

were of superior court judges,<sup>21</sup> and one was of a solicitor.<sup>22</sup> The journals record no attempt to impeach a local official. Thus the nature of impeachment, the weight of authority from other states, and North Carolina practice all support the supreme court's suggestion that impeachment is limited to state officers and is not available to remove local officials.

### III. AMOTION

Amotion, in corporation law, is the action of the corporation in removing one of its officers. Lord Mansfield, in a 1758 case involving a municipal corporation,<sup>23</sup> held that the power of amotion was inherent in a corporation if the removal was for sufficient cause. Judge Dillon, in his pathbreaking treatise on municipal corporations, discussed amotion at length and argued—for there was almost no American case law at the time—that the English rule should survive in American municipal corporations.<sup>24</sup> In the half century after Dillon wrote, a number of American jurisdictions considered the question, and the decisions went both ways.<sup>25</sup>

---

peachment seems to have been rooted in partisan politics. *Id.* at 566.

21. In 1871 the House impeached Judge Edward W. Jones, who resigned in the midst of the Senate trial. In 1874, the House Judiciary Committee considered impeachment charges against Judge Samuel W. Watts but reported that the evidence did not sustain the charges. In 1889 the House impeached Judge W.L. Norwood, but Norwood resigned before the Senate could act.

22. In 1873 the House impeached Robert M. Henry; it later withdrew the articles of impeachment.

23. *Rex v. Richardson*, 97 Eng. Rep. 426 (K.B. 1758). In *Richardson* 11 of 12 borough officials, called portmen, were removed from office for failure to attend the Great Courts of the borough. (Notice that the Great Courts were convening was apparently given by ringing a horn or bell.) The remaining portmen appointed Richardson to fill one of the resulting vacancies, and the case was an information in the nature of *quo warranto* to try Richardson's right to the office. Lord Mansfield firmly established the right of amotion but held that in this case there was insufficient cause for removal. *Id.*

24. 1 J. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 181 (2d ed. 1873). The 1873 edition is cited because it appears to be the one used by the North Carolina Supreme Court in the *Ellison* case, rather than the 1881 third edition.

25. The other states to accept the argument that amotion is an inherent corporate power were *Colorado*: *Laverty v. Straub*, 110 Colo. 311, 134 P.2d 208 (1943) (when city council president, after being convicted of receiving stolen goods, sought to enjoin removal proceedings before the council, the court held that the removal power was inherent in the council); *Georgia*: *Mayor of Savannah v. Grayson*, 104 Ga. 105, 30 S.E. 693 (1898) (mayor and aldermen have inherent power to institute proceedings against and remove members of board of fire commissioners, who were appointed by mayor and aldermen, for misconduct or neglect of duty); *Louisiana*: see *State ex rel. McMahon v. City Council*, 107 La. 632, 32 So. 22 (1902) (although council member was expelled under charter procedure, the court asserted that amotion is inherent and the charter power is same as right of amotion, but the power must be exercised by all the corporate officers and not simply the borough council); and *West Virginia*: *Richards v. Town of Clarksburg*, 30 W. Va. 491, 4 S.E. 774 (1887) (city council possesses inherent power to try mayor for misconduct in office and remove him).

The states rejecting the argument were *California*: *Legault v. Board of Trustees*, 161 Cal. 197, 118 P. 706 (1911) (because legislature has established a statutory procedure for removal of elected city officials, there is no necessity to support a claim that amotion is an inherent city power); *Massachusetts*: *Attorney Gen. ex rel. Cole v. Stratton*, 194 Mass. 51, 79 N.E. 1073 (1907) (in absence of statutory authority, voters at town meetings are without

North Carolina was one of the states to accept Dillon's argument.

North Carolina's acceptance of the doctrine of amotion rests on two cases, *Ellison v. Aldermen of Raleigh*<sup>26</sup> and *State ex rel. Burke v. Jenkins*.<sup>27</sup> *Ellison* resulted from a dispute among the Democratic majority of Raleigh's board of aldermen.<sup>28</sup> Following the May 1883 municipal election, the seventeen-member Raleigh board of aldermen, eleven Democrats and six Republicans, qualified for office. According to custom, the eleven Democrats caucused to agree on their numerous patronage appointments. They apparently could not agree, however, and a three-member minority determined to join with the six Republicans to control the board and the appointments. To avoid that outcome, the eight majority Democrats sought to remove five of the Republican members from the board, on the ground that they were federal officeholders and thus disqualified under the state constitution from holding state or local office.<sup>29</sup> The first person being removed was not allowed to vote, and the resulting eight-to-eight tie was broken by the holdover mayor (who had been appointed by the board), in the Democrats' favor. At least two of the vacant seats were filled immediately with persons who would vote with the Democratic majority, who then proceeded to organize the board and make their appointments. The five removed members brought actions in mandamus seeking reinstatement, and *Ellison* was one of two such cases to reach the supreme court.<sup>30</sup>

The court held in *Ellison* that the plaintiff sought the wrong remedy, that because his seat had been filled, the proper remedy was *quo warranto* against the new member. But in order for *quo warranto* to be appropriate, the new member must have had some colorable right or title to the seat. Therefore, the court spent some time discussing the power of a board of aldermen to remove one of its members. It concluded that although some process is due a member about to be removed (and none was

---

power to remove the members of the town's board of health); *Michigan*: *Speed v. Common Council*, 98 Mich. 360, 57 N.W. 406 (1894) (city's common council has no inherent power to remove for cause the city counselor, an officer appointed by the mayor); (*but see* *Hawkins v. Common Council*, 192 Mich. 276, 158 N.W. 953 (1916) (because amotion was inherent power of a city, the legislature may include in a city's charter specific authority to remove elected officials for official misconduct)); and *New Jersey*: *see* *Murphy v. Board of Chosen Freeholders*, 92 N.J.L. 244, 104 A. 304 (1918) (in the absence of statutory authority, a county governing board may not remove an officer it has appointed to a fixed term).

26. 89 N.C. 125 (1883).

27. 148 N.C. 25, 61 S.E. 608 (1908).

28. The narrative of events leading to the *Ellison* decision is based largely on contemporaneous accounts in the *Raleigh News and Observer*, May 8, 1883, at 4, col. 3; May 9, 1883 at 4, col. 2; May 12, 1883, at 4, col. 1; May 15, 1883, at 4, col. 1; May 16, 1883, at 2, col. 2 & at 4, col. 2; and the *Raleigh Farmer and Mechanic*, May 9, 1883, at 2, col. 2; May 23, 1883, at 2, col. 2; June 7, 1883, at 2, col. 5.

29. The constitutional provision was N.C. CONST. of 1868, art. XIV, § 7. The five Republicans (four blacks and a white) included a mail carrier, a postal clerk, a janitor in a federal building, a night watchman in a federal building, and an internal revenue clerk. Quite clearly, not all five could be said to hold federal offices.

30. The other case to reach the supreme court was *Doyle v. Aldermen of Raleigh*, 89 N.C. 133 (1883).

given Ellison), and although the causes that justify removal are limited (and the cause given for removing Ellison was probably not among them), a municipal corporation possesses the inherent power of amotion, and that power can be exercised by its governing board.

Among the counsel for Ellison was Walter Clark, who twenty-five years later, as Chief Justice, reaffirmed *Ellison's* conclusion that amotion was an inherent power of North Carolina local government. *State ex rel. Burke v. Jenkins* arose when the town commissioners of Bessemer removed the town's elected treasurer from office for paying a claim that the commissioners had forbidden him to pay. Citing many of the authorities relied on in *Ellison*, but oddly enough not *Ellison* itself, the court squarely held that the commissioners possessed the power to remove an elected town official for just cause and that they had had just cause in this case.<sup>31</sup>

Assuming for the moment that these cases remain good law—a matter to be considered shortly—what are the procedural and substantive constraints on amotion? In *Burke* the court indicated that the person being removed was entitled to notice and an opportunity to be heard and that removal could occur only for just cause. One must look elsewhere, however, for elaboration of these requirements.

None of the American decisions recognizing the validity of amotion discusses in detail the procedural requirements of a removal proceeding; therefore, it is appropriate to turn to Judge Dillon's treatise, the most complete treatment of the subject. Dillon's fairly simple strictures bring to mind the due process decisions of the past two decades. The charge against the officer must be specific enough to permit a defense. The officer must receive personal notice of the charge and of the meeting at which it will be heard in time to prepare a defense. And the officer must be given an opportunity to defend himself in an open proceeding at which the evidence for both sides is presented.<sup>32</sup>

The typical description of amotion indicates that an officer may be removed for "reasonable and just cause."<sup>33</sup> Whether a removal in a particular case meets that standard is always reviewable by a court. As a result, a body of case law has developed concerning whether specific reasons for removal constitute sufficient cause. Should a North Carolina governing board attempt to exercise the power of amotion, the board and any reviewing court could examine this case law as well as case law interpreting statutory removal procedures grounded on cause, misconduct in office, neglect of duty, or similar formulations.<sup>34</sup> As an introduction to that case

31. "But in this case there was the fullest notice given and opportunity to be heard and sufficient cause shown." 148 N.C. at 28, 61 S.E. at 609.

32. 1 J. DILLON, *supra* note 24, §§ 188, 191-193.

33. *E.g.*, *State ex rel. Burke v. Jenkins*, 148 N.C. 25, 61 S.E. 608 (1908); 1 J. DILLON, *supra* note 24, § 179; 2 D. MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 662 (1911).

34. Some notion of the magnitude of this case can be acquired by examining 4 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 12.234-246 (3d ed. 1979).

law, it will be useful to return to the four cases set out at the beginning of this article.

The first case involved councilman Gray, who had moved from the city and so was thought no longer qualified for the office. *Ellison*, of course, involved a removal on the grounds of alleged lack of legal capacity to hold the office. While the court suggested that amotion might be inappropriate if the incapacity antedated election to the office,<sup>35</sup> it made no such suggestion concerning a case arising afterwards, as is true in the first example. Thus the North Carolina case law indicates that legal incapacity is sufficient cause to justify amotion.

The second example, the commissioner who regularly misses meetings and is drunk when he does attend, is an easy one. Extreme neglect of duty is clearly just and reasonable cause for removal.<sup>36</sup>

The final two examples are problematic, and it will be useful to return one last time to Lord Mansfield. In *Richardson* he listed three sorts of offenses that justify amotion:

- (1). Offenses not related to the office but so "infamous . . . as to render the offender unfit" for any public office.
- (2). Offenses amounting to noncriminal misconduct in office.
- (3). Offenses that both are criminal and constitute misconduct in office.<sup>37</sup>

In the third category, the crime need not be as serious as in the first category nor the misconduct as gross as in the second; it is the combination that justifies removal. Dillon cited Mansfield's formulation as authoritative,<sup>38</sup> and it clearly has pervasively influenced judicial notions of just cause.<sup>39</sup>

When the third example, nonpayment of property taxes, is tested against Mansfield's formulation, it apparently fails to meet the cause requirement. Nonpayment of property taxes in North Carolina is not a crime, so the first and third categories do not apply. Nor is payment a special duty of elected officials; it is a duty common to all citizens. Be-

---

35. The court states that it can find no case allowing removal "for any preexisting impediment affecting [the member's] capacity to hold the office," 89 N.C. 125, 127-28 (1883), and quotes Lord Mansfield to the effect that a preexisting incapacity would not justify removal. *Id.* Mansfield's language, however, which appears in *King v. Mayor of Lyme Regis*, 99 Eng. Rep. 55 (K.B. 1779), is based on the English doctrine that an officeholder had a property right in his office. He analogized the officeholder's right to that of a person with possession of land. As the latter's title could be tried only by *quare impedit*, so the officeholder's could be tried only by *quo warranto*. Although North Carolina accepted the English doctrine of title to office at the time *Ellison* was decided, it no longer does, *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903), and so the foundation of Lord Mansfield's analogy is gone. Thus it should be possible in North Carolina to use amotion when the cause is a preexisting incapacity, as well as when the incapacity arises after the officeholder takes office.

36. 4 E. McQUILLIN, *supra* note 34, § 12.236a.

37. *Rex v. Richardson*, 97 Eng. Rep. 426, 438 (K.B. 1758).

38. 1 J. DILLON, *supra* note 24, § 189.

39. 4 E. McQUILLIN, *supra* note 34, § 12.234.

cause "misconduct in office" refers to conduct connected with the duties of the office and not to conduct as a citizen,<sup>40</sup> the second category is inapplicable as well. Amotion is not available in Case (3).

Nor is amotion available in Case (4). The only possible basis for sufficient cause in that case would be a determination that assault upon a female is a crime so infamous that a person convicted of it is unfit for public office.<sup>41</sup> To the contrary, it seems quite clear that simple assault is not such a crime. Mansfield decided *Richardson* at a time when the common law disqualified as a witness a person convicted of an infamous crime,<sup>42</sup> and it seems likely that, in referring to "infamous" crimes, he was referring to the contemporaneous evidentiary context. If a crime was sufficiently infamous to cause the offender's testimony to be suspect, it also should have destroyed his capacity to exercise a public trust. Thus the 1868 Constitution of North Carolina disqualified from office a person convicted of "treason, perjury, or any other infamous crime."<sup>43</sup> In the evidentiary context an infamous crime was one that included an element of fraud or deceit, and assault on a female is not such a crime.<sup>44</sup> The modern statutory case law on sufficient cause also restricts removal after conviction of a crime to conviction of felonies and offenses that involve a violation of official duties.<sup>45</sup>

Under accepted standards, then, amotion would seem to be available in Cases (1) and (2). But is it in fact available in those cases, or in any case; that is, do *Ellison* and *Burke* remain good law? The easy answer is that of course they do. They were decided by the North Carolina Supreme Court and have neither been reversed nor questioned. Nevertheless, that response begs the question whether the present supreme court would follow the two cases. *Ellison* and *Burke* are very old cases, one decided seventy-five years ago and the other almost a century ago. The two relied, for the most part, on contemporary treatises to support their holdings. Those treatises were written when little American case law was

---

40. *E.g.*, *Clark v. Weeks*, 414 F. Supp. 703 (N.D. Ill. 1976). In *Clark* the court upheld a statute that permitted removal of a county treasurer for "misconduct in office," against a challenge of unconstitutional vagueness, on the ground that the statute referred only to conduct closely related to official duties and did not extend to actions having no connection with those duties. *Id.* In *Wilson v. Council of Highland Park*, 284 Mich. 96, 278 N.W. 778 (1939), the court held that membership in the Black Legion, a violent secret society, was insufficient cause for removal of a city council member. No fault had been found in any of the council member's official actions. "The misconduct charged and established must be something which plaintiff did or did not do in his official capacity." *Id.* at \_\_\_, 278 N.W. at 778.

41. If assault on a female were a felony, conviction would disqualify the offender from office under the constitution, N.C. CONST. art. V, § 8, and amotion would then be available if necessary.

42. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519 (3d ed. J. Chadbourn 1979).

43. N.C. CONST. of 1868, art. VI, § 8. This provision was modified in 1900 to what is essentially its present form, which disqualifies a person convicted of any felony.

44. 2 J. WIGMORE, *supra* note 42, § 520.

45. 4 E. MCQUILLIN, *supra* note 34, § 12.241.

available on the subject, and what law existed was more prescriptive than descriptive. The present leading treatise on municipal corporations, which is more descriptive than Dillon, suggests there is no inherent right of amotion.<sup>46</sup> Because the two North Carolina cases were decided on the basis of the contemporary "common law" of municipal corporations, a modern court might believe the change in that "common law" compels a reversal of the cases.

Reversal, however, would be unfortunate. The modern case law simply is neither sufficiently plentiful nor uniform to support a claim that the notion of an inherent power of amotion is obsolete. Furthermore, the policy reasons that justified amotion in the late nineteenth and early twentieth centuries remain valid today.

Since 1884, when *Ellison* was decided, the question whether local governments possess an inherent power of amotion has been considered in only nine states. Many states have established removal procedures by statute or constitution, and such procedures have obviated the need to consider whether amotion is inherent. Moreover, of those nine states, five held or implied that the power of amotion existed, but only four held or implied the reverse; and the most recent case, in 1943, is among the former group.<sup>47</sup> These are weak grounds for arguing that the common law has reversed itself since 1894.

Furthermore, the policies behind *Ellison* and *Burke* and their English predecessors remain valid today. In *Richardson* Lord Mansfield noted that if the power of amotion did not exist there would be no way of removing from office persons deserving removal. The doctrine was necessary to the basic operation of the corporation. That underlying rationale was explicitly recognized in a 1911 California case that held it unnecessary to imply an inherent city power of amotion *because* a statutory removal procedure already existed.<sup>48</sup> But in North Carolina no general statutory procedure exists permitting removal of a local elected official for cause. *Quo warranto*, if brought promptly, would be available in a limited number of instances, but in many others, such as Case (2), it would not be available. If amotion were attempted in such a case, the officer whose removal was sought would have ample judicial protection. Immediate relief should be available if procedural protections were absent, and the sufficiency of cause could be tested by *quo warranto* if the vacancy had been

---

46. *Id.* § 12.231. ("The rule usually applied is that, unless the law provides to the contrary, any officer elected by popular vote for a definite period can be removed from office only by impeachment, or by judgment of forfeiture of a competent juridical tribunal.") It should be noted that McQuillin's treatise also contains language generally supporting the inherent power of amotion: "Unless mentioned in the constitution, municipal officers are corporate officers and not constitutional officers, and the power to remove such officers for just cause, whether so declared in the charter or applicable legislative act or not, is inherent in municipal corporations." *Id.* § 12.230. This language in section 12.230 dates from the original 1911 edition; the language in section 12.231 dates from the 1928 second edition. Succeeding editors apparently have never sought to reconcile the two sections.

47. The cases are set out in note 21 *supra*.

48. *Legault v. Board of Trustees*, 161 Cal. 197, 118 P. 706 (1911).

filled or by mandamus if the vacancy had not been filled. In the absence of motion, however, the county or city would have no general protection against an officeholder who had given cause for removal.

#### IV. LEGISLATIVE REMOVAL

The last potential method of removal to be explored is removal by legislative act. That is, may the General Assembly pass an act declaring that the incumbent of a particular local elected office is removed, either naming or providing for the appointment of a successor?

There is no North Carolina case law directly on point and little from anywhere else. A number of cases from other states contain strong language affirming this sort of legislative power,<sup>49</sup> but apparently the only case that directly addresses the question is *People ex rel. Robertson v. Van Gaskin*,<sup>50</sup> a Montana case decided while that state was still a territory. In *Robertson* the Montana court upheld a territorial act that declared vacant the offices of county commissioner in Custer County and then filled the three resulting vacancies. One case decided by a territorial court a century ago is fragile support for the power in North Carolina; thus it will be more useful to look to North Carolina law for an answer.

Four general points of North Carolina law support a conclusion that the General Assembly may remove a local elected official by legislative act. First, the General Assembly has plenary authority over local government, both against local governments themselves and against citizens.<sup>51</sup> The General Assembly enjoys final authority to decide what kind of local government shall exist in an area, what its structure shall be, which offices are elective and which appointive, and so on. Citizens have no constitutional claim to an electoral voice as to whether they are part of a particular county or city,<sup>52</sup> nor have they a "vested right in the election of any officer except as that mode of selection may be guaranteed by the

49. *E.g.*, *State ex rel. Watson v. Crooks*, 153 Fla. 694, 698, 15 So. 2d 675, 676 (1943) (the legislature's "plenary authority" over local government includes "the power to abolish an office or change the incumbent thereof"); *Attorney Gen. ex rel. Rich v. Jochin*, 99 Mich. 358, 368, 58 N.W. 611, 614 (1894) ("The legislature may remove officers, not only by abolishing the office, but by an act declaring it vacant.").

50. 5 Mont. 352, 6 P. 30 (1885).

51. The Legislature has full and complete power to create a municipal corporation. It may determine when and how the corporation may come into existence, the powers which it may exercise, the area in which the corporation may act, the number of officials to perform its corporate functions, and other incidental matters.

*Starbuck v. Town of Havelock*, 252 N.C. 176, 178, 113 S.E.2d 278, 280 (1960).

52. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). The City of Pittsburgh had sought to annex the City of Allegheny. In compliance with Pennsylvania's law, an election was held in which a majority of voters from the two towns favored annexation, though the majority of voters in Allegheny, taken alone, opposed annexation. The Allegheny voters' complaint of deprivation of property without due process of law was dismissed. The election and annexation had proceeded according to statute, and the power to modify municipal government was seen to "rest in the absolute discretion of the State." *Id.* at 178.