would be probably a stronger assurance of a fair return than before a tribunal comprised of a few men, who were apt to be partisan, whose action was subject to no review and punishable with neither fine nor imprisonment. Again, how often have statutes been passed, even in election matters, that were imperfect, especially in respect to contests. And again, if this were intended, why not exempt the custodian of the boxes from other special duties and burdens, which confessedly the law has imposed on him?

Again, it must be remembered that in 1894 provision was made for contest of local option elections, and that since then the Revision of 1895 was adopted, and that within very recent years an act has been passed in terms extending the general election laws over local option elections, unless rendered inapplicable by the special terms of the local option statute. All this, it seems to us, evinces a clear and settled purpose to apply the general provisions of our election laws to local option contests.

Again, if the ballots are to be counted, why should the boxes containing them be delivered, not to the county judge, but to the county clerk, to be securely kept, and not to go out of his possession, except on legal process in a suit or contest of the result of such election?

[7] Again, it is manifest that the box containing these ballots cannot and was not intended to be opened, except in the event of a *contest*, and then only in response to and by authority of due and lawful process. And by "contest" here is meant, we think, a suit in which the validity of the election, or the correct ascertainment of the result thereof, is the subject-matter of litigation in a court having jurisdiction to hear and determine such issues. This view harmonizes all the provisions of our election laws, preserves the secrecy of the ballot, and provides for a preservation, under seal, of the integrity of the ballot, in the event of a contest, and cannot by any possibility work either harm or injustice to any one, and is consistent, as we believe, not only with the true intent and purpose of the Legislature, but in harmony with our entire election machinery.

For many other reasons, and led by many other analogies and considerations which time does not suffice to write out, as well as these given above, we think the answer above given is correct, and we all so adjudge.

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## BONNER v. BELSTERLING et al.

## LEFEVRE v. SAME.

(Supreme Court of Texas. June 23, 1911.)

1. MUNICIPAL CORPORATIONS (§ 154*)—OFFICERS—"REMOVED"—RECALL.

A recall is a method of removal of officers, within Dallas city charter, providing that elective officers may be "removed" in a manner therein provided.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 350; Dec. Dig. § 154.*

For other definitions, see Words and Phrases, vol. 7, pp. 6078–6081; vol. 8, p. 7784.]

2. MUNICIPAL CORPORATIONS (§ 211*) — MUNICIPAL OFFICERS—BOARD OF EDUCATION—REMOVAL.

The members of the board of education of the city of Dallas, created by the charter placing the control of the city public schools in a board of education, composed of a president and six members, who shall be elected and hold their office for a specified term and until their successors are elected and qualified, are officers of the city, and are not within Const. art. 5, § 24, authorizing the judges of the district court to remove enumerated county officers and other county officers and the Legislature may provide for the removal of the members of the board otherwise than by the judges of the district court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 567–570; Dec. Dig. § 211.*]

3. STATES (§ 1*)—MUNICIPAL CORPORATIONS (§ 57*) — REPUBLICAN FORM OF GOVERNMENT—GOVERNMENT OF CITIES.

Except as limited by the federal Constitution, the people of Texas may adopt any form of government, and, subject to the limitations of the federal and state Constitutions, the Legislature may confer on any municipality any power that it may see fit to give.

[Ed. Note.—For other cases, see States, Cent. Dig. § 1; Dec. Dig. § 1;* Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

4. STATES (§ 4*)—MUNICIPAL CORPORATIONS (§ 124*) — "REPUBLICAN FORM OF GOVERNMENT" — RECALL PROVISION IN MUNICIPAL CHARTER.

A recall provision in a city charter, vesting the powers of government in the people and constituting all inhabitants of the city a body politic, is not violative of the Const. U. S. art. 4, § 4, guaranteeing to every state a "republican form of government," which merely means a government by the citizens in mass, acting directly, and not personally, according to the rules established by the majority.

[Ed. Note.—For other cases, see States, Cent. Dig. § 2; Dec. Dig. § 4;* Municipal Corporations, Cent. Dig. §§ 290–297; Dec. Dig. § 124.*

For other definitions, see Words and Phrases, vol. 8, p. 7785.]

5. CONSTITUTIONAL LAW (§ 43*)—DUE PROCESS OF LAW—REMOVAL OF OFFICERS.

A city officer elected subject to the recall provision in the charter may not urge that his removal from office by a recall deprives him of the benefit of his term of office without due process of law; he not securing the right to hold the office contrary to the wishes of the people electing him.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. § 43.*]

6. MUNICIPAL CORPORATIONS (§ 67*)—OFFICERS—TERM OF OFFICE—LEGISLATIVE POWER.

Under Const. art. 16, § 30, declaring that the duration of office, not fixed by the Constitution, shall never exceed two years, the Legislature in creating a municipality need not make the term of office two years, but it may fix the term at any time not exceeding two years, and the Legislature amy grant to the people of the municipality the right to remove by a recall any officer failing to discharge his duty in a

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

manner satisfactory to the people of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 161–165; Dec. Dig. § 67.*]

7. MUNICIPAL CORPORATIONS (§ 124*) — REMOVAL—"OFFICERS OF THE STATE."

Const. art. 15, § 7, requiring the Legislature to provide for the trial and removal from office of all "officers of the state," when considered in connection with article 5, § 24, providing for the removal of county officers, relates only to state officers and does not prohibit the removal from office of an officer of a city by recall.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 290–297; Dec. Dig. § 124.*]

Dibrell, J., dissenting.

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Actions by Shearon Bonner and by one Lefevre against E. L. Belsterling and others. There were judgments of the Court of Civil Appeals (137 S. W. 1154) affirming judgments for defendants in each case, and plaintiff in each case brings error. Affirmed.

Meador & Davis, A. B. Flanary, and E. G. Senter, for plaintiffs in error. Jas. J. Collins, Lee Richardson, and Lawther & Worsham, for defendants in error.

BROWN, C. J. The city of Dallas has a population exceeding 10,000 and by special act of the Thirtieth Legislature of Texas (Sp. Acts 1907, c. 71), and by the amendment of its charter by the Thirty-First Legislature (Sp. Acts 1909, c. 93; Sp. Acts 1909 [2d Called Sess.] c. 14), it was created a municipal corporation. Section 1 of article 5 of the charter provides for a board of education in this language:

"The city public schools shall be under the management and control of a board of education, composed of a president and six members, who shall be elected on the first Tuesday of April, 1908, and at a regular election to be held biennially thereafter on the first Tuesday of April, and shall hold their offices for two years and until their successors are elected and qualified. Any vacancy occurring in the board of education shall be filled by an election to be held by said board, and the person elected shall hold office for the unexpired term. The members of said board shall serve without compensation, shall have exclusive control of the public schools of the city of Dallas, and shall have full and ample authority, in accordance with the provisions hereof, to provide necessary school buildings and facilities, and to open and conduct a sufficient number of schools to meet the wants of the scholastic population of the city of Dallas, so far as they can do so by prudent and judicious application of the means made subject to their administration and management. Among the powers hereby conferred on said board of education, the following are for greater certainty enumerated: To contract for, lease and purchase lots, and to construct buildings for school purposes, and to make all needed repairs and alterations in same; to furnish said school buildings with all appropriate furniture, fixtures and apparatus; to sell or dispose of school property when the same is necessary or advisable; to lay off the city into such school districts as, in the judgment of the said board, shall be proper; to increase or diminish said districts, and to change the boundaries thereof at pleasure; to employ superintendents, teachers and such other persons as may be necessary, and to fix their compensation and prescribe their duties, and to establish all such regulations and rules deemed necessary by the board to provide and maintain an efficient system of public schools in the city of Dallas. The board of commissioners, when levying the annual tax for the fiscal year, shall levy an ad valorem tax of one-fourth of one per centum of the taxable value of the city of Dallas for that fiscal year, and said tax, when collected, shall be deposited with the city treasurer by the board of commissioners to the credit of the school fund, which said sum, together with all sums received from the state, county and other school funds, shall be held by the city treasurer subject to the order and disbursement of the board of education, and shall be paid out upon warrants issued by order of said board of education, audited by the city auditor and signed by the president and secretary of the board of education."

Article 9 of the charter provides: "The holder of an elective office may be removed at any time by the qualified voters of the city of Dallas. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by the qualified voters of said city, equal in number to at least 35 per cent. of the entire vote cast for candidates for the office of mayor on the final ballot at the last preceding general municipal election, demanding the election of a successor of the person sought to be removed, shall be filed with the city secretary; provided, that the petition sent to the board of commissioners shall contain a general statement of the grounds for which removal is sought."

It is conceded that the recall election was conducted according to the charter, and it is therefore unnecessary to copy that portion which prescribes the manner of proceedings in such elections.

After the enactment of the charter and the amendment thereof, to wit, on the 5th day of April, 1910, an election was held under the terms of the charter for members of the board of education, and C. C. Lane was elected president; H. D. Audrey, Robert N. Watkin, Shearon Bonner, petitioner here-

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

in, L. K. Wright, John W. George, and John C. Mann were elected members of the said board, all of whom were duly installed according to the requirements of the law. On the 11th day of August, 1910, another election was held, and John W. George and J. C. Mann were removed from the said board, and J. D. Carter and J. B. McCraw were elected and installed as such, and thereafter, on the 4th day of April, 1911, there was another recall election held under and in compliance with the provisions of article 9 of the city charter, at which E. A. Belsterling was elected president, and J. D. Carter, John B. McCraw, M. A. Turner, W. A. Goode, and Frank Gilbert were chosen as members of the board of education to succeed those previously named, including the plaintiff Shearon Bonner.

Shearon Bonner instituted this suit against the appellees in the district court of Dallas county for the purpose of obtaining restoration to the office from which he had been removed by the recall, and also to obtain a mandatory injunction requiring the parties who were elected at the recall election to surrender their said offices. The judge of the district court sustained a general demurrer to the petition and dismissed the case, which judgment was affirmed by the Court of Civil Appeals of the Fifth district.

Counsel for the plaintiff in error assert that the recall provision of the charter of the city of Dallas is violative of the Constitution of the United States in many respects, and that it is also violative of the Constitution of the state of Texas in 15 particulars. We do not feel called upon to discuss separately each of the objections made to the validity of the charter. We have examined each one of them sufficiently to satisfy ourselves that they are not of sufficient importance to require a separate discussion; therefore we overrule such as are not distinctly treated in this opinion.

It is claimed that the recall is a method of removing the officers of the city of Dallas, and is violative of article 5, § 24, of the state Constitution, which reads as follows: "County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed by the judges of the district court for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing, and the finding of its truth by a jury."

[1] It is claimed that the members of the board of education of the city of Dallas are county officers, and that they are therefore embraced within the article of the Constitution above copied, and cannot be removed in the manner attempted. The language of article 9 of the charter distinctly says that all elective officers may be "removed" in the manner therein provided. We are of opinion that the recall is a method of removal, and, so regarding it, we will proceed to inquire whether the officers involved in this proceeding come within the provision of the Constitution above copied. If they are within the designation, "other county officers," the proceeding for removal provided by the Constitution might be held to be exclusive, and that the Legislature could not authorize such removal by the recall method, but it is not necessary to decide that question.

In Hendricks v. State, 20 Tex. Civ. App. 178, 49 S. W. 705, the Court of Civil Appeals for the First district held that a trustee of a school district was an officer of the county, within the meaning of section 24 of article 5 of the state Constitution, and subject to removal by the district court. In that case the district was a subdivision of a county, and the trustee derived his authority solely from the general law which applied to the county. He was therefore an officer in the county and of the county in the same sense as was a justice of the peace. The court properly held that he was subject to removal under the article above stated.

In Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120, this court answered the following question, which was certified to it by the Court of Civil Appeals of the First district, "Is the position of superintendent of the public schools of the city of Houston an office for which a suit may be maintained in the district court?" To that question this court answered as follows: "We answer the first question in the affirmative. The position of superintendent of the free schools in the city of Houston is an office, and the lawful incumbent of it would have a right of action to recover it or its emoluments in case he was unlawfully deprived of the benefit. State v. Catlin, 84 Tex. 48 [19 S. W. 302]." It will be observed that the question to be answered embraced only one proposition; that is, Was the position of superintendent of public schools of the city of Houston an office for which suit might be maintained in the district court? The answer which is copied above fully and completely answered that question, and in the course of the discussion this court said: "We think there can be no doubt that a school trustee of an independent school district in this state is a county officer, as was held in the case of Hendricks v. State, 20 Tex. Civ. App. 178 [49 S. W. 705]."

[2] The board of education of the city of Dallas was created and its powers and duties prescribed by article 5 of the charter of the said city hereinbefore copied. The board derives its existence and all of the authority it possesses from the charter, which operates only within the limits of the city. By the provisions of the charter, the board had entire control of the school fund and of the property; in fact, of everything pertaining thereto. The auditor of the city is required to pass upon all accounts of the said

board, and no act of the board has any reference whatever to the county or its officers. The relation of the board of education to the county is only incidental to its being a part of the system of free schools of the state. We therefore conclude that the members of the board of education are officers of the city of Dallas, and not of the county of Dallas. Gertum v. Board of Officers, 109 N. Y. 174, 16 N. E. 328; Throop on Public Officers, § 27. The members of the board of education being of the city were not within the terms of article 5, § 24, of the Constitution, and it was within the power of the Legislature to provide for their removal otherwise than by the judge of a district court.

[3] Except as limited by the Constitution of the United States, the people of Texas have the right to adopt any form of government which they may prefer, and, subject to the same limitations and such limitations as may be found in the state Constitution, the Legislature may confer upon any municipal government any power that it may see fit to give. Brown v. City of Galveston, 97 Tex. 1, 75 S. W. 488; Telegraph & Telephone Co. v. Dallas, 134 S. W. 321.

[4] But it is claimed that the recall provision of the city of Dallas is a violation of article 4, § 4, of the Constitution of the United States, which we here copy: "The United States shall guarantee to every state in this Union a republican form of government."

Counsel for the defendants in error have made an exhaustive research for authorities upon this question, and by the citations in their admirable brief have made the examination of the question comparatively easy.

As to the meaning of the phrase, "Republican form of government," there is no better authority than Mr. Jefferson, who, in discussing the matter, said: "Indeed, it must be acknowledged that the term 'republic' is of very vague application in every language. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens. * * * On this view of the import of the term 'republic,' instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights, and especially that the evil flowing from the duperies of the people are less injurious than those from the egotism of their agents, I am a friend to that composition of government which has in it the most of this ingredient."

We could quote and cite any number of authorities, using the brief of the learned counsel for the defendants in error, but we deem it unnecessary to multiply them, and will proceed to examine the provisions of the charter with a view of determining if it fulfills the definition given by Mr. Jefferson; and, if it does, it is not obnoxious to the provisions of the federal Constitution as above quoted.

In the charter of the city of Dallas, all of the powers of government—that is, the sovereignty of the municipality—are vested in the people, which powers are exercised by representatives of the people; that is, officers elected by the voters. The charter of the city of Dallas vests the power of government in the people by these words: "Section 1. Corporate Name. All inhabitants of the city of Dallas, Dallas county, Texas, as the boundaries and limits of said city are herein established or may be hereafter established, shall be a body politic, incorporated under, and to be known by, the name and style of the 'City of Dallas,' with such powers, rights and duties as herein provided."

It will be observed that the people who reside within the described limits of the city of Dallas constitute the city, and to them is intrusted the powers of government. The sovereignty of the municipal government, its powers by which its affairs are conducted, are vested in the masses of the people, just as is required to constitute a republican form of government, and the other requirements to fulfill the definition are met in the charter by the several provisions for the election of officers named therein. That the city of Dallas is strictly republican in form of government is not questioned, if the recall be eliminated. But it is said that with the recall provision, it ceases to be republican. How this can be is not made plain to us. With the recall provision in the charter, the people are still invested with the sovereign power of the municipality, and they are intrusted with the selection of their representatives, who are to administer the city government. It occurs to us that there is a greater degree of sovereignty with the people with the recall of their representatives than would otherwise be the case; in fact, the right of recall asserts in a larger degree the right of representation; that is, representation in fact of the will and wishes of the voters. This enlargement of the control of the masses does not make the government less republican.

The policy of reserving to the people such power as the recall, the initiative, and the referendum is a question for the people themselves in framing the government, or for the Legislature in the creation of municipal governments. It is not for the courts to decide that question. We are unable to see from our viewpoint how it can be that a larger measure of sovereignty, committed to the people by this method of government, and a more certain means of securing a proper

representation in any way militates against its character as a republican form of government, and that it is thereby rendered in any sense obnoxious to the provision of the Constitution of the United States.

[5] Article 16, § 30, of the state Constitution reads: "The duration of all offices not fixed by the Constitution shall never exceed two years," etc. It is claimed that the recall by the citizenship of a city deprives the officer of the benefit of his term of office without due process of law. If the officer had been elected to the office and the law were changed subsequently, there might be some ground for making such an argument, but in this case the law provided for the recall at the time the plaintiff in error was elected to his office, and he took it upon the condition that the people might remove him from office, and he cannot now be heard to say that he had been deprived of his office without due process of law, for, in fact, the proceeding is just what he contracted for when he accepted the office. It seems to be in the mind of some of the counsel that an officer has some kind of secured right to hold an office contrary to the will and wishes of the people he represents, but we are of opinion that he has no more right, as a matter of good morals, to hold such office under such circumstances than any employé or agent has to continue in the discharge of his duty for which he has been employed when he ceases to give satisfaction, except that under the Constitution and laws as they have heretofore existed in this state such an officer could not be removed upon a failure on his part to give satisfaction in the discharge of his duties, but must be guilty of some offense to justify the removal under the constitutional provisions which are in effect in this state.

[6] In the creation of the municipal corporation, the Legislature was not bound to make the term of office two years; it might have made it to extend to any time not exceeding two years; and we conclude what we have to say in expressing the view again, what we have so frequently stated, that the people of the city of Dallas were invested with the sovereign power of the city by virtue of the grant of the charter to them, and that the Legislature has the power to grant to them the right to remove, by process of the recall provision, any officer who failed to discharge his duty in a manner satisfactory to the people of that city.

[7] Section 7, art. 15, of the Constitution, reads: "The Legislature shall provide by law for the trial and removal from office of all officers of this state, the modes for which have not been provided in this Constitution." It is objected that the removal by recall is violative of that section, because it does not provide for a trial of the officer. The section applies only to "officers of the state." In the connection in which it is used, the language must be held to refer to the class of officers treated of in that section, but omitted therefrom. We are of opinion that "officers of the state" have the same signification as "state officer." In article 5, § 24, the removal of all county officers had been provided for, and the language of section 7 of article 15 had the effect to include all state officers not included in that article. The objection is not sound, and is overruled.

The facts and questions of law are practically the same in cause No. 2,295, Lefevre v. Belsterling, this day decided, and this opinion applies to both cases.

It is ordered that the judgments of the district court and Court of Civil Appeals in each case be affirmed.

DIBRELL, J. I regret that I am not able to agree with a majority of the court in their disposition of this case, but, on account of the fact that the court is on the eve of adjournment, I will not have time to express my views on the questions involved. I consider the questions presented in this case of great importance, calling for a construction of more than one provision of the Constitution of this state, and affecting the form of our government.

I will reduce to writing my views for this dissent, and file later on.

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## IMPERIAL IRR. CO. v. JAYNE.

(Supreme Court of Texas. June 23, 1911.)

1. EMINENT DOMAIN (§ 10*)—RIGHT TO EXERCISE—QUASI PUBLIC IRRIGATION CORPORATIONS.

A corporation formed for irrigation purposes under Act March 9, 1895 (Acts 24th Leg. c. 21), authorizing corporations to construct and operate irrigation works, is a quasi public corporation, and may exercise the power of eminent domain subject to legislative regulations.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35–48; Dec. Dig. § 10.*]

2. EMINENT DOMAIN (§ 46*)—RIGHT TO EXERCISE—PROPERTY SUBJECT TO.

The right of eminent domain does not exist as to public land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 91-93; Dec. Dig. § 46.*]

3. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

In construing a statute, the legislative intent controls, and all other rules of construction are merely aids to ascertain the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.*]

4. STATUTES (§ 238*)—CONSTRUCTION—PUBLIC GRANTS.

Act March 9, 1895 (Acts 24th Leg. c. 21), providing for the use of water for irrigation and the construction of ditches, dams, and reservoirs therefor, is a public grant for the purpose of reclaiming public school lands in the arid and semiarid regions by irrigation, and must be liberally construed to carry out the legislative purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 319; Dec. Dig. § 238.*]

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