Municipal Corporations—Home Rule—Municipal Ordinance in Conflict with State Statute—[Ohio].—Under one of the home rule provisions of the Ohio Constitution, municipalities had the authority to adopt and enforce within their limits such local police and sanitary regulations as were not in conflict with general laws.[1] In the exercise of this police power, the defendant city made it a misdemeanor for holders of liquor permits issued by the state Department of Liquor Control to sell intoxicating liquors after midnight. However, a regulation passed by the state Liquor Control Board pursuant to the Ohio Liquor Control Act provided that no intoxicating liquors were to be sold on the premises of the holders of a certain class of permits between the hours of 2:30 A.M. and 5:30 A.M. The plaintiff, a hotel owner in the defendant city who held a permit of this type, brought an action for a declaratory judgment, claiming that the city ordinance was in conflict with the state law and therefore invalid. On appeal from a holding for the plaintiff, *held*, the ordinance was in conflict with the Liquor Control Act and the regulation of the Liquor Control Board. Judgment affirmed, three judges dissenting. *Neil House Hotel v. City of Columbus.*[2]

The result in the instant case is further evidence that the old problem of municipal home rule is not necessarily solved by sweeping constitutional provisions. By invalidating a city ordinance like that in the principal case the Supreme Court of Ohio has again added to the many vicissitudes of the home rule movement in Ohio.

The power granted municipalities to govern themselves in matters of local concern is a consequence of a long period of state legislative abuse. After the Revolution, state legislatures assumed the authority formerly vested in the governor as agent of the crown to grant and amend charters of cities by special acts, thereby making cities completely subject to legislative control—a situation which still exists in some states, such as Illinois.[3] The predominantly rural state legislatures were often corrupt and prejudiced, or at their best incompetent to solve the complex local problems of large, expanding cities.[4] A solution was sought by a number of states[5] in constitutional provisions conferring

[1] Ohio Const. Art. 18, § 11.

[2] 144 Ohio 248, 58 N.E. 2d 665 (1944). The Appellate Court decision was reported in 68 N.E. 2d 210 (1946).

[3] Mr. Barnet Hodes, Corporation Counsel of Chicago, has pointed out that in order for Chicago to permit the sale of peanuts on its Navy Pier it was necessary to secure state sanction through solemn legislative enactment. Hodes, Law and the Modern City 19 (1937).

[4] 1 MacQuillin, Municipal Corporations § 93 (1940); McBain, The Law and the Practice of Municipal Home Rule 3–106 (1916).

[5] Arizona, 1912. Ariz. Const. Art. 13, § 2; California, 1879. Calif. Const. Art. 11, § 8; Colorado, 1902. Colo. Const. Art. 20; Maryland, 1915. Md. Const. Art. 11a; Michigan, 1908. Mich. Const. Art. 8, § 21; Minnesota, 1896. Minn. Const. Art. 4, § 36; Missouri, 1875. Mo. Const. Art. 9; Nebraska, 1912. Neb. Const. Art. 11a; New York, 1938. N.Y. Const. Art. 9, §§ 1–16; Ohio, 1912. Ohio Const. Art. 18, § 7; Oklahoma, 1907. Okla. Const. Art. 18, § 3a; Oregon, 1910. Ore. Const. Art. 11, § 2; Pennsylvania, 1922. Pa. Const. Art. 15, § 1; Texas, 1912. Tex. Const. Art. 11, § 5; Washington, 1899. Wash. Const. Art. 11, § 10; and Wisconsin, 1921. Wis. Const. Art. 11, § 3.

power on municipalities to frame and adopt their own charters with full authority to regulate all matters of local concern.[6]

To enable cities to pass specific police regulations without the necessity of charter amendments, four state constitutions, including that of Ohio, grant municipalities the additional power to enforce police regulations which are not in conflict with general laws.[7] In these four states the additional grant presents to the courts the problem of defining the limits of the concurrent state and municipal police powers.

Thus the Ohio home rule provision[8] has been judicially divided into two parts. Municipal regulation, within an uncertain and narrow field defined by the courts as "local self government," has been sustained, state laws to the contrary notwithstanding.[9] On the other hand, it has been uniformly stated that

[6] The history of the Ohio home rule provision is perhaps typical. Prior to 1851 Ohio cities had suffered from characteristic legislative abuse. In that year a constitution was adopted which provided that the general assembly should pass no special acts conferring corporate power. Ohio Const. of 1851, Art. 13, § 1. By inadvertence, apparently, municipalities were not excluded from the operation of the provision. Though it would seem that special charter acts were now prohibited, the legislature ignored the provision and in a few years was passing special laws relating to municipalities in as great an abundance as ever. In State ex rel. Att'y Gen. v. Cincinnati, 20 Ohio 18 (1870), however, the court held invalid a special act conferring upon a city powers over suburban villages not formerly within the city. The decision ended the practice of enacting undisguised special laws for cities. Nevertheless, the legislature accomplished substantially the same result by a process of narrow classification of cities and legislation applicable only to cities of a particular class. This practice was terminated in 1902 by the Supreme Court of Ohio in State ex rel. Knisley v. Jones, 66 Ohio 453 (1902), where the classification of cities for any purpose, and city governments under this system, was held unconstitutional. A special session of the legislature called to meet this emergency substituted a uniform charter applicable to every city of the state, regardless of size. All cities of Ohio were governed under this code until the home rule amendment of 1912 went into operation. McBain, The Law and the Practice of Municipal Home Rule 68–74 (1916). It was to avoid the rigidity of such charters applying to cities of five hundred as well as fifty thousand that the home rule article was proposed. 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1433 (1913).

[7] The California provision, which was the earliest, states that "Any county, city, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Cal. Const. Art. 11, § 11. This provision was adopted in substance in the constitutions of Washington, 1899. Wash. Const. Art. 11, § 11; Idaho, 1889. Idaho Const. Art. 12, § 2; and Ohio, 1912. Ohio Const. Art. 18, § 3. The California courts have read the words of this section just as if no comma were present after "local," and as if "local" modified police instead of regulations. Peppin, Municipal Home Rule in California III, 32 Calif. L. Rev. 341 (1944).

[8] "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." Ohio Const. Art. 18, § 3.

[9] Thus a municipality has the authority, not subject to restriction by statute, to acquire and operate public utilities. Pfau v. Cincinnati, 142 Ohio 101, 50 N.E. 2d 172 (1943); it has dominion over city streets. Perrysburg v. Ridgeway, 108 Ohio 245, 140 N.E. 595 (1923); and over the election and salary of local officers, a statute regulating salaries of city councilmen being an unauthorized interference with local self-government. Mansfield v. Endly, 38 Ohio App. 528, 176 N.E. 462 (1931), aff'd 124 Ohio 652, 181 N.E. 886 (1932). Because this grant is absolute and not subject to state laws it has been restricted by the courts. Hitchcock, Ohio Ordinances in Conflict with General Laws, 16 U. of Cin. L. Rev. 1 (1942). For example, a

"police regulations," such as the regulation of liquor traffic in the present case, must not conflict with general laws on the same subject. It is in determining when a conflict exists that the courts have been faced with difficult questions of interpretation. The conflict is obvious where a city attempts to permit conduct which has been prohibited by the state.[10] But where a municipality seeks to make unlawful some conduct which has not been prohibited by the state, the validity of the municipal regulation will depend on which of two existing rules the court adopts to determine the presence of a conflict.

California decisions illustrate the first rule. In the leading case of *In re Hoffman*,[11] a Los Angeles ordinance requiring milk sold in the city to contain $3\frac{1}{2}$ per cent of solids—which was an amount higher than that prescribed by state law—was upheld by the Supreme Court of California on the ground that since it imposed requirements additional to those of the state law it did not conflict. The court dismissed the contention that the state by providing for a 3 per cent minimum had not only prohibited milk of lesser solid content but had shown an intention to permit the sale of milk of a solid content above the minimum. The *Hoffman* case established the rule that if the ordinance imposes the same or less strict requirements than the state law, it is in conflict with it, but where it imposes additional or stricter requirements it is valid.[12] The legislature must expressly provide that there shall be no additional local regulation of a given subject before the California courts will hold that state regulation invalidates an ordinance which does not directly conflict with it.[13]

The principal case is an example of a second rule to determine when a conflict exists. Had the court applied the California rule,[14] the midnight closing

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conflict between an ordinance and an act of the legislature, passed under its special power to create municipal courts and provide necessary officials, results in the fall of the former. Underwood v. Isham, 61 Ohio App. 129, 22 N.E. 2d 468 (1939), aff'd without opinion 135 Ohio 320, 22 N.E. 2d 468 (1939).

[10] In Kraus v. Cleveland, 135 Ohio 43, 19 N.E. 2d 159 (1939), an ordinance permitted the licensing of coin gambling and amusement machines which had been prohibited by statute. The conflict was obvious and the ordinance was held invalid. MacQuillin, 2 Municipal Corporations § 683 (1937).

[11] 155 Cal. 114, 99 Pac. 517 (1909).

[12] Natural Milk Producers Ass'n v. San Francisco, 20 Cal. 2d 101, 124 P. 2d 25 (1942); In re Iverson, 199 Cal. 582, 250 Pac. 681 (1926).

[13] James v. Myers, 68 Cal. App. 2d 23, 156 P. 2d 69 (1945); Ex parte Daniels, 183 Cal. 636, 192 Pac. 422 (1920).

[14] In a number of Ohio cases the courts have applied the California rule. City of Coshocton v. Saba, 55 Ohio App. 40, 8 N.E. 2d 572 (1937) (upheld an ordinance forbidding liquor sales after 10:00 P.M. though a regulation of the Board of Liquor Control permitted sales under the permit until 12:00 P.M.); Holsman v. Thomas, 112 Ohio 397, 147 N.E. 750 (1925) (city further regulated activities of auctioneers to whom licenses had been granted under the Ohio Gen. Code); Struthers v. Sokol, 108 Ohio 263, 140 N.E. 519 (1923) (ordinances penalized certain acts concerning prohibition of liquor which were not declared to be illegal under the state laws); Greenburg v. Cleveland, 98 Ohio 282, 120 N.E. 829 (1918) (ordinance proscribed attempts to commit larceny by pickpocketing when statute made only actual larceny punishable).

ordinance would have been sustained, as merely adding to the regulations of liquor traffic established by the state legislature. Instead, the court held that when a statute of the legislature and a regulation of the Board of Liquor Control say that a sale of intoxicants may not be made after a designated hour, it is equivalent to saying that sales up to that time are lawful, and an ordinance which attempts to restrict sales beyond an earlier hour is in conflict therewith and must yield.[15] The rule applied in this and some earlier Ohio cases[16] is that whenever the state has regulated a subject under its police power, any concurrent regulation of that subject matter by the municipality, though more stringent, is proscribed. For precedent the court relied on *Schneiderman v. Sesanstein*,[17] where a city ordinance prohibiting motorists approaching a school from proceeding at a rate greater than fifteen m.p.h. was held in conflict with a statute which set a higher speed limit.[18]

It is submitted that the Ohio rule is objectionable on several grounds. It proposes a rule of construction which is analytically unsound, and leads to results that are generally undesirable and particularly inappropriate where a liquor ordinance is questioned.

The rule assumes that whenever a state police regulation has either explicitly or by implication made some conduct permissible, it intended to grant that conduct an absolute privilege, not subject to further regulation by the municipality. Such reasoning leads to a doubtful conclusion in the instant case where the intention to grant the permit holder an unqualified right to operate after 12:00 P. M. does neither logically follow nor is manifested by the language of the act or the regulation. The regulation of the Department of Liquor Control concerning the permits in question specifically prohibited the sale within the designated hours, but did not state that during all other hours the sale should be permitted.[19]

[15] 144 Ohio 248, 253, 58 N.E. 2d 665, 668 (1944).

[16] Spisak v. Village of Solon, 68 Ohio App. 290, 39 N.E. 2d 531 (1941) (municipal ordinance requiring liquor dealers to obtain permit from city was held to be in conflict with the state Liquor Act); Russo v. State, 28 Ohio L. Abs. 21, appeal dismissed, 134 Ohio 510, 17 N.E. 2d 915 (1938) (invalidated city ordinance which proscribed driving of motor vehicles on its streets by persons under 18, where the state issued licenses to persons under 18); State ex rel. Cozart v. Carran, 133 Ohio 50 (1937) (where statute allowed state liquor board to issue one permit to sell liquor for every 2,000 inhabitants of the city, an ordinance limiting city permits to one for every 3,500 conflicted with the statute and was void).

[17] 121 Ohio 80, 167 N.E. 158 (1929).

[18] Ohio Code Ann. (Throckmorton, 1940) § 12603. Section 12608 provided that the provisions of § 12603 should not be diminished, restricted or prohibited by an ordinance. But the statute had not prohibited speed limits lower than those mentioned in the statute.

[19] The statute governing permits of Class D-3a held by the plaintiff stated that whenever the permit holder's place of business is operated for the sale of liquors after the hour of 1:00 A.M. he shall pay an additional fee of four hundred dollars. The statute further stated that the holder of a D–3a permit may sell during the same hours as the holders of Class D–5 permits are allowed to under the Liquor Control Act or the regulations of the Board of Liquor Control. Ohio Code Ann. (Throckmorton, 1940) § 6064–15. The act is silent as to the hours during

In view of normal rules of construction the Ohio interpretation is difficult to justify. The Ohio provision of 1912 was modeled after that of California which had been adopted in 1879 and judicially construed by 1909. It is a general rule that when a constitutional provision of another state is adopted after its construction by the courts of that state, a presumption arises that the adoption of that construction was also intended.[20] Substantial evidence in the records of the constitutional convention shows that it was the intent of the delegates that the Ohio courts adopt the California rule. The illustrations given in explanation of the intended operation of the provision were examples of the California rule.[21] The *Hoffman* case itself was cited by the chairman of the committee on municipal government.[22]

Special considerations exist for sustaining restrictive liquor ordinances. The Ohio Liquor Control Act does not vest the sole power and duty to control the alcoholic beverage traffic in the board.[23] Under the act, a license may not be granted or used within a territorial unit which voted against the repeal of prohibition in 1933, unless such a unit has since authorized the sale of liquors therein.[24] Moreover, the adoption of local option suspends the operation of the

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which liquors may be sold on the premises of a D–5 permit holder. Since the license given by D–3a permits was expressly intended to be governed by D–5 permits, the provision that the D–3a permit holder shall pay the fee whenever his place *shall be open after 1:00 A.M.* did not necessarily confer on a D–3a permit holder any more privileges than D–5 permit holders had so as to grant him an absolute right to operate after 1:00 A.M. The D–5 permits which governed the plaintiff's rights were to be regulated by the Department of Liquor Control. Accordingly, the Department of Liquor Control had issued regulation No. 30 which provided that "no beer or intoxicating liquor shall be sold or be permitted to be consumed on week days on the premises of a D–3a or D–5 permit holder between the hours of 2:30 A.M. and 5:30 A.M." Neil House Hotel v. City of Columbus, 68 N.E. 2d 210, 213 (1946).

[20] Mundell v. Swedlund, 58 Idaho 209, 71 P. 2d 434 (1937); Becker County Sand and Gravel Co. v. Wosick 62 N.D. 740, 245 N.W. 454 (1932); People v. Coleman, 4 Cal. 46 (1854).

[21] One of the influential delegates undertook to clarify the intended effect of the proposal to the convention members: ". . . . they [the municipalities] can go further than the general law, but if they undertake to weaken any provision of the general law it is in conflict with the general law and therefore inhibited, ... under this provision the municipality may stiffen within its borders the provision of the general law upon whatever particular subject is within the police power. Let me state what seems to me to be an illustration: The general assembly may enact a law . . . . providing that all restaurants shall close at ten o'clock at night. No municipality would have a right to say that they shall keep open till eleven but they would have a right to say they shall close at nine. . . . ." 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1441 (1913).

[22] 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1468 (1913).

[23] In a fact situation substantially identical to that of the principal case, the Supreme Court of Michigan held a city ordinance void because the Michigan Liquor Act gave the Michigan commission the sole right, power, and duty to control the liquor traffic. Noey v. City of Saginaw, 271 Mich. 595, 261 N.W. 88 (1935). The court in the instant case, in relying upon the Michigan case in its decision, did not distinguish the Michigan act in which exclusive control of liquor traffic was given to the board, from the Ohio act in which it was not.

[24] Ohio Code Ann. (Throckmorton, 1940) § 6064–17.

act within the local option territory[25] and makes the use of the permits issued unlawful.[26] If this is so, it may be argued that local areas should be permitted to partly abridge the validity of permits by means of city ordinances.[27]

The result in the principal case is ironic in the light of some peculiar facts concerning the liquor question in the history of the Ohio home rule provision. The original proposal of the constitutional convention allowed municipalities to adopt local police regulations, stating that they must not conflict with "general laws, *affecting the welfare of the state, as a whole,* and no such regulations shall by reason of the requirements therein, in addition to those fixed by law, be deemed in conflict therewith unless the general assembly, by general law, affecting the welfare of the state as a whole, shall specifically deny all municipalities the right to act thereon."[28] But the dry members of the convention feared that the wet cities might successfully claim that a general liquor law did not affect "the welfare of the state as a whole" and would thus feel free to allow uncontrolled traffic in liquor. They therefore suggested the omission of the italicized phrase. In the process of emendation the convention eliminated the entire section following the words "general laws." This was done under the avowed belief of both wets and drys that, except for the controversial phrase, the omitted part of the sentence had not conferred any rights on municipalities which were not already implicit in the remaining part of the home rule provision.[29] Had the last part of the provision been retained there is little doubt that the court in the instant case would have been compelled to uphold the ordinance

[25] Ibid., at § 6064–31. [26] Ibid., at § 6064–37.

[27] If the permits were intended to produce revenue for the state treasury, a more appealing argument might be made against city interference. But the sums collected by the state were to be distributed quarterly to each municipality in the amount collected from permits therein for the use of the general revenue fund of the municipality. Ohio Code Ann. (Throckmorton, 1940) § 6064–29.

The question of whether permit holders whose licenses would be in effect revoked by municipal police regulations of this type would be assured of a refund of fees paid was not discussed by the court. However, as was implied in the dissenting opinion, the Liquor Act seems to offer sufficient protection, for it provides for the payment to the holder of a proportionate amount representing the unexpired period, where a municipality makes the use of a permit unlawful through local option legislation. Ohio Code Ann. (Throckmorton, 1940) § 6064–29.

[28] 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1313 (1913) (italics added).

[29] While the original proposal was being discussed, Mr. Doty, a member of the convention, asked a member of the committee on municipal government whether the paragraph would not mean exactly what it was supposed to mean though a period were put after the word "laws" and the rest of the paragraph stricken. The committee member answered that in his opinion it would. Mr. Doty then questioned another member. A part of the ensuing conversation follows:

MR. DOTY: I would ask you, if we were to take the section as it stands, put a period after "general laws" and strike out all the rest of the paragraph, what difference would that make in what you say was attempted to be put in there?

. . . .

MR. ROCKEL: Well, I don't know.

MR. DOTY: Well, I don't.

since no statute explicitly forbade it. And yet the omission which accidentally resulted from the concern of the dry delegates over city ordinances liberalizing the liquor laws in the present case permits the court to invalidate a city ordinance which imposes an additional restriction on the liquor trade.

Finally, considerations of policy make the California rule preferable.[30] The sale of liquor may result in problems varying with each city and town. Where liquor is sold during the early morning hours a larger police force may be necessary. The added expense, coupled with the increased criminality which may accompany later closing hours, may lead a municipality to prescribe earlier closing hours. Furthermore, community attitudes toward the sale of liquor differ, not only because of the personal views of individuals, but because of the character, size and compactness of the community. It was because the state legislatures could not appreciate the peculiar needs of each municipality that home rule was granted. The principal case, in limiting the scope of the grant, is inconsistent with the end sought by home rule constitutional provisions. It leads to the anomalous result that cities in some states without home rule are in fact accorded more power in police matters than the cities of Ohio.[31]

Parent and Child—Adoption—Parent's Consent Unnecessary—[Maryland].—A mother and her second husband petitioned in Maryland for a decree of adoption of her infant child. The adoption was opposed by the child's natural father, from whom, in 1937, the mother had obtained a divorce on grounds of desertion. In 1938, after petitioners were married, the natural father instituted proceedings for custody and was given permission to have the child on alternate Sundays. However, the natural father did not see the child before and has not seen the child since the custody award. The boy is fully supported by the stepfather and uses his name. On appeal from a decree of adoption, *held*, decree affirmed, two judges dissenting. *Adoption of Lagumis*.[1]

In contrast to the typical American adoption statute, the Maryland statute does not in terms require the consent of the natural parents.[2] While both the

[30] As to the other two states that have a constitutional provision for municipal police power, Idaho, it seems, has not yet been faced with the problem here discussed. The Supreme Court of Washington has stated that the right of a city to exercise the police power over a particular subject matter ceases when the state acts, unless there is room for the exercise of concurrent jurisdiction. Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892 (1914). But whether there is room for such exercise depends in turn on the court's determination of the legislative intent. Thus, neither has the Washington court indicated which rule of construction it will adopt.

[31] In Michell v. City of Birmingham, 222 Ala. 389, 133 So. 13 (1931), an ordinance prohibiting the practice of fortune-telling or palmistry for reward was held valid, though a general law provided for licensing of fortune-telling. There is no home rule provision in Alabama.

[1] 46 A. 2d 189 (Md., 1946).

[2] "The several equity courts of this state, upon the application of any person residing in the city or county where such application is made, or the equity court in the city or county where a person to be adopted resides, shall have power to pass a decree declaring any person the