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Municipal Corporations -- Legislative Authority -- Limitation Thereon

James T. Pritchett Jr.

as a matter of law that the refusal was not an unfair practice,[25] the Board is entitled to the benefit of a presumption that its experienced judgment is correct.[26]

Whatever be the merits of the very close question of due process, the Supreme Court's opinion in the *Stowe* case is in line with its liberal policy in construing the National Labor Relations Act. The holding is restricted to circumstances where two conditions concurrently exist: (1) physical necessity for holding the meeting, if at all, in the employer's hall; (2) use of the hall, with the employer's assent, by the public for other purposes. Thus understood, the decision is of limited significance. It remains for the future to disclose where the court will draw the ultimate line in balancing the conflicting claims of employers to control property and of union representatives to use it for organizational purposes.

ELIZABETH OSBORNE ROLLINS.

Municipal Corporations—Legislative Authority—Limitation Thereon

The power of municipalities to legislate on specifically enumerated subjects is usually supplemented by a general delegation of authority to pass ordinances for the general welfare of the city. In North Carolina this general enabling act is N. C. GEN. STAT. §160-52 (1943), which provides that "The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, *not inconsistent with this chapter and the law of the land,* as they may deem necessary."

"[Police ordinances and regulations] must not be inconsistent with the general laws of the state, including the common law, equity and public policy."[1] This principle is frequently relied upon in litigation involving the validity of a local regulation, and many ordinances are attacked and overthrown as in conflict with the general law. Therefore, it is important to attorneys and to local legislative bodies to know what constitutes such an inconsistency as is contemplated by the statute. How

[25] Marsh v. Alabama, 326 U. S. 501, 509 (1946) ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."); National Labor Relations Board v. Cities Service Oil Co., 122 F. 2d 149 (C. C. A. 2nd 1941) ("It is not every interference with property rights that is within the Fifth Amendment. . . . Inconvenience, and even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."). This statement was cited and quoted in the *Republic* case, 324 U. S. 793, 803 (1945).

[26] *E.g.,* Peyton Packing Co., 49 N.L.R.B. 828 (1943), *enforcement granted,* 142 F. 2d 1009 (C. C. A. 5th 1944).

[1] 3 MCQUILLIN, MUNICIPAL CORPORATIONS §953 (2nd ed. 1939).

may municipal regulations best be drawn to avoid a conflict? When will the court look for some state law or policy on the same subject in order to invalidate an ordinance and when will it endeavor to find them consistent?

As will be seen, some ordinances are so worded that they cannot be reconciled with the state law. In that case the latter must, of course, prevail.[2] But when the state and local regulations merely overlap to a certain extent the question is as to their comparative effectiveness. This depends on whether the matter to be regulated is one of more particular interest to the people as members of municipalities or as citizens of the state. Does it involve acts more injurious and more apt to occur in congested areas than elsewhere? Do local differences make uniform legislation impractical, or would varying degrees of regulation from place to place impede enforcement? These factors are seldom discussed in the written opinions, the courts talking only in terms of conflict or of the authority of the municipality. However, the courts should and apparently do in most cases give some consideration to the purpose behind the general law. Then if it is thought that some degree of municipal control will aid in the accomplishment of that purpose, the ordinance will be upheld whenever possible; if not, it is apt to be found inconsistent, or the state said to have "preempted" the field. Only on this basis can the decisions be reconciled.

Direct Conflict Between Statute and Ordinance

It is settled everywhere that an ordinance cannot "prohibit an act which the state permits, or permit an act which the state prohibits."[3] In the words of the North Carolina Supreme Court, a town "cannot by ordinance make an act illegal which is legal under our statutes."[4] As for permitting what the state prohibits, our court has held that a city might not pay a debt incurred "in aid of the rebellion," the state having since declared all such debts to be unlawful and expressly forbidden that they be paid."[5] Also, where cities are allowed by statute to tax

[2] 2 *id.* §683 n. 68.

[3] *See* Schneiderman v. Sesanstein, 121 Ohio St. 80, 86, 167 N. E. 158, 160 (1929); Village of Struthers v. Sokol, 108 Ohio St. 263, 268, 140 N. E. 519, 521 (1923).

Prohibiting what state permits. Shelton v. City of Shelton, 111 Conn. 433, 150 Atl. 811 (1930); National Amusement Co. v. Johnson, 270 Mich. 613, 259 N. W. 342 (1935); Collins v. Hatch, 18 Ohio 523, 51 Am. Dec. 465 (1849); Craig v. Gallatin; 168 Tenn. 413, 79 S. W. 2d 553 (1935); Brewer v. State, 113 Tex. Crim. 522, 24 S. W. 2d 409 (1930).

Permitting what state prohibits. In re Ridenbaugh, 5 Idaho 371, 49 Pac. 12 (1897); Commonwealth v. Surridge, 265 Mass. 425, 164 N. E. 480 (1929); Armitage v. Camden, 5 N. J. Misc. Rep. 129, 135 Atl. 661 (1927); Zucarro v. State, 82 Tex. Cr. Rep. 1, 197 S. W. 982 (1917).

[4] State v. Eubanks, 154 N. C. 628, 632, 70 S. E. 466, 467 (1911).

[5] Weith v. City of Wilmington, 68 N. C. 24 (1873).

motion picture theatres on a population basis, a city may not levy a higher tax than is permitted for cities in its population bracket, according to the official census.[6] A more recent example is *Eldridge v. Mangum.*[7] There a statute required the vote of three-fourths of a municipal legislative body in order to amend a zoning plan over the protest of the property owners involved. An ordinance requiring only a majority vote of the city's three commissioners in such a situation was held void.

Identical Provisions in Statute and Ordinance

It is well settled in North Carolina that an ordinance which duplicates a statute cannot stand. Thus where an ordinance provides that its violators shall be arrested, the provision for arrest, at least, is void, since the power to arrest is given by statute which makes the violation of any town ordinance a misdemeanor.[8] However, if the remainder of the ordinance is not a duplication of or repugnant to the state law it may be upheld as a distinct and independent part of the ordinance.[9] And it has been held that one cannot be convicted for violating an ordinance which prohibits gambling in almost the identical words of a statute declaring the same acts to be a misdemeanor.[10] It was said that the ordinance conferred no jurisdiction of the offense since it was in "conflict" with the general law. It made no difference that the ordinance was passed first and had been valid until duplicated and superseded by the statute.[11]

Statute and Ordinance Punishing the Same Act

Even when the language of statute and ordinance are not identical, it is sometimes said that under a general grant of power a city may not penalize an act punishable by statute,[12] but there is considerable authority to the contrary.[13] In North Carolina "it is settled that a town ordinance that undertakes to make that which constitutes a criminal offense under the general law of the state an offense against the town, punishable by fine or otherwise, is inoperative and void."[14] California takes the same view,[15] subject to the careful distinction that "We only

[6] State v. Prevo, 178 N. C. 740, 101 S. E. 370 (1919).
[7] 216 N. C. 532, 5 S. E. 2d 721 (1939).
[8] State v. Earnhardt, 107 N. C. 789, 12 S. E. 426 (1890). The court points out that a fine imposed by a by-law is only a debt arising *ex contractu,* so to arrest one merely to collect the fine would be imprisonment for debt prohibited by N. C. Const. Art. I, §16.
[9] *Ibid.; cf.* Chapman v. Selover, 172 App. Div. 858, 159 N. Y. Supp. 632 (4th Dep't. 1916), *rev'd,* 225 N. Y. 417, 122 N. E. 206 (1919).
[10] State v. McCoy, 116 N. C. 1059, 21 S. E. 690 (1895); *Contra:* City of Seattle v. MacDonald, 47 Wash. 298, 91 Pac. 952 (1907).
[11] *See* 2 McQuillin, *op. cit. supra* §683 n. 75.
[12] 2 Dillon, Municipal Corporations §632; 3 McQuillin, *op. cit. supra* §924.
[13] *See* Note, 17 L. R. A. (N. S.) 63 *et eq.*
[14] State v. Keith, 94 N. C. 933, 934 (1886) (resisting an officer).
[15] *See Ex parte* Daniels, 183 Cal. 636, 645, 192 Pac. 442, 447 (1929).

hold that there is a conflict where the ordinance and the general law punish precisely the same acts. We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the legislature has seen fit to legislate upon the subject."[16] The Supreme Court of Washington, however, while recognizing an adverse weight of authority, has held that under a general grant of authority a city may enact ordinances for the punishment of offenses already made punishable by state laws.[17]

The reasons for not allowing an ordinance and a statute punishing the same offense to stand together are brought out in the opinion in *Town of Washington v. Hammond*.[18] The defendant had been convicted for violating an ordinance which provided for a fine of not more than twenty dollars, or imprisonment for not more than one month for injuring public property. Damaging public buildings was also made a misdemeanor by statute. In reversing the conviction the court said that since the superior courts have no original jurisdiction when punishments are limited as in the ordinance, to allow it to stand would be to strip those courts of their original jurisdiction of the offense.[19] As an alternative objection is was said that the offender could not be tried and punished under both laws. But in *State v. Taylor*[20] the defendant was tried by both municipal and state courts for the same act. He was indicted for assault and pleaded a former conviction under an ordinance against disturbing the peace by fighting. The court said "It is well settled that a town ordinance cannot make criminal or prescribe a punishment for acts which are indictable at common law or by statute,"[21] but held the ordinance valid and the former conviction no bar to prosecution by the state. The court found no double jeopardy in this situation on the theory that the two actions were for different offenses, different in that one might fight in such a way as to violate the ordinance without being guilty of an assault. This illustrates the length to which the court will go to uphold an ordinance which is thought to be well adapted to carry out the legislative policy of the state. This can be

[16] *In re* Sic, 73 Cal. 142, 149, 14 Pac. 405, 408 (1887).
[17] City of Seattle v. MacDonald, 47 Wash. 298, 91 Pac. 952 (1907).
[18] 76 N. C. 33 (1877).
[19] Texas allows municipal punishment of state offenses provided only that the punishment be identical with that prescribed by the statute. *See* Neuvar v. State, 72 Tex. Crim. App. 410, 163 S. W. 58, 60 (1914). Kentucky only requires that the minimum punishment be the same. Burden v. Hendrix, 205 Ky. 167, 265 S. W. 493 (1924). In neither state may one be punished under both statute and ordinance. 3 McQUILLIN, *op. cit. supra* §§929, 932.
[20] 133 N. C. 755, 46 S. E. 5 (1903); *cf.* State v. Stevens, 114 N. C. 873, 19 S. E. 861 (1894); State v. Tucker, 137 Wash. 162, 242 Pac. 363 (1926); Mahew v. Eugene, 56 Ore. 102, 104 Pac. 727 (1909).
[21] State v. Taylor, *supra* note 20 at 758, 46 S. E. at 6.

done only if the words of the ordinance do not render it necessarily co-extensive with the general law on the subject.

Indeed, though the indiscriminate use of the words "act" and "offense" in the opinions often tends to cloud the issue, the majority of jurisdictions will allow state and local prosecutions for the same act.[22] The double jeopardy argument is sometimes met by holding that recovery of a penalty by the city is a civil action for debt and not a criminal prosecution.[23] More frequently, however, it is on the ground that the prohibited act constitutes two distinct offenses against different governing bodies.[24]

ORDINANCES SUPPLEMENTING STATUTORY REGULATIONS

It is usually said that an ordinance may supplement a statute,[25] and a municipal government may make "new, further, and more definite regulations"[26] in addition to those provided for by the general law.[27] Mr. Justice Connor in the *Taylor* case quoted Chief Justice Bleckley, formerly of the Georgia Supreme Court, as follows: "Many transactions which are made penal by the general law of the state may at the same time afford material for a proper police ordinance. The state may deal only with the central element of the transaction, which is fringed all around with adjuncts that ought to be prohibited by ordinances as highly mischievous to the quiet of municipal society."[28] The reason for allowing additional local legislation in most fields is that many acts are more injurious and more apt to occur in congested areas than throughout the state as a whole, and so are more efficiently regulated by municipalities.[29] In order to meet the more acute needs of city life, ordinances have been upheld which prescribe higher standards than a statute requires,[30] or fix a more severe penalty,[31] or both.[32] In some jurisdictions a general

[22] 3 MCQUILLIN, *op. cit. supra* §934.

[23] Levy v. State, 6 Ind. 281 (1855); *cf.* State v. Earnhardt, 107 N. C. 789, 12 S. E. 426 (1890).

[24] See generally on this subject Kneier, *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy*, 16 CORN. L. Q. 201 (1931); 2 DILLON, *op. cit. supra* §633.

[25] 3 MCQUILLIN, *op. cit. supra* §924, n. 25.

[26] 2 DILLON, *op. cit. supra* §632.

[27] Standard Chemical Oil Co. v. Troy, 201 Ala. 89, 77 So. 383 (1917) (privilege tax); Dorsa v. Board of Supervisors of Santa Clara County, 23 Cal. App. 2d 217, 72 Pac. 2d 912 (1937) (hours for retailing meat); Lamar & Smith v. Stroud, 5 S. W. 2d 824 (Tex. Civ. App. 1928) (street crossings); Brittingham & Hixon Lumber Co. v. Sparta, 157 Wis. 345, 147 N. W. 635 (1914) (weighing coal).

[28] McRea v. The Mayor, 59 Ga. 168, 170, 27 Am. Rep. 390 (1877).

[29] 3 MCQUILLIN, *op. cit. supra* §924, n. 20; Town of Neola v. Reichart, 131 Iowa 492, 498, 109 N. W. 5, 7 (1906).

[30] *Ex parte* Yong Shin, 98 Cal. 681, 33 Pac. 799 (1893); Spitler v. Town of Munster, 214 Ind. 75, 14 N. E. 2d 579 (1935); Olson v. City of Platteville, 213 Wis. 344, 251 N. W. 245 (1933).

[31] *See* Polinsky v. People, 73 N. Y. 65, 71 (1878).

[32] Kansas City v. Henre, 96 Kan. 794, 153 Pac. 548 (1915).

grant of power is even held to be sufficient authority to permit cities to prohibit entirely within their borders acts and occupations which are regulated or licensed by the state.[33] North Carolina will not go this far.[34] However, North Carolina towns may prohibit lesser degrees of offenses punished by the state, such as acts of disorderly conduct which from the evidence do not amount to an indictable assault[35] or nuisance.[36] Also the city and state may act upon different persons in order to achieve the same end. Thus an ordinance forbidding an unmarried minor to enter a barroom has been held valid as properly supplementing a state law which prohibited the sale of intoxicants to such minor.[37]

Ordinances Purporting to Operate in a Field Preempted by the State

Not all ordinances which attempt to supplement the state law are upheld. If the court feels that a given field will be better regulated if left in the exclusive control of the state, an ordinance on the subject will be held void, though it may be less extensive than or go beyond existing statutory regulation. Before the days of prohibition the sale of liquor was considered to be such a field in North Carolina. In *State v. Langston*[38] the court considered an ordinance forbidding any person, "having license," to sell spiritous liquors on the Sabbath, and a statute making it a misdemeanor to sell intoxicating liquors on Sunday. The ordinance was held to be beyond the authority conferred by a general grant of power to make by-laws. "This statute, more comprehensive in its scope than the ordinance, embracing as well those who have not as those who have, license to sell, . . . must supersede the latter."[39] In *State v. Dannenberg*[40] it was the ordinance which had the broader scope. It prohibited the sale of malt liquors containing one-half of one per cent alcohol or more; the state prohibited the sale of all *intoxicating* liquors in the same county. The defendant was convicted under the ordinance for selling a malt drink containing over one-half of one per cent of alcohol, but admitted not to be intoxicating. This ordinance was held void and the judgment reversed. In answer to the contention

[33] Mitchell v. City of Birmingham, 222 Ala. 389, 133 So. 13 (1931) (fortune telling); Elsner Bros. v. Hawkins, 113 Va. 47, 73 S. E. 479 (1912) (sale of deadly weapons in pawn shops); Fox v. City of Racine, 225 Wis. 542, 275 N. W. 513 (1937) (walkathons).

[34] State v. Brittain, 89 N. C. 574 (1883); *accord,* National Amusement Co. v. Johnson, 270 Mich. 613, 259 N. W. 342 (1935).

[35] State v. Taylor, 133 N. C. 755, 46 S. E. 5 (1903).

[36] State v. Sherrard, 117 N. C. 717, 23 S. E. 157 (1895).

[37] State v. Austin, 114 N. C. 855, 19 S. E. 919 (1894).

[38] 88 N. C. 692 (1883).

[39] *Id.* at 693. It can hardly be imagined that by prohibiting sales by one "having license" it was intended to authorize sales without a license. Therefore, the ordinance was probably meant to be equally as comprehensive as the statute.

[40] 150 N. C. 799, 63 S. E. 946 (1909).

of the attorney-general that this drink fell within a "twilight zone" outside the statutory prohibition the court said "We are of opinion that the entire zone has been preempted by the statutes of the state and that there is no territory open to entry."[41] California has also applied this "preempting the field" doctrine. In a case very similar on its facts—the ordinance was aimed at liquor with one-third of one per cent alcohol content; the statutory standard was one-half—the court pointed out the difficulty of enforcing liquor prohibition laws if liability is made to depend on whether a particular liquor is intoxicating. Therefore it was thought that the state might sometime see fit to prohibit beverages which were near-intoxicants and so intended to occupy that entire domain of prohibitory legislation.[42]

It is sometimes said that whether the state intends to occupy an entire field depends on whether the matter legislated upon is essentially criminal in its nature or merely regulatory, and if the latter it is subject to additional local regulation.[43] North Carolina, apparently, makes no such distinction. Thus, where a statute requires one approaching any intersection in an automobile to reduce his speed to not more than ten miles per hour—not an "essentially criminal" matter—a city cannot require him to stop altogether at certain named intersections.[44] A better explanation would seem to be that the state is held to have preempted a field in which local regulation might tend to impede enforcement of a related state law.

ORDINANCES CONFLICTING WITH A COMMON RIGHT OR POLICY

When a particular ordinance is thought to be improper or ill-advised and there is no statute on the same subject, it may be attacked and invalidated as in conflict with the common law,[45] or as contravening a common right,[46] or as inconsistent with the state legislative policy.[47] Thus in North Carolina it has been held that under the general grant of authority of N. C. GEN. STAT. §160-52 (1943) a city could not legally pass an ordinance forbidding an owner to remain in his barroom between ten o'clock P.M. and four o'clock A.M., since it contravened the

[41] *Id.* at 802, 63 S. E. at 948.

[42] *Ex parte* Simmons, 71 Cal. App. 522, 235 Pac. 1029 (1925). This case is an example of the interesting and apparently unique practice in California of refusing to discharge a petitioner in habeas corpus, notwithstanding the invalidity of the ordinance under which conviction was had, if the complaint, purporting to charge a violation of the void ordinance, in fact charges an offense under the state law.

[43] 2 DILLON, *op. cit. supra* §632; 15 CALIF. L. REV. 345 (1926).

[44] State v. Stallings, 189 N. C. 104, 126 S. E. 187 (1924).

[45] *See* State v. Black, 150 N. C. 866, 867, 64 S. E. 778 (1909).

[46] 2 DILLON, *op. cit. supra* §§596, 597. Mr. Dillon leaves the point in some doubt by saying "An ordinance cannot legally be made which contravenes a common right. . . . But there is, however, no common right to do that which, by a valid law or ordinance is prohibited."

[47] 2 *id.* §§601, 602; 2 MCQUILLIN, *op. cit. supra* §685.

common right of everyone to remain in his own house, whether dwelling or place of business.[48] In *State v. Darnell*[49] the policy argument was used to invalidate an ordinance making it unlawful for Negroes to occupy houses on streets dominantly white and vice versa. The court drew an analogy to the "Irish Pale" and the "Russian Ghettoes," each resulting in the exodus of an oppressed people, and indulged in the far-fetched reasoning that since this ordinance would tend to have the same effect it was contrary to North Carolina policy as embodied in an old law requiring those who transported Negroes from the state to pay a license fee. It is obvious that if the court had wished to uphold the ordinance it could have gotten a truer picture of the North Carolina legislative policy from public school and public vehicle segregation laws.

That infringement upon a common right is more a tool used to overthrow undesirable local regulations than an insurmountable obstacle to their validity appears from the decisions which hold ordinances valid without discussing this possible objection.[50] Many such decisions would pass unnoticed except for a dissenting opinion which relies on the common right argument. For example, a zoning ordinance prohibiting a filling station within 150 feet of the graded school has been upheld, notwithstanding a dissenting opinion to the effect that it conflicted with the principle that private property should not be taken for public purposes without adequate compensation, "a principle so grounded in natural equity it has never been denied to be part of the law of North Carolina."[51] In *State v. Austin*[52] an ordinance excluding minors from barrooms was held valid and not inconsistent with the "law of the land," characterized as the statutory and common law of the state. Yet Mr. Justice Avery, dissenting, contended that such ordinance was inconsistent with the common law since it abridged an infant's common law right of unrestrained locomotion.

ORDINANCES EXCEEDING THE AUTHORITY OF THE MUNICIPALITY

The court sometimes preserves exclusive control of a subject in the state by invalidating ordinances on the basis of a want of authority to pass them in the local legislative body. This means may be adopted in preference to straining to find an inconsistency with the general law.[53]

[48] State v. Thomas, 118 N. C. 1221, 24 S. E. 535 (1896); *accord,* State v. Ray, 131 N. C. 814, 42 S. E. 960 (1902).

[49] 166 N. C. 300, 81 S. E. 338 (1914). *Contra:* Tyler v. Harmon, 158 La. 439, 104 So. 200 (1925).

[50] Lawrence v. Nissen, 173 N. C. 359, 91 S. E. 1036 (1917) (location of a hospital); State v. Vanhook, 182 N. C. 831, 109 S. E. 65 (1921) (regulating dance halls).

[51] *See* Mr. Justice Clarkson, dissenting in Town of Ahoskie v. Moye, 200 N. C. 11, 15, 156 S. E. 130, 132 (1930).

[52] 114 N. C. 855, 19 S. E. 919 (1894).

[53] State v. Gulledge, 208 N. C. 204, 179 S. E. 883 (1935).

To support such a decision the court may rely upon Mr. Dillon's classification of the powers of a municipal corporation as only those expressly granted, fairly implied, or essential to the declared purposes of the corporation.[54] In these cases N. C. GEN. STAT. §160-52 (1943) is either ignored[55] or declared not to confer the requisite authority,[56] in the absence of an *express* grant. In other cases where it is sought to uphold the ordinance, however, the enabling act may itself be considered an express grant of authority to exercise the police power of the state.[57]

It has been seen that the court adopts various arguments when it is sought to overthrow a particular ordinance. However, when the local legislation is thought to be well adapted to the accomplishment of a desirable end, the same arguments will not be allowed to prevail against its validity. An example is *State v. Wilson*.[58] The ordinance in that case prohibited any person from obstructing any water-way so that the water should accumulate in any street of the city, even if the obstruction be placed on the party's own property. The possibilities for the "common right" argument are apparent. Defendant, charged with a violation, contended that the ordinance was void as creating an offense—public nuisance—already punishable by the general laws of the state, relying on *Washington v. Hammond* and *State v. Langston*. Indeed the warrant as originally drawn had expressly referred to the condition produced by defendant's act as a "nuisance." However, the Supreme Court found the ordinance valid and within the legislative power of the city. The court considered the purpose of the ordinance, to prevent nuisances by going beyond and enlarging the protection ordinarily afforded by the general law, consistent and complementary. On the other hand, not even an express grant of power to make regulations on a particular subject will save an ordinance if the court feels it would be a poor policy to enlarge on the statutory requirements in that field.[59]

The key to the problem of the validity of a particular municipal regulation in North Carolina is the attitude which the Supreme Court has taken toward other ordinances in the same field.

Zoning. This is a field apparently thought to be well suited to municipal control. Zoning ordinances are frequently attacked as unreasonable, arbitrary, or discriminatory,[60] but the possibility of a conflict

[54] *Id.* at 207, 179 S. E. at 885; State v. Darnell, 166 N. C. 300, 301, 81 S. E. 338 (1914). The cited section is 1 DILLON, *op. cit. supra* §237.
[55] State v. Ray, 131 N. C. 814, 42 S. E. 960 (1902).
[56] State v. Clay, 118 N. C. 1234, 24 S. E. 492 (1896); State v. Thomas, 118 N. C. 1221, 24 S. E. 535 (1896).
[57] *See* 131 N. C. 814, 819, 42 S. E. 960, 961 (1902).
[58] 106 N. C. 718, 11 S. E. 254 (1890).
[59] State v. Eubanks, 154 N. C. 628, 70 S. E. 466 (1911).
[60] Bizzell v. Board of Aldermen of the City of Goldsboro, 192 N. C. 348, 135 S. E. 50 (1926); State v. Tenant, 110 N. C. 609, 14 S. E. 387 (1892).

with the general law is rarely considered.[61]

Disorderly conduct. North Carolina is definitely committed to the view that acts of disorderly conduct are a proper subject for local regulation, though the same acts, if repeated, or in a greater degree, or in a different place might amount to an indictable assault or nuisance under the general law.[62] Even an ordinance expressly declaring the prohibited acts to be a nuisance has been upheld, nuisance at common law being disinguished as necessarily involving a public place. The question of conflict was not argued.[63]

Sunday observance.[64] Ordinances restricting hours of business generally are not condoned.[65] However, Sunday observance is apparently considered a proper subject for municipal regulation in conjunction with state action, since the ordinance renders the state policy againist pursuing ordinary business callings on Sunday more efficient.[66] An ordinance considered in *State v. Medlin*[67] prohibited the keeping open of any shop or store on Sunday except drug stores. The defendant contended that it was invalid on the ground that Rev. 2836, forbidding work in ordinary callings on Sunday, had preempted the field. In order to uphold the ordinance the court looked to decisions construing the statute as confined in its operation to "manual, visible, or noisy labor" and found neither conflict nor duplication. The court pointed out that public sentiment on the matter varies in different localities. Therefore, power to make such local regulations is wisely vested in the towns by N. C. GEN. STAT. §160-52 (1943) which takes notice of this diversity of views. Only if the Sunday ordinance also involves an additional factor better left to state control, such as selling liquor, is an inconsistency found.[68]

Gambling and prostitution. It might be thought that analogously with the Sunday observance cases the court would treat with similar liberality local regulation of other matters affecting the public morals and decency. However, ordinances relating to gambling[69] and houses

[61] Town of Ahoskie v. Moye, 200 N. C. 11, 156 S. E. 130 (1930); Lawrence v. Nissen, 173 N. C. 359, 91 S. E. 1036 (1917); *accord, Ex parte* Lacey, 108 Cal. 362, 41 Pac. 411 (1895); *see* Shuford v. Town of Waynesville, 214 N. C. 135, 198 S. E. 585 (1938).

[62] State v. Moore, 166 N. C. 371, 81 S. E. 693 (1914); State v. Sherrard, 117 N. C. 717, 23 S. E. 157 (1895); State v. Debnam, 98 N. C. 712, 3 S. E. 742 (1887); State v. Cainan, 94 N. C. 880 (1886). *But cf.* State v. Horne, 115 N. C. 739, 20 S. E. 443 (1894).

[63] State v. McNinch, 87 N. C. 567 (1882).

[64] Cases collected in note, 29 A. L. R. 397, 409 (1924).

[65] State v. Ray, 131 N. C. 814, 42 S. E. 960 (1902); *cf.* State v. Thomas, 118 N. C. 1221, 24 S. E. 535 (1896).

[66] State v. Burbage, 172 N. C. 876, 89 S. E. 795 (1916).

[67] 170 N. C. 682, 86 S. E. 597 (1915).

[68] State v. Langston, 88 N. C. 692 (1883).

[69] State v. McCoy, 116 N. C. 1059, 21 S. E. 690 (1895).

of prostitution[70] have been held void as unauthorized or not in harmony with the state law. Perhaps it is felt that there is no room for a reasonable difference of opinion on such matters in different localities.

Intoxicating liquor. As has already been indicated[71] the sale of liquor is a field said to have been preempted by the state. The cases are practically unanimous in holding municipal regulation on the subject unauthorized by N. C. GEN. STAT. §160-52 (1943).[72] The lone dissenting voice is that of Mr. Justice Burwell speaking for the majority of the court in the *Austin* case. In a well reasoned opinion he resisted the "common right" and "preempt" arguments and looked to the purpose of the statute to prevent the sale of liquor to minors. The ordinance in the case was upheld as not inconsistent with but further effectuating this purpose by forbidding such minors to enter barrooms and thus preventing exposure to temptation.[73]

Motor vehicles.[74] In this field there is a lack of uniformity in the decisions throughout the country.[75] The North Carolina position, however, is clearly opposed to local regulation.[76] The court is not inclined to state any reason for its holdings except that an ordinance must yield to the state law. It may be that due to the mobility and great number of automobiles, our court feels that control should be centralized and uniform and not subject to local variations. It would seem, however, that in the matter of speed and traffic regulations, at least, different local situations would render uniform legislation unsatisfactory. The fact that the legislature has provided certain limitations on speed and traffic for the good of the state as a whole should "not prevent further restrictions by the city if the same are reasonable and are made necessary by special conditions and circumstances that are plainly not considered by

[70] State v. Webber, 107 N. C. 962, 12 S. E. 598 (1890); *see* State v. Black, 150 N. C. 866, 867, 64 S. E. 778 (1909).

[71] See note 41 *supra.*

[72] State v. Dannenberg, 150 N. C. 799, 63 S. E. 946 (1909); State v. Thomas, 118 N. C. 1221, 24 S. E. 535 (1896); State v. Brittain, 89 N. C. 524 (1883); State v. Langston, 88 N. C. 692 (1883). *But cf.* State v. Stevens, 114 N. C. 873, 19 S. E. 861 (1894) (under express authority to tax the retailing of liquor a city may punish selling without a city license, the ordinance providing that if the sale be without a state license also, the seller be bound over to the Superior Court).

[73] *Cf. Ex parte* Boswell, 86 Cal. 232, 233, 24 Pac. 1060 (1890): "It may be said that one cannot well bet at a gambling game unless he is a visitor thereat."

[74] Cases collected in notes, 147 A. L. R. 522 (1943), 64 A. L. R. 993 (1929) and 21 A. L. R. 1186 (1922).

[75] 3 MCQUILLIN, *op. cit. supra* §924, n. 27.

[76] State v. Sasseen, 206 N. C. 644, 175 S. E. 142 (1934) (requiring taxi cab companies to file indemnity bonds with the city); State v. Gulledge, 208 N. C. 204, 179 S. E. 883 (1935). *Contra:* Willis v. City of Fort Smith, 121 Ark. 606, 182 S. W. 275 (1916); City of Dallas v. Gill (Tex. Civ. App.), 199 S. W. 1144 (1918); *Ex parte* Dicky, 76 W. Va. 576, 85 S. E. 781 (1915). *See* notes, 13 N. C. L. REV. 222 (1935) and 14 N. C. L. REV. 104 (1935) criticizing Sasseen and Gulledge cases, respectively.

the legislature."[77] On the contrary it seems that additional local regulation is necessary in order to afford equal protection to the people of congested areas. As said by Mr. Justice Cardozo in reversing a lower New York court which had held a local speed regulation invalid as in conflict with the state law: "We think the power of the local authorities has been too narrowly construed. A speed that is safe in the open country may be dangerous in cities and villages. The purpose of the Legislature, in its delegation of the ordinance power was not to relax in such localities the rules of the road. It was to make them more rigid. We should be slow to construe the statute as making excessive speed a misdemeanor in districts where the danger is slight, and in denying it a like quality where the danger is great. Its language does not force us to a construction so unreasonable."[78]

Such considerations will not prevail in North Carolina, however; nor are they even discussed in the opinions. In *State v. Stallings*[79] the statute required everyone to reduce his speed to not more than ten miles per hour when approaching any intersection. An ordinance requiring automobiles to be stopped completely before entering certain named streets was held void as depriving operators of their right to cross all intersections at ten miles per hour. It seems likely, however, that the legislature was probably less concerned with creating such a right than with preventing accidents at street intersections.[80] The ordinance was designed to achieve this same purpose by requiring more care at particular danger spots. Again in *State v. Freshwater*[81] an ordinance purporting to reduce the speed of motor vehicles below the maximum fixed by the general assembly was tersely dismissed as "plainly in conflict" with the statute. But the two regulations were not necessarily inconsistent in either language or policy. The statute merely provided that a speed in excess of ten miles per hour anywhere in the business portion of a city should be deemed a violation;[82] the ordinance further reduced the permissible speed within designated "fire limits." The reverse situation has been considered in some states and an ordinance upheld which establishes a higher maximum speed limit than that provided by statute.[83] There seems to be no North Carolina case in point, but there is no reason to believe that our court would view this situation in any more favorable light.

[77] Christensen v. Tate, 87 Neb. 848, 853, 128 N. W. 622, 624 (1910).
[78] Chapman v. Selover, 225 N. Y. 417, 420, 122 N. E. 206 (1919).
[79] 189 N. C. 104, 126 S. E. 187 (1924). *Contra:* Lamar & Smith v. Stroud (Tex. Civ. App.), 5 S. W. 2d 824 (1928); *cf.* Mann v. Scott, 180 Cal. 550, 182 Pac. 281 (1919).
[80] *But see* Schneiderman v. Sesanstein, 121 Ohio St. 80, 86, 167 N. E. 158, 160 (1929).
[81] 183 N. C. 762, 111 S. E. 161 (1922). [82] N. C. C. S. §2618 (1922).
[83] *Ex parte* Snowden, 12 Cal. App. 521, 107 Pac. 724 (1910).

North Carolina's strict attitude toward municipal regulation of automobiles has been embodied in the Motor Vehicle Act as N. C. GEN. STAT. §20-19 (1943): "Local authorities, except as expressly authorized . . . shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rule or regulations contrary to the provisions of this article."[84] This statute and its predecessors in content may, indeed, account for the position taken by the Supreme Court. However, the court in the *Freshwater* case construed a former statute (N. C. C. S. §2601 (1922)) prohibiting ordinances contrary to the provisions of the chapter on motor vehicles, and said that the same result would follow without regard to the statutory inhibition.

Summary and conclusion. Ordinances are not permitted either to contradict or duplicate a state law in express terms. Where there is room for the court to go either way on the question of inconsistency the test should be the purpose behind the general law and how best to achieve the most effective regulation. The North Carolina decisions for the most part seem to give effect to this practical side of the problem. In the written opinions, however, the main issue is too often obscured by talk about "preempting the field," "lack of authority," and "conflict."

JAMES T. PRITCHETT, JR.

Railroads—Right-of-Way—Statutory Limitation Barring Recovery Therefor

In a recent North Carolina case,[1] the plaintiff railroad sought an injunction to require defendant to allow additional tracks to be built parallel to and within fifty feet of the original track. The charter of the railroad gave it the right to take land of "not more than one hundred feet from the center of the road"[2] by condemnation proceedings, and in 1884 the railroad had entered and laid its track on the original roadbed without bringing condemnation proceedings and without any conveyance from the owner. The defendant, or his predecessors in title, has been in possession of the land adjoining the roadbed ever since it was built and is the owner of the fee. In this case no action for compensation has ever been brought against the railroad. N. C. GEN. STAT. §1-51(1) bars any suit against a railroad for compensation for land taken unless brought within five years after the land has been

[84] *See* City of Fremont v. Keating, 96 Ohio St. 468, 118 N. E. 114 (1917) holding a similar statute unconstitutional as violating OHIO CONST. Art. XVIII §3 giving municipalities authority to adopt police regulations not in conflict with the general laws.

[1] Carolina & N. W. Ry. v. Piedmont Wagon & Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949).

[2] N. C. Pub. Laws 1871-2, c. 130, §7.