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STATUTORY CONSTRUCTION IN RESOLVING CONFLICTS BETWEEN STATE AND LOCAL LEGISLATION

CHARLES S. RHYNE *

I. INTRODUCTION

As creatures of the states, our municipalities occupy a unique position in our governmental scheme. Not endowed with sovereignty, the municipality possesses no inherent powers, and can only do that which is authorized by the state.[1] The exercise of local powers, therefore, becomes the exercise of those powers which have been conferred upon it by state legislative action. Possible exceptions to this are those states in which "home rule" has been constitutionally conferred upon municipalities, by which authority to form local governments and to administer municipal affairs in the manner desired by the local electorate prevails.[2] In view of the fact, however, that every action taken by a nonhome-rule municipality or any of its officers, agents or departments amounts to an exercise of a power which is derived, expressly or impliedly, from a statute, it is patent that the construction of such statutes is of paramount importance to cities, for through such construction the legality of local action is determined.[3]

The organic law of a municipality is found in its charter or applicable state statutes. Except in home-rule jurisdictions where the authority to frame charters is vested in the people of the city, local charters are state statutes which spell out the bounds of permissible municipal action. Other state legislation, not necessarily in the form of charter grants of authority, frequently outlines further limits within which municipal action must be confined. The

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1. 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 367 (2d ed. 1940). Compare the cases cited *infra* note 3.

2. For example, Section 6, Article XX, of the Colorado Constitution provides in part: "The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the State of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters. Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."

3. Insofar as the Fourteenth Amendment to the Federal Constitution is concerned, municipal action is "state" sovereign action. "[M]unicipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment." Lovell v. Griffin, 303 U.S. 444, 450, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938). See also Cuyahoga River Power Co. v. Akron, 240 U.S. 462, 36 Sup. Ct. 402, 60 L. Ed. 743 (1916); Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510 (1913); and Raymond v. Chicago Union Traction Co, 207 U.S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78 (1907).

interpretation and construction of these enabling statutes, therefore, plays a vital role in the administration of municipal affairs.

The need for local self-government which is synonymous with the right of cities to frame and adopt their own charters under state constitutional authority, and the power to legislate freely on matters of local concern is clearly demonstrated in the thousands of decisions pertaining to municipal corporations that are rendered each year by the highest courts of the 48 states. In well over a majority of these decisions the basic question is whether or not the authority of the municipality to act exists. It might be appropriate, therefore, to examine a few of the more recent decisions to determine why powers have been so frequently construed against municipalities in certain cases.

Because the law of municipal corporations is so completely interwoven with statutory construction, and is, to a large degree, dominated by it, certain limitations upon the scope of this paper are obviously necessary. The phase of the problem chosen for discussion is that of conflicts between state and local legislation. The reasons for selecting this phase of the statutory construction problem are dual. In the first place, an increasing emphasis upon intergovernmental relationships has arisen in recent years. Our intricate society necessitates liaison and cooperation between our different levels of government, and these relations have undeniably created legal problems of great importance to these levels of government. The second reason for adopting this approach was the relative absence of any recent analysis of the matter of conflict between state and local legislation.

The method of considering this problem is, of course, important and it is believed that study of the actual decisions of the courts is necessary in order to properly evaluate and analyze the principles which have been applied. It should be pointed out that irrespective of the desire for comprehensive treatment, self-imposed limitations as to scope are essential in order that the subject may be considered with some degree of conciseness.

It is a familiar doctrine that where the Federal Constitution has conferred jurisdiction upon Congress to regulate certain activities, and a clear need exists for a uniform national policy respecting such activities, then it is improper for the states to legislate upon such matters even though the Federal Government has remained silent. In other situations, where there is no clear need for a uniform national policy, and the Federal Government has remained silent, state action may be permissible. But where the Federal Government has spoken, then greater limitations on state action immediately come into play.[4] These principles apply to some extent to the relationships between states and municipalities.

4. The test as to whether federal action excludes all former and prevents all future state action has been whether Congress had definitely intended such exclusiveness or not.

Trends in the judicial application of these principles have been toward a further limitation of local power. Conflicts between state and municipal legislation provide but a single phase of the manifold problems of statutory construction and interpretation, but they do afford an interesting aspect of the law of statutory construction as applied to municipalities.

What is or is not permissible municipal action by ordinance is always more difficult to determine where the state has taken a legislative position with respect to the same subject matter. The mere fact, however, that a state has regulated a certain endeavor does not necessitate an automatic conclusion to the effect that a municipality is foreclosed from action relating to the same field of endeavor. The basic principle which must be borne in mind is that a local ordinance cannot prohibit that which a state statute allows nor can a local ordinance permit that which a state statute forbids. As sound as the basic principle may be, its application has been regrettably mechanical.

Accepting the materiality of the principle with reference to a given factual situation, the next step is to determine what is "prohibited" or what is "permitted" by both the statute and ordinance under consideration. This step is actually the determinative one and once mastered requires only a formalistic application of the principle. But so many of the decisions have not bothered to reach the "determinative" step. They have been merely content to apply the principle without heeding its refinements, which are so necessary for its proper application.

To demonstrate that the application of the principle is and can be frequently misdirected is not difficult. To reduce an example to an obvious situation, assume that a state enacts a statute which "prohibits" the operation of motor vehicles at a rate of speed in excess of 25 miles per hour in certain urban areas. Assume further that a municipality in the same state adopts an ordinance which "prohibits" a speed in the same area in excess of 15 miles per hour on a street adjacent to a public school. Disregarding the basic question of whether the municipality has the legal authority to act in this matter, is the ordinance void for its difference or conflict with the state statute? Applying our principle, we find that the ordinance "permits" nothing prohibited

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See Mintz v. Baldwin, 289 U.S. 346, 350, 53 Sup. Ct. 611, 77 L. Ed. 1245 (1933), where, with reference to a state requirement that cattle brought into such state must be certified to be free from Bang's disease and its alleged conflict with the Federal Cattle Contagious Disease Act of 1903, the Court said: "The purpose of Congress to supsersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear." For other Supreme Court decisions concerned with the concurrent and exclusive powers of the Federal and State governments, see California v. Zook, 336 U.S. 725, 69 Sup. Ct. 841 (1949); California v. Thompson, 313 U.S. 109, 61 Sup. Ct. 930, 85 L. Ed. 1219 (1941); Welch Co. v. New Hampshire, 306 U.S. 79, 59 Sup. Ct. 438, 83 L. Ed. 500 (1939); Missouri Pac. R.R. v. Porter, 273 U.S. 341, 47 Sup. Ct. 383, 71 L. Ed. 672 (1927); Erie R.R. v. New York, 233 U.S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L.R.A. (N.S.) 266 (1914); McDermott v. Wisconsin, 228 U.S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L.R.A. (N.S.) 984, Ann. Cas. 1915A 39 (1913).

by the state, for the ordinance is entirely prohibitory in character. But does it prohibit something that the statute allows? No, because the statute likewise is prohibitory and not permissive.

But, suppose that by judicial interpretation it is held that the statute is not prohibitory, but "permits" a rate of speed up to 25 miles per hour. With this approach, we reach a conclusion exactly opposite to the one just reached, for we now find that the ordinance "prohibits" something which the statute allows, namely, travelling between 15 and 25 miles per hour.

We find, therefore, that it is of paramount importance to determine, in the first instance, just what the statute and ordinance "permit" or "prohibit." This determination must be reached not by a mere interplay of words, which would permit the adoption of either conclusion, but through an examination of the language employed in the statute and ordinance, the purpose for which they were enacted, the evils at which they were aimed, and the manner in which the state and local legislators have fashioned their laws.

The pitfalls into which some courts have fallen because of mechanical treatment of the principle, despite its fundamental soundness, are all too clearly revealed in a case study covering recent years. Even in home-rule jurisdictions, the question exists because what a city council may deem to be a "local" matter [5] may be held to be a "state" affair [6] so as to nullify local action.

II. STATE PRE-EMPTION OF THE FIELD TO THE ABSOLUTE EXCLUSION OF CITIES

The conflicts which have been found to exist where the state has so

5. "Local affairs" have been defined as "those public affairs which alone concern the inhabitants of the locality as an organized community apart from the people of the state at large, as supplying purely municipal needs and conveniences and the enforcement of by-laws and ordinances of a strict local character limited to the interests of the city residents." 1 McQUILLIN, MUNICIPAL CORPORATIONS § 196 (2d ed. 1940). The question arises principally in home-rule jurisdictions. Municipal affairs have been held to include the opening and maintenance of public streets, Black v. Southern Pacific Co., 124 Cal. App. 321, 12 P.2d 981 (1932); administration of police relief and pension funds, Cincinnati v. Gamble, 64 Ohio App. 313, 28 N.E.2d 676 (1940); advertisement of city's advantages, Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 164 P.2d 598 (1945); administration of local health affairs, Fisher v. Kelly, 264 App. Div. 596, 36 N.Y.S.2d 497 (4th Dep't 1942); and assessment and collection of street paving costs, Berry v. McCormick, 91 Okla. 211, 217 Pac. 392 (1923), to enumerate a very few.

6. "State affairs" have been defined as "Public matters concerning the people of the state at large in common with the inhabitants of the given community. . . ." 1 McQUILLIN, MUNICIPAL CORPORATIONS § 195 (2d ed. 1940). "State affairs" have been held to include the administration of justice, Fortune v. Civil Service Comm'n, 138 Ohio St. 385, 35 N.E.2d 442 (1941); the creation of rights between citizens, Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S.W. 648, 5 L.R.A. (N.S.) 186 (1905); tort liability of a municipality, Helbach v. City of Long Beach, 50 Cal. App. 2d 242, 123 P.2d 62 (1942); the care of neglected and delinquent children, Salt Lake County v. Salt Lake City, 42 Utah 548, 134 Pac. 560 (1913); regulation of banks, New Rochelle Trust Co. v. White, 283 N.Y. 223, 28 N.E.2d 387 (1940); the mediation of labor disputes, Local Union No. 876, International Brotherhood of Electrical Workers v. State Labor Mediation Board, 294 Mich. 629, 293 N.W. 809 (1940); the destruction of public records, *Ex parte* Shaw, 32 Cal. App.2d 84, 89 P.2d 161 (1939); and control of the free public school system, State v. Commings, 47 Okla. 44, 147 Pac. 161 (1915). This enumeration is merely illustrative, not complete.

completely pre-empted a field, according to judicial interpretation, that any local power, however exercised, must fall, present the most serious aspect of this problem, because of the denial of the city's right to act in any respect.

The result reached in the case of *Ray v. City and County of Denver,*[7] decided in 1942 by the Colorado Supreme Court may be open to question, but at least the principle set forth above was not applied in a mechanical fashion. In this case, a local ordinance was held void as in irreconcilable conflict with a state statute on the same subject matter. The ordinance fixed a lower rate of interest to be charged on small loans than that prescribed by state law. In approaching the solution to the question, the court was cautious in specifying the criterion for determining whether or not conflict existed when it stated:

> ". . . it seems evident that in the final analysis the courts revert to the determination of what might be called the factual question of whether the ordinance forbids the doing of a thing which the statute authorizes. Since the challenged ordinance, as was its purpose, forbade the collection in Denver of the charges specified in the state law, *the resolution of the question* submitted necessarily *hinges upon the ascertainment of whether the state law conferred authority, as a matter of right,* on licensees thereunder to collect the charges therein designated, *or whether, as the city contends, the statute merely fixed the regulatory ceiling for such rates below which it was free to impose more strict requirements."* [8]

After examining the statute, the court asserted that it "grants a right" to do the things enumerated therein, including the right to collect interest at a rate not to exceed 10% per annum "except as authorized by this Act." The ordinance sought to prescribe an 8% interest rate. Inasmuch as the statute was held to *grant* a right the ordinance was found conflicting in view of its prohibitory character, since it forbade the collection of interest at a rate in excess of 8%. The ordinance therefore was found to prohibit that which the statute permitted.

While the application of the principle in the *Ray* case is not believed to be misdirected, it is not difficult to demonstrate the pitfalls and entanglements into which courts could fall when the principle is attempted to be applied in a mechanical or perfunctory manner. Assume, for example, that the state statute in the *Ray* case had been interpreted to "prohibit" the receipt of interest rates by loan brokers in excess of 10% and assume that the municipality had adopted an ordinance which prohibited the receipt of interest rates in excess of 8%. Is the ordinance void for its difference or its so-called conflict with the statute? Applying the principle we find that the ordinance "permits" nothing prohibited by the statute for the ordinance, as the statute, is entirely prohibitory. With the conclusion, however, that the statute "permits" something, the application of the principle results in a directly opposite conclusion

7. 109 Colo. 74, 121 P.2d 886, 138 A.L.R. 1485 (1942).
8. 121 P.2d at 888 (italics added).

for we now observe that the ordinance "prohibits" something which the statute "permits."

The refinements of the principle which we have seen applied by the Colorado Supreme Court have been expressed by other authorities. For example, the following statement has been made:

> "In order that there be a conflict between a state enactment and a municipal regulation both must contain either express or implied conditions which are inconsistent and irreconcilable with such other." [9]

And another authority has stated:

> "Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has prohibited or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the the provisions of the statute and the ordinance because of which they cannot coexist and be effective." [10]

Further illustrative of the type of decision wherein the state was held to have completely dominated the field so as to oust municipal authority is the case of *City of Lynchburg v. Dominion Theatres,*[11] where it was held that a city could not forbid the showing of a motion picture which had received a permit from the state-created board of censorship.

The Supreme Court of Appeals of Virginia there held that the state " 'having occupied the entire field of moving picture censorship, municipalities are thereby excluded therefrom as to matters comprehended by the statute.' " [12] The court found that no local regulations could exist in view of the comprehensive treatment which the problem of motion picture censorship had received from the state legislature. In the decision, it was stated:

> "If municipalities may censor films and determine the right of the owner to exhibit them then the unified control plan as outlined in the State statutes would be ineffectual and inoperative to carry out the expressed intention of the legislature." [13]

The intention of the state to occupy the entire field, the court held, was found "in the very statutes themselves when considered as a whole."

In *People v. McDaniel,*[14] the court observed that a local ordinance on the subject matter of regulating the use of motorboats on a certain lake in the city would have been valid were it not for the existence of pre-emptive state legislation. The ordinance in question prohibited the use of all motor-

9. 43 C.J., *Municipal Corporations* § 220(b) (1927).
10. 37 AM. JUR., *Municipal Corporations* § 165 (1941).
11. 175 Va. 35, 7 S.E.2d 157, 126 A.L.R. 1358 (1940).
12. 7 S.E.2d at 159-60.
13. *Id.* at 160.
14. 303 Mich. 90, 5 N.W.2d 667 (1942).

boats having gasoline or internal combustion engines of greater than five horsepower except when specially authorized on days of celebration or holidays. The statute specified requirements such as mufflers, underwater exhausts and keeping such mufflers and exhausts in proper working order for all motorboats operating in inland waters of the state.

In holding that the ordinance prohibited that which was permitted by state law, the court recognized that motorboat noises would be most likely to disturb the peace and quiet of those living nearby, and that ordinary police powers would provide a basis for the regulation. The conflict, however, resulted in a declaration that the ordinance was void. It is believed that this decision was erroneously decided as the court failed to give proper weight to local conditions not contemplated by the state legislature.

The refinements of the principle were apparently unobserved in the case of *City of Harlan v. Scott*,[15] where a local ordinance which forbade the operation of a motion picture show on Sundays after 6 P.M. was held to be conflicting with a statute which provided that the operation of a moving picture show should not be construed as a work, labor, trade, business or calling within the meaning of the state law prohibiting Sunday labor.

This case again presented an opportunity to examine the extent to which local requirements, stricter than those of the state, could be imposed. Such stricter local requirements, however, were merely concluded to be in conflict, the court stating:

> "An ordinance may cover an authorized field of local laws not occupied by general laws but cannot forbid what a statute expressly permits and may not run counter to the public policy of the state as declared by the Legislature." [16]

The decision, however, appeared to turn on the reasonableness of the ordinance, for the court later stated:

> ". . . the closing hour provided by this ordinance is arbitrary and unreasonable when considered in the light of the legislative declaration of public policy revealed in the 1934 amendment to Section 1321." [17]

Confusion as to "unreasonableness" on the one side and "conflict" with state law on the other should not exist, as these arguments are distinctly independent. If the ordinance in the above case conflicts with the state statute, then it is void for that reason. If it is unreasonable, then it likewise is void, but because it is unreasonable. These two attacks on local measures should be considered separately as different principles of law apply to each. As the statute in the *Scott* case appears to be permissive, and the ordinance prohibitory, the overall result seems to be correct.

15. 290 Ky. 585, 162 S.W.2d 8 (1942).
16. 162 S.W.2d at 9.
17. *Id.* at 10.

In *Pipoly v. Benson,*[18] decided by the Supreme Court of California, we observe a further instance in which state action was held to be exclusive and would preclude municipal regulation of the same matter. The ordinance in this case provided that no pedestrian should cross a roadway other than by a crosswalk in a central traffic district or in any business district. The Vehicle Code of the state provided that:

> "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." [19]

The question was whether or not the ordinance conflicted with the code because it (the ordinance) prohibited a pedestrian from crossing, while the statute merely imposed an obligation upon the pedestrian to yield the right-of-way.

After reciting the general doctrine of "municipal affairs" [20] prevailing in California under their constitutional home rule, the court observed that additional local regulations not in conflict with the general law may be applied where the necessities of the particular locality would seem to require such additional regulation. However, the court noted an exception to this rule prohibiting an ordinance from imposing additional requirements "in a field which is *fully occupied by the statute.*" [21] In this case the question presented was whether the state had intended to occupy the entire field and in concluding that the Vehicle Code did prescribe a uniform policy applicable throughout the state and in all counties and municipalities therein, the court quoted the following section of the Code:

> "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein." [22]

This section, the court held, clearly indicated the legislature's intent to completely occupy that field of regulation so that the local ordinance was invalid.

The extreme in construing statutes and ordinances so as to deny local power on the ground that state action had removed the necessity for local legislation is typified by the case of Ex parte *Gammel,*[23] decided in 1949 by the Criminal Court of Appeals of Oklahoma. In that case a municipal ordinance of the City of Shawnee prohibited beer taverns from using curtains or

18. 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515 (1942).
19. CAL. VEHICLE CODE § 562(a) (1943).
20. See note 5, *supra.*
21. 125 P.2d at 485 (italics added).
22. CAL. VEHICLE CODE § 458 (1943).
23. 208 P.2d 961 (Okla. Crim. App. 1949).

screens or painted glass in excess of three feet in height from the floor of the premises so as to obstruct the view from the outside. Partitions between booths in such places exceeding 36 inches in height from the floor were also prohibited. The pertinent state statute prescribed certain qualifications for holding a license for the sale of nonintoxicating beverages but was silent as to obstruction of the view from the outside and as to the height of partitions between booths in taverns where such beverages were sold.

The court held that the state had surrounded the sale of beer with all of the regulations deemed necessary and that municipalities were foreclosed from further regulation. It stated:

> "If they [the Legislature] had thought that further regulations in the cities or more populous areas might have been necessary, it would have been a small matter to have provided that such municipality might pass further regulations to control the sale of such beverages within such municipalities." [24]

In addition the court held that a local ordinance could "move in the same direction" as the state statute, but that "no municipality may add to the restrictions or qualifications thus laid down by the Legislature." [25]

The court concluded:

> "The Legislature has spoken so that there would be a uniform application of the law in each county and municipality of the state. Evidently, it was the purpose and intent of the Legislature to fully prescribe all of the conditions under which the sale of this so called non-intoxicating beverage may be had and not leave the prescription thereof to a town or city council which might change its mood frequently." [26]

In one breath, therefore, we find the conclusions (1) that the state has completely occupied the field to the exclusion of municipalities and (2) that municipal regulations may run in the same general direction as that of the state statute. Under the decision it would appear that municipalities would be unable to enact any controlling regulation of any nature over beer taverns. Statutory silence thus becomes statutory prohibition. Nor, for that matter, could a city "move in the same direction." If it prohibited the identical matters prohibited by statute, the ordinance would not be moving in any direction, and if it attempted to add to the restrictions insofar as matters of purely local interest were concerned, it would be a nullity according to the decision. Here the state had not legislated concerning outside view and height of partitions between booths, but, nevertheless, local power to do so was denied as in conflict. Applying the principle that an ordinance may not permit or prohibit that which is not permitted or prohibited by the state, it is observed that the state did not permit obstructions to the front view of a beer tavern,

24. 208 P.2d at 966.
25. *Id.* at 967.
26. *Ibid.*

nor did it permit booths with partitions in excess of three feet, so that, therefore, the ordinance prohibiting both, did not prohibit that which the state allowed. The decision in this case goes much too far in denying municipal power.

III. NONEXCLUSIVE ENTRY BY THE STATE INTO THE FIELD

(A) *Cases Holding Conflict Exists*

Many of the decisions concerned with the question of conflict between state and local legislation have not been troubled with the vexatious determination of whether or not the state has so completely occupied a particular field of regulation that any and all municipal action is void. These decisions are concerned with whether, in fields in which there can be mutual action, the municipality has exceeded its own proper sphere of activity and has improperly invaded that of the state.

Such situations present compelling necessities for most careful analyses of the legislation involved, and bar the more easily reached conclusion in those cases where the state has been held to have completely preempted the field.

In measuring the extent of permissible local action, the decisions have applied rigid rules of construction against municipalities, and have very frequently denied their power to act, particularly in the taxation and licensing field. In the exercise of the police power, some decisions have recognized the need for local authority to cope with problems posing menaces to the public health, safety and welfare.

The application of the principle that an ordinance may not permit what a statute forbids was not too difficult in the case of *Birmingham v. Allen*, [27] which was an action to determine the validity of a provision of the city's municipal plumbing code which permitted "certified gas fitters to install not exceeding ten (10) feet of water pipe in connection with the replacement of any gas appliances." The state plumbing code permitted only certified plumbers to do plumbing work. The local plumbing law was readily found to be in conflict with the state code as it permitted something forbidden by statute.

In holding the provision void the court stated:

> "It seems to us that the proviso in the ordinance is plainly an effort by indirection to sanction the installation of plumbing in the City of Birmingham by a class prohibited so to do by the state law. The proviso thus interpreted is inconsistent with the general policy of the state . . . and for this reason cannot stand." [28]

The difficulties attendant upon a question of whether stricter local re-

27. 251 Ala. 198, 36 So.2d 297 (1948).
28. 36 So.2d at 299.

quirements could be imposed were, of course, absent in the *Allen* case, so that the application of the principle was simplified.

In *Bennett v. City of Hope,*[29] the Arkansas Supreme Court struck down an ordinance which required newly constructed buildings to be connected with the sanitary sewer system of the city as in conflict with a state statute that stated:

> "Nothing in this act shall be so construed as to authorize the board of health to order or compel the building of a sewer by one property owner over the property of another, or for a greater distance from his property through or into any street or alley than three hundred feet, to a place where a connection can be made with a sewer." [30]

The court readily found that the ordinance attempted to do exactly what the statute "says that it may not do."

In *Hot Springs v. Gray,*[31] another Arkansas decision, an ordinance which permitted the keeping open of a grocery store on Sundays where two or fewer employees were in attendance was declared to be "in the very teeth" of a statute which prohibited any grocery store from remaining open on the Sabbath.

The *Allen, Bennett* and *Gray* cases present relatively simple problems in statutory construction, the conflicts being rather more evident than in most cases in this field.

However, in passing to more complicated factual situations, and to instances in which the alleged conflict was, if anything, more subtle, we find that the principles of law governing conflicts between state and local legislation of much greater difficulty in application.

The case of *Fieldcrest Dairies v. Chicago,*[32] is illustrative. In that case the City of Chicago had enacted an ordinance which prohibited the use of anything but standard milk bottles when milk or milk products were sold in quantities of less than one gallon. During the pendency of the action which was for a declaratory judgment that plaintiff's single service milk containers conformed to the city ordinance, the state legislature enacted a comprehensive statute which plaintiff contended established a state policy for the manufacture and distribution of pasteurized milk, including its distribution in single service containers. The statute referred specifically to single service containers and specified that they should be "manufactured and transported in a sanitary manner."

It was the city's contention that the statute did not affect the city's power to prohibit such containers in view of the clause which read:

29. 204 Ark. 147, 161 S.W.2d 186 (1942).
30. ARK. DIG. STAT. § 9615 (1937).
31. 219 S.W.2d 930 (Ark. 1949).
32. 122 F.2d 132 (7th Cir. 1941), *reversing* 35 F. Supp. 451 (N.D. Ill. 1940), *rev'd,* 316 U.S. 168, 62 Sup. Ct. 986, 86 L. Ed. 1355 (1942).

"Nothing in this Act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk and pasteurized milk products, provided that such regulation does not permit any person to violate any of the provisions of this Act." [33]

In holding the ordinance prohibiting the plaintiff from distributing milk in single service containers to be void as contrary to the public policy of the state the court said:

"The purpose of the saving clause . . . was to preserve in the city the unquestioned right to continue in a field which had been entered by the state, and in which, thereafter, each should have co-extensive power and authority. . . . the state, upon entering the field not only made provision for the sale and distribution of pasteurized milk, but recognized, permitted and approved the use of such containers and the ordinance is squarely in conflict therewith." [34]

The case of *Moore v. Village of Gilbert*,[35] decided by the Minnesota Supreme Court, was an action to recover $550 paid to the defendant village for permits to move buildings from a point inside to a point outside the municipality. The plaintiff was also required to pay $220 to the village water and light department for any expenses incurred in moving operations.

A state statute provided that movers of buildings should do their work so as not unnecessarily to "interfere with, damage or destroy any . . . telephone or electric power poles, wires, or cables" upon any street, alley or highway. The statute also provided that the owner of poles, wires and cables should not be required to displace them until reasonable costs had been tendered.

In holding that the collection of the $550 was ultra vires, the court stated:

"The statute expresses the general law of the state as to exactions of money by a municipality, public utility, or other owner of property from one desiring to move a building over any highway. . . . we hold that the action of defendant village in requiring of plaintiff the payment of $550.00 in addition to the more than adequate sum paid to the water and light department to cover expenses is ultra vires." [36]

In other words, the only thing the village could exact was the cost incurred in changing utility facilities and no permit fee could be collected to insure reasonable protection and safety to the public from the physical movement of the buildings. Again, the police power was effectively thwarted through statutory construction. Actually, the sole question for decision would appear to have been any alleged excessiveness of the permit fee or the basic authority of the municipality to levy it.

Several decisions have denied local power because of the prohibitory nature of local legislation where the state has not acted prohibitorily or

33. ILL. REV. STAT., c. 56½, § 133 (1945).
34. 122 F.2d at 139.
35. 207 Minn. 75, 289 N.W. 837 (1940).
36. 289 N.W. at 838.

where the state has recognized the particular activity as lawful. The case of *Frecker v. City of Dayton,*[37] is illustrative. In this case an ordinance of defendant city had the effect of prohibiting the sale of ice cream and confections by street peddlers on the streets of the city. A state statute authorized municipalities to license peddlers but forbade the collection or imposition of a license fee upon owners of products which they themselves had raised and were attempting to sell. In striking down the ordinance, the court stated:

> "These enactments clearly recognize peddling as a lawful occupation. If a city cannot even require a license from certain vendors . . . and the plaintiff comes under this classification, it should be apparent that it does not possess the far greater power of completely destroying such a business." [38]

In *King v. Louisville,*[39] the question was whether or not the plaintiff was engaged in a lawful business. He was convicted of violating a municipal ordinance making it "unlawful for any person . . . to sell, barter, exchange . . . or to have in his . . . possession . . . fire crackers, Roman candles, torpedoes, sky rockets, or any other explosives commonly called fire works."

The statute involved authorized municipalities to adopt "ordinances prohibiting within the corporate limits the commission of any act which amounts to a misdemeanor under the laws of the state." No statute existed making the possession of fire works a misdemeanor, although a statute did prohibit the explosion of "fire crackers, Roman candles, sky rockets or any kind of fire works in any unincorporated town or village in this state."

In holding that the plaintiff was engaged in a lawful business since there was no state law which prohibited the sale or possession of fire works and since a privilege tax was levied on the occupation by the state, the court concluded that: "This ordinance, furthermore, is not a regulation, but a city-wide prohibition of a lawful business. . . . Prohibition is not regulation but destruction." [40]

These two cases illustrate a further extension of the doctrine that a municipality may not prohibit anything permitted by statute and in these cases the device of finding or determining the lawfulness of the occupation was the means through which the end result of invalidity was reached.

In the taxation and licensing fields there are numerous decisions which find that local authority has overstepped its permissible bounds and has infringed upon territory which has been preserved by the state to itself. While there appears to be no basic distinction between the application of the principle where local police powers are concerned, and where local taxing powers are concerned, it might be appropriate to observe that historically

37. 85 N.E.2d 419 (Ohio App. 1949).
38. *Id.* at 422.
39. 42 So.2d 813 (Miss. 1949).
40. *Id.* at 816.

the existence of any claim of taxing power of cities has been more stringently construed against cities than has the exercise of local police powers. It is, of course, well established that where any doubt exists as to the authority of a municipality to act, that authority is generally determined against the city.

A recent decision dealing with the coextensiveness of state and local taxing powers was that of *Pittsburgh Milk Company v. Pittsburgh.*[41] In this case certain local taxes were permitted by statute "except that such local authorities shall not have authority by virtue of this act to levy, assess and collect or provide for the levying, assessment and collection of any tax on a privilege, transaction, subject, occupation or personal property which is now or does hereafter become subject to a state tax or license fee." The city levied a mercantile tax and license fee for revenue purposes. The state had likewise required the plaintiff to pay an annual license fee for the privilege of doing business. In applying the language of the above quoted statute to the local tax the court quoted with approval the language of the lower court in which it was stated: "If it were not for the three words 'or license fee' we would have no difficulty in deciding this case in favor of the defendants. . . ." [42] The Supreme Court of Pennsylvania stated: "We agree with this. Those three words make all the difference and since they cannot be disregarded or explained away, our decision must be the same as of the Court below." [43]

Notwithstanding the different purposes of the statute and the ordinance, the former being for regulatory and the latter for revenue purposes, the court stated that since the state had imposed a license fee such difference in purposes was immaterial in view of the unambiguous language of the statute.

Local power was again denied in the case of *City of Griffin v. First Federal Savings & Loan Ass'n of Griffin,*[44] where a municipality sought to levy a license tax upon a loan association in the face of a statute which forbade the assessment of such associations with taxes by any municipality "on its franchise, capital reserves, surplus, loans, shares or accounts." The sole question was whether or not the tax was a franchise tax within the provision of the statute. In holding that the "license tax" of the municipality was within the prohibitions and therefore void, the court held that the state legislature had used the word "franchise" in a loose or general manner, synonymously with the term "license" or "occupation."

Another decision which most strictly interpreted local authority was that of *Macon v. Southern Oil Stores* [45] in which a local tax on gasoline stations, based upon the storage capacities of such stations was imposed. The act of the state legislature with which this ordinance was held conflicting

41. 360 Pa. 360, 62 A.2d 49 (1948).
42. 62 A.2d at 51.
43. *Ibid.*
44. 80 Ga. App. 217, 55 S.E.2d 771 (1949).
45. 190 Ga. 612, 10 S.E.2d 34 (1939).

prohibited cities from levying "any fee, license, privilege or excise tax or taxes measured or computed in gallons upon the sale, purchase, storage, receipt, distribution, use, consumption or other disposition of motor fuel and/or kerosene or other products of petroleum; provided, however, that nothing herein shall prevent the levying by municipalities of reasonable flat license fees or taxes upon the business of selling motor fuel and/or kerosene or other like products of petroleum at wholesale or retail." [46]

The court held that the ordinance was void even though it was imposed merely on the gasoline storage capacity of filling stations since its necessary effect was to tax the storage of the fuel itself.

In the case of *Hill v. Richmond*,[47] the plaintiff sought relief from assessments of license taxes by the defendant city upon plaintiff as a wholesale merchant. Prior to 1928, the plaintiff was assessed with a state license tax as a commission merchant and also as a wholesale merchant. The City of Richmond likewise assessed plaintiff with a city license tax as a wholesale merchant and also as a commission merchant.

In 1928, the state reclassified businesses whereby the state license tax as a wholsesale merchandise broker was required of plaintiff but none was required as a wholesale merchant. The city thereupon exacted only one license for the privilege of conducting the business of merchandise broker or commission merchant and the former wholesale merchants' license was abandoned by both the state and the city. In 1940, however, the city reverted to the method used prior to 1928 and assessed against the plaintiff another license tax as a wholesale merchant.

In reversing the judgment of the lower court for the city the court stated:

> ". . . where the state has made its own classification of a business that is as generally well known as that of 'Wholesale Merchandise Broker,' the city is bound to follow the State, if it desires to require a license for that particular business. It certainly cannot split the business into two parts as attempted here, and tax each part separately. It has no power to require one tax on that portion of the brokerage business which includes buying and selling on the broker's own account and require another tax on that part of his business which is devoted to selling on commission." [48]

The above decisions in this section have been concerned with statutes and ordinances that were directed toward the regulation or taxation of the same activity. It is not necessary, however, that the statute and ordinance relate to the identical field of activity in order to find conflict between the two.

One of the most recent cases in which such a conflict was found where statutes covering different matters than the ordinances involved was *Ft. Worth & D.C. Ry. v. Ammons*.[49] This was an action to enjoin a railroad from

46. GA. CODE ANN. § 92-1403[G] (1937).
47. 181 Va. 744, 26 S.E.2d 48 (1943).
48. 26 S.E.2d at 52.
49. 215 S.W.2d 407 (Tex. Civ. App. 1948).

extending an industrial spur track into a residential zone so classified by the City of Lubbock, Texas. The railroad contended that its right to further extend its tracks under the eminent domain powers which it possessed by virtue of authority of state law was superior to the local zoning ordinance and in sustaining this position the court stated: ". . . that portion of the . . . Ordinance which places the strip in a C or residential zone is in conflict with appellants' authority to select and use the strip as their right of way." [50]

In Ex parte *Means*,[51] local requirements of certificates of registration for journeymen plumbers was held unlawful and inapplicable to a state employee engaged in the work of a plumber at state fair grounds within the municipality on the ground that such ordinance conflicted with the civil service statutes of the state which established the qualifications for state plumbers. The court stated:

> "Although the legislature has enacted no statute regulating plumbing, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service, may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the requirement of its governmental subsidiary. Upon fundamental principles, that conflict must be resolved in favor of the state." [52]

In *Lisenba v. Griffin*,[53] an ordinance regulating barbershops and providing for a city barber board with authority to grant permits and adopt rules to govern that trade, was held void for conflicting with the state statute providing that "no local board of health or other executive board for the exercise of public health functions, other than the county board of health, shall be established or exist in any county or municipality. Nor shall any municipality have a municipal health officer. . . ." In so holding the court stated, "this ordinance is patently in conflict with" the above quoted statute.[54]

In Michigan the same result was reached in the case of *Builders Ass'n v. Detroit*,[55] where an ordinance of the defendant city made it unlawful to conduct real estate business on Sundays without any exceptions, while a state statute relating to Sunday work excepted those who conscientiously believed that the seventh day of the week should be observed as the Sabbath.

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50. *Id.* at 411.
51. 14 Cal.2d 254, 93 P.2d 105, 123 A.L.R. 1378 (1939).
52. 93 P.2d at 108. City ordinances are generally held inapplicable to state property, acts or employees. See, for example, Kentucky Institution for Education of Blind v. Louisville, 123 Ky. 767, 97 S.W. 402, 8 L.R.A. (N.S.) 553 (1906), holding an ordinance relating to fire excapes inapplicable to a state institution; and Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642, 17 Ann. Cas. 1002 (1909), holding that regulations requiring that the work of altering and improving buildings be subject to local supervision were inapplicable to state buildings.
53. 242 Ala. 679, 8 So.2d 175 (1942).
54. 8 So.2d at 177.
55. 295 Mich. 272, 294 N.W. 677 (1940).

The court readily found that the ordinance prohibited that which the statute allowed and while the permissive character of the statute and the obviously prohibitory character of the ordinance was not recognized there can be little question as to the result.

(B) *Cases Holding No Conflict Exists*

Having reviewed certain decisions which have concluded that the municipality had enacted legislation that conflicted with state statutes, we now turn to those decisions which held that no conflict existed. The similarity between the various circumstances in the following cases with those of the preceding section would indicate a lack of appreciation of the fundamental doctrine by which the question of conflict should be determined.

Two additional considerations that have influenced the following decisions were inexplicably absent in the consideration of the cases in the foregoing section. These considerations are (1) whether the ordinance is identical with the statute, and (2) whether the ordinance makes "reasonable" extensions of state requirements.

Whether or not one would be placed in double jeopardy by doing an act which violated a statute when said act is also made an offense by city ordinance was considered in the case of Ex parte *Borah*.[56] An ordinance of the City of San Francisco made it unlawful for any person engaged in a telephone conversation with any telephone operator, supervisor, or "with any other person" to use abusive, profane, lewd, bawdy, or obscene language." A statute in effect at the time made it a misdemeanor to use vulgar, profane or indecent language within the presence or hearing of women or children, in a loud and boisterous manner. Penalties under the ordinance were $500 fine or six months imprisonment or both, while under the statute the penalty was fixed at $200 fine and ninety days imprisonment or both.

The court held that the ordinance was not in conflict with the state law because "it is broader than the Penal Code Section, which refers only to the use of such language in the presence of women and children, in a loud and boisterous manner. . . . The ordinance section and the penal code section are not in conflict, not identical, and not precisely the same." [57]

As for double jeopardy the court held that where the ordinance would prevent a prosecution of the offense under the general state law, it would be held conflicting with the general law. The decision stated: " 'It will be observed that we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts.' " [58]

As the decisions in the preceding section have demonstrated, lack of

56. 208 P.2d 405 (Cal. App. 1949).
57. *Id.* at 407.
58. *Ibid.*

similarity between the local ordinance and the state statute was either disregarded or not considered.

In the case of *Remmer v. Municipal Court of City and County of San Francisco,*[59] the plaintiff sought a writ of prohibition to prevent his trial for the offense of keeping and maintaining a place where draw poker and draw low ball poker were carried on in violation of the Police Code of the city. State law prohibited every person from dealing, playing, carrying on any enumerated games, not including however draw poker or draw low ball poker. In sustaining the section of the Police Code as not being in conflict with the state statute, the court stated:

> "Neither draw, nor draw low ball, poker is prohibited by state law, hence respondents contend that section 288, Police Code, when invoked against places where gambling games are played as it was here, is not in conflict with sections 330 or 331, Penal Code, or any other state law. We are satisfied that this position is supported by the authorities. . . .
>
> ". . . the former [ordinance] prohibits keeping and maintaining a gambling house while the latter [statute] prohibits prevailing upon another to enter one. Under 318 it is not sufficient merely to prove invitation, but 'prevailing' must be proved. . . . The acts denounced by the two sections are entirely different." [60]

Again, it is observed that lack of similarity resulted in a holding that the ordinance was valid.

The case of *Cincinnati v. Luckey* [61] is another recent decision relating to the permissive scope of a municipal ordinance which regulated locomotives and the manner in which they could block street crossings. The defendant was convicted of violating an ordinance which provided that "It shall be unlawful for any railroad company to operate its locomotives, cars or trains of cars in such manner as to block a street crossing for a period of more than ten minutes. . . ."

A statute of the State of Ohio made it unlawful for a railroad car or locomotive to remain upon or across a public road or highway for longer than five minutes. The question before the court was whether the extension of time by the municipality was such a conflict with the statute that it must fall.

In a decision which carefully analyzed the language of the ordinance and statute it was held that the city council had not intended to legislate upon a subject fully covered by the statute as the council "was aware of" the existence of the statute and that in the use of the word "operate" it was to be presumed that the council had in mind a different situation from that intended to be covered by the state statute. The court concluded that: "The effect of the ordinance is to govern the speed of the train imposing by its limitations a *minimum* speed when crossing a street." [62]

59. 90 Cal. App.2d 854, 204 P.2d 92 (1949), *appeal dismissed,* 338 U.S. 806 (1949).
60. 204 P.2d at 94, 95-96.
61. 87 N.E.2d 894 (Ohio App. 1949).
62. *Id.* at 896.

The conviction of the defendant however was reversed because an unlawful regulation of interstate commerce was found to exist in the case.[63]

Here, we observe an instance of liberal interpretation that would give full effect to both the state and local enactments.

As has been noted in the preceding sections, municipal regulations in addition to those imposed by the state with reference to the regulation of the sale of intoxicating liquors and beer has frequently resulted in conclusions that the state has absolutely preempted the field of regulation so that municipalities are powerless to add to any of the restrictions created by the statute. Two recent Missouri cases provide exceptions to the rule of these decisions and merit attention.

In *City of Flat River v. Mackley,*[64] an ordinance which prohibited the sale of 3.2 beer at any time on Sunday was involved. The statute prohibited such sales only between the hours of 1:30 A.M. and 6:00 A.M. In affirming the conviction of the defendant for violating the ordinance the court applied what is believed to be the true criterion for determining conflicts, namely whether the ordinance "prohibits" something which the statute "permits." It was stated as follows in the decision:

> "If the ordinance in the case at bar undertook to provide that intoxicating beer could lawfully be sold 'between, the hours of 1:30 o'clock A.M. and 6:00 o'clock A.M.,' we would then have a situation where it could properly be said to be in conflict with the state law. . . . However, the ordinance contains no such provision and hence is not inconsistent with nor in conflict with the state law, and is therefore not void." [65]

It is clear that the court decided that the statute "prohibited" something and did not "permit" something.

In *Nickols v. North Kansas City,*[66] the court held that the Missouri Liquor Control Act, while comprehensive, was not all inclusive and that a municipality could legally prohibit the selling of 3.2 beer on Sunday.

In holding that a city would be powerless to prohibit the sale of beer by ordinance, the court held that a city was not powerless to regulate such sale in a reasonable manner and quoted the following from the case of *Vest v. Kansas City* [67] with approval:

> "The fact that a state has enacted regulations governing an occupation does not of itself prohibit a municipality from enacting additional requirements. So long as there is no conflict between the two, both the statute and ordinance will stand." [68]

The test in this case would appear to have been whether or not the municipality *reasonably* extended state restrictions. It is submitted that this

63. *Cf.* cases cited note 3, *supra.*
64. 212 S.W.2d 462 (Mo. App. 1948).
65. *Id.* at 467.
66. 214 S.W.2d 710 (Mo. 1948).
67. 355 Mo. 1, 194 S.W.2d 38 (1946).
68. 214 S.W.2d at 713.

approach is sounder and greatly to be preferred to those decisions which have flatly held that municipalities are precluded from any action simply because the state happens to have legislated upon the same subject.

The case of *Brotherhood of Stationary Engineers v. St. Louis,*[69] is still another Missouri decision which manifested a sympathy for the relative position between municipalities and the sovereign state and a willingness to sustain local action where there is no real conflict with state legislation.

This was an action to enjoin the enforcement of an ordinance providing for the licensing and regulation of stationary engineers on the ground that such ordinance was inconsistent with state law which provided that no person should manage, control, take charge of or act as engineer of any steam boiler, engine or apparatus who had not the requisite knowledge and ability to manage the same. The statute also provided that any incorporated association of qualified local steam engineers in any city of the population of 20,000 (which included plaintiff association) should be authorized to grant certificates of qualification to all persons who duly pass an examination before a committee of examiners of such association, such certificates to be "prima facie" evidence of the qualifications of the person to whom issued.

The ordinance of the city provided for a board of engineers of three who were to examine into the qualifications of applicants for engineering licenses. The board was required to grant certificates to those having the requisite qualifications.

The plaintiff alleged that the ordinance failed to recognize the certificates which it had issued under the authority of the above state law and that, therefore, the ordinance was inconsistent with state law.

After pointing out that the state had not attempted to assert sole control in determining the qualifications of steam engineers, because of the use of the term "prima facie," the court stated:

> "Interpreting the state law accordingly, and acting under its charter power, the City of St. Louis enacted the ordinance in question, which enlarges upon the provisions of the state law by requiring more than the state law requires, but which is in no sense in conflict with it. The state law undertakes to prohibit an unqualified person from operating a steam boiler or engine, and provides that a certificate of qualification issued by an association such as the Brotherhood shall be prima facie evidence of the holder's qualifications. The ordinance does not authorize an unqualified person to operate a steam boiler or engine, nor does it prevent a certificate of qualification from being prima facie evidence of the fitness of the person to whom it is issued. On the contrary, the ordinance conforms to the same standard as that set up by the state law, and merely supplements the state law by requiring a person proposing to operate a steam boiler or engine within the City of St. Louis to obtain a license from the Board of Engineers. It does not permit what the state law prohibits, nor does it prohibit what the state law permits. It is not inconsistent with the provisions of the state law, and both may stand together in harmony." [70]

69. 212 S.W.2d 454 (Mo. App. 1948).
70. *Id.* at 459-60.

Other recent decisions have also sustained similar exercises of local powers.[71]

CONCLUSION

It is undeniable that many of the decisions which have been discussed in the preceding sections are founded upon sound principles of law, but it is believed that they provide eloquent testimony of the need for extended local autonomy and the need for a new conception of the role which municipalities play in our governmental scheme. The unfortunate effect which some of these decisions have had upon cities and the burdens which they have created for these cities emphasize the necessity for a more liberal treatment of the problems of local authority by both the legislative and judicial branches of our state governments. The ultimate in desirability, however, is, of course, the provision of adequate constitutional self-powers, for this enables a municipality, faced with peculiar and ofttimes isolated problems which are unique only to that municipality, to cope with such problems in a manner deemed best by those who are responsible for the administration of the affairs of such locality.

State supremacy, of course, is not to be questioned for there is nothing more vital to our democratic system than the preservation of state prerogatives. It is suggested, however, that there is serious doubt as to the wisdom of an automatic reliance upon the catch phrase "state supremacy" in decisions of our courts where the questions in such decisions have nothing whatever to do with state sovereignty.[72] The decisions discussed hereinbefore embrace legal questions which are of the highest practical importance to municipalities and where the problem of state sovereignty is absent, or is falsely created, there should be no mechanical treatment of the whole question as if state sovereignty were the crux of the entire matter. Realistic approaches rather than stilted and doctrinaire attitudes toward the complexities of urban life in the 20th century are needed to provide the strength and vitality to local

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71. Franklin v. Peterson, 87 Cal. App.2d 727, 197 P.2d 788 (1948) (local gross receipts tax upon attorneys); Springfield v. Stevens, 216 S.W.2d 450 (Mo. 1949) (transportation of intoxicating liquors in taxicabs); People v. Capriulo, 89 N.Y.S.2d 531 (Sp. Sess. 1949) (tiling of chicken markets); Holy Sepulchre Cemetery v. Town of Greece, 191 Misc. 241, 79 N.Y.S.2d 683 (Sup. Ct. 1947) (zoning of cemetery property); Columbus Legal Amusement Ass'n v. Columbus, 79 N.E.2d 915 (Ohio 1947) (mechanical amusement devices); Portland v. Duntley, 203 P.2d 640 (Ore. 1949) (bookmaking); Aberdeen v. Forkel, 37 N.W.2d 407 (S.D. 1949) (driving while intoxicated); Tsutras Automatic Phonograph Co. v. City of Williamson, 51 S.E.2d 427 (W.Va. 1948) (license tax upon pinball machines).

72. "Federal supremacy" so as to provide immunity from state action was mentioned in the recent case of S.R.A., Inc. v. Minnesota, 327 U.S. 558, 66 Sup. Ct. 749, 90 L. Ed. 851 (1946), holding that a state could tax realty, the legal title to which remained in the Federal Government, while the equitable title passed to the person purchasing the realty from the Federal Government. See also United States v. County of Allegheny, 322 U.S. 174, 64 Sup. Ct. 908, 88 L. Ed. 1209 (1944), where "Federal supremacy" prevented the imposition of local taxes upon the machinery of a cost-plus contractor of the Federal Government, where such machinery was leased from the Federal Government.

governments that are necessary to preserve their integrity.[73] Integrity, and to a certain degree, independence of local government unquestionably redound to the benefit and strength of the state.

Home rule philosophies have been attempted in a number of our states and time has proven that there is more than ample room in our governmental hierarchy for both the state and local government. Both can and have existed without infringement upon the proper sphere of activity of either.[74]

Statutory construction as applied to municipal corporations, therefore, can be a device whereby our municipal corporations may be permitted to thrive and efficiently discharge their functions. This device, as observed, has not always been used in furtherance of this idea. Courts should, however, become increasingly aware of the true place which the city occupies in our life and accord to it a recognition of its vital role in our system of government. Examination of mere words in a statute or ordinance falls far short of the judicial responsibility. Mechanical application of rigid formulas falls even shorter. Examination of the true relationships between our cities and their parent states is imperative in all cases of asserted conflict of action in order to assure the preservation and proper functioning of that form of government which is the closest to the American citizen.

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73. While not directly related to the problem under consideration, it is to be noted that many ordinances have been invalidated under the "due process" clause of the 14th Amendment or similar provisions of state constitutions as being "unreasonable" exercises of the police power. In the past some state courts have not been adverse to inquiring into the wisdom or expediency of local legislation and have, in effect, applied *sub silentio* what might be termed a "presumption of unconstitutionality," particularly in the application of state constitutional provisions. Fortunately, these decisions have been limited in number and the accepted rule of judicial action that courts will not and should not pass on the wisdom or expediency of legislation has been applied in most instances. This has been notably true in recent years in cases dealing with what has been denoted as "economic legislation." The increasing tendency of state courts to uphold local legislation attacked as violative of the due process clauses of state or Federal constitutions, where it bears any degree of relationship to a legitimate end, has been, at the least in part, influenced by the "shift of emphasis" of the United States Supreme Court in a series of cases which rejected the due process philosophy expounded in a previous line of cases. See Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934). In discussing what has been termed a return to "earlier constitutional principles," the Court has stressed that the "due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket." See the majority opinion by Mr. Justice Black and the concurring opinion of Mr. Justice Frankfurter in Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 69 Sup. Ct. 251 (1949). The tendency by all courts to return to the true judicial function of refusing to upset legislation because the court may have doubts as to its desirability or wisdom has been of practical importance to municipalities attempting to regulate local affairs under the myriad ramifications of modern society. The principle that legislation should not be invalidated and annulled as unreasonable unless palpably in excess of legislative power is the only practical principle consonant with the precepts of democratic philosophy, for under that philosophy the practical forum for the correction of unwise or ill-advised legislation is a responsive legislature subject to the will of the electorate. See Daniel v. Family Security Life Insurance Co., 336 U.S. 220, 69 Sup. Ct. 550 (1949).

74. The experience with, and the need for, home rule has been of great concern to municipal attorneys who have accorded much attention to the subject. See, for example, the annual reports of the Committee on City-State Relations of the National Institute of Municipal Law Officers, which are reproduced in 1950 MUNICIPALITIES AND THE LAW IN ACTION 329-34; 1949 *id.* 312-15; 1948 *id.* 165-72; 1947 *id.* 171-93; 1946 *id.* 98-101; 1945 *id.* 293-95; and 1944 *id.* 184-86. See also Adamowski, *Home Rule for Cities*, in 1949 *id.* 316-29.