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Peace-and-Order Power of an Ohio Municipal Corporation

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*by Louis B. Perillo**

BY AUTHORITY OF THE CONSTITUTION of 1851, and prior to the constitutional convention of 1912, the ordinance-making powers of Ohio municipal corporations were derived from legislative enactments of the General Assembly. The state was the sovereignty and the municipality was the agent or "arm of sovereignty" to carry out the general purposes of the state. The municipal corporation possessed those police powers which were expressly granted by statute, and those which could be reasonably implied as necessary to carry into effect those expressly granted.[1] The power to preserve and maintain the "good order and peace" was only one facet of those powers.

In the early, but leading, case of *Morgan v. Nolte*,[2] a local ordinance, providing for the apprehension of any person who was a known thief, and unable to account for himself, enacted within the authority of the then Revised Statute 2108,[3] which provided that a municipal council could ". . . provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace . . . and any suspicious person who cannot give a reasonable account of himself," was upheld, although there were no specific acts of the defendant of which the municipality could complain, on the reasoning that a general course of conduct, or mode of life, which is prejudicial to the public welfare may be prohibited and punished as an offense by the municipality.

Although the General Assembly established a rather liberal statutory framework within which the municipalities might adopt

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1 Ravenna v. Pennsylvania Co., 45 Ohio St. 118 (1887); Townsend v. City of Circleville, 78 Ohio St. 122 (1908); Cady v. Village of Barnesville, 4 Week. L. Bull. (Ohio) 101 (1878).

2 37 Ohio St. 23, 41 Am. Rep. 485 (1881).

3 General Code Sec. 3664, Revised Code Sec. 715.55.

suitable peace-and-order measures,[4] and although ordinances enacted thereunder were, in the main, given effect by the courts,[5] the courts were reluctant to apply local penal ordinances, enacted thereunder, unless authority to enforce such provisions were expressly granted or reasonableness of purpose were apparent.[6] In *Jeffries v. Defiance*[7] and in In re *Fitzsimmons*[8] the

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[4] General Code Sec. 3658 (Revised Code Sec. 715.55):

"Any municipal corporation may prevent riot, gambling, noise and disturbance, and indecent and disorderly conduct or assemblages, preserve the peace and good order, and protect the property of the municipal corporation and its inhabitants."

General Code Sec. 3659 (Revised Code Sec. 715.51):

"Any municipal corporation may: (A) Regulate billiard and pool tables, nine or ten pin alleys; (B) Authorize the destruction of instruments or devices used for the purpose of gambling."

General Code Sec. 3660 (Revised Code Sec. 715.52):

"Any municipal corporation may: (A) Suppress and restrain disorderly houses and houses of ill-fame; (B) Provide for the punishment of all lewd and lascivious behavior in the streets and other public places."

General Code Sec. 3662 (Revised Code Sec. 715.53):

"Any municipal corporation may regulate taverns and other houses for public entertainment."

General Code Sec. 3663 (Revised Code Sec. 715.54):

"Any municipal corporation may restrain and prohibit the distribution, sale and exposure for sale of books, papers, pictures, and periodicals or advertising matters of an obscene or immoral nature."

General Code Sec. 3664 (Revised Code Sec. 715.55):

"Any municipal corporation may provide for: (A) The punishment of persons disturbing the good order and quiet of the municipal corporation by clamors and noises in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens or otherwise violating the public peace by indecent or disorderly conduct, or by lewd and lascivious behavior; (B) The punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself."

General Code Sec. 3628 (Revised Code Sec. 715.67):

"Any municipal corporation may make the violation of any of its ordinances a misdemeanor, and provide for the punishment thereof by fine or imprisonment, or both. The fine, imposed under authority of this section, shall not exceed $500.00 and imprisonment shall not exceed six months."

[5] Cleveland v. Lavelle, 3 Ohio L. Rep. 648, 51 Week. L. Bull. (Ohio) 310 (1906); Esch v. Elyria, 7 Ohio C. C. (N. S.) 9, 17 Ohio C. Dec. 446 (1905); Squires v. Wiener, 19 Ohio C. C. 736, 10 Ohio C. Dec. 293 (1899); Billington v. Hoverman, 18 Ohio C. C. 637, 7 Ohio C. Dec. 358 (1897); Trimble v. Village of Bucyrus, 9 Ohio Dec. 832, 5 Week. L. Bull. (Ohio) 15 (1880); Bauer v. Avondale, 6 Ohio Dec. Repr. 706, 7 Am. L. Rec. (Ohio) 478, 7 Ohio Dec. Repr. 577, 4 Week. L. Bull. (Ohio) 12 (1878); Morgan v. Nolte, *supra*, note 2.

[6] Glaser v. Cincinnati, 1 Ohio Dec. 398, 31 Week. L. Bull. (Ohio) 243 (1893).

[7] 11 Ohio Dec. Repr. 144, 25 Week. L. Bull. (Ohio) 68 (1891).

[8] 13 Ohio N. P. (N. S.) 104, 57 Week. L. Bull. (Ohio) 285 (1912).

courts would not enforce village ordinances enacted under authority of General Code Sec. 3664 for the offenses of "being in a state of intoxication." Sec. 3664 provided that disorderly conduct and the disturbing of the peace were subject to local enforcement; and for the purpose of definition, indicated that a person would be in violation of the ordinance when perpetrating such misconduct while, among other things, in the state of intoxication. Since Sec. 3664 did not empower the municipalities to enact ordinances which made "being in a state of intoxication" in and of itself an offense, such ordinance was void. Similarly in In re *Howard*[9] and in In re *Dunlap*[10] loitering, in itself, was found not to constitute disorderly conduct within the purview of Sec. 3664, and the local ordinances predicated thereon could not be enforced. In *Cady v. Village of Barnesville,*[11] an ordinance prohibiting any male person to associate with a known lewd female was declared invalid as authority to adopt and enforce such an ordinance was not conferred, expressly or impliedly, by statute.

Before passing out of the pre-1912 era it is interesting to note the decisions on the question of the applicability of local ordinances prohibiting certain acts which the General Assembly had defined as crimes against the State and for which the General Assembly had provided appropriate punishment. In a few of the earlier cases[12] it had been decided that the state and a municipality could each provide for the punishment of the same act and the jurisdiction to punish thereto was concurrent. In a later case, *Wellsville v. O'Conner,*[13] the court denied the validity of an ordinance defining "assault and battery" as an offense against the municipality declaring ". . . that the prohibition of crimes and offenses lies within the domain of police power; that the exercise of police power is an exclusive prerogative of the state; that the municipal corporation has no inherent power to enact by-laws or ordinances for the punishment of offenses; that it has only such powers as are clearly and expressly conferred upon it by the legislature, or must necessarily be implied in order

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9 15 Ohio C. C. (N. S.) 171, 23 Ohio C. Dec. 634 (1912).

10 13 Ohio N. P. (N. S.) 325, 57 Week. L. Bull. (Ohio) 484 (1912).

11 *Supra,* note 1.

12 Koch v. State, 53 Ohio St. 433, 41 N. E. 689 (1895); Emery v. Elyria, 8 Ohio N. P. 208, 11 Ohio Dec. 316 (1899); Wightman v. State, 10 Ohio 452 (1841).

13 1 Ohio C. C. (N. S.) 253, 14 Ohio C. Dec. 689 (1902).

to carry into effect those expressly granted; that where the legislature, by general law, has exercised its jurisdiction as to punishment of an offense, there is a presumption of an intention to make its jurisdiction over such subject exclusive; and that in all cases where the grant is uncertain or doubtful the power must be denied." [14]

Because the legal incidents within a community increase as the members of that community increase in number, and because coextensive therewith, the ability of the legal processes to keep pace with the legal incidents decreases, it is imperative, in the interest of maintaining the proper order of things that the responsibility of applying the legal processes be invested in those who would be most affected. In order to bring the need for the laws and the making of the laws into practicable proximity, there was born of the Ohio constitutional convention of 1912, and embodied into the Ohio constitution, the home-rule amendment, Art. XVIII, Sec. 3:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

By virtue of Art. XVIII, Sec. 3, each municipality received, within specified limits, supreme authority to regulate its own affairs to the extent necessary to prevent offenses and to preserve the health, morals and safety of the public. Quite contrary to the situation which existed prior to the adoption of Sec. 3, the General Assembly was precluded from denying, delimiting or delineating the municipalities' police powers.[15]

A rundown of the decisions in the years immediately following the adoption of Sec. 3 shows that the statutes which theretofore had been the basis of upholding ordinances whose purpose

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[14] In Koch v. State and Wightman v. State, *supra* note 12, the prosecution was brought by the State of Ohio on an offense previously punished by municipal ordinances, whereas in Wellsville v. O'Conner the action was by the municipality under its ordinance.

[15] Cincinnati v. Gamble, 138 Ohio St. 220, 20 Ohio Op. 273, 34 N. E. (2d) 226 (1941); Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N. E. 158, 64 Am. L. Rec. 981 (1929); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N. E. 829 (1918); Fremont v. Keating, 96 Ohio St. 468 (1917). The Keating case recognized the application of the home-rule amendment to the extent that it declared unconstitutional General Code Sec. 6307 which provided, among other things, that the local authorities could not regulate the speed of motor vehicles. The court reasoned that a state statute could not deny the local auhorities, in explicit terms, the exercise of those rights given by the constitution.

it was to maintain the peace and good order were, in some measure, still relied upon by the courts. In In re *Baldridge*[16] the validity of an anti-loitering ordinance was upheld on the basis of General Code Sec. 3664 and in the *Matter of Sherlock*[17] the validity of an ordinance, making it unlawful to carry evidence of wagering on horse races, was upheld on the basis of General Code Sec. 3658. However in *Welch v. Cleveland*[18] the court declared as valid an "anti-loitering and suspicious persons" ordinance on the proposition that the home-rule amendment gave to municipal corporations no less than what they had under General Code Sec. 3664. Similarly in *Greenburg v. Cleveland*[19] the court declared as valid an anti-pocketpicking ordinance, citing General Code Sec. 3658 and Sec. 3664 as sources of authority, but stating that even in the absence of such statutes, by virtue of Art. XVIII, Sec. 3 of the Ohio Constitution, the power to enact such an ordinance inhered in municipal corporations.

The *Greenburg* case must stand out—at least in the phase of peace-and-order—as the first case in which the courts recognized, in express terms, the superiority of the home-rule amendment to General Code Sec. 3658 and Sec. 3664. The succeeding cases on this subject have revealed a general tendency on the part of the courts to interpret the home-rule amendment in the broadest perspective. The validity of an ordinance enacted under the authority of the home-rule amendment has been sustained when each of two conditions prevails: (1) The ordinance has a reasonable purpose and the means of effectuating that purpose is not arbitrary; and (2) There is no conflict with general laws. It is well-settled that this constitutionally-endowed power is not to be used arbitrarily; and further, that such exercise of that power must, in some substantial degree, tend to prevent offenses or to preserve the health, morals or safety of the public.[20] That to

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16 6 Ohio App. 76, 28 Ohio Ct. App. 353, 30 Ohio C. Dec. 156 (1915).

17 16 Ohio N. P. (N. S.) 302 (1916).

18 97 Ohio St. 311, 313, 120 N. E. 206, 208 (1917). J. Wannamaker declared: "If cities had the power under said Section 3664 (General Code) to declare against loafing and loitering and any suspicious person who cannot give a reasonable account of himself as the statute evidently declares, surely that municipal power was not in any wise lessened by the grant in said Section 3 (Ohio Const. Art. XVIII). If a city has not such power, it lacks the very first element of the preservation of public order, peace and government. . . ."

19 *Supra*, note 15.

20 Cincinnati v. Correll, 141 Ohio St. 535, 26 Ohio Op. 116, 49 N. E. (2d) 412 (1943).

maintain the peace and good order falls within the indicated classification is readily apparent, and the courts have gone to great lengths to give effect to municipal ordinances whose purposes are to maintain peace and good order.

In the *Greenburg* case, pocketpicking by the defendant was held to be in violation of a Cleveland ordinance defining as a misdemeanor any attempt, other than by force or violence, to steal from the person of another, anything of value. In response to defendant's contention that the prohibition of crimes and offenses was a function of the state, J. Donahue stated, "While this proposition is fundamentally true, yet the exercise of this power is of such vital importance to large centers of population . . . that it is exercised by the state, at least to a limited degree, through the agencies of municipalities. . . ." [21]

In *Kearney v. Cincinnati*[22] and in the very recent case of *Dayton v. Miller*,[23] ordinances defining the misdemeanor of assault and battery were upheld notwithstanding that such offenses were punishable by statute. In *Meyers v. Cincinnati*,[24] the court upheld an ordinance making it unlawful to exhibit and maintain slot machines. In *Cleveland Heights v. Christie*,[25] the court upheld a charge of violating an ordinance making it unlawful for one to conduct himself in a noisy, rude, boisterous, or insulting manner toward any other person, where defendant called a police officer "a bastard." In *McCollum v. Cincinnati*,[26] an ordinance prohibiting the discharge of firearms was upheld where defendant shot and killed a dog, which was engaged in a fight with another dog, although by statute it appeared that the dog could be killed lawfully.[27] In *Youngstown v. Aiello*,[28] the court upheld a "suspicious persons" ordinance, reiterating the

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[21] 98 Ohio St. 282, 283.

[22] 22 Ohio N. P. (N. S.) 255, 29 Ohio Dec. 594 (1919).

[23] 154 Ohio St. 500, 43 Ohio Op. 433, 96 N. E. (2d) 780 (1951).

[24] 128 Ohio St. 235, 190 N. E. 569 (1934).

[25] 128 Ohio St. 297, 190 N. E. 770 (1934). Also see Cincinnati v. Schill, 125 Ohio St. 57 (1932).

[26] 51 Ohio App. 67, 4 Ohio Op. 49, 199 N. E. 603 (1935).

[27] Ohio General Code Sec. 5838 provided: "A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal or person, can be killed at any time or place. . . ."

[28] 156 Ohio St. 32, 45 Ohio Op. 45, 100 N. E. (2d) 62 (1951).

dicta presented in two earlier cases;[29] although in *Columbus v. Aldrich,*[30] such an ordinance was invalid against one, of known notoriety, who was charged with "loitering about a barroom" where such loitering actually consisted of the defendant's conferring with his attorney for a period of four minutes. In *Solomon v. Cleveland,*[31] an ordinance making it an offense to sell newspapers or periodicals containing racing news and tips on horse racing was declared to be a valid exercise of power within the home-rule amendment. In the area of liquor regulation, both during and after federal prohibition, regulations by local ordinances, where there were no conflicts with state or federal provisions, were held to be within the valid exercise of the municipalities' powers.[32] In *Shaker Heights v. Klein,*[33] it was ruled that an ordinance requiring the daily registration of pickets was an unreasonable restriction on the rights and freedoms granted by the U. S. and Ohio Constitutions.

OHIO CONST. Art. XVIII, Sec. 3 endows the municipalities with those powers of local self-government ". . . as are not in conflict with general laws." The courts have unanimously interpreted the general laws to be those laws which have been enacted by the General Assembly. A question of conflict arises (1) where the state and the municipality each have prohibited the same act and where each seeks to enforce, independent of the other; (2) where the municipality seeks to prohibit that which the state permits, or seeks to permit that which the state prohibits; and (3) where the municipality provides a penalty in excess of that authorized by the state.

It is well-settled that the municipality may, by ordinance, regulate the same acts as the state. The Attorney-General[34]

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29 Morgan v. Nolte, *supra,* note 2 and Welch v. Cleveland, *supra,* note 18: "The offense of being a suspicious person does not consist of particular acts, but of the mode of life, the habits and practices of the accused in respect to the character or traits which it is the object of the ordinance creating the offense to suppress."

30 69 Ohio App. 396, 24 Ohio Op. 142, 42 N. E. (2d) 915 (1942).

31 26 Ohio App. 19, 159 N. E. 121 (1927).

32 Kaufman v. Paulding, 92 Ohio App. 169, 49 Ohio Op. 288 (1951); Akron v. Scalera, 135 Ohio St. 65, 13 Ohio Op. 376, 19 N. E. (2d) 279 (1939); Coshocton v. Suba, 55 Ohio App. 40, 8 Ohio Op. 345, 8 N. E. (2d) 572 (1936); Lorain v. Petralia, 8 Ohio L. Abs. 159 (1929); Struthers v. Sokol, *infra,* note 40.

33 25 Ohio Op. 415, 9 Ohio Supp. 234 (1942).

34 *Ops. Att'y Gen.* (Ohio), Vol. II, P. 1539 (1919).

makes the following comment: "The rule in Ohio seems to be that municipalities, within the limits of the power granted to them, may pass ordinances regulating the same acts as state statutes have regulated so long as the said ordinance prescribes a punishment which limits the offense to a misdemeanor. If a city ordinance should prescribe such a punishment as would result in placing the accused in jeopardy when being prosecuted under said ordinance, this would defeat operation of the state statute providing an offense for the same act and render said ordinance invalid."

Where there is express conflict, that is, the municipality permits that which the state prohibits, or prohibits that which the state permits, there is without question "a conflict with general laws" and the municipal ordinance must be of no effect.[35] So that in *Kaufman v. Paulding*,[36] that portion of a local ordinance which prohibited the sale of beer on Sunday was void, since by statute[37] the State had permitted such sale; but that portion of the local ordinance which prohibited the sale of intoxicating liquor on Sunday was valid as it did not conflict with general laws. In *Scioto Valley Dairy v. Dayton*,[38] a municipal ordinance prohibiting the sale of confections and refreshments in parks and certain other public places was found to be void as it conflicted with General Code Sec. 3670 and Sec. 3672,[39] and further that the police power granted to municipalities included the power to regulate but not the power to prohibit.

Where the conflict is one of penalties and not of substance, the conflict is not resolved so easily. It is noted that Art. XVIII, Sec. 3 provides that a municipality may adopt and enforce such *police regulations* as are not in conflict with general laws. Does a penalty constitute a police regulation, or is it merely a remedy, and hence independent of the regulation? In *Struthers v. Sokol*,[40] this question was analyzed with respect to a local liquor prohibition ordinance which provided a penalty in excess of that

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35 See Dayton v. Miller, *supra*, note 23; Lorain v. Petralia, *supra*, note 32; Struthers v. Sokol, *infra*, note 40; Greenburg v. Cleveland, *supra*, note 15; Kearney v. Cincinnati, *supra*, note 22.

36 92 Ohio App. 169, 49 Ohio Op. 288 (1951).

37 General Code Sec. 6064-22 (Revised Code Sec. 4301.22).

38 88 Ohio App. 52 (1951).

39 Revised Code Sec. 715.61 and Sec. 715.63.

40 108 Ohio St. 263, 140 N. E. 519 (1923).

provided by a state statute on the same subject. In ruling that differences in penalties between local ordinances and state statutes upon the same offenses do not constitute conflicts in general laws within the meaning of Art. XVIII, Sec. 3, C. J. Marshall stated:[41] "No real conflict can exist unless the ordinance declares something to be right which the state declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other."

With a single exception,[42] the Ohio decisions have followed the doctrine expounded in the *Sokol* case,[43] namely that an ordinance is not invalid because it provides for a penalty in excess of that prescribed by statute for a similar offense or of that prescribed by General Code Sec. 3628 which defines and describes the limits to which a municipality may punish for the violation of an ordinance.

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[41] Id. at 268.

[42] In *In re* Brown, 29 Ohio L. Rep. 220 (1929), a Cleveland ordinance which was identical to the Ohio-enacted Crabbe Act, prohibiting the sale and use of intoxicating liquors, was declared void because the penalty provided thereunder exceeded the maximum penalty established by General Code Sec. 3628.

[43] *In re* Calhoun, 87 Ohio App. 193, 42 Ohio Op. 401, 94 N. E. (2d) 388 (1949); Kistler v. Warren, 58 Ohio App. 531, 16 N. E. (2d) 948 (1937); Leipsic v. Folk, 38 Ohio App. 177, 176 N. E. 95, 34 Ohio L. Rep. 312 (1931).