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PRE-EMPTION BY STATE OVER PENAL ORDINANCES

Municipalities have, as a general rule, been granted the exercise of certain regulatory powers in areas of local concern, these powers being limited by the general laws of the state.[1] Clearly, when obvious conflict exists between ordinance and general law, the ordinance must yield.[2] Unfortunately in many cases the determination of whether or not conflict exists is extremely difficult.

A recent California case, *In Re Lane,*[3] brings squarely to issue the conflict of a municipal penal ordinance enacted in an area already entered into by the general law. The defendant was tried and convicted of the crime of "resorting" under a Los Angeles ordinance.[4] The general law of the state covered prostitution and other forms of illegal carnal intercourse, but contained no provision pertaining to simple fornication. On appeal to the Supreme Court of California, the ordinance was held to be an invalid exercise of municipal power in an area intended to be pre-empted by the state. In so holding the court stated, "It is therefore clear that the Legislature has determined by *implication* that such conduct shall not be criminal in this state."[5] (emphasis added)

In re Lane would seem to indicate that the age of free wheeling homerule is running aground. It is submitted that by so holding the Supreme Court of California has effectively curtailed the municipalities of its state, at least in the area of penal ordinances.

BASIS OF THE MUNICIPALITIES' JURISDICTION

The basis of the municipalities' jurisdiction over criminal offenses depends upon municipal charters, statutes, and judi-

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1. See City of Mobile v. Madison, 40 Ala. 713, 122 So. 2d 540, 541 (1960) "The City of Mobile being a creature of the state cannot contravene the laws and policy of its creator, the State of Alabama;" 72 Harv. L. Rev. 737, 741 (1959) Using the liberal 'Home Rule' as an indication of what is local; "(A) home-rule grant is generally held to permit a municipality to act in the fields of taxation, public utilities, education, health, liquor regulation, traffic control; and rent control." The 'home-rule,' of course represents the furthest extension of municipal power.
2. City of Alexandria v. LaCombe, 220 La. 618, 57 So. 2d 206 (1952) State had defined gambling and the municipality by ordinance made a further definition. The ordinance was held void because the state intended to occupy the field.
3. 18 Cal. Rptr. 33, 367 P.2d 673 (1962).
4. § 41.07 of the Los Angeles Municipal Code provided: "No person shall resort to any, . . . residence, apartment house, . . . for the purpose of having sexual intercourse with a person to whom he or she is not married . . . ."
5. **In re** Lane, **supra** note 3, at 34.

cial construction of the enabling acts.[6] Municipalities have derived their jurisdiction in two ways, by home rule or by legislative grant.

A number of states have given cities jurisdiction over acts which concern purely municipal affairs.[7] This granting of control over the health, welfare, and morals of the community is known as home rule.[8] Under home rule municipalities may regulate offenses so long as the ordinance is not unreasonable,[9] unjust or illegally discriminatory between persons in similar circumstances.[10] This power has even been extended into the area of penal ordinances so long as the ordinance does not conflict with the general laws of the state,[11] or with the federal or state constitutions.[12]

Municipalities, being creatures of the state, may also derive jurisdiction over certain criminal acts by specific legislative grant, even though the acts punished by the ordinance are crimes against the state.[13] Where the power to enact penal ordinances has been granted, municipalities are still restricted to such ordinances not in conflict with the criminal laws of the state.[14] In the absence of home rule or legislative grant, it is contended that municipalities have not the power to confer on themselves jurisdiction to punish criminal offenses of statewide concern.

PENAL AND NON-PENAL ORDINANCES

At common law prosecutions for the violation of municipal ordinances were treated as civil actions; imprisonment was not looked upon as punishment, but as a means of enforcing

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6. See 6 McQuillin, MUNICIPAL CORPORATIONS § 23.05 (3d ed. 1949).
7. See, **e.g.,** Woolverton v. City and County of Denver, 361 P.2d 982 (Colo. 1961); City of Portland v. Welch, 154 Ore. 286, 59 P.2d 228 (1936); see 1 McQuillin, MUNICIPAL CORPORATIONS § 3.21 (3d ed. 1949).
8. See **e.g.,** California for an example of a Constitution granting home rule: CAL. CONST. Art XI, § 11 (1954); Under home rule the following are typical example of areas in which municipal ordinances will control: Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956) (traffic within a city); Heubeck v. City of Baltimore, 205 Md. 203, 107 A.2d 99 (1954) (rent control); Anderson v. City of Two Harbors, 244 Minn. 466, 70 N.W.2d 414 (1955) (health: home rule council has the discretion to appropriate money to a hospital).
9. Standard Oil Co. of New Jersey v. City of Charlottesville, 42 F.2d 88 (1930).
10. Yickw v. Hopkins, 118 U.S. 356 (1885).
11. Square Deal Coal Haulers, and Yardmen's Club, Inc., 176 N.E.2d 348 (Ohio 1961).
12. Adams v. City of New Kensington, 357 Pa. 557, 55 A.2d 392 (1947).
13. See People v. Hanrahan, 75 Mich. 611, 42 N.W. 1124, 1126 (1889) (resorting to house of illfame); Richards v. Town of Magnolia, 100 Miss. 249, 56 So. 386 (1911).
14. People v. Thatcher, 190 Misc. 249, 73 N.Y.S.2d 655 (1947).

payment.[15] Based on this reasoning the majority of municipalities hold that ordinance violations are civil wrongs against the community even though payment of the penalty is enforced by detention.[16] However, the power to fine and imprison municipal offenders may be abused by cities. One jurisdiction has allowed a municipality to punish an offender for assault and battery more severely than the state would have for the same offense.[17] There are, however, limits to the municipalities' powers to punish ordinance offenders.

Generally felonies[18] and gross or indictable misdemeanors[19] cannot be dealt with by ordinances since they are regarded by the legislatures as being beyond the scope of municipal concern. It is also true that not every penalty imposed by a municipal ordinance is always civil in nature. Many actions are quasi-criminal in character.[20] When the penalties in such actions take on a strictly criminal character such as imprisonment or excessive fines the ordinance is no longer civil but criminal and should be struck down. Since violation of a municipal ordinance results in a civil action punishment must be limited to forfeiture, or imprisonment only to the extent of enforcing such forfeiture.[21]

Therefore, it is submitted that municipalities be only allowed to impose fines for the violation of civil offenses against the community. The penalty imposed by a municipal ordinance is no longer in the nature of a civil fine when the city prohibits the same conduct prohibited by state criminal laws, commits an offender to prison, or imposes excessive fines. When penal penalties are imposed by a municipality, such ordinances should be declared invalid because "the sovereign alone can create a crime."[22]

PENAL PARALLEL ORDINANCES

In the area of municipal penal ordinances, cities have enacted ordinances exactly paralleling state statutes. The validity

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15. Village of Litchville v. Hanson, 79 N.D. 672, 124 N.W. 1119 (1910).
16. Fortune v. Incorporated Town of Wilburton, 142 Fed. 114 (1905); City of Chicago v. Williams, 254 Ill. 360, 98 N.E. 666 (1912); see 9 McQUILLEN, MUNICIPAL CORPORATIONS § 27.06 (3d ed. 1950).
17. **In re** Calloun, 87 Ohio 193, 94 N.E.2d 388 (1949).
18. Thompson v. City of Sylacauga, 30 Ala. 72, 200 So. 795 (1941); Dismukes v. Town of Louisville, 101 Miss. 132, 57 So. 547 (1912).
19. State v. Frederic, 28 Idaho 709, 155 Pac. 977 (1916).
20. City of Moultrie v. Csiki, 71 Ga. 13, 29 S.E.2d 785 (1944); City of Milwaukee v. Ruplinger, 155 Wis. 391, 145 N.W. 42 (1914).
21. State v. Schmiege, 28 N.W.2d 345 (Wis. 1947).
22. **Id.** at 348.

of such parallel ordinances depends on the jurisdiction's interpretation of whether a municipal offender may be tried both under the statute and the ordinance.

The majority rule appears to be that there may be prosecution and punishment under the ordinance as well as prosecution and punishment under statute for the same act.[23] Parallel penal ordinances seem to have been upheld in the Federal Courts' determination of *Guidoni v. Wheeler*:[24]

> "It is well settled that an act may be made a penal offense under the statute of a state, and also made punishable under an ordinance of a municipal corporation."

The basis of this reasoning is that offenses against a municipality and the state are distinguishable and the prosecution of each proceeds upon a different hypothesis.[25] Therefore, the violation of a municipal ordinance is not a crime or criminal offense against the state but only against the municipal corporation enacting the ordinance or regulation.[26] Prosecution may be carried on by either the municipality or the state without constituting double jeopardy.[27] In these cases the dual sovereignties of the state and federal governments is held to be analogous.[28] Whether or not such dual sovereignty is analogous to the relationship between municipalities and states is an open question.

The minority view is that parallel ordinances punishing acts already penal and punishable under the general laws of the state are invalid.[29] The reason that parallel ordinances are struck down is that the state has entered the field by enacting complete and comprehensive regulations so there is no room for ordinances.[30] Other courts have held that a municipal ordinance punishing an act made penal by a state law covering the same subject material must yield to the state law because of duplication.[31]

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23. See State v. Poynter, 70 Idaho 438, 220 P.2d 386 (1950); Town of Bloomfield v. Trimble, 54 Iowa 399, 6 N.W. 586 (1880); Harlow v. Clow, 110 Or. 257, 223 Pac. 541 (1924); 6 McQUILLIN, MUNICIPAL CORPORATIONS §§ 23.10, .12 (3d ed. 1949).
24. 230 Fed. 93, 96 (9th Cir. 1916).
25. Perry v. City of Birmingham, 38 Ala. App. 460, 88 So. 2d 577 (1956).
26. Ibid.
27. McLaughlinn v. Stephens, 16 Fed. Cas. 234 (No. 8,874) (C.C.D.C. 1818); State of Minnesota v. Lee, 29 Minn. 445, 13 N.W. 913 (1882).
28. 6 McQUILLIN, MUNICIPAL CORPORATIONS, § 23.10 (3d ed. 1949); cf. 109 U. Pa. L. Rev. 290 (1960).
29. Landford v. Alfriend, 147 Ga. 811, 95 S.E. 688 (1918); State v. McCoy, 116 N.C. 1059, 21 S.E. 690 (1895); State v. Keith, 94 N.C. 933 (1886); see 6 McQUILLIN, MUNICIPAL CORPORATIONS § 23.11 (3d ed. 1949).
30. Commonwealth v. Wolbarst, 319 Mass. 291, 65 N.E.2d 552 (1946).
31. People v. Villarino, 134 Cal. App. 2d 893, 286 P.2d 86 (1955); Jenkins v. Jones, 209 Ga. 758, 75 SE.2d 815 (1953).

A third view holds that punishment by a municipality is a bar to being tried again by the state.[32] These courts permit a parallel ordinance to stand but allow the defense of double jeopardy.

It is submitted that where a subject is covered by statute, a municipal corporation cannot deal with such matters by parallel ordinances unless expressly authorized by the state. If not authorized, municipal parallel ordinances should be struck down because the state has entered the field. The writer feels that there cannot be double punishment on the theory that one criminal offense is an offense against both the state and the municipality. There is no rationalizing a decision like *Slayton v. State,*[33] in which the defendant was convicted under a city ordinance, and subsequently convicted by the state for the same offense. The court held that there may be prosecution and punishment under the ordinance as well as prosecution under statute for the same act.

Error would seem to be committed by the adoption of the federal-state analogy as to the validity of parallel ordinances. In the federal-state situation there are two separate sovereigns, but a municipality is not a sovereign apart from the state. A municipality is a creature of the state.

ORDINANCES CREATING CONFLICTS

Generally under home rule and legislative grant a municipality cannot enact any ordinances which are in conflict with the general laws of the state.[34] Traditionally, a municipal ordinance is in conflict with the state statutes when the ordinance prohibits what the other permits or vice versa.[35] However, this test is not infallible. What is the result when the municipality provides for a greater penalty than the state? What is to prevent a city from punishing what the state has not prohibited?

The most obvious conflict between state statutes and municipal ordinances is the ordinance providing a different penalty.[36]

There appears to be a split of authority as to whether or

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32. State v. Flint, 63 Conn. 248, 28 Atl. 28 (1893); **Ex parte** Freeland, 38 Tex. Ct. App. R. 321, 42 S.W. 295 (1897).
33. 31 Ala. App. 622, 21 So. 2d 122 (1945).
34. **Supra** note 10, 12, and 13.
35. Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).
36. See State v. Weeks, 216 Minn. 279, 12 N.W.2d 493 (1943).

not an ordinance providing for a lesser penalty conflicts with the state statute. In *City of Wink v. Griffith Amusement Co.*[37] an ordinance provided for a lesser penalty than the statute. The court held:

> "The rule is definitely established with us that the penal provisions of the ordinance cannot be different for those of the Penal Code for the same offense . . . ."

On the other hand, ordinances providing for a lesser penalty than the state, have been upheld.[38]

Just as some jurisdictions have upheld ordinances providing a lesser penalty than the statute, other courts have upheld ordinances providing a greater penalty than the statute.[39] In the case of *In re Calhoun,*[40] an ordinance prescribing a greater penalty than the state for assault and battery was upheld. The court held that the test for conflict was whether the ordinance permits that which the statute prohibits or vice versa, rather than the penalties prescribed were different.

To circumvent the obvious conflict between terminology and penalties used in ordinances and statutes, a group of cases have held:

> "(A) municipality may punish for an act which is forbidden by the penal laws of the state, if into the act penalized by the ordinance there enters some essential ingredient not necessary to constitute the statutory offense . . . ."[41]

Moving out of the area of discrepancy between wording and penalties, there is an area where the ordinance and the statute punish different offenses. Conflict becomes evident when a municipality permits what a state has prohibited. Such ordinances are usually declared void.[42] The conflict does not clearly present itself when the municipality punishes what the state has not prohibited. Here too there is a split of authority. Some courts have held that municipalities may punish in areas where the state has not acted as long as the state has not declared the act legal.[43] The city under this theory may

37. 129 Tex. 40, 100 S.W.2d 695 (1936); Landis v. Borough of Vineland, 54, N.J. 104, 23 Atl. 357 (1892).
38. City of Moberly v. Deskin, 169 Mo. App. 672, 155 S.W. 842 (1913).
39. Shaw v. City of Norfolk, 167 Va. 346, 189 S.E. 335 (1937) (Dictum).
40. 87 Ohio App. 193, 94 N.E.2d 388 (1949).
41. Howell v. State, 13 Ga. App. 74, 78 S.E. 859 (1913); Wright v. City of Atlanta, 61 Ga. App. 650, 7 S.E.2d 215 (1940).
42. State v. City of Youngstown, 68 Ohio App. 254, 40 N.E.2d 477 (1941); **cf.** City of Fargo v. Sathre, 76 N.D. 341, 36 N.W.2d 39 (1949).
43. Village of Struthers v. Sokol, **supra** note 35.

expand the state law as in the case of *Ex Parte Hong Shin.*[44] Here the state regulated the sale of opium by requiring certain labeling. A San Francisco ordinance required sale of opium on prescription of a medical graduate only. The court held the ordinance valid:

> "While the regulation is different from that of the state, there is no conflict and therefore it is not in violation of the provision of the constitution . . . ."[45]

Some examples of areas in which municipal ordinances have punished what the state has not prohibited are lottery,[46] gambling,[47] slot and pinball machines.[48]

The opposite view is that a municipality cannot pass a criminal ordinance more comprehensive than the state statute on the same subject.[49]

It is felt that there is little need for a municipality to invade the penal areas controlled by the state. There would seem to be no reason why a city should supplement a state statute. A municipality should not be allowed to convict under an ordinance prescribing a greater penalty than that which the state provides. A city is not a separate sovereign apart from the state with the authority to punish offenses of state wide concern. This function is left to the state legislature. It is submitted that municipal ordinances are in conflict with the general laws of the state where they impose additional requirements, different penalties, or prohibit what the state permits.

PRE-EMPTION AND SILENCE

Often in the discussion and supporting authority of the cases in this area, there is to be found little or no distinction between the civil and the criminal.[50] Due to the fact that in statutory jurisdictions the common law has been superseded, and crimes against the state are only those offenses as are

44. 98 Cal. 681, 33 Pac. 799 (1893).
45. **Id.**
46. Reid v. Perkerson, 207 Ga. 27, 60 S.E.2d 151 (1950); Batley v. Ritchie, 73 Utah 320, 273 Pac. 969 (1928). **Contra,** City of Columbus v. Barr, 160 Ohio St. 209, 115 N.E.2d 391 (1953); Allen v. City of Norfolk, 195 Va. 844, 80. S.E.2d 605 (1954).
47. Remmer v. Municipal Court of City and County of San Francisco, 90 Cal. App. 2d 854, 204 P.2d 92 (1949).
48. Sternall v. Strand, 76 Cal. App. 2d 432, 172 P.2d 921 (1946); Clemons v. Wilson, 151 Kan. 250, 98 P.2d 423 (1940); **Contra,** Curtus v. Hutchingson, 14 La. App. 588, 170 So. 133 (1936).
49. City of Amory v. Yielding, 203 Miss. 265, 34 So. 2d 726, 727, 728 (1948) (Liquor); City of Cape Girardeau v. Pankey, 224 S.W.2d 588, 589 (Mo. 1949); **Ex parte** Parks, 67 N.E.2d 459 (Ohio 1946); City of Huntington v. Salyer, 33 W. Va. 397, 63 S.E.2d 575 (1951).

enumerated in the statutes of that state, this failure to differentiate between the civil and the criminal would seem to be a shortcoming, if not outright error.

With this in mind there is but one question for the purpose of this discussion. That being, does the state, either by enacting generally or by remaining silent, pre-empt the field and estop municipalities from enacting penal ordinances in the criminal law?

The better opinion would seem to be in accord with the decision reached by the California Supreme Court in *In re Lane*,[51] wherein the court held that the state by enacting generally in an area had pre-empted the field. In support of that opinion, it has been said that "a state might, by regulating some but not all aspects of an area of conduct, be held to have pre-empted the field so as to exclude further participation by the municipality."[52] In further support of this position the following statement was made by the Louisiana Court in *City of Alexandria v. La Combe*:[53]

> "When the Legislature in its latest enactment removed from a municipality the power which it had previously given to it to define gambling and itself passed a law specifically defining it, it intended to occupy the whole field of legislation on the subject and merely left the municipality with the concurrent power to suppress it in the manner as defined by that law."

The further extension to pre-emption by silence is to be found in the comments of the court in *City of Shreveport v. Maloney*,[54] where the court struck down an ordinance making a certain type of gambling illegal by saying, "The law making power has remained strictly silent upon the subject . . . ." Thus, it is submitted that the municipality may not, in the absence of expressly granted authority, enact an ordinance making a criminal offense that which is not made an offense against the state.

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50. See **In re** Lane, **supra** note 3 (dissenting opinion). It would appear that the dissenting judge failed to recognize the distinction.
51. **Supra** note 3.
52. Scott, **Municipal Penal Ordinances in Colorado,** 30 Rocky Mt. L. Rev. 267, 274 (1958).
53. City of Alexandria v. La Combe, 220 La. 618, 57 So. 2d 206, 210 (1952); Gazotti v. City and County of Denver, 352 P.2d 963 (Colo. 1960); Commonwealth v. Wolbarst, 319 Mass. 291, 65 N.E.2d 552 (1946); Walsh v. City of Union, 13 Or. 589, 11 Pac. 312 (1886).
54. 7 La. 193, 31 So. 702, 703 (1902); City of Baton Rouge v. Weis, 141 La. 99, 74 So. 709 (1917).

CONCLUSION

"The trial and punishment of offenses defined by the laws of the state is not a municipal affair,"[55] and "a municipal corporation cannot punish for an offense against the criminal laws of the state."[56] In all doubtful cases it would be better for municipal authorities to arrest and commit offenders for trial before a proper state tribunal.[57]

It is acknowledged that there is a vast split of authority in this area, and that the fore mentioned authority does not want for opposition. However, it is felt that it is the better opinion.

From a comprehensive study of the field it would seem that the primary cause of conflict is the desire of the municipalities to exercise more and more power by weight of their own ordinances. The fact that municipalities are already bound to enforce the laws of the state would seem reason enough for denying them the power to try and convict in the face of state legislation or pre-emption.

Pre-emption and pre-emption by silence are clearly valid labels for legislative intent. This would seem to be particularly true in the area of criminal law,[58] and would seem to be the more plausible approach to legislative intent in this area.

In short, much confusion and possible injustice would cease to exist in the criminal law if both pre-emption by general enactment or by silence were adopted; thus leaving the task of enumerating criminal acts in its rightful place—in the legislative bodies of the several states.

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55. Robert v. Police Court of City and County of San Francisco, 148 Cal. 131, 82 Pac. 838, 840 (1905) (concurring opinion).
56. Dannie v. City of Atlanta, 10 Ga. 471, 73 S.E. 684, 685 (1912); 6 McQUILLIN, MUNICIPAL CORPORATIONS § 23.05 (3d ed. 1949).
57. Jenkins v. Mayor, 35 Ga. 146 (1886); see 6 McQUILLIN, MUNICIPAL CORPORATIONS § 23.05 (3d ed. 1949).
58. It has been found that a great deal more latitude has been granted to municipalities in areas of purely civil nature.