

The Multiple Dwelling Law Decision

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THE MULTIPLE DWELLING LAW DECISION

WE have the word of so experienced a person as Judge Cardozo that men do not turn to the law reports for spiritual elixir, unless it be to the opinions of Mr. Justice Holmes.¹ Nowadays, judges are generally regarded as men, and are generally familiar with the work of Justice Holmes. Spiritual elixir, if it is to be theirs, must be sought in other fields, in fields less dominated by the formalism that is still fashionable in the law. And one that readily suggests itself is the work of critics of contemporary life.

This too apparent irrelevancy is the result of having read on the same day the Multiple Dwelling Law decision² and a sparkling bit of Chesterton's.³ Reading the former produced a feeling that there was something wrong with these recent Home Rule decisions, for those concerned were expending so much energy in a seemingly vain pursuit of clarity. Reading Mr. Chesterton's sprightly arraignment of the widespread acceptance of "tags of language" suggested, quite by accident, that possibly the phrase upon which the decisions turned—property, affairs or government of cities—had to some extent become a tag of language.

In the first case arising under the Home Rule Amendment,⁴ the late Louis Marshall contended, and unsuccessful—

¹ Excerpted from an address delivered at the Commencement Exercises of the Law School, June 15, 1928. Privately printed.

² *Adler v. Deegan*, as Commissioner, etc., 251 N. Y. 467, 167 N. E. 705 (August, 1929).

³ "On the Young Idea," published in a collection, "Generally Speaking," Dodd, Mead & Co., New York, 1929.

⁴ N. Y. Const., Art. XII, Sec. 2 (as amended). The legislature shall not pass any law relating to the property, affairs or government of cities, which shall be special or local either in its terms or in its effect, but shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the governor declaring that an emergency exists and the concurrent action of two-thirds of the members of each house of the legislature.

Sec. 3 (new). Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state, relating to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, the wages or salaries, the hours

fully, that the amendment proceedings were abortive. Though the Court was at pains to state its contrary belief, its decisions in that, and in subsequent cases seemingly indicate that Mr. Marshall really won his point; that, in fact, the voters accomplished nothing. Not only has the City of New York been thwarted in its attempt to relieve the local transit congestion in a manner locally determined,⁵ but it has been denied the right to amend the Charter provisions for an employees' retirement system, under which it is the only governmental body subjected to expense;⁶ and the right to fix by local law the salary of a municipal court justice, clearly a local officer under the present constitution, though possibly not so in 1876 when the court's sole precedent was formulated.⁷

At the last session of the Legislature, the Multiple Dwelling Law was enacted.⁸ No emergency message came from the governor; enactment was effected in the usual manner. The new law is made applicable to cities of 800,000 or more inhabitants, that is, to the City of New York; other communities are free to adopt it in whole or in part. In

of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it, and the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health. The legislature shall, at its next session after this section shall become part of the constitution, provide by general law for carrying into effect the provisions of this section.

Sec. 4 (new). The provisions of this article shall not be deemed to restrict the power of the legislature to enact laws relating to matters other than the property affairs or government of cities.

Sec. 5 (new). The legislature may by general laws confer on cities such further powers of local legislation and administration as it may, from time to time, deem expedient.

Sec. 6 is concerned with the election of local officers.

Sec. 7 (new). The provisions of this article shall not affect any existing provision of law; but all existing charters and other laws shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this article. Nothing in this article contained shall apply to or affect the maintenance, support, or administration of the public school systems in the several cities of the state, as required or provided by article nine of the Constitution.

⁵ *Browne v. City of New York*, 241 N. Y. 96, 149 N. E. 21 (1925).

⁶ *Schieffelin v. Berry*, 217 App. Div. 451, 216 N. Y. Supp. 367 (1st Dept., 1926), *aff'd* without opinion by Court of Appeals, Pound and Crane, *JJ.*, dissenting, 243 N. Y. 603, 154 N. E. 623 (1926).

⁷ *Schieffelin v. Leary*, 219 App. Div. 660, 220 N. Y. Supp. 587 (1st Dept., 1927).

⁸ N. Y. Laws, 1929, ch. 713. The sections referred to in this paragraph are 2, 3, 27, 31, 36, 41, 80, 174, 214, 350-360.

length, the new act is three times the original Tenement House Law;⁹ and in scope, unique. Not trusting to a sonorous preamble, it includes as one of its sections a legislative finding of its desirability. It contains restrictions upon the height and bulk of multiple dwellings, regulates the sizes of rooms and prohibits overcrowding them, enjoins privacy, punishes slipshod housekeeping, and penalizes buildings so unfortunate as to be occupied by persons of deficient morality.

A test case was not long delayed. In fact, ten weeks after the Governor's approval, the new act was declared unconstitutional at a Special Term of the Supreme Court held in New York County.¹⁰ The building industry and the Building Department of the city were confronted with a quandary. For some days there was an open season for those who blatantly denounce the law and all its works,¹¹ but theirs was the deserved fate of gloaters when the Court of Appeals expressed its willingness to hear an appeal on July 11th, nine days after the entry of the lower court's judgment. Prompt hearing was followed by prompt decision. Five opinions were written, and the vote for reversal was five to two.¹²

The opinion of the Court was delivered by Judge Crane.¹³ It was his belief that the meaning of the words of our tag, "property, affairs or government of cities," was the determining factor of the appeal. As his first step toward definition, he cited the fourth section of the Home Rule Amendment, providing that the amendment's provisions should not be deemed to restrict the Legislature's power to enact laws relating to matters other than the property, affairs or government of cities. This he followed by the concession that the colloquial significance of the words would require a judgment of unconstitutionality, but, he tells us, some words have acquired a meaning at law. If the words

⁹ N. Y. Laws, 1901, ch. 334.

¹⁰ *Adler v. Deegan*, Supreme Court, Special Term, New York County, July 2, 1929; unreported.

¹¹ Even the normally conservative *N. Y. Evening Post* on June 27, 1929, editorially decried the lack of appellate machinery adequate to modern needs.

¹² Judges Kellogg and Hubbs concurred in the three prevailing opinions; Judges Lehman and O'Brien dissented in separate opinions.

¹³ His discussion covers pp. 470-478, 251 N. Y.

discussed had been previously used in a limited meaning in statutes or decisions, that limited meaning accompanied them into the Constitution. And such a limited meaning was found in the case of *Admiral Realty Co. v. City of New York*,¹⁴ and confirmed by another transit dispute, *McAneny v. Board of Estimate*.¹⁵ The mere fact that in the cases cited some reference was had to the words involved, sufficed for the conclusion that they were inserted in the Constitution as part of the Home Rule reform with a Court of Appeals definition, not Webster's. It would be unfair to the people, we are told, should the Court depart from its definition, and this, irrespective of whether anyone could have divined its existence. As Judge O'Brien points out in his dissent,¹⁶ the Court in the *Admiral* case specifically stated that the statute there concerned had been enacted prior to the adoption of the then Constitutional restriction upon special city laws, with which it was claimed to conflict. The portion of the opinion upon which Judge Crane relies is found in its closing paragraphs, where the Court, after disposing of this minor argument which was not even mentioned in the two other opinions, indulged in gratuitous comment. The *McAneny* case involved a legislative direction to the city to pay the expenses of the Transit Commission at a time when, as the opinion reveals, the State Legislature had plenary power over municipal funds. Whatever slight applicability this case may have had should be considered in the light of Judge Cardozo's sound assumption of the city's present plenary power over its purse.¹⁷ The pre-Amendment authorities cited, it will be noted, both involve disputes over municipal transit, of itself a sore spot of long standing.

Judge Crane has also a post-Amendment authority for constitutionality. It is the case which affirmed the Legislature's power to settle a boundary dispute between New York City and an adjoining community.¹⁸ Nothing, Judge

¹⁴ 206 N. Y. 110, 99 N. E. 241 (1912).

¹⁵ 232 N. Y. 377, 134 N. E. 187 (1922).

¹⁶ *Supra* Note 2 at 502.

¹⁷ *Ibid.* 489. This assumption was based upon the decision in *Matter of Mayor, etc., of New York (Elm Street)*, 246 N. Y. 72, 158 N. E. 24 (1927).

¹⁸ *City of New York v. Village of Lawrence*, 250 N. Y. 429, 165 N. E. 836 (1929).

Crane insists, so affects a city as the extent of its territory; hence that decision is further warrant for whittling away a general grant of power. But such a decision is obviously inapplicable. A legislative act determining a boundary relates not to the property, affairs or government of a city, but of two communities. To permit one to settle the matter by local enactment would be to submit the difference to the arbitration of the swifter contestant.

At this point, the Tenement House Law of 1901¹⁹ is introduced into the argument. We are told that since the decision sustaining its validity,²⁰ if not before, the police power insofar as it deals with the health of the people has been considered a state affair. But not even in 1929 is it denied that regulations in aid of health are affairs of the state. The Legislature, however, is not the only body concerned with such affairs; state and legislature are not synonymous terms. In the Constitution, the people, the sovereign authority, direct that the state's power shall be exercised in a manner prescribed and by the agencies designated. By the Home Rule Amendment, if anything has been accomplished, the delegation of state power to municipalities has been increased, the delegation to the Legislature diminished. The fact that in 1901 no claim was made that municipal functions were being usurped affords no support to Judge Crane's argument, for as is pointed out by Judge Pound, the old Tenement House Law was made applicable to all cities of the first class at a time when laws so applying were, under the Constitution, general laws.²¹

In quest of further corroboration of his delimitation, Judge Crane turns to the City Home Rule Law²² enacted pursuant to a direction in the Home Rule Amendment that the Legislature, by general law, provide for carrying into effect the provisions of the third section of that Article. It would be difficult to find language more clearly directing the establishment of procedural regulations, but the Legislature took it upon itself to add restrictions upon municipal

¹⁹ *Supra* Note 9.

²⁰ *Tenement House Dept. v. Moeschon*, 179 N. Y. 325, 72 N. E. 231 (1904).

²¹ *Supra* Note 2 at 481.

²² N. Y. Laws, 1924, ch. 363.

power beyond those set forth in the Constitution.²³ Among these was an inhibition of local enactments that would change any provision of the Tenement House Law.²⁴ If, reads the opinion, the matters covered by the Tenement House Law were local matters, the power of the Legislature to so provide would have been nil. That is the extent to which this point is discussed, but, to be sure, if the Legislature's power were beyond doubt, there would have been no need of so many pages of argument on other points, for the exclusion of local power would have left the field to the Legislature.

As the final bit of what he terms authority, Judge Crane writes of the facts surrounding the adoption of the Home Rule amending resolution and act. He declares unequivocally that the Legislature in drafting the amending resolution "knew and realized that the words 'property, affairs or government of cities' did not include health measures."²⁵ Yet, Section 3 of the Constitutional article, which enumerates subjects of local legislation, includes laws "relating to * * * the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health." In fact, the word "health" immediately precedes the sentence authorizing the Home Rule Law—a law passed, we are reminded, by "this same legislature," a continuous body, the individual membership of which may change, but whose "vital spark, giving it mentality, intent and purpose, we must assume, continues the same from year to year."²⁶ Strangely, this constant Legislature which disregarded constitutional direction in Sections 21 and 30 of its enactment,

²³ It is believed that the Constitutional restrictions are to be found in Sections 1 and 7 of Article XII.

²⁴ City Home Rule Law, Sec. 21. Notwithstanding any provision of this chapter, the local legislative body of a city shall not be deemed authorized by this chapter to adopt a local law which supersedes a state statute now in force or hereafter enacted by the Legislature, if such local law

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6. Changes any provision of the Tenement House Law.

²⁵ *Supra* Note 2 at 476. It will be recalled that in the leading case of *Browne v. City of New York*, *supra* note 5, Judge Cardozo included "health laws" in his five-part classification, 241 N. Y. 96, 125.

²⁶ *Supra* Note 2 at 476.

Possibly the vital spark will be somewhat dimmed at the next session because of the passing of that up-state assemblyman who is reputed to have habitually pelted speakers with wads of paper, *Brooklyn Daily Eagle*, Nov. 6, 1929.

respected its every syllable in Section 11, and speedily amended Section 12 so as to negative a Court of Appeals decision.²⁷ Stranger still, within a few days of its approval of the Multiple Dwelling bill, it attempted to validate all existent local laws relating to subjects entrusted to *its* regulation by Article XII, Section 1 of the Constitution.²⁸

Reason as well as authority, Judge Crane continues, justifies his position. Because of New York City's pre-eminence as a port, a stopping point for immigrants, a gathering place of transients, anything that affects the health and welfare of the city touches almost directly the welfare of the state as a whole. An equally rational conclusion would be that the welfare of the entire world was touched with commensurate directness. If the concern of the state in this matter is the "shifting population" of which he writes, it might be well to recall that as long ago as 1913, the city was delegated to care for the safety, health, comfort and general welfare of those who might visit it.²⁹

In his final paragraph, there recurs the thought that the city's position involves a denial of the state's police power, and we encounter a plea which epitomizes Judge Crane's position, a plea for recognition of "the useful division which *custom and practice* have made."³⁰

Judge Pound wrote the first of two concurring opinions.³¹ He believes that the Constitution and Home Rule Law plainly indicate a division between state and city affairs, and that the line of demarcation must be drawn by the courts as occasions arise. Indeed, he declares that neither the Constitution nor the Legislature has attempted a definition of laws relating to property, affairs or government of cities, and he disavows the Court's intent to do so. To him it is clear that under the Amendment a law may relate to or affect cities as civil divisions of the state or centers of population without necessarily relating to their property, affairs

²⁷ *Bareham v. Rochester*, 246 N. Y. 140, 158 N. E. 51 (1927).

²⁸ N. Y. Laws, 1929, ch. 646. By the same chapter, the Legislature amended Sec. 11 of the Home Rule Law so as to insert before the enumeration of local legislative subjects, the words "including but not limited to."

²⁹ General City Law, Sec. 20 (13), added by N. Y. Laws, 1913, ch. 247.

³⁰ *Supra* Note 2 at 478; italics ours.

³¹ His discussion is found at pp. 478-484.

or government. From this follows his conclusion that as to general laws the Legislature is supreme, except that it may no longer pass laws which, though general in terms, in effect relate *exclusively* to the property, affairs or government of a city or cities and do not within their field apply alike to all cities. Plainly, this involves two enlargements of the Legislature's conferred power. The interpolation of "exclusively" would immediately emasculate the Amendment, for from the veriest local of acts may be tortured some possibility of extra-local effect. The testing of legislative acts by "fields of applicability" would introduce not only an additional standard unexpressed in the Amendment, but would provide further opportunity for judicial re-legislation.

To bring the Multiple Dwelling Law within his permitted class, Judge Pound had to argue that it was a general law applicable throughout its field. His first step was to cite the upholding of the original Tenement House Law, a law in terms applicable only to cities of the first class. Of course, at the time of that decision, a law so applying was a general law under the Constitution.³² But there, Judge Pound stresses, a law affecting only tenements and only those in first-class cities was said to offend no *existing* Constitutional provision. He insists that in that case the mind of the Court was concentrated upon the power of legislative classification rather than upon a division between state and city affairs, but evidently that was because the law was assailed on the former ground. A citation of the transit cases, added to the foregoing, is the development of his argument that the Legislature in enacting health measures may make reasonable classifications based upon population. This, however, seemingly overlooks the fact that the Home Rule Amendment directs an extensive revision of what *was* deemed reasonable classification. The same objection is available against Judge Pound's conclusion that nothing in the amended Constitution prevents the Legislature from passing laws general in terms but local in immediate application, so long as it does not act in relation to the property, affairs or

³²N. Y. Const., Art. XII, Sec. 2, prior to the amendment of 1923, read in part:—"general city laws are those which relate to all the cities of one or more classes."

government of cities as such. The last two words of this conclusion prompt the impudent suggestion that there would probably be more difficulty encountered in applying them, than in showing how a law applicable only to cities of 800,000 or more could elude Judge Pound's own preliminary requirement that it be "general in terms."

The majority's third expression is the work of Judge Cardozo.³³ He visions the new legislation as a measure to eradicate the slum. "The end to be achieved," he tells us in his effective prose, "is the quality of men and women." The affirmance of legislative authority in this case, he assures us, leaves to the city a wide field for welfare work. By way of example he mentions parks, recreation piers and public concerts, but even before the Home Rule Amendment the city had all this power and more.³⁴ In fact, its authority to establish and regulate an extensive hospital system might well be deemed to affect more directly the health and physical welfare of the people of the state than a requirement that a building be constructed in accordance with statutory specifications.

Judge Cardozo admits difficulty in allocating interests to the state or to the municipality, but he is certain that the maintenance of life and health, like the maintenance of public education, is a function of the state at large. It will be recalled that the Home Rule Amendment, in terms, prohibits local interference with the public educational system,³⁵ but places no such inhibition upon health regulation; in fact, the enumeration of subjects of local legislation includes laws relating to this subject.³⁶

The Judge argues that Section 21 (6) of the Home Rule Law, forbidding local interference with the Tenement House Law evidences a contemporaneous understanding that tenement regulation was not an affair of the locality; but if such opinion were held, it was not revealed in the basic document of the reform. The act questioned must be sustained, we are told, if matters of state concern are to have the meaning

³³ His opinion appears at pp. 484-491.

³⁴ General City Law, Secs. 20 and 22.

³⁵ *Supra* Note 4, Sec. 7.

³⁶ *Ibid.* Sec. 3.

that has been theirs throughout the years. Presumably such meaning is one to be found in the pre-Amendment cases cited, cases decided at a time when, to use the Judge's words of two years ago, "the distinction between special or local laws on the one hand and general laws on the other was directed to the form of the enactment rather than to its substance. If the act by its terms was applicable to a class, it did not cease to be general though the fact would appear, if extrinsic evidence were received, that it was local in effect."³⁷

In attempting to determine the line of division between city and state concerns, Judge Cardozo makes a threefold classification. Affairs intimately connected with the exercise of a city's corporate functions are to be classed as city affairs only; such matters as the law of domestic relations, of wills, etc., are matters of exclusive state concern; a field of overlap presents a class of mixed concerns over which the Legislature, he believes, retains its power. Apparently there is some arbitrariness in this division, for the most local affair imaginable could be transformed into a state concern by the simple device of a statute generally applicable.³⁸ The enactment here involved is relegated to the third division. Judicial precedents prior to 1923 and a canon of construction are said to indicate the Legislature's power over its subject-matter; and these indications are aided by Section 4 of the Home Rule Amendment and Section 30 of the Home Rule Law. Section 4, it will be remembered, affirms the power of the Legislature to enact laws relating to matters other than property, affairs or government of cities. And, partially quoting the last clause of Section 30, Judge Cardozo asserts that that reservation of power is merely another way of saying that the Legislature is unfettered as to "matters of state concern." But the clause thus alleged to sustain legislative control of an overlapping class, continues beyond the last word quoted. It states that it is not the Legislature's intention "to restrict the powers of the legislature to pass laws regulating matters of state concern as distinguished from matters relating to the property, affairs or government of cities." This section, declaring the legislative intent with

³⁷ Matter of Mayor, etc., *supra* note 17 at p. 75, 246 N. Y.

³⁸ *Supra* Note 4, Sec. 2.

respect to effectuating the provisions of the Home Rule Amendment, offers cogent evidence of that body's denial of its power over matters of possibly concurrent jurisdiction. The obvious application of its last clause is a case such as the Village of Lawrence boundary dispute, above mentioned.³⁹

Judge Cardozo, having affirmed Legislative power over cases of overlapping interests, proceeds to consider how great must be the infusion of local interest before that power is fettered. The proffered test of predominance he rejects as too vague, and in its stead suggests that if the subject be in substantial degree a matter of state concern the Legislature may act; until it does so, the municipality is free to regulate. Apparently the considerations involved in sustaining a reform in the field of public health have proved more potent than those that would advise sustaining a redistribution of legislative power.

Judge Lehman quite appropriately prefaced his dissenting opinion with the warning that considerations based upon the policy and wisdom of the questioned act were irrelevant in determining the extent of the Legislature's power.⁴⁰ It is beyond question, he avers, that health protection is within the power of the state. He recognizes that the state's power may be exercised by bodies other than the Legislature, and points out that Section 3 of the Home Rule Article confers upon cities authority to exercise some part of that which is known as the police power. The exercise of the functions bestowed, he develops, is necessarily a matter of city government. And it is in the light of the enlarged scope of city government, he maintains, that the validity of the Multiple Dwelling Law must be considered, for the test prescribed by the Constitution, and the only one, is that the Legislature's enactment must not *relate to* the property, affairs or government of cities, unless it be a law applicable to all cities or one enacted under the prescribed emergency procedure. Questions as to the reasonableness of a separate classification of New York City, of the preponderance of state-wide or local interest, of the concerns of non-residents, are sub-

³⁹ *Supra* Note 18.

⁴⁰ His opinion occupies pp. 491-501.

ordinated, and properly so, by this approach. Under the Constitution as amended, the city specifically has *some* power in the field of health regulation.⁴¹ Under the Constitution, the Legislature may restrict this power only in the manner prescribed. Judge Lehman reminds us that even under pre-Amendment definitions of property, affairs or government of cities, the City of New York could, and did, cover by local ordinance many of the matters included in the Multiple Dwelling Law.⁴² He finds the pre-Amendment decisions defining the field of government or affairs of cities not inconsistent with his views; to the governmental functions of cities, the Amendment has merely added another, the function of legislation. If the Multiple Dwelling Law is to be sustained, he believes, the Legislature may apparently cover the entire field of protection of property, health and safety in New York City. Section 21 (6) of the Home Rule Law, as viewed by Judge Lehman, hardly shows that the Legislature thought that under the Amendment the city could not change provisions of the Tenement House Law, but, of course, he does not pass upon its validity. He argues at length that, since the Legislature under the Home Rule Amendment may by general law enlarge the local legislative powers of cities,⁴³ it would be a perversion of the Amendment's terms to permit it to reduce, by special law, the legislative power of New York City. The enactment in question he sees as particularly offensive in this regard, for not only are ordinances of the city of New York repealed,⁴⁴ but the powers of other municipalities are, if anything, increased, because they are free to ignore the law.⁴⁵ In rounding out his argument, Judge Lehman refers to the very page of a report of the Home Rule Commission, which Judge Cardozo has cited in developing legislative control of an overlapping class, and deduces that where the Legislature and city may have concurrent power of legislation, the former body may

⁴¹ N. Y. Const., Art. XII, Sec. 3, as amended.

⁴² In the Code of Ordinances of the City of New York, may be found the City's extensive Building Code, containing 32 articles, and its Building Zone Resolution (amended generally, Oct. 3, 1924).

⁴³ N. Y. Const., Art. XII, Sec. 5, quoted in full in note 4, *supra*.

⁴⁴ Multiple Dwelling Law, Sec. 365.

⁴⁵ *Ibid.* Sec. 3.

act only upon an emergency message.⁴⁶ And to conclude his opinion, he forcefully replies to Judge Pound's caution that the Home Rule Amendment does not create a multitude of city states—"With at least equal force, it might be said that the Home Rule Amendment was intended to prevent the cities of the state from becoming a conglomeration of subdivisions of the state, some with reasonable powers of local legislation and others mere satrapies."⁴⁷

Judge O'Brien, in his dissent, has yet another approach.⁴⁸ He argues cogently for interpretation of the Amendment in the light of its indicia of liberality. As he sees it, the question to be here determined is whether the enactment relates to the affairs or government of the City of New York. He mentions the abolition of the Constitutional classification of cities.⁴⁹ He points to the authority given the city to adopt a building code and a zoning resolution, and to the exercise of that authority. Authorizing the city to perform certain functions is, he believes, a recognition that those functions pertain to the city, and places them in the category of municipal affairs. Acts of executive departments and adoption of ordinances and resolutions go to make up the political fabric known as government. Admittedly, the Multiple Dwelling Law directs a repeal of city ordinances and regulations, and, hence, he concludes, it is a law relating to the affairs and government of the city. And in doing so, he tersely eliminates the pre-Amendment authorities, the naive argument for Legislative control that a non-resident might suffer injury in a multiple dwelling, the unwarranted assumption that to invalidate the statute assailed is wholly to preclude legislative action upon the subject.⁵⁰

The principal quarrel with this decision is that the result of the majority is achieved by the introduction of

⁴⁶ Fourth Report of the Home Rule Commission (Leg. Document, 1928, No. 55), p. 14.

⁴⁷ 251 N. Y. at 501.

⁴⁸ His discussion is at pp. 501-506.

⁴⁹ N. Y. Const., Art. XII, Sec. 2, as amended, omits the classification formerly made by this article.

⁵⁰ For example, Judge Pound at p. 483, seemingly overlooking the prescribed emergency procedure, declared, "To exact that laws peculiarly adapted to conditions existing in the city of New York must apply alike in terms and effect to all cities, is to deny to the Legislature all powers of reasonable classification based on population in matters within its field of operation."

standards unmentioned in the Constitution.⁵¹ In lieu of applying the prescribed test of *relationship* to municipal property, affairs or government, there is offered a discussion of the *limits* of state and local interests.⁵²

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New York City.

⁵¹ Again some words of Judge Cardozo's seem singularly apt. "Home Rule for cities, adopted by the people with much ado and after many years of agitation, will be another Statute of Uses, a form of words and little else, if the courts in applying the new tests shall ignore the new spirit that dictated their adoption. The municipality is to be protected in its autonomy against the inroads of evasion." *Matter of Mayor, etc.*, *supra* note 17 at p. 76.

⁵² Under former Art. XII, Sec. 2, special city laws, then defined as "those which relate to a single city, or to less than all the cities of a class," were required to be submitted to the local authorities for approval, and if such approval were refused, could not be submitted to the Governor until repassed by both branches of the Legislature. The omission of such requirement from a liberalizing article might well suggest a grant of local legislative power as broad as the words of the Amendment.

Another self-prompting suggestion is that whatever force there might be in the majority's insistence upon a separate classification of New York City, based upon conditions peculiar to its needs, is negatived by inclusion in the enactment of provision for its adoption by even the smallest community.