

State of Maryland

City of Baltimore to wit

At a session of the Superior Court of Baltimore City in the Fifth Judicial Circuit of the State of Maryland begun and held at the Court House in and for the City aforesaid on the second Monday in January being the Ninth day of the same month in the year of our Lord One thousand eight hundred and sixty

Present

The Honorable

Robert A. Martin Judge

George H. Dutton Esquire Sheriff.

Geo. E. Langston Clerk

Among other were the following proceedings, to wit

The State of Maryland  
on the relation of the Board  
of Police in the City of  
Baltimore

vs

The Mayor & City Council  
of Baltimore

Petition for Mandamus

Be it remembered that  
at the above Term of the  
Superior Court of Balti-  
more City, to wit;

On the Tenth day of  
February in the year of  
our Lord one thousand

eight hundred and sixty, the said State of Mary-  
land on the relation of the Board of Police in the  
City of Baltimore by Rev. &y Johnson, Delasson  
Campbell, William H. Norris and A. Hackle Wallis  
Esquires its attorneys exhibited to the Court here its  
petition in form following to wit:

To the Honorable the Superior Court of Bal-  
timore City,

The petition of the State of Maryland on  
the relation of the Board of Police of the City of Bal

duties of their said office, severally took and subscribed before the Clerk of the Superior Court of Baltimore City, the oath required by the 4th Section of the 1st Article of the Constitution and also the oath prescribed by said act to be taken and subscribed by them before their entrance on their said duties.

That so soon as they were thus qualified by taking and subscribing the said oaths, the said Commissioners divided themselves by lot into two classes as directed by the Act aforesaid, the said Charles Howard and John St. Davis being drawn of the first class and the said William H. Lathrop and Charles D. Henck being drawn of the second class, (and gave notice thereof in writing to the Governor, and so soon as the said Board held its first meeting to wit; on the 6th day of February 1860 it informed in writing Benjamin St. Herring Marshal, and Stephen H. Manly Deputy Marshal of Police in the City of Baltimore being the Chief and Second Officer of said Police that it required their attendance upon it ~~and obedience to its orders~~, which they nevertheless in writing refused to give.

That by force of the Act aforesaid and the premises from and after the first meeting of said Board which took place on the 6th day of February 1860, the whole existing police force in the City of Baltimore passed under the exclusive management and control of said Board, and is now by the provisions of said Act subject to no other control and entitled to receive neither orders nor pay (except arrearages, if any then due) from any other authority (and so continues at this present time).

And that the said Board for the Police so as aforesaid at present under its exclusive management and control desires and would immediately, the use as well of the Fire Alarm and

Amore,

Sheweth

That the said Board was created by an act of the General Assembly of Maryland here before duly passed at January Session in the year of our Lord one Thousand eight hundred and Sixty entitled "An Act to amend the 4th Article of the Code of public local laws by amending the 38<sup>th</sup> Section of said article relating to the Police and general power of the Mayor and City Council of Baltimore (and repealing the 774<sup>th</sup> 775<sup>th</sup> 776<sup>th</sup> and 777<sup>th</sup> Sections of said Article relating to the Police of said City and the power of the Mayor and City Council to establish and regulate the same and inserting in said Article in lieu of the sections so repealed, the following sections for the purpose of providing a permanent police for the City of Baltimore"

That by said Act it is among other things provided that said Board shall consist of the Mayor of the City of Baltimore for the time being or who soever may lawfully act in that capacity together with four Commissioners by said Act named and appointed (and to be hereafter appointed in pursuance of it, and that a majority of said Board shall constitute a quorum and that the failure or refusal of the Mayor or acting Mayor of the City of Baltimore to qualify or act under said law, shall in no wise impair the right or duty of the said Commissioners to organize or proceed with the execution of their prescribed duties,

That the present Mayor of the City of Baltimore Thomas F. Pratt Esquire though requested so to do has declined (and still refuses to qualify or act as a member of said Board

That the Commissioners named in and appointed by said Act, to wit Charles Thomas William H. Intwell, Charles L. Fierke and Abner W. Davis have accepted said appointment, and before entering on the

Police telegraph in said City, as of all the Station houses, watch boxes, arms, accoutrements, and other accommodations and things provided by the Mayor and City Council of Baltimore for the use and service of the Police created by said Mayor and City Council as fully (and to the same extent at the time of the passage of said Act were or might be used by or for the said City Police, (and that it has applied for such use of said Alarm, Telegraph Station houses, watch boxes, arms, accoutrements and other accommodations and things to the Mayor and City Council of Baltimore, in whose possession or under whose control the same now are requiring such use immediately and to the extent above set forth, and that the said Mayor and City Council of Baltimore refuse to allow such use when and as required by said Board,

Wherefore the State of Maryland on the relation of the Board of Police of the City of Baltimore prays that this Honorable Court will issue the writ of Mandamus to the Mayor and City Council of Baltimore, commanding and enjoining them the said Mayor and City Council immediately after the receipt thereof and without delay to furnish and allow to the Board of Police of the City of Baltimore, for the Police now under its exclusive management and control, as well the use of the Fire alarm and Police telegraph in said City as of all the Station houses, watch boxes, arms, accoutrements and other accommodations and things provided by the said Mayor and City Council of Baltimore for the use and service of the Police created by it, as fully and to the same extent as the same at the time of the passage of said Act were or might be used by or for the said City Police.

Reverdy Johnson  
 Johnson Campbell  
 Wm Henry Morris  
 J. T. Wallis for Petitioner

State of Maryland

City of Baltimore to wit

On this 10th day of February A. D. 1860 before me the subscriber a Justice of the Peace of the said State in and for the said City personally appeared Charles Howard, William H. Satchell, Charles D. Hinks, and Mr. H. Davis of the City of Baltimore and made oath on the Holy Evangelist of Almighty God that the matters and things stated in the foregoing Petition are true to the best of their knowledge information and belief.

Danl. E. Myers

Which being read and heard the Court thereupon passed the following order of hearing to wit:

The State of Maryland  
on the relation of the Board  
of Police of the City of Baltimore

The Mayor and City Council  
of Baltimore

In the Superior Court  
of Baltimore City

Ordered by the Court this  
tenth day of February  
A. D. 1860 that the ap-  
plication for a Mandamus

in this case be heard on the 27th instant, provided notice thereof be given to the Mayor and City Council of Baltimore by serving a copy of the petition and of this order upon Thomas Swann Esq: Mayor, or leaving the same at the Mayor's Office in the City of Baltimore on or before the 13th instant.

R. W. Martin

And on the same Tenth day of February the following admission of service of copy of said petition and order, was filed in said Cause to wit:

The State of Maryland  
on the relation of the Board  
of Police of the City of Baltimore

The Mayor and City Council  
of Baltimore

Service of Copy of the Court's order  
of the 10th February 1860, and of the  
Petition in this Case admitted this  
10th February 1860 by

Wm Price for Thomas Swann Esq:  
for the Mayor & City Council

And thereupon come into the said Court here the Mayor & City Council of Baltimore aforesaid, the Respondent by Jonathan Meredith, William Price William Schley & Thomas S. Alexander Esquires its Attorneys, and files in said Petition, its answer thereto as follows to wit:

The answer of the Mayor and City Council of Baltimore under its common seal to the petition of the state on the relation of Charles Howard William H. Satchell Charles D. Hinks and John W. Davis, exhibited against this respondent in the Superior Court of Baltimore City, the said Charles Howard, William H. Satchell Charles D. Hinks, and John W. Davis claiming to sue in this behalf as the Board of Police of the City of Baltimore "by virtue of certain alleged powers vested in said persons and the Mayor of the City by an Act of Assembly of Maryland passed at its present session, and praying that a writ of mandamus may be issued by this Honorable Court to this respondent, commanding and enjoining this respondent immediately after the receipt thereof, and without delay, to furnish and allow to the said persons as such Board of Police of the City of Baltimore, as well the use of the Fire Alarm and Police Telegraph in said City, as of all the Station Houses, Watch Boxes, <sup>arms</sup> accoutrements, and other accommodations and things provided by this respondent for the use and service of the Police created by it,

And this respondent, is advised and so insists that in answering the said petition, it appears in obedience to the mandate of this Court and the law of the land, to show cause why the most stringent and urgent process known to that law should not be issued against it, And this respondent answering the said petition shows cause, why the writ of mandamus should not be issued as prayed as follows,

The City of Baltimore was created a municipal corporation by the Act of 1796 Chap 78 conferring upon it certain corporate rights and powers, which from time to time were added to and enlarged by subsequent Acts of the Legislature, which charter and additions are fully set forth in the revised public local laws of the State under Article IV and Sections 1 to 904 both inclusive to which sections of said Article reference is now made, and it is prayed that such reference may avail and have the same effect as if every clause in said Sections material to this answer were herein set forth (and stated as a part of the same).

That in and by the existing Constitution the City of Baltimore is recognized as a separate and integral part of the government and of the territory of the State and as such entitled to its separate Judiciary and to its representation in the Legislature by its Senator (and Delegates, in the same manner and to the like effect as the several of the counties of the State.

That at the time of the adoption of the existing Constitution the said City was divided into twenty different wards of known, defined and certain boundaries, the limits and bounds of the City in its whole territorial extent being also well known and defined.

That long before and at the time of the adoption of the existing Constitution the said City of Baltimore was endowed with a city government consisting of a Mayor or executive department, and its City Council divided into two branches, constituting together the legislative department thereof.

That to the City government thus constituted was confided, in addition to its general

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powers of legislation for City purposes, the great and fundamental power of assessing, levying and collecting taxes from the persons and property of the said City.

That the said Mayor and City Council receiving their appointments periodically and at short intervals from the legal and qualified voters of the City, were vested with all powers of legislation for City purposes, according to the wants and the wishes of the inhabitants of the said City, which City government thus elected, endowed, and established, is fully recognized and essentially confirmed to the City and its inhabitants by the existing constitution.

And this respondent is advised and so insists that the said act of assembly so appointing the said persons as a Board of Police of the City of Baltimore, virtually and practically, subverts the said City government, subjects its people and property to onerous burthens of taxation without representation, destroys or greatly impairs many of its necessary powers and faculties, and renders it a different corporation, with different powers from those recognized and confirmed to the City by the existing Constitution, in all which particulars, (and in divers other particulars hereinafter enumerated this respondent insists that the said act of assembly is null and wholly void, and ought to be so declared by this Honorable Court.

This Respondent further states, that by the provisions of said existing constitution, the Legislature was authorized to fix the number of Justices of the Peace and Constables for each ward of the City of Baltimore, and the Justices of the Peace and Constables, when the number thereof should be so fixed as aforesaid, were, by the express

provisions of the Constitution, to be elected, for each of said wards respectively, by the legal and qualified voters of said several wards respectively; and that the Legislature, in pursuance of the powers reserved, did afterwards, by the several Acts of Assembly, of 1852 Chapter 274, and 1853 Chapter 102, fix the number of Justices of the Peace and of Constables to be elected, for said several wards of said City, by the legal and qualified voters thereof, respectively, as upon reference to said Acts will fully appear.

This respondent further states, that, at an election, held in the several wards of the City of Baltimore, on the second day of November last, in pursuance of the Constitution and in conformity with the direction of said several Acts of Assembly, the precise number of persons were returned elected as Justices of the Peace for each of said several wards respectively, and the precise number of persons were elected constables, for each of said several wards respectively, as fixed by said several Acts of Assembly; And that all the said persons, so returned elected as Justices of the Peace, and as constables, respectively, accepted said several offices, respectively; And duly qualified themselves to act, as such, by complying with all the requirements of law, in that behalf; and are now, respectively, acting as such.

This Respondent further suggests, that by force of the provisions, in that behalf, of said Constitution, in case of a vacancy in the office, of any one or more of the said Justices of the Peace, power is conferred upon the Governor to fill the said vacancy, until the next regular election of Justices of the Peace,

for said several wards respectively; (and that in case of a vacancy in the office of Constable, power is conferred on the Mayor and City Council of Baltimore, to appoint a person to serve, as Constable, until the next regular election thereafter for Constables for the several wards of said City.

This respondent further suggests, that whilst by the provisions of the Constitution, the power is conferred on the Legislature, to fix the number of the permanent Police force of the City of Baltimore; yet, the power, and the exclusive power, is conferred on the Mayor and City Council, to provide, by ordinance from time to time, for the creation and government of such temporary additional Police, as the said Mayor and City Council may deem necessary to preserve the public peace,

And this respondent avers that in the exercise of the power so conferred, ordinances have been enacted for the creation and government of a temporary additional police adequate to the preservation of the public peace of said City (and that said ordinances are in full force and effect, and that under the provisions thereof there are now appointed and acting one Marshal of Police, one deputy Marshall, Eight Captains, Eight Lieutenants, Twenty-four Sergeants, Three hundred and fifty police officers, Five detective police officers and Eight Turnkeys; and that in the judgment of the said Mayor and City of Baltimore no further temporary additional police is necessary for the preservation of the public peace of the said City and this Respondent submits that the aforesaid Bill is further unconstitutional in this that the aforesaid temporary additional police so created by this respondent so placed by the Constitution under the Government

and disposition of this Respondent is by the said Bill placed under the exclusive government and direction of the persons named as the Board of Police in said bill.

This respondent further states that apt provision has been made, by valid and existing ordinances of the City of Baltimore, for the establishment and appointment of night watchmen, patrols, bailiffs, and other public officers, for arming them, when necessary, and otherwise, for the sufficient and efficient employment, and government, of an adequate Police force for said City.

This respondent further states, that by the provisions of said existing Constitution, two persons are to be duly elected, every second year, for the office of Sheriff of said City, by the qualified voters of said City; and this respondent now states that at the general election held in said City, on the second day of November last, two qualified persons were accordingly elected to said office; the one of whom having the greatest number of the qualified votes, was subsequently duly commissioned, by the Governor, and who has duly qualified himself to act, as Sheriff, by having given bond, and by having taken the oath of office, as prescribed by law; and who is now acting as such Sheriff of said City; and this respondent further states, that none of the large common law powers appertaining to the office of Sheriff had, at the time of the adoption of said existing Constitution, been taken away, or impaired, as respects the said City of Baltimore, nor have said powers been since taken away, or impaired in any manner; unless the said act of Assembly, passed at the present session shall avail to do so. This

respondent further suggests to this Court, that whereas by article IV. Section 1. of the Constitution it is declared that the whole Judicial power of the State shall be vested in the Court of Appeals, in the several Circuit Courts, in such Courts as should be established, pursuant to the Constitution for the City of Baltimore, and in ~~justices of the Peace~~, to be elected as provided in and by the said Constitution, yet in and by the said act of Assembly said Board of Policemen clothed with power and authority, to try Policemen, to punish them, by fine, by forfeiture of pay, or otherwise as said Board shall adjudge, power being conferred on said Board by said Bill, to make all such rules and regulations not inconsistent with the said act for the trial of the Police force, and also power, as to any person, appearing or called before them, to administer oaths, or affirmations, and of summoning witnesses, and power also, to issue process to run, not merely within and throughout the limits of the City of Baltimore, but beyond the City limits, upon the Chesapeake Bay, or any river, creek, or other place, on land or water, within the State,

And again although it is clear, that the power resides in the Legislature, to fix the number of the permanent Police force of the City of Baltimore; yet, it is equally clear that all Justices of the Peace, and all Justices composing such permanent Police force, are by the express provisions of the Constitution, to be elected, for the several wards of said City, by the legal and qualified voters of said wards, respectively; and it is also, equally clear, that the Mayor and the City Council, by the express provisions of the Constitution are, authorized, and, of course, exclusively authorized, to provide

by ordinance, for the creation and government of such temporary additional Police, as they, (the said Mayor and City Council) may deem necessary to preserve the public peace;

And this respondent is advised, and now respectfully insists, that said Bill is repugnant to the provisions, in this behalf, of the said Constitution, in the following particulars, that is to say; firstly, for that whilst said Bill does specify the number of which said Police force shall consist, upon its first organization by said Board, at three hundred and fifty, yet the same is not fixed as the permanent number of such Police force, inasmuch as power is expressly conferred on said Board to reduce that number, or to increase the same to not more than four hundred and fifty; as the experience of said Board may warrant, thus conferring, in this respect, upon said Board, the power which the Constitution had conferred on the Legislature;

Secondly, for that whilst the Justices of the Peace and the Constables (who were intended, by the provisions of the Constitution, to compose the permanent Police force of said <sup>City</sup>, whose numbers were to be fixed by the Legislature) are, by the provisions of the Constitution, to be elected, for the several wards of said City, by the legal and qualified voters thereof, respectively; yet in (and by said Bill, the Police force, therein meant and intended, are not to be elected, either by the qualified voters of the respective wards, or in any other manner; but are to be appointed by the said Board.

Thirdly, for that whilst, under the Constitution any temporary additional Police is to be provided, by ordinance of the City, and in accordance with

the judgment of the Mayor and City Council; yet by said Bill, the said Board is empowered to raise for extraordinary emergencies, such additional Police force, as the emergency, in the judgment of said Board may demand; thus conferring upon said Board the absolute power of deciding whether an extraordinary emergency, has or has not occurred. And also of determining whether such emergency requires the employment, of any additional Police force; fourthly for that whereas, by the election, prescribed by the Constitution the permanent Police force are to be elected, for the term of two years, they are by said Bill to be appointed for the term of five years; with no qualification, as to residence, except citizenship of the United States; fifthly whereas by the Constitution, not merely the creation, but the government of the additional Police force is conferred on the Mayor and City Council; yet by the said Bill, all authority of the Mayor and City Council, in the premises, is annulled.

And this respondent further avers that the aforesaid Fire Alarm and Police Telegraph, the Station Houses, watch Boxes, arms accommodations and other accommodations and things aforesaid, the delivery whereof is demanded as aforesaid are all used and possessed by the temporary additional police force created as aforesaid by the said Mayor and City Council and that the exclusive use and possession thereof is necessary to be confided to the aforesaid temporary additional police and that the same properties cannot nor any part thereof be confided to the use and occupancy of the said persons named as a Board of Police in said Bill either exclusive or in ~~common~~ with the aforesaid temporary additional police created by this respondent as aforesaid

And again the Sheriff elected for the City of Baltimore, as a known peace officer, of ancient and large conservative powers, would (independently of the provisions of said Bill) not only have the right, but would be bound by duty to exercise his extraordinary powers, in any emergency, requiring the assistance of the posse comitatus; and the citizens of Baltimore would, under the Constitution, have the right to expect, on proper occasions, the exercise of this power, as one of their securities and safeguards; yet, in and by said Bill, the Sheriff of the City of Baltimore is placed, as if he were in fact, a mere policeman, under the authority and control of said Board of Police; bound, on the requisition of said Board, to summon the posse comitatus; even if, in his judgment, the same was unnecessary; and to hold and employ the same, according to the directions of said Board; and by necessary implication, stripped and deprived of any power or authority, either to summon, or employ, the posse comitatus, on any occasion, or for any purpose, even in the case of an open riot in his presence, unless first required and allowed to do so, by the said Board of Police.

And again, whilst the Constitution expressly declares, that all the Judges of the State shall be conservators of the Peace throughout the State and of course, when corporally present within the City of Baltimore; yet the said Bill expressly declares that all conservators of the peace, within the said City, shall act under the control of said Board; and not otherwise; thereby depriving the inhabitants of Baltimore of their Constitutional right, as one of the guards and securities for personal and other

protection, to the intervention of the Police force, of Constables, Sheriff, and Justices of the Peace; and also of the Judges of the local Courts, and of the Courts of the several circuits and of the Court of Appeals, even in cases where in the opinion of such conservators of the peace, the occasion might call for such intervention, and where, if interposed the same, in all human probability would be preventive of an outrage; unless in virtue of an antecedent direction of said Board, severe penalties being provided in this behalf; and in the case of the Sheriff, if he should assume to act, in virtue of his common law powers, without a previous command of said Board, the penalty is fixed at \$5000.

Moreover by the Constitution the very delicate power of calling out the militia to suppress insurrections, and enforce the execution of the laws is confided to the Governor of the State; but by the provisions of said Bill, in case the said Board shall deem it necessary, the said Board may call out such of the military forces, lawfully organized or existing in said city as they may see fit to aid them in preventing threatened disorder, or opposition to the laws (of which state of the case they are by necessary implication to be the sole judges) or in suppressing insurrections, riot, or disorder on election days, and at all other times; and it is thereby declared to be the duty of said military force, so called out to obey such directions, as may be given by said Board whenever the exigency or circumstances may, in the judgment of said Board warrant it.

Having thus specifically pointed out certain features of said Bill, which, as this respondent is advised, render the same unconstitutional and void.

and relying upon all other valid objections to the said Bill, on the ground of its repugnancy to the Constitution, this respondent is further advised, and respectfully insists, that said Bill, in other respects ~~and~~ for other sufficient reasons, ought to be held and pronounced a nullity in law.

And this respondent suggests that the powers conferred on said Board are unusual and dangerous, incompatible with civil liberty, and repugnant to natural justice.

And this respondent suggests that said Bill declares, that said Police Board shall be deemed and taken to be one of the authorities of said City, in the same manner, as if created or appointed by or under, the Mayor and City Council; and that the said City shall be in effect, liable for any failure of said Board to discharge the duties and obligations of said City; whilst at the same time it is expressly declared, that the Mayor and City Council shall not have control, over said Board, or over any officer or Policeman appointed thereby.

This respondent further suggests that the inevitable effect of the said Bill if declared to be constitutional and operative will be to weaken the authority of the Mayor and City Council by taking away antecedently existing important legislative powers; and to paralyze the executive arm of said City by making the whole Police force, even the existing Police force, whose officers were conferred upon them by the City Authorities, subordinate, and subject, to said Board; and entirely independent of the City authorities.

This respondent further suggests that power is given to said Board to burden the City of Baltimore with onerous Police expenses by payment of the salaries, allowed to said Commis-

owners and their clerks and of their Treasurer, Marshal, Deputy Marshal, their Captains, Lieutenants and Turnkeys, their ordinary and extraordinary Policemen, and of the gratuities which they may think proper to allow, as authorized by said Bill; and in payment of the expenses of providing and maintaining such officers and office furniture and other things (as authorized in terms by said Bill) and of such clerks and subordinates, as they may need; the expense of providing and maintaining Station Houses in the several Police Districts, into which they may deem it needful to divide the City, with all things and attendants required for the same (as in terms, is authorized by said Bill) and all such other accommodations as may in their judgment, be required, for the Police. This respondent further suggests that the Mayor and City Council have no power to control or regulate, the expenses of this Police department; for the Bill in terms imposes on the Mayor and City Council the mere ministerial duty of assessing and levying, specifically, and without any delay, upon all the assessable property of Baltimore, such amount of money, as may according to the estimate of said Board, be sufficient, clear of all expenses and discounts to enable the said Board to discharge the various duties, imposed on said Board by said Bill; without any power on the part of the City authorities, to consider the reasonableness of such estimate; or to call for the grounds on which the same may have been made,

And this respondent further suggests, that the Bill, also contains this extraordinary and coercive provision, that no tax bill, for payment of the necessary ordinary expenses of the City, shall be reasonable, unless such tax bill contains a charge for

said Police tax. And this respondent further suggests, that said Bill authorizes the said Police Board to make requisition from time to time upon the Mayor, Register, Comptroller, or other proper disbursing officer of said City, for such sum of money, as the said Board may deem necessary for executing their duties, not exceeding in any one year, their said estimate, for said year; with power to said Board, in case payment is not made, forthwith, in compliance with such requisition, to issue certificates of indebtedness, in the name of the Mayor and City Council, bearing six per cent interest, payable at not more than twelve months after date, and to raise money, on said certificates, by pledging or disposing of the same, and with the further power, in case the estimate of said Board, for any year shall fall short of the actual disbursements, to issue, pledge, or dispose of, certificates of indebtedness, to a further amount, not exceeding in any one year an additional amount of thirty thousand dollars; all which is in derogation of the chartered rights of this respondent, & in violation of the Constitution of the United States.

And this respondent further suggests that said Bill contains a provision, that any officer or servant of the Mayor and City Council, or other person whatever, who shall forcibly resist the execution or enforcement of any of the provisions of said Bill, shall not only be liable to a penalty of \$1000, for each and every offense; but shall forever thereafter, be disqualified to hold office, under said City, or under said Bill; thus creating a disfranchisement, unknown to the Constitution (and) contrary to its spirit.

For all which said reasons this respondent is advised that it is oppressive and

unjust; (and that it is an unwarranted encroachment upon and interference with the vested rights of the Mayor and City Council of Baltimore; with the rights of the corporation as to its government, the administration of its internal affairs, the selection of its own agents and officers, the imposition of taxes, the creation of liabilities, and the introduction, within the City, as a City institution, of a Board of Police, against the will of the City. And because the said Bill subjects the citizens and property holders of Baltimore to the burthen of heavy taxes and charges, to be imposed by a Board, not representing the people of the City.

And because also the said Act without the warrant of the Constitution, and against its letter and spirit, practically subverts the entire City government, and annuls its chartered (and corporate franchises. Dugd.

And because, to make room for the provisions of the said act all the provisions of the Constitution authorizing and establishing a Police for the City of Baltimore are first to be displaced, it being by the Constitution expressly, ordained that the permanent Police of said City shall be chosen by the qualified voters of the separate wards thereof, each ward exercising its privilege of choice by itself and for itself, while such temporary additional Police as may be necessary from time to time, to preserve the public peace, shall by the command of the same instrument, be provided by the Mayor and City Council, a corporate body chosen by the popular suffrage of the said City, the people thereof in executing their said right of choice, acting by themselves and for themselves, without the interference or control of any portion of the people outside of the said City.

And because this constitutional right of choosing

their own Police thus created in and guaranteed to the people of Baltimore is proposed to be set aside, to make room for a Police force created by the Legislature to be appointed by a board of control, drawing none of its alleged powers from the popular choice of the City of Baltimore, but appointed, established, and installed in defiance of the wishes and the will of her people.

And as respects the Fire Alarm and Police Telegraph, the Station Houses, Watch Boxes, Arms, accoutrements, and other accommodations and things provided by the Mayor and City Council of Baltimore for the use and service of the police, created by said Mayor and City Council, (all of which said petition prays, that this respondent may be compelled by mandamus immediately to furnish and deliver to the said Board of Police, for the use of the police stated by said petition to be under the exclusive management and control of said Board) this respondent suggest and avers, that these belong absolutely to the said corporation as its property, having been purchased by the said corporation, for corporate uses and purposes, at the cost and outlay of nearly eighty thousand dollars paid therefor out of the proper funds of the said corporation. (B)

And this respondent further avers that the aforesaid Fire Alarm and Police Telegraph, the Station Houses, Watch Boxes, Arms, accoutrements, and other accommodations and things aforesaid the delivery whereof is demanded as aforesaid, are all used and possessed by the temporary additional police force created as aforesaid by the said Mayor and City Council, and that the exclusive use and possession thereof is necessary to be confided to the aforesaid temporary additional police, and that the same properties cannot nor can any part thereof

be confided to the use and occupancy of the said persons named as a Board of Police in said Bill, either exclusively or in common with the aforesaid temporary additional police created by this respondent as aforesaid.

And this respondent further states and avers that said property and all of said property is necessary and essential to be held by said corporation for the faithful and proper performance of its duties; and that the Fire alarm and Police Telegraph especially is necessary for the efficient operation and employment of the Fire Department; and the respondent states and avers that said Fire Department now exists as an institution of the City of Baltimore, maintained at the expense of said City. And this respondent suggests that if the demand of the said Commissioners shall be enforced as prayed in and by said Petition by mandamus or otherwise, the plain effect will be as this respondent is advised and respectfully suggests to take away from the City of Baltimore property of large value, as above stated, to which it has a clear title and absolute right, without any compensation therefor; and to deliver over the same to said Petitioners, who but for the provisions of said Bill would not have even a show or color of title, and who under said Bill, can have no legal right to the same unless the mere will of the Legislature that they shall have it; shall be deemed a sufficient warrant to entitle them to claim the same,

All which matters and things this respondent is ready to maintain and prove in case the same shall be traversed, as to any matters of fact.

And this respondent respectfully demands the judgment of this Honorable Court as to the matters of law;

And prays that the said petition may be dismissed with costs &c

And in verification of this answer, this respondent hath caused the Corporate Seal of the Mayor and City Council of Baltimore to be hereunto affixed by the Register of said City; and the Mayor of the said City, by direction of this respondent in further certification of this answer hath hereunto in his official capacity, subscribed his name.



Thos. Swann

Mayor of the City of Baltimore

Test

Jos. A. Thompson  
Register of the City of Baltimore

Jonathan Meredith

William Price

William Schley

Th. S. Alexander

For Respondent

State of Maryland

City of Baltimore to wit;

Be it remembered } That on this seventeenth day of February 1860 before me, the subscriber, a Justice of the Peace of the State of Maryland in and for the City of Baltimore, personally appeared Thomas Swann Esq Mayor of the said City of Baltimore; Samuel S. Spicer President of the First Branch and David Taylor President pro tem of the Second Branch of the City Council of Baltimore; and severally made oath on the Holy Evangelys of Almighty God that the facts, matters, and circumstances set forth and contained in the foregoing Answer are true to the best of their knowledge and belief.

Given before William H. Hayward Justice of the Peace

Whereupon the following agreement to amend the foregoing answer is filed in said petition to wit:

The State of Maryland  
on the relation of Charles Howard  
vs  
The Mayor & City Council  
of Baltimore

Superior Court of Balto City  
It is agreed in this case  
that the answer of the  
Defendants be considered  
as amended in these  
particulars.

First, that it admits the  
qualification of the Relators, as Com<sup>rs</sup> and the act  
of Assembly stated in the application for the mandamus  
in the manner required by said act.

Second That the demand & refusal for the Station  
houses as stated in the application was made  
as there stated.

Fourth That said admissions are to be considered  
parts of the Defts answer, in the same way  
& to the same effect, as if they had been a  
part of the answer when filed & that the same  
are to be received without further oath

Fifth, It is also agreed that either party be at  
liberty at the hearing in this Court, & in the Court  
of Appeals to read from the Statute Book of  
the State any & every law private or public that  
he may think advisable, & also any & every ordi-  
nance of the said said City, from the printed ordi-  
nances

Sixth, it is further agreed that the paper hereunto  
annexed marked A, is to be esteemed a part of  
the answer as fully as if the same had made  
part thereof when the answer was filed

Balto 20 Feby 1860 }

Revdy Johnson  
Wm Henry Morris  
P. Seackle Wallis  
for the State

Wm Price  
J. Meredith  
Wm Schley  
Th. S. Alexander  
for respondent

And thereupon the following amended answer is filed in said petition to wit:

And the respondent further states that whilst the Constitution declares that the Governor shall nominate and by and with the advice and consent of the Senate, appoint all civil and military officers of the State whose appointment or election is not otherwise therein provided for, unless a different mode of appointment be prescribed by the law creating the Office, And whilst the Declaration of Rights forever separates the legislative, executive (and judicial powers of government from each other and declares that no person exercising the functions of said departments, shall assume or discharge the duties of any other, yet the said Bill nominates and appoints the following persons the first Commissioners of Police under said Bill to wit, Charles Howard, William H. Gatchell, Charles D. Smith and John St. Davis who shall divide themselves into two equal classes to be determined by lot, and the two who shall be drawn of the first class shall serve from the time of their appointment until the end of two years from and after the tenth day of March, Eighteen hundred and sixty (and until their successors shall have been appointed and qualified, and the two who shall be drawn of the second class, shall serve from the time of their appointment until the end of four years from and after the tenth day of March Eighteen hundred and sixty and until their successors shall have been

appointed and qualified; and further provides that in case a vacancy shall happen among the Commissioners during the recess of the Legislature it shall be filled by the remaining Commissioners, the appointment so made to continue till the appointment and qualification of some person for said vacancy which appointment shall be made by the General Assembly on joint ballot, at the next regular session of the Legislature; and the General Assembly shall also in like manner appoint Commissioners to succeed those whose term of service shall expire, such appointments to be made at the Session of the Legislature immediately preceeding such expiration,

All which enactments your Respondent respectfully submits are repugnant to those provisions in the Declaration of Rights and the Constitution before referred to, and a violation of that acknowledged fundamental principle, that Legislative powers cannot be delegated to private persons.

And the said Relator by its Attorneys aforesaid files in said Petition, its Demurrer to the answers of the said Respondents, to said petition as follows to wit:

The State of Maryland  
upon the relation of  
Charles Howard & others

In the Superior Court of  
Baltimore City,  
Jan'y T. 1860

The Mayor & City  
Council of Baltimore

And the said State by its  
attorneys comes & says, that  
under the Constitution &

laws of the State & its  
ordinances of the Mayor & City of Baltimore, there  
is nothing in the answer of the said Respondent  
whereby the said State ought to be prescribed  
from having its Mandamus as prayed in its said  
Petition & therefore the said State demurs to the said

answer as insufficient in point of law, as a defense to the said Petition & moves that the Mandamus be issued as prayed therein.

Reedij. Johnson

S. J. Wallis

Wm. Henry Morris

Jas W. Campbell

for the State

Which is thus endorsed to wit:

Service of copy admitted Feb'y 27th 1868

J. Meredith

Th. S. Alexander

for City

Whereupon all and singular the premises aforesaid whereof the said parties have put themselves upon the Judgment of the Court here being by the Court here seen heard and fully understood, and mature deliberation thereupon had the Court file in said Petition the following opinion, and thereupon pass the following order sustaining the demurrer of the ~~said Petitioner~~ to the answer of the said Respondent and the order for a mandamus as prayed is thereto made absolute to wit:

State ex relation  
of Charles Howard &c

vs

Mayor & City Council  
of Baltimore

The general question presented for my consideration in this case is whether the act of the General assembly of this State passed at its late session for the purpose of creating a permanent

police for the City of Baltimore is to be treated by the Court as a valid exercise of legislative power. It is a question not of expediency or policy but of power, the magnitude of which has not been overestimated. That it is a question in reference to which there may exist a conscientious difference of opinion must be admitted. This is manifest from the argument at the bar. It is

not to be supposed that eminent Council would on so grave a question of constitutional law, espouse a principle or advocate a doctrine in the correctness of which they did not sincerely believe and yet upon this question we find the leaders of the bar divided in opinion. On the one side it is said that the chartered rights of a large prosperous city have been invaded by a legislative enactment which has no warrant in the Constitution, and upon the other side it is contended that the General Assembly of the State in rearranging the police powers of the city has only exercised that supervision and control which belonged to that body by virtue of its controlling power over all the municipal corporations of the State. These conflicting claims and discordant opinions can only be adjusted by the judicial tribunals of the State. I am aware of the importance of the question to be decided and the opinion which I am about to pronounce is the result of a calm dispassionate and deliberate examination of the whole subject.

It is perfectly manifest that any right which the Mayor and City Council of Baltimore may possess to the exclusive exercise of the police powers of the city must be derived either from a legislative grant or grants, or that right must be secured by the Constitution. The tenure by which those powers are held must be either a legislative or a constitutional tenure; and the questions to be considered are; First, What is the scope and extent of the authority of the General Assembly over the Mayor and City Council, with respect to these police powers as statutory delegated powers, irrespective of the nineteenth section of the fourth article of the Constitution of the State? And secondly what is the operation and effect of that section as a restraining prohibition upon the general legislative power? These are

the prominent questions upon which the whole controversy turns and have been argued by the respective counsel with unsurpassed ability. It may be conceded that the City of Baltimore has been recognized by the existing Constitution as one of the territorial divisions of the State, occupying politically the rank and position of a county and as such entitled to be represented in the General Assembly. But Baltimore is still a municipal corporation created by the government for political purposes, as counties towns and villages are created and as such invested with subordinate local delegated legislative powers to be exercised for the promotion of the public good, subject always to the supervision and control of the legislative power as the parent power (9th Gill and Johnson 395)

All the power of the corporation emanates from the State, and when a tax is imposed by the Mayor and City Council or a police power is exerted, it is the action of the State operating through the instrumentality of its municipal agents.

The City of Baltimore is a political community but not a distinct community. The city is an integral part of the State or a portion of the body politic, one of the branches of the government (8th Md Rep 102) and constituted a political agent by the State for the more efficient and convenient exercise of the police powers of the government, and it is a clear proposition that the power to employ any agent for these political objects includes the power to substitute one municipal agent for another. In the case of a municipal corporation the visitatorial power resides in the State and the State has the exclusive right as the trustee of the public interest to inspect regulate control and direct the corporation and its funds and franchises because the whole interest and franchises are conferred for the public use.

and advantage Such corporations are always governed according to the law of the land (2nd Kent 353 & 9th Gill and Johnson 401) The power in the Legislature to repeal or modify the local legislative powers delegated to these municipal corporations involves no violation of the obligation of a contract within the perview of the tenth section of the first article of the Constitution of the United States for in those corporations the State is the only party and the corporate authorities are merely trustees for the public (2d Kent 358) There is no vested right to be disturbed for the Mayor and City Council can have as against the State no vested right to retain undiminished those local powers of legislation antecedently delegated by the charter and its supplements because those powers were conferred by the State upon the city authorities as its municipal agent created for purposes connected with the administration of the government.

Besides it is a great mistake to suppose that the absence or the existence of authority in the Legislature to repeal or modify the police powers which may have been from time to time delegated to the Mayor and City Council depended upon the fact that the city had been chartered or incorporated. The incorporating act neither gives nor prevents this control. The controlling power of the Legislature stands on the proposition that this municipal corporation is an instrument of the State, created for its own purposes. In the case of Dartmouth College vs Woodward 4th Wheaton 638 Mr Chief Justice Marshall says "From the fact then that a charter of incorporation has been granted nothing can be inferred which changes the character of the institution or transfers to the government any new power over it. The character of civil institutions do not grow out of their incorporation but out of the manner in which they are formed and the objects for which they are created.

The right to change them is not founded on their being incorporated but on their being the instruments of government created for its purposes. The same institutions created for the same objects though not incorporated would be public institutions and of course controllable by the Legislature. The incorporating act neither gives nor prevents this control.

It will be found that the principles thus stated are supported by an unbroken series of adjudications which it is impossible to resist. In the case of the State vs The Baltimore and Ohio Railroad Company 12th Gill and Johnson 436, Judge Stephen speaking for the Court of Appeals uses this language.

Washington county is an integral part of the State or portion of the body politic and the money if recovered by her would belong to her as public property in her public political capacity to be applied exclusively to the public use, as a county she stands to the State in the relation of a child to a parent, subject in all respects to its jurisdiction and power, as well as entitled to the benefits of its fostering care and protection, as a member of the political family she has a right to participate in the legislative councils of the country, but the will of the majority when expressed according to the forms of the Constitution, is binding and obligatory upon her, and to that will, as the rule of her conduct she is bound to submit with becoming deference and respect.

I quote the opinion of Mr Chief Justice Taney in the same case as reported in 3d Howard 550. In speaking of the Commissioners of Washington County he says:

"As relative to the Commissioners they are not named in the law nor were they in any shape parties to the contract supposed to have been made, nor in the

money declared to be for their use. They are a corporate body it is true and the members who compose it are chosen by the people of the county, but like similar corporations in every other county in the State it is created for the purpose of government and clothed with certain defined and limited powers to enable it to perform those public duties which according to the law and usage of the State are always entrusted to the local tribunals. But however chosen their powers and duties depend on the will of the Legislature, and are modified and changed and the manner of their appointment regulated at the pleasure of the State.

In the case of *Hartmouth College vs Woodward* 4th Wheaton Mr Justice Story at page 671 uses this strong language:

When the corporation is said at the bar to be public it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests to regulate, control and direct the corporation and its funds and its franchises at its own will and pleasure. Now such authority does not exist in the government except where the corporation is in the strictest sense public, that is, where its whole interests and franchises are the exclusive property and domain of the public."

The same principle is asserted by Mr Justice Washington at page 660; and in the case of the *Regents of the University of Maryland vs Williams* 7th Gill and Johnson 347. The Court of Appeals say "A public corporation is one that is created for political purposes with political powers, to be exercised for purposes connected with the public good in the administration of the civil government; an instrument of the government, subject

to the control of the Legislature, and its members officers of the government for the administration or discharge of public duties as in the case of cities and towns."

In speaking of East Hartford as a municipal corporation, Mr Justice Woodbury, at page 534, 10th Howard uses this clear and strong language:

The grantees likewise, the towns being mere organizations for political purposes, were liable to have their their powers, rights and duties modified or abolished at any moment by the Legislature. They are incorporated for public and not for private objects. They are allowed to hold privileges or property only for public purposes. The members are not share holders nor joint partners in any corporate estate which they can sell, or which can be attached and levied on for their debts. Hence generally the doings between them and the Legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes. It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative authority and checking most legislative amendments and improvements as well as a supervision over its subordinate public bodies. Thus one of the highest attributes and duties of a Legislature is to regulate public matters with all public bodies no less than the community from time to time, in the manner which the public welfare may appear to demand"

It is not necessary to vindicate the position assumed on this branch of the case by the counsel for the Relations, to maintain that the Legislature is

invested with the authority to annul or abolish the charter of the city. The franchise of governing the city through the instrumentality of a Mayor and City Council, is I think secured and recognized by the Constitution. But this franchise of passing ordinances and exercising local legislative powers for the government of the municipality is subject to the control of the sovereign power of the State. It is apparent from the passage already quoted from the opinion of Mr Chief Justice Marshall at page 638 of 4th Wheaton, that the incorporating act neither gives nor prevents this control. I consider then that the authority of the Legislature to repeal the police powers heretofore delegated to the Mayor and City Council and to invest those powers in the Board of Commissioners created by the bill, is clearly established by the cases to which I have referred unless that authority has been restrained or prohibited by the 19th Section of the 4th article of the Constitution.

This presents for my consideration the proposition upon which it has been said the counsel for the Respondent mainly rely. It is this: That the whole ground covered by the bill is already preoccupied by the Constitution. That to make room for the bill it will be necessary to displace the entire arrangement made of the same subject by the Constitution itself. That by the very terms of the act, the Legislative Police is made to extinguish the Constitutional Police of the City of Baltimore which cannot be done unless the law is held to be superior to the Constitution. In considering this question, it is necessary to inquire into the nature and extent of the power of the General Assembly of the State. By the 1st section of the 3d article of the Constitution it is declared that the Legislature shall consist of two distinct Branches, a Senate and a House of Delegates, which

shall be styled "The General Assembly of Maryland". There is no grant of power to the Legislature, because none was necessary. This article of the Constitution is employed with the organization of the Legislature, the authority of its separate branches and the privileges of its members. The framers of that instrument and the people who adopted it assumed that all power was inherent in the Legislature, as the representatives of the people unless it was prohibited by the Constitution or the Bill of Rights, or was vested in some other department of the government. (Hatt. vs Allen 13th Con. Dec. 125).

When the inquiry is whether a particular power is possessed by the Legislature, it is answered by ascertaining <sup>not</sup> whether the power has been granted but whether it has been prohibited. The power of the general government in this respect is entirely unlike the State power. Congress it is true is supreme within the sphere of its powers but it has ~~no~~ no powers except such as are enumerated, defined and specifically granted. And so anxious were the framers of the Constitution of the United States to guard against the necessity of reserving to implied or constructive powers, that after granting to Congress specifically certain powers carefully enumerated in various subdivisions, it confers expressly the power to make all laws that may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or any department of office thereof. And it is clear that when a power is used by Congress as an auxiliary power necessary and proper to execute some one of the specifically granted powers, it does not stand merely upon the ground of implication, but is covered by this express

grant.

I do not mean of course to say that the power to pass any law, which might be necessary and proper to carry into execution any one of the granted powers, would not be implied in the absence of an express grant, but that this clause was inserted *ex industria* to obviate the necessity of resorting to constructive powers and an examination of the Constitution of the United States and the Constitution of the State will show a disposition on the part of the framers of those instruments and the people who adopted them to obtain as far as practicable from the grant or the relinquishment of powers by implication. A principle always to be regarded when the Court is considering whether a particular power has been granted or surrendered by the people in their fundamental law. But when the validity of a particular power exercised by the General Assembly of the State is contested, it is not necessary to show that the power was granted by the Constitution. Those who dispute the power must establish affirmatively and clearly, that it has been denied. It is presumed to be valid. The Legislature is the depository of the power of the people and you cannot curtail the authority of the Legislature without diminishing the power of the people.

It is upon this ground as well as from a becoming respect for the action of a co-ordinate department of the government, that the courts have uniformly declared that in no doubtful case would they pronounce a legislative act to be contrary to the constitution. (*Fletcher vs Peck* 6th March 128 *Calder vs Bull* 3d Ballas 385. 4th Wheaton 607. 12th Gill and Johnson 438) In reference therefore to the question whether this act is to be treated as unconstitutional I assume that the Legislature is to be considered in the possession of all powers properly legislative, so far

as the Constitution of the State is concerned, which has not been by that Constitution prohibited expressly or by necessary implication. I say all power properly legislative, for to transfer the property of one individual to another or to make a man a judge in his own cause is not the exercise of legislative power. But this principle as we have seen from the authorities, has no application to the case of a municipal corporation (9th Gill and Johnson 364, 12th Gill and Johnson 436, 30 Howard 550).

It is not contended that the power exercised by the Legislature in creating a permanent police for the city of Baltimore has been expressly prohibited by the Constitution, and the question is whether it is to be regarded as a power prohibited by implication and the question which stands in advance of all other questions on this branch of the case is whether a power of this description (the police power) can be considered as relinquished by the people by mere implication. Can you predicate of the people in forming their Constitution the intention to abdicate a power like this?

What is the police power? I do not speak of this power in its largest sense, but in the sense in which it is to be understood in connection with a subject like the one now under consideration. It is emphatically a State power, one of the attributes of sovereignty, and in the nature of things it is a power which the Legislature should have the means of expanding to meet all the varied and changing wants of the community. No duty the Judge says in the case of the people vs Draper (20th Barbours 374) when speaking of the police power of the State or sovereignty, is more general or comprehensive in its nature than the duty of preserving the peace throughout its territory, of preventing crime protecting the right

of persons and property, guarding the public health, preserving order at elections, and the other numerous duties provided for by the act before him, and enjoined upon the public officers, It is a mistake to suppose that the police duty imposed upon these Commissioners is limited to preservation of the public peace. They are required by the 5th Section of the act to preserve the public peace, prevent crime, and arrest offenders, protect the rights of person and property, guard the public health, to preserve order at every public election, and at all public meetings and places and on all public occasions, prevent and remove nuisances in the streets, highways, waters and other places, provide a proper police force for every fire, for the protection of firemen and property, protect strangers emigrants and travellers at steamboats, ship landings, and railway stations, see that all laws relating to elections and to the observance of Sunday, and regarding pawnbrokers, gambling, intemperance, lotteries and lottery policies, vagrants, disorderly persons, and free negroes, and the public health are enforced, and also enforce all laws and all ordinances of the Mayor and City Council of Baltimore not inconsistent with the provisions of this article or any other law of the State which may be properly enforceable by a police force.

This is the character of the power involved in this controversy and the question is whether it is not to be regarded as a vital power which the whole community is interested in retaining undiminished? Within the principle established by the Supreme Court in the case of the Providence Bank vs Billings & Pittman 11th Peters 514 and in the case of the Charles River Bridge vs the Warren Bridge 11th Pet 527, that where the power is of that kind which the people are interested in preserving undiminished, there can

be no assumed abandonment of that power.

In the case of the *Bank of Providence v. Billings & Pittman* it appeared that the Legislature of Rhode Island had chartered a bank in the usual form of such acts of incorporation. The charter contained no reservation on the part of the State that it would not impose a tax on the bank, nor any restriction of the right to do so. It was silent on the subject. Afterwards a law was passed imposing a tax on all banks in the State; and the right to impose this tax was resisted by the bank upon the ground that if the State could impose a tax it might tax so heavily as to render the franchise of no value, and thus to destroy the institution; that the charter was a contract; and that a power which may in effect destroy the charter was inconsistent with it and is impliedly renounced by granting it.

But the Court said the taxing power was of vital importance and essential to the existence of the government and the relinquishment of such a power is never to be assumed; and in delivering the opinion of the Court Mr Chief Justice Marshall says in speaking of the taxing power, "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

In the case of the *Charles River Bridge v. the Warren Bridge* the question was whether the State could be presumed to have surrendered by granting a charter, one of its police powers? The Court considered the case before them in principle precisely similar to that of the *Providence Bank v. Billings & Pittman*. Mr Chief Justice Taney in delivering the opinion says "It may perhaps be said that in

the case of the Providence Bank, this Court were speaking of the taxing power, which is of vital importance to the very existence of the Government, But the object and end of all government is to promote the happiness of the community by which it is established and it never can be assumed that the government intended to diminish its power of accomplishing the end for which it was created.

A State ought never to be presumed to surrender this power because like the taxing power the whole community have an interest in preserving it undiminished.

If it be true then that the Legislature when in the possession of a power of this description is never to be presumed to have surrendered it, because the whole community is interested in preserving it undiminished, it is equally true that the people in adapting their Constitution are not to be presumed to have abdicated it. The police power includes the power to pass sanitary and other police laws and to select the agents by whom those laws are to be executed; these powers are necessarily connected. To render a power of this character efficient, the body in whom it resides must have the authority to modify it to meet the changing circumstances of the community upon whom it operates; this is not the business of a Constitution which deals only with general principles and fundamental rules; and even if it could be assumed that by the 19th section of the 4th article, the Justices of the Peace and the Justices were converted into police officers and a police force thus created for the counties and the City of Baltimore, it might well be doubted if from an arrangement of this kind in the Constitution, an intention in the people to withhold this power from the Legislature could be inferred. But

the interpretation placed by the council for the Respondent upon this section of the Constitution cannot be maintained. That it was not the purpose of the Constitution by this provision to exhaust the whole police power of the State is obvious from the fact that the 19th section provides only for the preservation of the public peace. This is one of the objects to be accomplished by the creation of a police force, but it is only one of those objects, and as the police force supposed to be created by this section is limited to the preservation of the public peace, if it be true that the whole police power of the State is exhausted and the Legislature thus impliedly prohibited from exercising this power, it must follow that there is a large and important class of police duties with respect both to the city and counties for which the Legislature can make no provision. Such a proposition I think inadmissible.

But this section was not inserted in the Constitution for the purpose of creating a police force for the city or for the counties, it was framed with a different purpose. The object was to organize subordinate judges with a limited jurisdiction and to provide them, in the constable with executive officers who bear the same relation to the justices of the peace that the Sheriffs bear to the courts. This section is therefore found in that article of the Constitution which provides for the organization of the judiciary department and declares that the judicial power of the State shall be vested in a Court of Appeals in Circuit Courts in such courts for the City of Baltimore as may be hereinafter prescribed and in Justices of the Peace.

The general duties of a police officer are man-

ipately unsuited to and inconsistent with the official duties of the Justices of the peace and the constables, and when it is declared that they shall have such duties and compensation as now exists, or may be provided for by law, the purpose was to authorize the Legislature to impose such new duties as were compatible with the duties which had already been assigned to them,

It is declared that they shall be, by virtue of their offices, conservators of the peace for counties and city respectively, but this was an act of supererogation and was inserted from abundant caution, for both the justices of the peace and the constables would be ex officio conservators of the peace in the absence of any provision of this kind in the Constitution.

That portion of the 19<sup>th</sup> Section which declares that the Mayor and City Council of Baltimore may provide from time to time for the creation and government of such temporary and additional police as they deem necessary to preserve the public peace, cannot be regarded I think as covering the whole field of the police power within the city of Baltimore.

The force which the city authorities are thus authorized to create was confined to the preservation of the public peace, it was to be temporary in its nature, and to be organized or diminished as the public exigencies might require, and the force to which it was to be attached as an additional force was the police force in existence at the time the Constitution went into operation, and which had been created under the Acts of assembly, and the ordinances of the city previously passed, I think therefore, that the General Assembly in passing this act creating a permanent police for the city of Baltimore

are not to be considered as having transcended their constitutional authority.

The next question to be considered is whether the appointment by the Legislature of the Relations as Commissioners of this Board of Police is in conflict with the 11th section of the 2d article of the Constitution which declares that the Governor shall nominate and by and with the advice of the Senate appoint all civil and military officers of the State, whose appointment or election is not otherwise herein provided for unless a different mode of appointment is prescribed by the law creating the office. I think not as the office in contest was created by law. This question cannot be considered as open since the decision of the Court of Appeals in the case of Davis vs The State 9th Md Reports 161. I quote the opinion of the Court as one which I adopt, as containing the true exposition of this provision of the Constitution, and covering the whole proposition.

The Court says "The appellant contends that the law of 1854 is unconstitutional and void, inasmuch as it seeks to take from the Governor the appointment of the inspector; and article 2d and section 11 of the Constitution is relied on to support this position. That section provides that the Governor shall appoint all officers whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office. In a few words we think this provision means simply the Governor shall have power to fill all offices in the State, whether created by the Constitution or by the act of Assembly, unless otherwise provided by the one or the other; therefore when the Legislature has created an office by act

of Assembly the Legislature can designate by whom and in what manner the person who is to fill the office shall be appointed. If the source of the appointment is not thus designated the Governor by virtue of the above section, makes the appointment, the same as if he had been specifically authorized by the act to do so.

Assuming then that this Board was validly constituted, the Relations were entitled I think to require from the Mayor and City Council the surrender of the use of the fire alarm police telegraph, all the station houses, watch boxes, arms, and accoutrements, mentioned in the 12th section of the act, and to exact a compliance with this demand by the writ of mandamus. The property in question was acquired by means of taxes imposed by the State through the instrumentality of her municipal agent and was strictly public property and as such subject to the disposition and control of the State. It was not private property held for municipal uses as property acquired by endowment or gift (20 Kent 309) This proposition is established by the case of the Mayor and City Council vs. Tenison and the case of Washington County vs. the Railroad Company 12th Gill and Johnson 438, and the same case in 3 Howard 350.

In speaking of the money claimed by Washington County, the Court of Appeals say, That the county by which the claim is attempted to be enforced is one of the public territorial divisions of the State established for political purposes, connected with the administration of the government. In that character she would receive the money as public property, to be used for public purposes only, and not for the use of the citizens in their private individual characters and capacities. In that

relation they would have no immediate interest and could assert no title. And in 30 Howard 550 the Supreme Court say in reference to the money claimed by Washington County. If this money had been received from the Railroad Company the Commissioners in their corporate capacity would not have been entitled to it, and could neither have received nor disbursed, nor directed the uses to which it should be applied, unless the State had seen fit to enlarge their powers and commit the money to their care. This corporation therefore had certainly no corporate interest in the money and indeed the sum is not entered for their use but for the use of the county. The claim for the county is equally untenable with that of the Commissioners.

But the true ground of contest with respect to this branch of the power exercised by the Legislature is that which is raised by the answer and supported with great ingenuity by the counsel for the respondents. It is this. By the 19th Section of the 4th article the Mayor and City Council are empowered to provide for the creation and government of such temporary and additional police force as they may deem necessary for the preservation of the public peace. That this right being secured by the Constitution is beyond the control of the Legislature and that the whole police apparatus demanded by the Relators in their petition for a mandamus is necessary for the use and accommodation of this force. Admitting the foundation on which this argument is erected to be sound, the conclusion is irresistible. But the defect in the argument is in the original proposition.

The police force which was in existence at the time of the passage of this act, and which is

now in existence, and for the use and accommodation of whom this police apparatus has been provided, is not an additional and temporary police but the police created and organized under the Act of Assembly of 1853 Chapter 46 and the ordinance of the 1st of January 1857 passed in pursuance of that Act. This is apparent from the fact that while the police now existing as organized under the Act of 1853 and the ordinance of 1857 is charged with the entire class of police duties any additional (and temporary) police which the Mayor and City Council might create under the power granted by the 19th Section would be limited to the preservation of the public peace.

If the Mayor and City Council were involved in a controversy in reference to their right to create the Police force now in existence and in a special plea of Justification derived their right to raise this force from the 19th Section of the 4th Article, it is clear that the Court would be obliged to pronounce a plea of that description defective. It follows therefore that as the Act of 1853 Chapter 46, under which the existing police, for whose use this police apparatus was prepared is repealed, the police force must itself disappear at the period designated by the bill and the police apparatus which was provided for its accommodation must be transferred for the purposes of that force which supplies its place. It is only necessary in concluding the opinion on this part of the case, to say that, as the question whether the existing Police force was created under the 19th section of the 4th Article, or under the Act of 1853 Chapter 46 is a question of law the allegation in the answer in reference to this subject is not conceded by the demurrer.

The 15th Section of the bill presents the question

as to the authority of the Legislature to confer upon the commissioners the means of raising the money necessary for the execution of the duties imposed upon them, without which of course the Board would be inefficient and powerless. That portion of the 15th Section which confers on the Commissioners the authority to estimate what sum of money will be necessary to enable them to discharge the duties imposed on them and the obligation of the Mayor and City Council to raise by assessment (and levy upon the assessable property of the City the sum thus estimated by the Board, is not obnoxious to any valid objection as a question of power. But the commissioners are authorized to issue certificates of indebtedness in the name of the Mayor and City Council in the manner upon the terms and for the purposes indicated by the bill, upon the contingency of the Mayor, Register, Comptroller or other proper disbursing officer, failing to comply with the requisitions of the Board and the validity of this power has been contested and defended with great ability by the respective counsel.

The counsel for the respondent contend that these certificates are to be considered as bills of credit, and therefore within the prohibition of the 10th Section of the 1st article of the Constitution of the United States. The argument assumes, and correctly assumes, that these certificates though issued by the Board are to be treated as issued by the State; but it necessarily concedes the proposition that when the taxing power or any other power is exerted by a municipal agent the act is to be regarded as the act of the State exercised through the instrumentality of its agent. The power emanates from the State, and the State

can of course regulate the manner in which the power is to be used. The case of the Mayor and City Council vs the Baltimore and Ohio Railroad Company 9th Ell 288, establishes the principle that the State may declare what the city may and may not tax. These certificates are clearly not bills of credit, the faith of the State is not pledged for their redemption which is essential in the definition of a bill of credit (Craig vs State of Missouri 4th Pet 410. Prineas vs the Bank of Kentucky 11th Pet 207) The exercise of this power is not in conflict with the Constitution of the General Government and I am not aware of any restriction upon the taxing power of the State except such as is to be found in the Constitution of the United States, or in the 13th article of our Bill of Rights. Any power which the State can exercise directly, it may exert through the instrumentality of its municipal agents and the authority to use the power includes the right to determine the mode in which the power was to be employed; and if the Legislature chooses to select two agents, as has been done in this case, for the execution of her own authorized powers within the limits of her municipalities it is difficult to perceive why she cannot authorize one of those agents to use the name and power of the other.

The right to use this authority stands on the proposition that the whole taxing power of the municipality is at the command and under the control of the State. But even if the authority granted to the Commissioners to issue these certificates and use them in the way prescribed by the bill, could be considered as not within the competency of the Legislature, I do not think it would invalidate

the act (7th Maryland 161 2nd Gray 101)

It is a contingent power that may never occur.

The probabilities are all against the happening of an event upon which alone this power would be called into existence. If this act should be declared to be unconstitutional by the Court of dernier resort, the authority of the Board is terminated. And if its validity should be established the presumption is that the city authorities would yield to the requisitions of an act of the State, which would then be decided as the acknowledged law of the land. It follows from the views thus expressed that I think the Relators are entitled to the writ of mandamus as claimed in their petition and in stating my opinion in relation to the two objections that have been raised against the bill, as interfering with the power of the Governor over the militia, and as invading the rights and privileges of the Sheriff, I do so as these questions have been elaborately argued and because the counsel for the Respondent seem to consider that the parts of the bill connected with those objections cannot be severed from its main provisions, and if they are unauthorized the whole bill is invalidated.

By the 9th Section of the 2d article of the Constitution, it is declared that the Governor shall be Commander in Chief of the land and naval forces of the State, and may call out the militia to repel invasions, suppress insurrections and enforce the execution of the laws but shall not take the command in person without the assent of the Legislature. and the question is whether the power to call out the militia for any of the purposes mentioned in this section of the Constitution is to be considered as exclusively

rested in the Governor. I think not. The proposition that this power is to be regarded as vested exclusively in the Governor, ascribes to those who framed the Constitution, and to the people who adopted it, a want of sagacity not to be attributed to them. Suppose a servile insurrection, in actual operation or threatened or railroad riot, so formidable as to require the aid of the military arm for its prevention or suppression in a remote county of the State and the Governor is at the seat of government, or at some distant place, is it to be supposed that the Legislature have no authority to provide for such an emergency by vesting in some of the tribunals of the State, or in some of the local authorities, as its own municipal agents, the power of meeting the emergency by calling forth the militia? If so the counties and the city of Baltimore might be left in a most defenceless condition. The Constitution of 1776 empowered the Governor by and with the advice and consent of the Council to embody the militia and when embodied they were placed under his command. The Constitution of 1836 conferred the same power on the Governor, the Council having been abolished and under those Constitutions the power of calling out the militia has been vested by the Legislature in the Courts and local authorities and that this was a legitimate exercise of legislative authority has never been denied or questioned.

(Act of Assembly 1823 Chapter 188 section 70)

That this power as well as all other powers vested in this Board will be discreetly exercised we have those guarantees which exist in reference to the faithful performance of official duties by other political agents and if a power was to be defeated on the ground that it might be abused by those to whom it was entrusted, the objection would be fatal to all power. The objection raised to that portion of the bill which

vests in the Commissioners the right to require the services of the Sheriff and directs him upon their order to summon the posse comitatus, and places the Sheriff and that force under the direction of the Board, cannot I think be maintained.

The Sheriff is a constitutional officer, but his duties as a conservator of the peace are not defined by the Constitution. Those duties are common law duties and are described by the Supreme Court in the case of *South vs the State of Maryland* in 18th Howard; "It is there said that the Sheriff as a conservator of the peace of his country or bailiwick is the representative of the King or sovereign power of the State for that purpose. He has the care of the Courts and though forbidden by magna charta to act as a Justice of the Peace on trial of criminal cases he exercises all the authority of that office where the public was concerned.

He may upon view without writ or process, commit to prison all persons who break the peace or attempt to break it, and for these purposes, he may command the posse comitatus of the county.

These are the common law duties of the Sheriff as a conservator of the peace and as such may be repealed or modified by the Legislature at its will and pleasure. This is done every day.

I do not perceive in what way the private rights privileges or immunities of the Sheriff are invaded by this act, and his official duties are subject to the control of the Legislature. In the case of the *People vs Draper* (25th Barbour) in speaking of the Sheriff the Court says: at common law and at the time of the adoption of this Constitution, in most if not all the counties, the Sheriff was in some sense head of the police, and it was his special duty to preserve the peace. He is an officer who is recognized

by the Constitution, and whose election is there specially provided for, yet that part of his duties could unquestionably be taken from him and performed by others, as by the mayor of a city, or the head of police.

After a careful and anxious examination of this case I have come to the conclusion that the objections raised against this act, and which have been pressed with great ingenuity and ability are to be considered as applying only to the question of expediency, with which the Court has no concern, and not to the question of power.

It is therefore ordered this 13th day of March 1860 that the demurrer to the answer in this case be sustained, and that the order for a mandamus as prayed for by the Relators in their petition is made absolute.

Whereupon during the said term to wit on the thirteenth day of March in the year aforesaid the said Respondents by William Price and Thomas S. Alexander Esquires of its Attorneys, files in said cause the following prayer of Appeal to wit:

|                                            |   |                                                                                              |
|--------------------------------------------|---|----------------------------------------------------------------------------------------------|
| State of Maryland                          | } | Superior Court of Baltimore City                                                             |
| on the relation of Charles Howard & others |   |                                                                                              |
| vs                                         |   |                                                                                              |
| The Mayor & City Council of Baltimore      | } | Mr. Foxglove                                                                                 |
|                                            |   |                                                                                              |
|                                            |   | Enter an appeal on the part of the respondents from the Judgment awarding a writ of mandamus |
|                                            |   | Wm. Price                                                                                    |
|                                            |   | Th. S. Alexander                                                                             |
|                                            |   | for respondents                                                                              |

And to it, it is granted, It is thereupon ordered by

the Court here that a transcript of the Record of proceedings, in the petition aforesaid, with all things thereunto relating be transmitted to the Court of Appeals of the State of Maryland, and the same is hereby transmitted accordingly.

Test Geo E. Sangston *CL*

In Testimony that the foregoing is a full and true manuscript taken from the Record of proceedings of the Superior Court of Baltimore City in the therein entitled cause

I here subscribe my name and affix the seal of said Court, this sixteenth day of March in the year of our Lord one thousand eight hundred and Sixty.

Geo. E. Sangston *CL*  
Supr. Ct. of Balt. City