</sup>*State ex rel. Gerry v. Edwards supra*, note 30.

<sup>39</sup>The city as an employer of firemen was said to be acting in a proprietary capacity, even though fire protection itself was said to be a function of the sovereign. *State ex rel. Kern v. Arnold infra*, note 48. But in *State ex rel. Gebhardt v. Helena*, 102 Mont. 347, 90 P. (2d) 330 (1936), the Court said that, since police protection was part of the



within a municipality's duties as an agent of the sovereign. Rather, these functions are described as *proprietary* or *private*. And we find that, with respect to these functions, municipal corporations were at common law and are now subject to many of the same liabilities, burdens, and responsibilities as are others acting in proprietary capacities. They may sue or be sued without consent of the legislature, just as are private businesses engaged in similar activities.<sup>40</sup> If, then, municipal corporations do not act in the capacity of the sovereign in these proprietary affairs, in what capacity do they act? The answer, and the only answer which suggests itself, is that they must act in these affairs as private corporations. And if that is so, it must logically follow that not only are municipal corporations subject to the

power of the sovereign, the employment and payment of policemen were also part of the sovereign power. These cases seem difficult to reconcile.

Care of streets and alleys and the erection and maintenance of local improvements have been said not to be part of the sovereign power held by cities. *Snook v. Anaconda*, 26 Mont. 137, 66 P. 757 (1901); *May v. Anaconda*, 26 Mont. 140, 66 P. 759 (1901); *State ex rel. Brooks v. Cook*, 84 Mont. 478, 276 P. 958 (1929) (dictum); *Barry v. City of Butte*, 115 Mont. 224, 142 P. (2d) 571 (1943). But the majority opinion in a recent case, *Dietrich v. Deerlodge* .....Mont....., 218 P. (2d) 708 (1950), said that the surfacing and care of city streets is a part of the State's sovereign power to establish and maintain highways. A specially concurring opinion of Chief Justice Adair, following the previous cases, stated that alleys and streets are matters of strictly municipal concern *but the financing thereof is a governmental act*. This last case casts considerable doubt upon the classification of this function.

<sup>40</sup>*Campbell v. City of Helena supra*, note 32; *Safransky v. City of Helena* 98 Mont. 456, 39 P. (2d) 644 (1935); *Griffith v. City of Butte supra*, note 32; *Felton v. City of Great Falls supra*, note 37. Montana counties also have been held subject to suit for the torts of their officers and employees when acting in proprietary functions. *Johnson v. City of Billings*, 100 Mont. 462, 54 P. (2d) 1068 (1936) (where a city and a county were held jointly liable); *Jacoby v. Chouteau County*, 112 Mont. 70, 112 P. (2d) 1068 (1941), citing the *Johnson* case as controlling. However, the decisions were based upon a very broad construction of R.C.M. 1935, § 4444 (R.C.M. 1947, § 16-804) which gives counties the power to sue and be sued, and the court, in the *Johnson* case, recognized that but for this statute it could not entertain the suit.

It is submitted that the holdings of the two cases just mentioned do not in any way weaken the argument that since municipal corporations *may be sued without any such statute*, they must have been intended to be treated as private corporations when acting in proprietary affairs.

See Kline, *Municipal Corporations: Liability of Counties for Negligent Acts and Omissions of Their Employees and Officers*, 3 MONT. L. REV. 128 (1942). The author there apparently did not recognize the statutory basis for suits against counties. McElwain in *State Immunity From Tort Liability*, 8 MONT. L. REV. 45 (1947), asserts that the sovereign's immunity from suit is a feudal holdover and should be done away with, but he recognizes that the change must come through legislative action in the way of consent statutes.

burdens imposed upon private corporations but are also entitled to all the rights, privileges, and immunities accorded private corporations. This precisely is what Judge Cooley said in dictum in his opinion in *People v. Detroit*:<sup>41</sup>

“The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacities, as well as to corporations for manufacturing and commercial purposes.”

And this is precisely what the Montana court held in the case of *State ex rel. Missoula v. Holmes*.<sup>42</sup>

The *Holmes* case was the first Montana case which held invalid legislative interference in municipal affairs and which holding cannot be explained by any express constitutional limitation specifically directed against legislative interference with municipal affairs. The *Steele* and the *Edwards* cases,<sup>43</sup> discussed the private corporation theory and the reserved right theory of inherent local self government and quoted Judge Cooley's dictum in *People v. Detroit*, and seemed to approve both. But, as before stated, the decisions went off on express constitutional limitations relating to municipal corporations.<sup>44</sup> The issue in the *Holmes* case was the constitutionality of a statute (since defeated on referendum) requiring all political subdivisions to insure their public buildings with the state.<sup>45</sup> The court considered no less than seven contentions made against the validity of the statute, but rejected every one and said the statute was valid so far as it related to counties and other political subdivisions. However, as it applied to cities, the court said this:

“... If the city when acting in its proprietary capacity is subject to the burdens, responsibilities, and liabilities . . . of others acting in proprietary capacities, it must logically follow that when acting in such a capacity it is entitled to the rights, privileges, and immunities accorded others.”

The court then quoted as controlling, Cooley's dictum in *People v. Detroit*,<sup>46</sup> which said that the municipal corporation is protected in its proprietary affairs by the due process

<sup>41</sup>*Supra*, note 23 at 28 Mich. 240.

<sup>42</sup>*Supra*, note 36.

<sup>43</sup>*Supra*, notes 27, 30.

<sup>44</sup>*Supra*, pp. 48 and 49.

<sup>45</sup>R.C.M. 1935, § 173.2.

<sup>46</sup>*Supra*, note 23.

clause.<sup>47</sup> The *Holmes* case was reaffirmed later in the same year in the case of *State ex rel. Kern v. Arnold*,<sup>48</sup> and as late as 1949 in dictum.<sup>49</sup> Thus, we find that Montana recognizes a doctrine of inherent local self government based upon the private corporation theory.

Of course, constitutions must be read as legal documents, and effect cannot be given to the intent of the framers unless that intent can fairly be found in the words used.<sup>50</sup> The questions are whether the due process clause was intended to apply to municipal corporations when acting in proprietary affairs, and whether that intent can be found in the language used by the framers.

Several principles of construction must be observed: the meaning of the constitution was fixed when it was adopted; the object of construction is to give effect to the intent of the people who adopted the writing; the whole instrument must be examined with a view to arriving at the true intention of each part; if possible, the court must construe the provisions to give each word some meaning; if words of art are used, it is presumed that they were employed in their technical sense.<sup>51</sup> With these in mind, we now turn to the solution of the questions raised.

First, we find in various places in the Montana Constitution reference to municipal corporations.<sup>52</sup> The word "corporation," in the law, has a special meaning. It is a word of art. It connotes the binding together of a bundle of rights and powers into a separate artificial person. The framers of our constitution chose to use this technical word to distinguish a particular type of local subdivision. They must have intended to give the type called "municipal corporations" separate treatment,<sup>53</sup> and they must be presumed to have used the word "corporation" in its technical sense. Article XV, Section 18, states ". . . ; and *all* cor-

<sup>47</sup>Montana Constitution, Art. III, § 27.

<sup>48</sup>100 Mont. 346, 49 P. (2d) 976, 100 A.L.R. 1071 (1935).

<sup>49</sup>*Lindeen v. Montana State Liquor Control Board*, 122 Mont. 549, 207 P. (2d) 977 (1949).

<sup>50</sup>COOLEY'S CONSTITUTIONAL LIMITATIONS, (8th ed. 1927) p. 124.

<sup>51</sup>*Id.*, pp. 124-132.

<sup>52</sup>Art. V, §§ 26, 39; Art. XII, § 2; Art. VIII, § 6; Art. XVI, § 6; Art. XIII, § 4. R.C.M. 1947, § 16-801; R.C.M. 1935, § 4441, also states that counties are "bodies corporate" but those words are used in a limited sense and only for certain purposes set forth in the section itself. "Body corporate" as there used means only that for those purposes the county may act as a unit though still as an agent of the state. School districts are also "bodies corporate," R.C.M. 1947, § 75-1803; R.C.M. 1935, § 1022.

<sup>53</sup>*Hersey v. Nielson*, *supra*, note 1.

porations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons. . . ." (Emphasis supplied.) The word "corporation" is not qualified.

Couple all this with the fact that local self government existed in England and the Colonies before there ever was a state constitution, and with the fact that municipal corporations were and are regularly subjected to the burdens and liabilities of private persons engaged in similar proprietary affairs, and it is fairly inferable from the language used that the framers intended to protect municipal corporations in those affairs as private corporations.

In summary, local self government in municipal corporations is socially and economically desirable and is a characteristic mark of English and American democracy. Some states have expressly provided for a right to local self government by amendment to their constitutions, but on sound legal principles there is no room for a theory of a reserved right existing independently of such express constitutional provision. However, another theory of local self government has been adopted by a few jurisdictions which, though more limited, is sound on legal principles. It is that municipalities, when acting in proprietary or private matters, are protected as private corporations by the due process clauses of the state constitutions. Montana has not only given verbal approval to this theory but has actually decided cases on the basis of it. There can be no doubt now but that the Montana Supreme Court will hold invalid any legislative interference in municipal affairs which would be a violation of due process if municipalities were ordinary private corporations acting in a similar activity.

It is submitted that the position of the Montana Supreme Court is socially, economically, and legally sound.

ROBERT L. EHLERS.

## RES IPSA LOQUITUR

### Substantive Law

Res ipsa loquitur, literally translated, means "the thing speaks for itself." The courts in deciding cases often quote and refer to this literal translation.<sup>1</sup> Shortly, attorneys refer to it

<sup>1</sup>Johnson v. Herring, 89 Mont. 420, 300 P. 535 (1931); Maki v. Murray Hospital, 91 Mont. 521, 7 P. (2d) 228 (1932); Standard Oil Co. of New Jersey v. Midgett, 116 F. (2d) 562 (1941); Cunningham v. Dady, 191 N.Y. 152, 83 N.E. 689 (1908); Morner v. Union Pac. R. Co., 196 P. (2d) 744 (1948).