

# California Law Review

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VOLUME XXXII

DECEMBER, 1944

NUMBER 4

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## Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution

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PREVIOUS articles<sup>†</sup> have pointed out that the framers of the present California constitution adopted five provisions curtailing the power of the legislature to interfere with the affairs of municipal corporations and also vesting in such corporations extensive powers of local self-government, and that a sixth such provision was subsequently added by amendment to the constitution. One of these provisions has been discussed in a previous article.<sup>1</sup> It is proposed to discuss here the second, *viz.* section 11 of Article XI.

Section 11 of Article XI originally provided and still provides that:

“Any county, city, town 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.”

The origin and purposes of the provision are exceedingly obscure. It was adopted without debate in the Convention<sup>2</sup> and apparently without public discussion of any kind. It does not appear to have been taken from any other state although it was subsequently adopt-

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†(1941) 30 CALIF. L. REV. 1; (1942) 30 CALIF. L. REV. 272.

<sup>1</sup> See 30 CALIF. L. REV. at 272, discussing CAL. CONST. art. XI, §6, art. IV, §25, prohibiting special legislation.

<sup>2</sup> 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1879 (1881) 1482-1485. In 2 *ibid.*, 1052, a motion to insert “school or road district” in section 11 after the word “town” was rejected without debate.

ed in substance by three.<sup>3</sup> It has remained, therefore, for the California courts to say what the provision means unaided by anything that went before. What they have said so far has been far from clear.

Examination of section 11 reveals that it in effect does two things, *viz.* (1) it grants to counties, cities, towns and townships power to make the specified regulations and (2) it places a limitation on such grant by providing that the regulations authorized shall not be in conflict with general laws. Accordingly the courts have been confronted with two main problems, *i.e.*, to determine the scope of the grant on the one hand and of the limitation on the other.

(1) SCOPE OF THE GRANT OF POWER CONTAINED IN SECTION 11.

(a) *Evolution of section 11 as authorizing only penal ordinances.*

On its face section 11 vests cities and counties<sup>4</sup> with the power to make and enforce within their limits "all such local, police, sanitary

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<sup>3</sup> WASH. CONST. (1889) art. XI, §11 is identical. 1 WASH. REV. STAT. ANN. (Remington, 1932) 473. The Pierce and Ballinger statutory compilations, however, omit the comma between "local" and "police". IDAHO CONST. (1889) art. XII, §2 and OHIO CONST. (1851 as am. in 1912) art. XVIII, §3, read the same except that each omits the comma between "local" and "police" and the Idaho provision is that the regulations "shall not be in conflict with its charter or with general laws." For a study of the Ohio provision, see Hitchcock, *Ohio Ordinances in Conflict with General Laws* (1942) 16 CIN. L. REV. 1.

<sup>4</sup> Since 1890 when Antioch, the only then known city incorporated under the Towns Act of 1856 (Cal. Stat. 1856, p. 198. See (1941) 30 CALIF. L. REV. 21, note 58.) reincorporated under the Municipal Corporation Bill, the distinction between cities and towns has been of no importance, for there are now no known instances of any town incorporated under this Act. Since the Act has not been repealed, however, presumably it is still in force and can be used, since it is a "general law". The distinction between cities and towns, therefore, is, as far as is known, one of name only since both are now incorporated under the same laws. Accordingly reference herein to the word "city" or "cities" unless otherwise indicated, will also be deemed to refer to "town" or "towns".

Townships have always been units of judicial administration rather than of local government in California. Since townships also had this status under the 1849 Constitution their inclusion in section 11 along with counties, cities and towns is rather curious and is difficult to account for. Townships have never asserted power under section 11 and hence will not be otherwise herein referred to.

Although section 11 does not in terms refer to a "city and county" it was made applicable to any city and county by section 7 of article XI. See *Ex parte Keeney* (1890) 84 Cal. 304, 305, 306, 24 Pac. 34. As before indicated, the only consolidated city and county now existing in California is San Francisco, it having had that status since 1856. Sacramento was a consolidated city and county from 1858 to 1863. See (1941) 30 CALIF. L. REV. 45. Unless otherwise indicated, references to "city" or "cities" herein, shall also be deemed to refer to or include a "city and county."

and other" regulations as are not in conflict with general laws. We have here a seemingly very broad grant of power, for it is hard to imagine any regulation which a city or county might make as not being either "local", "police", "sanitary" or "other". And the word "regulation" is usually regarded as synonymous with "law".<sup>5</sup> Accordingly, if the section means what it seems to say, it is difficult to see why it does not in effect give every city of the state a charter conferring full and complete power to do almost any thing it sees fit as long as no conflicting general law is in existence. Some have claimed that that is exactly what it means.<sup>6</sup> Examination of the California authorities would seem to indicate, however, that such a claim is without foundation.

In the first place, the California courts seem to have performed a major operation on the section by reading the words "local, police, sanitary and other regulations" just as if no comma were present after "local", and as if "local" modified "police" instead of "regulations", and also in effect holding that the section authorized only "police" regulations. This was done in a very oblique manner and courts have so far lacked the candor to acknowledge that it has been done. The evidence that it has, however, is unmistakable and overwhelming. Disregard of the comma first appeared in the case of *In re Sic*,<sup>7</sup> in 1887. It was repeated in the case of *Ex parte Campbell*<sup>8</sup> the same year, where in discussing section 11 the court in purporting to quote the language of the section omitted the comma and then added that any city has under it the same power over "its own *local police and sanitary affairs*" as was formerly granted by the legislature.

The *Sic* and *Campbell* cases, *prima facie* at least, thus deprived the word "local" of the significance it might otherwise have had. If they had been the only examples of the court having done this, it would be possible to contend that it was mere inadvertence. They were not the only examples, however. On many later occasions the

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<sup>5</sup> WEBSTER'S NEW INTERNATIONAL DICTIONARY (1934) 2099.

<sup>6</sup> *Ex parte Campbell* (1887) 74 Cal. 20, 26, 15 Pac. 318, 321; *Pasadena School District v. Pasadena* (1913) 166 Cal. 7, 9, 134 Pac. 985; *People v. Willert* (1939) 37 Cal. App. (2d) (Supp.) 729, 733, 93 P. (2d) 872; Grant, *Penal Ordinances in California* (1936) 24 CALIF. L. REV. 123, 131. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916) 330, 331, seems to favor this view.

<sup>7</sup> (1887) 73 Cal. 142, 148, 14 Pac. 405, 408.

<sup>8</sup> (1887) 74 Cal. 20, 23, 15 Pac. 318, 319.

courts similarly disregarded the comma<sup>9</sup> and on even more they have referred to section 11 as if it authorized the exercise of "police power" and nothing else, the court placing progressively less emphasis on "sanitary" and "other".<sup>10</sup> No case has been found in which the courts

<sup>9</sup> In the following cases the comma is omitted from a purported quotation of the section: *Ex parte Cheney* (1891) 90 Cal. 617, 620, 27 Pac. 436, 437; Pasadena School District v. Pasadena, *supra* note 6, at 9, 134 Pac., at 985; *In re Mingo* (1923) 190 Cal. 769, 772, 214 Pac. 850, 851; *Gilbert v. Stockton Port District* (1936) 7 Cal. (2d) 384, 387, 60 P. (2d) 847, 848 (Pacific Report, however, adds the comma); *Merced Falls Gas & Elec. Co. v. Turner* (1906) 2 Cal. App. 720, 722, 84 Pac. 239, 240; *Denton v. Vann* (1908) 8 Cal. App. 677, 679, 97 Pac. 675, 676, Sup. Ct. *hearing den.*; *In re Zany* (1912) 20 Cal. App. 360, 363, 129 Pac. 295, 296. In *Natural Milk Producers Ass'n. v. San Francisco* (1942) 20 Cal. (2d) 101, 108, 124 P. (2d) 25, 29, Justice Carter, in paraphrasing section 11, omitted the comma between "local" and "police". And in *Brown v. Boyd* (1939) 33 Cal. App. (2d) 416, 419, 91 P. (2d) 926, 929, Sup. Ct. *hearing den.*, the court did the same thing. The language of *In re Ackerman* (1907) 6 Cal. App. 5, 9, 91 Pac. 429, 431, is well illustrative of the thinking of the courts on section 11 as to the word "local", the court saying that section 11 has by direct grant vested "plenary power to provide and enforce such police, sanitary and other local regulations" as are not in conflict with general law. Note should be made of the shift here from the "local, police, sanitary and other regulations" of section 11 to the "police, sanitary and other local regulations" of the opinion.

The comma is also disregarded in David, *Municipal Tort Liability in California* (1934) 7 So. CALIF. L. REV. 372, 390.

<sup>10</sup> In *Ex parte Cheney*, *supra* note 9, at 820, 27 Pac. at 437, the court, after quoting section 11 (but omitting the comma between "local" and "police") said, "This gives to each municipality the right to determine what police regulations it will prescribe. . . ." *Ex parte Tuttle* (1891) 91 Cal. 589, 590, 27 Pac. 933, 934, declared that the section gave authority to make and enforce "such police regulations as are not in conflict with general laws." In *In re Mingo*, *supra* note 9, at 772, 214 Pac. at 851, the court said that power under section 11 "is limited to the enactment of such police regulations as are not inconsistent with the general law." Similar expressions, indicating a prevalent notion that section 11 is the basis for the exercise of "police power" and nothing else are found in *People ex rel. Wilshire v. Newman* (1892) 96 Cal. 605, 607, 31 Pac. 564; *Merced County v. Helm* (1894) 102 Cal. 159, 163, 36 Pac. 399; *In re Pfahler* (1906) 150 Cal. 71, 82, 88 Pac. 270, 275; *Giddings v. Board of Trustees* (1913) 165 Cal. 695, 697, 133 Pac. 479, 480; *Pasadena School Dist. v. Pasadena*, *supra* note 6, at 9, 134 Pac., at 985; *Civic Center Ass'n v. Railroad Comm.* (1917) 175 Cal. 441, 445, 166 Pac. 351, 353; *Parker v. Colburn* (1925) 196 Cal. 169, 175, 236 Pac. 921, 924; *Fourcade v. San Francisco* (1925) 196 Cal. 655, 661, 238 Pac. 934, 936; *In re Iverson* (1926) 199 Cal. 582, 585, 250 Pac. 681; *Hurst v. Burlingame* (1929) 207 Cal. 134, 138, 277 Pac. 308, 310; *Gilbert v. Stockton Port District*, *supra* note 9, at 387, 60 P. (2d) at 848; *Natural Milk Producers Ass'n v. San Francisco*, *supra* note 9, at 108, 124 P. (2d) at 29; *Denton v. Vann*, *supra* note 9, at 679-680, 97 Pac. at 676; *Golden & Co. v. Justice's Court* (1914) 23 Cal. App. 778, 787, 140 Pac. 49, 53, Sup. Ct. *hearing den.*; *In re Luera* (1915) 28 Cal. App. 185, 186, 152 Pac. 738; *People v. Fendley* (1916) 32 Cal. App. 37, 39, 162 Pac. 137, 139, Sup. Ct. *hearing den.*; *Herald v. Glendale Lodge* (1920) 46 Cal. App. 325, 334, 189 Pac. 329, 333; *In re Mathews* (1922) 58 Cal. App. 649, 650, 209 Pac. 220; *Whyte v. Sacramento* (1924) 65 Cal. App. 534, 545, 224 Pac. 1008, 1013; *Griffin v. Los Angeles* (1933) 134 Cal. App.

have undertaken to construe the word "local" and to determine whether it should be held to modify "police". The word "local", therefore, by a most curious judicial technique seems in effect to have been read out of the section as a separate category of "regulations" authorized by the section. And the continued deemphasis of "sanitary" and "other" seems in effect to have read those words out too so that nothing remained but "police".

But even with the word "local" and perhaps the words "sanitary" and "other" as well, thus read out, the word "police" was still there and the section was universally conceded to authorize the exercise by cities and counties of "police power" of the same general character as that familiarly exercised by the state legislature.<sup>11</sup> It is common knowledge that such "police power" early came to be and is now recognized as almost limitless, embracing power to do almost anything which the legislative body deems necessary or proper to promote the general welfare of the people.<sup>12</sup>

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763, 771, 26 P. (2d) 655, 659, Sup. Ct. *hearing den.*; *Borum v. Graham* (1935) 4 Cal. App. (2d) 331, 337, 40 P. (2d) 866, 868; *Laguna Beach County Water Dist. v. County of Orange* (1939) 30 Cal. App. (2d) 740, 743, 87 P. (2d) 46, 48, Sup. Ct. *hearing den.*; *People v. Taylor* (1938) 33 Cal. App. (2d) (Supp.) 760, 761, 85 P. (2d) 978; *Ex parte Porterfield* (Cal. App., 1944) 147 P. (2d) 15, 18-19.

<sup>11</sup>In *McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal. (2d) 595, 600, 122 P. (2d) 543, 546, the court said: "It is, of course, undisputed that a municipality, under article XI, section 11, of the state Constitution, may, within its limits, exercise police powers equal in extent to those of the state." *Ex parte Lacey* (1895) 108 Cal. 326, 328, 41 Pac. 411, 412, states that power under section 11 "is not confined within narrow limits, but is broad and far-reaching in its scope and effect." In *In re Iverson* (1926) 199 Cal. 582, 585, 250 Pac. 681, the court says that section 11 allows regulations "promoting considerations of public welfare, public morals, public health and public safety." The power is called "as broad as that possessed by the legislature itself" in *Jardine v. Pasadena* (1926) 199 Cal. 64, 68, 248 Pac. 225, 226, and within its limits "equal in extent" to that of the state itself in *In re Kazas* (1937) 22 Cal. App. (2d) 161, 165, 70 P. (2d) 962, 964. Similar expressions are found in *Ex parte Sing Lee* (1892) 96 Cal. 354, 357, 31 Pac. 245, 246; *Odd Fellows Cemetery Ass'n v. San Francisco* (1903) 140 Cal. 226, 230, 73 Pac. 987, 988; *In re Sumida* (1918) 177 Cal. 388, 390, 170 Pac. 823, 824; *Justesen's Food Stores v. Tulare* (1938) 12 Cal. (2d) 324, 329, 84 P. (2d) 140; *Ex parte Murphy* (1908) 8 Cal. App. 440, 445, 97 Pac. 199; *Boyd v. Sierra Madre* (1919) 41 Cal. App. 520, 523, 183 Pac. 230, 232; *Justesen's Food Stores v. Tulare* (1941) 43 Cal. App. (2d) 616, 621, 111 P. (2d) 424; *In re Lawrence* (1942) 55 Cal. App. (2d) 491, 495, 131 P. (2d) 27, 30.

In construing the identical Washington constitutional provision, see *supra* note 3, the Washington Supreme Court also states that the section gives police powers within the limits of cities equal in extent to those of the state. *Spokane v. Coon* (1940) 3 Wash. (2d) 243, 246, 100 P. (2d) 36, 38.

<sup>12</sup>*Miller v. Board of Public Works* (1925) 195 Cal. 477, 484, 234 Pac. 381, 383; *In re San Chung* (1909) 11 Cal. App. 511, 513, 105 Pac. 609, 610; *Pacific Gas & Electric Co. v. Police Court* (1915) 28 Cal. App. 412, 152 Pac. 928. See also cases cited *supra*

As has heretofore been pointed out,<sup>13</sup> however, California cities have always operated under charters which purported carefully to define and limit their powers and the manner of their exercise. If, notwithstanding such definition and limitation a broad and nebulous "police power" was conferred on cities by section 11 to do anything they deemed to be for the welfare of their inhabitants even though the charter did not confer such power, or indeed even though it may have prohibited it, the charter would have become to a considerable extent meaningless. For in that case the powers specified or the mode of their exercise would not have been exclusive and limitations thereon not binding. The charter would have been supplemented by the broad power conferred on the legislative body by section 11. Moreover, such a construction would have flown in the face of the rule of strict construction of powers of municipal corporations—a rule as well established in 1879 as it is today, and even then set forth in the classic and oft quoted statement of Judge Dillon in his work on municipal corporations.<sup>14</sup> It is hard to believe that the framers thought they were accomplishing any such result or that such result is a desirable one. Accordingly, it might have been expected that somehow section 11 would be interpreted in such a way as to avoid it and to preserve the integrity of city charters.

For a considerable length of time, however, it was doubtful whether this would be done and the California courts are not very

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note 10 and *Mugler v. Kansas* (1887) 123 U.S. 623, 661; *Nebbia v. New York* (1934) 291 U.S. 502, 523-524; *Olsen v. Nebraska* (1941) 313 U.S. 236; *Jack Lincoln Shops v. State Dry Cleaners Board* (1943) 320 U.S. 208.

<sup>13</sup> (1941) 30 CALIF. L. REV. 4-5, 41-45.

<sup>14</sup> "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation, nor its officers, can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void." DILLON, *MUNICIPAL CORPORATIONS* (1st ed. 1872) §55, pp. 101-102. *Ibid.* (5th ed. 1911) §237, pp. 448-450. The foregoing statement is one of the most venerable and has perhaps been cited more often than any passage from any textbook. Note that Judge Dillon's statement was first made in 1872, seven years before adoption of the California Constitution, thus indicating that the principle had become well-established by 1879. The general rule of strict construction is still followed. 1 McQUILLIN, *MUNICIPAL CORPORATIONS* (2d ed. Rev. 1940) §367.

clear on the point even now. For over a decade after the new constitution became effective the California Supreme Court, without discussion or analysis, repeatedly assumed that section 11 conferred powers on cities which their charters did not give them.<sup>15</sup> That it then deemed the grant of power in the section as broad and far reaching is evident from the statement in *Ex parte Campbell*<sup>16</sup> that "section 11 of Article 11 is itself a charter for each county, city, town, and township in the State." All of these early cases involved the legality of ordinances declaring certain conduct criminal if committed

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<sup>15</sup> *In re Stuart* (1882) 61 Cal. 374 (San Francisco held to have power to adopt ordinance licensing sale of liquor both by virtue of its special charter as amended and by virtue of the "eleventh section of Article XI of the Constitution of 1879"); *Ex parte Casinello* (1881) 62 Cal. 538 (holding San Francisco had power under its charter to pass ordinance forbidding throwing of debris on streets "but if there were any room for doubt, the clause in the Constitution (Section 11 of Article XI) is too plain to admit of more than one construction"); *Ex parte Moynier* (1884) 65 Cal. 33, 2 Pac. 728 (upholding San Francisco ordinance providing for inspection of laundries for proper drainage and prohibiting operation on Sundays or at certain hours on other days—on authority of §11, Article XI, without more, no statute or charter provision being referred to); *Ex parte Wolters* (1884) 65 Cal. 269, 3 Pac. 894 (Butte County held to have power to license sale of liquors under §11, Article XI, the court not referring to the County Government Act or other law giving powers to counties); *Ex parte Mount* (1885) 66 Cal. 448, 6 Pac. 78 (held Oakland had power by virtue of charter provision authorizing it to make regulations for licensing, taxing and regulating all business, to pass ordinance requiring retailers to take out license and impose tax therefor and that in any event the argument that section 11 of Article XI gave the power was held "equally strong and unanswerable"; that the delegation of power made by section 11 is "very broad and comprehensive"); *Ex parte White* (1885) 67 Cal. 102, 7 Pac. 186 (upholding under section 11 San Francisco ordinance requiring all buildings erected and used as laundries to be limited to one story in height); *In re Yick Wo* (1885) 68 Cal. 294, 9 Pac. 139 (upholding San Francisco ordinance prohibiting the maintenance of laundries other than those constructed of stone or brick without first obtaining consent of supervisors under San Francisco charter and seemingly, also under section 11); *In re Guerrero* (1886) 69 Cal. 88, 10 Pac. 261 (Los Angeles held to have power under its 1877 charter and also under sections 11 and 12 of Article XI to require licensing and taxing of liquor dealers, the court relying equally on all three sources); *In re Hang Kie* (1886) 69 Cal. 149, 10 Pac. 327 (Modesto, a sixth class Municipal Corporation Bill city, had power under section 11 to pass ordinance forbidding laundries in certain area of city. The court found it unnecessary to rely on the Municipal Corporation Bill as section 11 gave the power.); *Ex parte McNally* (1887) 73 Cal. 632, 15 Pac. 368 (Eureka, a special charter city, held to have power under section 11 to pass ordinance licensing sale of liquor); *Ex parte Campbell* (1887) 74 Cal. 20, 15 Pac. 318 (held that Pasadena, a sixth class Municipal Corporation Bill city, had power under section 11 to enact ordinance prohibiting maintenance of saloons in city, the court not referring to Municipal Corporation Bill).

<sup>16</sup> (1887) 74 Cal. 20, 26, 15 Pac. 318.

within the limits<sup>17</sup> of the city or county and providing a penalty therefor.

In the meantime, San Francisco had been unsuccessful at the polls in three attempts, made in 1880, 1883 and 1887,<sup>18</sup> to obtain a new charter. The general expressions in the cases referred to in the preceding paragraph, especially the one that section 11 "is itself a charter" apparently came as sweet music to the proponents of change. For such expressions seemed to indicate that their unsuccessful efforts to obtain a new charter had really been wholly unnecessary. San Francisco had had a new charter ever since 1880 without knowing it! Gone was the necessity, so they apparently reasoned, for heeding any longer the strictures of Judge Dillon. The door was wide open and the sky was the limit—at least in the absence of general law. Accordingly they set out to reorganize the city government. Their first step was to attempt to correct a situation which had apparently

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<sup>17</sup> The authority granted to a city or county by section 11 is limited to the making and enforcement "within its limits" of the specified regulations. Because of this requirement ordinances seeking to regulate conduct outside the boundaries of the city or county have been invalidated. *South Pasadena v. Los Angeles Terminal Ry. Co.* (1895) 109 Cal. 315, 41 Pac. 1093 (regulating railway rates between city and points outside city); *Oakland v. Brock* (1937) 8 Cal. (2d) 639, 67 P. (2d) 344 (inspection of slaughter houses outside city); *In re Smith* (1917) 33 Cal. App. 161, 164 Pac. 618 (licensing carrying on of transportation business outside limits of regulating city); *People v. Sackett* (1935) 6 Cal. App. (2d) (Supp.) 763, 43 P. (2d) 1115 (same); *Ferran v. Palo Alto* (1942) 50 Cal. App. (2d) 374, 122 P. (2d) 965 (licensing laundry business outside city).

However, in *The Emporium v. San Mateo* (1918) 177 Cal. 622, 171 Pac. 434, an ordinance licensing the operation of delivery wagons of an out-of-city retailer for purposes of delivery to customers in the city was upheld. And in both *In re Blois* (1918) 179 Cal. 291, 176 Pac. 449, and *Oakland v. Brock*, *supra*, the court conceded that ordinances requiring as a condition to granting permission to sell laundry services and meat respectively in the city that the vendor submit to inspection by the city authorities of out-of-city laundries and slaughter houses, respectively, would be valid.

In Washington the court has construed the identical provision of the Washington Constitution as preventing the legislature from delegating to cities power to exercise police power beyond their limits. *Brown v. Cle Elum* (1927) 145 Wash. 588, 261 Pac. 112, 55 A.L.R. 1175. While section 11 was not cited and while the reasoning seems inconsistent with the later case of *Gilbert v. Stockton Port District*, *supra* note 9, the California Supreme Court, in *Ebrite v. Crawford* (1932) 215 Cal. 724, 12 P. (2d) 937, upheld a law conferring on cities power to make police regulations as to the operation of aircraft at municipal airports located outside their boundaries, the court seemingly rejecting the reasoning of the *Cle Elum* case. However, the case of *Oakland v. Brock*, *supra*, which was decided after the *Gilbert* case seems very clearly to recognize that section 11 does not impose a limitation on the legislature which prevents it from vesting extraterritorial powers in cities.

<sup>18</sup> *McBAIN*, *op. cit. supra* note 6, at 229.

long been distasteful to the city. The existing charter (Consolidation Act of 1856 as amended) provided that three of the members of the five man board of fire commissioners should be appointed by the supervisors and the other two by the judges of the San Francisco County Court and the San Francisco Municipal Court respectively. Both of said courts had been abolished by the Constitution of 1879 so that while the two commissioners appointed by the judges of said courts before 1880 held office for the balance of the four year terms for which they had been appointed,<sup>19</sup> the power to fill the offices after the end of such terms apparently devolved on the governor under Section 16 of Article XX of the constitution.

Thus the city had been confronted for some time with a situation where two of its five fire commissioners were filled by appointment by the governor and since special laws amending pre-1879 special charters were not permitted, and attempts to obtain a freeholders charter had been unsuccessful, nothing could be done about it. At least not until the broad expressions of the supreme court as to the scope of section 11 engendered new hope. Filled with that hope the board of supervisors, on March 16, 1889, passed the so-called "Barry Ordinance" which reorganized the fire department and provided that all five of the fire commissioners should be appointed by the supervisors. The supervisors thereupon appointed Wilshire to the office theretofore held by Newman. Newman refused to surrender the office and in an action by Wilshire in the nature of quo warranto it was contended that the ordinance was void because contrary to the charter. In reply, Wilshire invoked section 11. In *People ex rel Wilshire v. Newman*,<sup>20</sup> decided in 1892, the court held for Newman, invalidating the ordinance. It said that section 11 "was not intended to clothe the board of supervisors with the power to annul a constituent part of the charter itself, or to overthrow one of the municipal departments," that the regulations provided for by it "are such as are in accordance with the fundamental or organic law." "This must be so," the court went on, "otherwise the board of supervisors could completely revolutionize the entire city government under a grant of power to make 'such local, police, sanitary, and other regulations as are not in conflict with general laws,'—in effect, make a new charter by ordinance, and change the same as often as it desired."<sup>21</sup>

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<sup>19</sup> *People ex rel. Parsons v. Edwards* (1892) 93 Cal. 153, 28 Pac. 831.

<sup>20</sup> (1892) 96 Cal. 605, 31 Pac. 564.

<sup>21</sup> *Ibid.* at 607-608, 31 Pac. at 564.

The *Wilshire* case thus seemed to declare without equivocation that section 11 was not a charter and that any power therein granted was subject to the terms of the actual city charter.

Whether the *Wilshire* case would stand, either in whole or in part, was rendered doubtful, however, by the decision in *Foster v. Board of Police Commissioners*,<sup>22</sup> decided two years later. The San Francisco charter as amended in 1878 vested in the police commissioners full discretion to grant licenses to sell liquor. Subsequently in 1893 the supervisors passed an ordinance purporting to limit that discretion by providing that licenses should not be granted to persons employing female waitresses. The court, while conceding that the ordinance was in conflict with the charter, upheld it with little more than the terse statement that it was "purely local, applicable only to the City and County of San Francisco, and was upon a subject included within section 11 of Article XI of the constitution."<sup>23</sup> Notwithstanding the patent inconsistency of this language with the principles just declared in the *Wilshire* case the latter was not cited.

The result of these two cases was to leave the question very much up in the air, for one held flatly that powers given by section 11 were subject to the city charter, so that very little power, if any, was added by section 11. The other assumed precisely the contrary.

The case of *Von Schmidt v. Widber*<sup>24</sup> decided later on the same year, did much to clear up the inconsistency. The pre-1879 charter of San Francisco provided that the Board of Supervisors shall exercise the powers expressly included therein "and they are prohibited to exercise any others." Power to purchase a site for a smallpox hospital was not among those enumerated in the charter. Notwithstanding, the board had attempted to make such purchase. The purchase was attacked as illegal because unauthorized by the charter, counsel invoking the familiar rule of strict construction of powers of municipal corporations referred to above. This rule is, of course, the very antithesis of the views expressed by the California courts prior to the *Wilshire* case recognizing a broad power in the council (or other legislative body) under section 11 to do anything under the sun, regardless of its charter. The court attempted, for the first time, to reconcile these two apparently incompatible notions and to assign to each its

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<sup>22</sup> (1894) 102 Cal. 483, 37 Pac. 763.

<sup>23</sup> *Ibid.* at 489, 37 Pac. at 764.

<sup>24</sup> (1894) 105 Cal. 151, 38 Pac. 682.

proper sphere of operation. After giving its approval to the doctrine of strict construction of municipal powers, citing and quoting Judge Dillon, and applying the doctrine to hold that the charter did not authorize the purchase, the court then replied to the argument that section 11 of Article XI justified the action of the board by saying that the section was of no avail because "the 'regulations' which the board of supervisors is thus authorized to make *are rules of conduct to be observed by the citizens*, and cannot by any construction of language be held to include the purchase of real estate; nor can the power to make such purchase be implied from the authority to make the regulations."<sup>25</sup>

While the *Von Schmidt* opinion has been attacked as being "extremely narrow" and "a superficial quibble,"<sup>26</sup> this appraisal seems wholly unwarranted. On the contrary, the case seems to furnish a sound basis of distinction between the *Wilshire* and the *Foster* cases and to restrict the power conferred by section 11 to the enactment of regulations governing conduct of persons generally. All other powers, it seems to hold, must be found in the charter after applying the rule of strict construction or they do not exist. Obviously the power asserted in the *Wilshire* case did not involve such regulations. Neither did that involved in the *Von Schmidt* case. Just as plainly, that involved in the *Foster* case did, as did those involved in the cases above referred to,<sup>27</sup> antedating the *Wilshire* case.

While the language of the *Von Schmidt* case thus distinguishing power to make regulations prescribing rules of conduct of citizens from other powers was not repeated in later cases, we find the interesting fact that most of the cases do in point of fact fit rather nicely into this pattern.

Thus in nearly all cases where section 11 has been held to authorize the exercise of power, the regulations did in fact "prescribe rules of conduct to be observed by citizens." To illustrate, ordinances declaring it criminal to sell liquor without a license<sup>28</sup> or at all<sup>29</sup> or to engage

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<sup>25</sup> *Ibid.* at 161, 38 Pac. at 686. (Italics supplied.)

<sup>26</sup> *McBAIN, op. cit. supra* note 6, at 330, 331.

<sup>27</sup> *Supra* note 15.

<sup>28</sup> *Ex parte* Wolters (1884) 65 Cal. 269, 3 Pac. 894; *Ex parte* Hayes (1893) 98 Cal. 555, 33 Pac. 337 (also providing that no licenses be issued to persons employing female waitresses); *Ex parte* Fedderwitz (1900) 6 Cal. Unrep. 562, 62 Pac. 935; *Ex parte* Pfirrmann (1901) 134 Cal. 143, 66 Pac. 205; *Ex parte* Young (1908) 154 Cal. 317, 97 Pac. 822; *In re* Coombs (1915) 169 Cal. 484, 147 Pac. 131; *In re* Pierce (1909) 12 Cal. App. 319, 107 Pac. 587; *Guzzi v. McAlister* (1913) 21 Cal. App. 276, 131 Pac.

in other types of business or activities without a license<sup>30</sup> were of this character and were upheld under section 11. Similarly upheld under section 11 were ordinances making it a crime to operate pool rooms.<sup>31</sup> Comprehensive zoning ordinances,<sup>32</sup> building set-back ordinances,<sup>33</sup>

336; *McRae v. Pine* (1914) 25 Cal. App. 594, 144 Pac. 983; *In re Aki* (1917) 32 Cal. App. 483, 163 Pac. 338; *Los Angeles Brewing Co. v. Los Angeles* (1935) 8 Cal. App. (2d) 379, 48 P. (2d) 65.

<sup>29</sup> *Ex parte Ellsworth* (1913) 165 Cal. 677, 133 Pac. 272; *In re Isch* (1917) 174 Cal. 180, 162 Pac. 1026; *In re Iverson* (1926) 199 Cal. 582, 250 Pac. 681; *In re Mogenssen* (1907) 5 Cal. App. 596, 90 Pac. 1063; *Selma v. Brewer* (1908) 9 Cal. App. 70, 98 Pac. 61, Sup. Ct. *hearing den.*; *In re Bond* (1909) 12 Cal. App. 255, 107 Pac. 143; *People v. Fages* (1916) 32 Cal. App. 37, 162 Pac. 137, Sup. Ct. *hearing den.*; *Herald v. Glendale Lodge* (1920) 46 Cal. App. 325, 189 Pac. 329; *In re Volpi* (1921) 53 Cal. App. 229, 199 Pac. 1090; *People v. Tomasovich* (1922) 56 Cal. App. 520, 206 Pac. 119; *People v. Draper* (1933) 134 Cal. App. (Supp.) 787, 22 P. (2d) 604.

In *In re Anixter* (1913) 22 Cal. App. 117, 134 Pac. 193, *ibid.* (1914) 166 Cal. 762, 138 Pac. 353, an ordinance prohibiting the soliciting or taking of orders for liquor was upheld. And in *People v. Velarde* (1920) 45 Cal. App. 520, 188 Pac. 59, an ordinance requiring the labeling of liquors transported was upheld as an aid in enforcing an ordinance prohibiting the sale of liquor.

<sup>30</sup> *County of Plumas v. Wheeler* (1906) 149 Cal. 758, 87 Pac. 909 (raising of sheep); *The Emporium v. San Mateo* (1918) 177 Cal. 622, 171 Pac. 434 (operation of delivery trucks on streets of city by out-of-city retailer); *In re Holmes* (1921) 187 Cal. 640, 203 Pac. 398 (dealing in second hand books); *In re Prentice* (1914) 24 Cal. App. 345, 141 Pac. 220 (plumbing); *In re Hartmann* (1938) 25 Cal. App. (2d) 55, 76 P. (2d) 709 (peddling); *In re Allbrecht* (1938) 25 Cal. App. (2d) 750, 76 P. (2d) 713 (same); *Ex parte Porterfield* (Cal. App. 1944) 147 P. (2d) 15 (soliciting memberships in dues-paying organizations).

<sup>31</sup> *Ex parte Murphy* (1908) 8 Cal. App. 440, 97 Pac. 199, rejecting argument that section 11 conferred power to regulate only—not to prohibit.

Idaho and Ohio also take the view under their similar constitutional provisions that the power is not limited to regulation but also includes prohibition. *Gale v. Moscow* (1908) 15 Idaho 332, 97 Pac. 828, 831; *Heppel v. Columbus* (1922) 106 Ohio St. 107, 140 N. E. 169.

*Cf. In re Smith* (1904) 143 Cal. 368, 77 Pac. 180, holding county could not prohibit gas works in certain area of county because section 19, article XI of Constitution, in authorizing cities to regulate their rates impliedly recognizes the lawfulness of the business and forbids prohibition.

<sup>32</sup> *Miller v. Board of Public Works* (1925) 195 Cal. 477, 234 Pac. 381; *Fourcade v. San Francisco* (1925) 196 Cal. 655, 661, 238 Pac. 934; *Dwyer v. Berkeley* (1927) 200 Cal. 505, 253 Pac. 932; *Brougher v. Board of Public Works* (1928) 205 Cal. 426, 271 Pac. 487; *Hurst v. Burlingame* (1929) 207 Cal. 134, 138, 277 Pac. 308; *A. C. Blumenthal & Co. v. Cryer* (1925) 71 Cal. App. 668, 236 Pac. 216; *Stockton v. Frisbie & Latta* (1928) 93 Cal. App. 277, 270 Pac. 270, Sup. Ct. *hearing den.* (ordinance enforced by injunction).

In the *Miller*, *Dwyer*, *Hurst* and *Blumenthal* cases, however, the general Enabling Act of 1917 (Cal. Stats. 1917, p. 1419, CAL. GEN. LAWS ACT 994) conferring power to zone on all cities was relied on equally with section 11.

<sup>33</sup> *Thille v. Board of Public Works* (1927) 82 Cal. App. 187, 255 Pac. 294.

and ordinances forbidding livery stables,<sup>34</sup> gas works<sup>35</sup> or other types of business, occupations or structures except in designated parts of the city,<sup>36</sup> all under the sanction of criminal penalties, were held authorized by section 11. The section also authorized, so it was held, ordinances regulating motor or other vehicle traffic,<sup>37</sup> requiring the inspection of business establishments<sup>38</sup> or their closing during certain hours or days,<sup>39</sup> banning assault and battery while in the act of picketing,<sup>40</sup> regulating rates of taxicabs,<sup>41</sup> telephone companies,<sup>42</sup> and of

<sup>34</sup> *Boyd v. Sierra Madre* (1919) 41 Cal. App. 520, 183 Pac. 230.

<sup>35</sup> *Dobbins v. Los Angeles* (1903) 139 Cal. 179, 72 Pac. 970.

<sup>36</sup> *Re Linehan* (1887) 72 Cal. 114, 13 Pac. 170 (keeping of cows); *McCloskey v. Kreling* (1888) 76 Cal. 511, 18 Pac. 433 (maintenance of wooden buildings; *Ex parte* Sing Lee (1892) 96 Cal. 354, 31 Pac. 245 (laundries); *In re San Chung* (1909) 11 Cal. App. 511, 105 Pac. 609 (same); *Ex parte Lacey* (1895) 108 Cal. 326, 41 Pac. 411 (steam carpet beating works); *In re Pfahler* (1906) 150 Cal. 71, 88 Pac. 270 (slaughtering of animals); *Grunbach v. Leland* (1908) 154 Cal. 679, 98 Pac. 1059 (liquor business); *Denton v. Vann* (1908) 8 Cal. App. 677, 97 Pac. 675, Sup. Ct. *hearing den.* (same); *In re Mathews* (1923) 191 Cal. 35, 214 Pac. 981 (keeping of goats); *ibid.*, 58 Cal. App. 649, 209 Pac. 220; *Parker v. Colburn* (1925) 196 Cal. 169, 236 Pac. 921 (public garage without permit); *Ex parte Ellis* (1938) 11 Cal. (2d) 571, 81 P. (2d) 911 (keeping of bees); *In re Newell* (1906) 2 Cal. App. 767, 84 Pac. 226, Sup. Ct. *hearing den.* (tents or movable structures); *In re Pedrosian* (1932) 124 Cal. App. 692, 13 P. (2d) 389 (forbidding collection and disposal of rubbish in certain zone except by person designated by city).

<sup>37</sup> *Mann v. Scott* (1919) 180 Cal. 550, 182 Pac. 281 (requiring motor vehicles to stop in rear of standing street cars); *Lindenbaum v. Barbour* (1931) 213 Cal. 277, 2 P. (2d) 161 (requiring motor vehicles to stop at boulevard stop signs); *Quinn v. Rosenfeld* (1940) 15 Cal. (2d) 486, 102 P. (2d) 317 (prohibiting jay-walking except at right angles to street); *Ex parte Snowden* (1910) 12 Cal. App. 521, 107 Pac. 724 (fixing maximum speed of motor vehicles); *Ham v. Los Angeles County* (1920) 46 Cal. App. 148, 189 Pac. 462 (same); *Whyte v. Sacramento* (1924) 65 Cal. App. 534, 224 Pac. 1008 (forbidding trucks on certain streets); *Flynn v. Bledsoe Co.* (1928) 92 Cal. App. 145, 267 Pac. 887 (requiring diagonal parking of motor vehicles); *Borum v. Graham* (1935) 4 Cal. App. (2d) 331, 40 P. (2d) 866 (requiring motor vehicles to stop at pedestrian cross-walks when occupied by pedestrians); *Mecchi v. Lyon Van & Storage Co.* (1940) 38 Cal. App. (2d) 674, 102 P. (2d) 422, Sup. Ct. *hearing den.* (requiring parallel parking of automobiles on city streets other than state highways).

<sup>38</sup> *Justesen's Food Stores, Inc. v. Tulare* (1941) 43 Cal. App. (2d) 616, 111 P. (2d) 424.

<sup>39</sup> *In re Sumida* (1918) 177 Cal. 388, 170 Pac. 823; *In re Lowenthal* (1928) 92 Cal. App. 200, 267 Pac. 886; *In re Gatsios* (1928) 95 Cal. App. 762, 273 Pac. 826, Sup. Ct. *hearing den.*; *Justesen's Food Stores, Inc. v. Tulare*, *supra* note 38.

<sup>40</sup> *In re Bell* (1942) 19 Cal. (2d) 488, 122 P. (2d) 22.

<sup>41</sup> *Ex parte Martinez* (1942) 56 Cal. App. (2d) 473, 132 P. (2d) 901; *ibid.* (1943) 22 Cal. (2d) 259, 138 P. (2d) 10.

<sup>42</sup> *Horne Telephone & Telegraph Co. v. Los Angeles (C.C.S.D. Cal. 1907)* 155 Fed. 554. In *Denninger v. Recorders Court* (1904) 145 Cal. 629, 638, 79 Pac. 360, the court indicated that power to regulate gas rates comes from section 11.

water companies<sup>43</sup> and banning the distribution of handbills,<sup>44</sup> the ordinances in each case declaring violations criminal. And various other ordinances regulating specified acts or conduct and declaring violations criminal were held referable to the police power conferred by this section.<sup>45</sup> In each of these cases, while the court did not say

<sup>43</sup> Title Guarantee & Trust Co. v. Railroad Commission (1914) 168 Cal. 295, 142 Pac. 878.

<sup>44</sup> People v. Kim Young (1938) 33 Cal. App. (2d) (Supp.) 747, 85 P. (2d) 231; People v. Taylor (1938) 33 Cal. App. (2d) (Supp.) 760, 85 P. (2d) 978.

<sup>45</sup> *In re Taylor* (1890) 87 Cal. 91, 25 Pac. 258 (banning obstruction of streets as nuisance); *Ex parte Cheney* (1891) *supra* note 9 (prohibiting carrying of concealed weapons); *Ex parte Tuttle* (1891) 91 Cal. 589, 27 Pac. 933 (prohibiting selling of pools on horse races); *Ex parte Hong Shen* (1893) 98 Cal. 681, 33 Pac. 799 (regulating sale of opium); *In re Murphy* (1900) 128 Cal. 29, 60 Pac. 465 (banning gambling games); *Ex parte McClain* (1901) 134 Cal. 110, 66 Pac. 69 (prohibiting possession of lottery tickets); *In re Zhizhuzza* (1905) 147 Cal. 328, 81 Pac. 955 (forbidding collection and removal of garbage except by city); *Glass v. Fresno* (1936) 17 Cal. App. (2d) 555, 62 P. (2d) 765 (same); *Ex parte Hoffman* (1909) 155 Cal. 114, 99 Pac. 517 (regulating solid content of milk sold in city); *Harter v. Barkley* (1910) 158 Cal. 742, 112 Pac. 556 (prohibiting connections with city sewer except when made by city); *Santa Ana v. Santa Ana Valley Irrig. Co.* (1912) 163 Cal. 211, 124 Pac. 847 (regulating manner of construction of open water ditch); *Pasadena School Dist. v. Pasadena*, *supra* note 6 (regulating building construction); *Simoneau v. Pacific Elec. Ry. Co.* (1913) 166 Cal. 264, 136 Pac. 544 (regulating speed of street railways); *Wright v. Los Angeles Ry. Corp.* (1939) 14 Cal. (2d) 168, 93 P. (2d) 135 (same); *Switzler v. Atchison Top. & S. F. Ry. Co.* (1930) 104 Cal. App. 138, 155, 285 Pac. 918, Sup. Ct. *hearing den.* (same); *Ex parte Cardinal* (1915) 170 Cal. 519, 150 Pac. 348 (requiring jitney operators to have certain driving experience); *Ex parte Barmore* (1917) 174 Cal. 286, 163 Pac. 50 (banning solicitation of customers by hotels on boats or at depots); *Ex parte Maas* (1933) 219 Cal. 422, 27 P. (2d) 373 (regulating use of water from wells); *Natural Milk Products Co. v. San Francisco* (1942) 20 Cal. (2d) 101, 124 P. (2d) 25 (prohibiting sale of unpasteurized milk); *Merced Falls Gas & Elec. Co. v. Turner* (1906) 2 Cal. App. 720, 84 Pac. 239 (requiring electric light company to change location of poles); *Ex parte Ackerman* (1907) 6 Cal. App. 5, 91 Pac. 429 (regulating ownership of dogs); *Pacific Gas & Elec. Co. v. Police Court* (1915) 28 Cal. App. 412, 152 Pac. 928, Sup. Ct. *hearing den.* (requiring street railroad to sprinkle right of way with water); *Robinson v. Otis* (1916) 30 Cal. App. 769, 159 Pac. 441, Sup. Ct. *hearing den.* (requiring permit for moving building over streets of city); *Broady v. Jennings* (1925) 70 Cal. App. 647, 234 Pac. 120 (making it unlawful for owner of domestic animals to permit them to run at large); *Witt v. Klimm* (1929) 97 Cal. App. 131, 274 Pac. 1039, Sup. Ct. *hearing den.* (prohibiting sale in San Francisco of milk not pasteurized therein); *Ex parte Lyons* (1938) 27 Cal. App. (2d) 182, 80 P. (2d) 745 (regulating manner of disposition of garbage); *Justesen's Food Stores, Inc. v. Tulare*, *supra* note 38 (requiring separation by partition of meat business from other business carried on in same room); *Ex parte Boza* (1940) 41 Cal. App. (2d) 25, 106 P. (2d) 29 (banning intoxication in public places); *Ex parte Lawrence* (1942) 55 Cal. App. (2d) 491, 131 P. (2d) 27 (banning pin games or marble games); *Vaughn v. Police Commrs.* (1943) 59 Cal. App. (2d) 771, 140 P. (2d) 130, Sup. Ct. *hearing den.* (holding right to revoke permits granted in exercise of police power comes from section 11); *Grier v. Ferrant* (1944) 62 Cal. App. (2d) 306, 144 P.

so or avowedly rest its conclusion on that ground, the regulation was indeed one making "rules of conduct to be observed by citizens" and so each was consistent with the distinction made in the *Von Schmidt* case. And since in each the regulation had the sanction of criminal penalties, this feature seems to have been brought in as a necessary concomitant, so that what the courts really conceived section 11 to authorize was the enactment of penal ordinances.

On the other hand, where the city was not making "rules of conduct to be observed by citizens," i.e. when it was not enacting penal ordinances, the California courts, ever since the *Von Schmidt* case, have repeatedly condemned the attempted exercise by cities of powers not found within the four corners of the city charter or of some applicable general law after application of the rule of strict construction declared in that case. Thus cities were held to lack power to purchase an electric light plant<sup>46</sup> and were said to lack power to construct, own or operate other municipally owned public utilities.<sup>47</sup> They could not set up special assessment districts to pay for the cost of street improvements<sup>48</sup> or remove the city marshal for dereliction of duty.<sup>49</sup> They were held to lack power to grant franchises for the business of selling electricity;<sup>50</sup> to provide an insurance plan and

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(2d) 631, Sup. Ct. *hearing den.* (requiring taxicab operators to obtain bond permitting joinder of insured with insurer in action by injured person); *People v. Commons* (1944) 64 A. C. A. 578, 148 P. (2d) 724 (possession in automobile of dangerous weapon capable of being concealed, without first obtaining permit).

In *Ex parte Green* (1892) 94 Cal. 387, 29 Pac. 783, it was held that section 11 authorized a fifth class Municipal Corporation Bill city to provide that if fines imposed for violation of penal ordinances are not paid the violator would be imprisoned in lieu thereof. The court also thought that power to make such provision was necessarily implied from the powers expressly granted in the Municipal Corporation Bill. *In re Goetz* (1941) 46 Cal. App. (2d) 848, 117 P. (2d) 47, is to like effect, involving the City of Newport Beach, a sixth class Municipal Corporation Bill city.

<sup>46</sup> *Hyatt v. Williams* (1906) 148 Cal. 585, 84 Pac. 41.

<sup>47</sup> *In re Russell* (1912) 163 Cal. 668, 672, 126 Pac. 875 (stating this to be the law prior to the 1911 amendment of section 19 of article XI which seemingly gave municipal corporations such power. The Russell case said section 19 was a direct grant of power to cities). *Oro Electric Corp. v. Railroad Commission*, *infra* note 50, held that other parts of section 19 did not constitute a direct grant of power and the city had to look to its charter. But recently in *Mill Valley v. Saxton* (1940) 41 Cal. App. 290, 294, 106 P. (2d) 455, section 19 was held to be a direct grant of power to cities to acquire or construct a municipally owned utility.

<sup>48</sup> *Gassner v. McCarthy* (1911) 160 Cal. 82, 116 Pac. 73.

<sup>49</sup> *Legault v. Board of Trustees* (1911) 161 Cal. 197, 118 Pac. 706.

<sup>50</sup> *Oro Electric Corp. v. Railroad Commission* (1915) 169 Cal. 466, 147 Pac. 118.

pension fund for employees;<sup>51</sup> to pass an ordinance on the day of its introduction where the charter provided for a five day waiting period;<sup>52</sup> to improve the harbor of the city where the charter gave only power to improve "the waterfront", the court holding "waterfront" did not include "harbor";<sup>53</sup> to charge tolls in excess of operating and maintenance expenses for the use of sewers which it had power to construct.<sup>54</sup> Applying the same rule, Los Angeles was held to lack power to offer a reward for apprehension of criminals guilty of offenses declared by state law.<sup>55</sup> By like reasoning, Marin County was held to lack power to contract to employ a private corporation to make a survey, classification and valuation of the assessable property of the county since such power was not among those conferred on counties by the Political Code.<sup>56</sup> And many other similar examples exist.<sup>57</sup> With but two exceptions,<sup>58</sup> none of the foregoing cases mentioned section 11 and it is not clear that counsel even invoked it. This would seem to indicate a rather general tacit acquiescence that section 11 was no longer applicable to this type of case. Since none of these

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<sup>51</sup> *Frisbie v. O'Connor* (1932) 119 Cal. App. 601, 603, 7 P. (2d) 316, where section 11 was invoked by counsel, but the rule of strict construction of municipal powers was held by the court to govern.

<sup>52</sup> *San Pedro L. A. & Salt Lake Ry. Co. v. Long Beach* (1916) 172 Cal. 631, 158 Pac. 204.

<sup>53</sup> *Long Beach v. Lisenby* (1917) 175 Cal. 575, 166 Pac. 333.

<sup>54</sup> *Madera v. Black* (1919) 181 Cal. 306, 184 Pac. 397.

<sup>55</sup> *Griffin v. Los Angeles* (1933) 134 Cal. App. 763, 26 P. (2d) 655, Sup. Ct. *hearing den.*; *Los Angeles v. Gurdane* (C.C.A. 9th, 1932) 59 F. (2d) 161.

<sup>56</sup> *Tax Factors Inc. v. County of Marin* (1937) 20 Cal. App. (2d) 79, 66 P. (2d) 666, Sup. Ct. *hearing den.*

<sup>57</sup> *Egan v. San Francisco* (1913) 165 Cal. 576, 133 Pac. 294 (San Francisco held to lack authority to acquire opera house to be managed and controlled by private citizens); *Foxen v. Santa Barbara* (1913) 166 Cal. 77, 134 Pac. 1142 (city held to lack authority to let contract to one other than lowest responsible bidder as provided in charter); *Logan v. Shields* (1923) 190 Cal. 661, 214 Pac. 45 (county board of supervisors held not authorized by section 11 to provide for appointment of and payment from county treasury of salary of traffic officer, but court also relied on fact section 5 article XI gave power to appoint county officers to legislature); *Hill v. Eureka* (1939) 35 Cal. App. (2d) 154, 94 P. (2d) 1025, Sup. Ct. *hearing den.* (city lacked power to license other than for purposes of regulation).

In the recent close case of *Powell v. San Francisco* (1944) 62 Cal. App. (2d) 291, 144 P. (2d) 617, Sup. Ct. *hearing den.* (three justices dissenting) in which San Francisco was held to have power to send municipal officials to Washington to testify before Congressional committee as to desirability of amending Raker Act, neither the majority nor minority opinions referred to section 11 as a possible source of power, again showing general acquiescence that the section is not applicable outside the field of penal ordinances.

<sup>58</sup> *Frisbie v. O'Connor*, *supra* note 51, and *Griffin v. Los Angeles*, *supra* note 55.

cases involved power to pass ordinances making "rules of conduct to be observed by citizens," sanctioned by criminal penalties, i.e. penal ordinances, it is quite plain that all of them are in strictest accord with the distinction made in the *Von Schmidt* case.

It was indicated above that not all the cases subsequent to the *Von Schmidt* case were in accord with that distinction. In view of the lack of clear guidance furnished by the supreme court on this question, this can scarcely be deemed surprising. At all events in several,<sup>59</sup> one having been decided as late as 1941,<sup>60</sup> section 11 was

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<sup>59</sup> *De Baker v. Southern Cal. Ry. Co.* (1895) 106 Cal. 257, 39 Pac. 610, indicated that section 11 gave Los Angeles power to erect a levee. There was no discussion or analysis on the point, the opinion devoting nearly all of its discussion to other points. The *Von Schmidt* case was not cited. *Scott v. Boyle* (1912) 164 Cal. 321, 128 Pac. 941, found, also without discussion or analysis, that section 11 gave a city authority to pass an ordinance providing for the appointment of officers to act as sealers of weights and measures, even though the charter did not. And a similar ordinance was upheld on the authority of *Scott v. Boyle* in *Milliken v. Meyers* (1914) 25 Cal. App. 510, 513, 144 Pac. 321. In *Parker v. Colburn* (1925) 196 Cal. 169, 236 Pac. 921, the court, after elaborate discussion and analysis, held that the Oakland charter gave power to construct public garages. It then added, without discussion or analysis, that in any event, section 11 also gave such power. *Jardine v. Pasadena* (1926) 199 Cal. 64, 248 Pac. 225, held that both the city charter and section 11 gave Pasadena power to establish a hospital. The charter quite clearly gave the power so that section 11 was not heavily relied on. *Valle v. Shaffer* (1905) 1 Cal. App. 183, 81 Pac. 1028, Sup. Ct. *hearing den.*, held with very meagre discussion that power of a county to appoint an expert medical employee as health officer and fix his compensation stemmed from both the County Government Act and section 11. *Farley v. Stirling* (1925) 70 Cal. App. 526, 233 Pac. 810, upheld a county ordinance providing for the county engaging in the manufacture of squirrel poison on the ground that it was authorized under section 11. There was only categorical statement and no reasoning. The same is true of *Goodall v. Brite* (1936) 11 Cal. App. (2d) 540, 54 P. (2d) 510, Sup. Ct. *hearing den.*, upholding under section 11 a county ordinance providing for free hospitalization of the needy in the county hospital. *San Diego v. Kerckhoff* (1920) 49 Cal. App. 473, 482, 193 Pac. 801, Sup. Ct. *hearing den.*, assumed that power to grant street railway franchises to individuals came from section 11 but held the power was taken away by general law. *Glass v. Fresno* (1936) 17 Cal. App. (2d) 555, 62 P. (2d) 765, held that power to collect and dispose of garbage came from section 11 but the ordinance also prohibited such collection and disposal by anyone else, under criminal penalties. Little discussion appears but the case seems to be contrary to the *Von Schmidt* case. *Mountain View v. Southern Pac. R. Co.* (1934) 1 Cal. App. (2d) 317, 36 P. (2d) 650, Sup. Ct. *hearing den.*, assumes without discussion that authority for a city to widen a road crossing a railroad track comes from section 11. *Harder v. Denton* (1935) 9 Cal. App. (2d) 607, 51 P. (2d) 199, seems to intimate, although this is debatable, that section 11 has to do with matters other than penal ordinances. *Galvin v. Board Supervisors* (1925) 195 Cal. 686, 692, 235 Pac. 450, seems to assume that somehow power to grant a franchise to operate a toll-bridge came from section 11.

In Note (1941) 29 CALIF. L. REV. 651, it is suggested that section 11 is authority for cities to construct parking meters and require motorists to pay the prescribed fee

held to authorize powers other than the making of criminal ordinances. The problem is not adequately analyzed or discussed in any of these cases. That all of them are in error and that the *Von Schmidt* distinction is now unassailable is strongly supported by two other cases, viz. *In re Werner*<sup>61</sup> and *Gilgert v. Stockton Port District*.<sup>62</sup>

In the *Werner* case, decided in 1900, a statute attempted to confer on sanitary districts the power to license the sale of liquor at retail and pursuant to that authority the North Pasadena Sanitary District passed a resolution making it a misdemeanor to sell liquor at retail in the district without a license. The resolution was held void on the ground that the subject of the authorizing statute was not expressed in its title.<sup>63</sup> In making this holding, however, the court added language to the effect that because of section 11 of Article XI and the rule of *expressio unius est exclusio alterius* the legislature could not confer the power to make and enforce "local, police, sanitary and other regulations" on any entity other than those named in section 11, viz. "counties, cities, towns and townships"; that since a sanitary district was not one of the designated entities it could not be given the powers enumerated in section 11.<sup>64</sup> It was not clear whether the language on this point was dicta or holding. Apparently

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when parking in the city street. It would seem, however, that authority for acquisition and installation of the meters must be sought elsewhere, at least in California, since this would not be a penal matter. But authority to make criminal the act of parking without payment of the required fee would be derivable from section 11. Note, however, that under the identical Washington Constitutional provision, authority for the installation of the meters was also held to come from such provision. *Kimmel v. Spokane* (1941) 7 Wash. (2d) 372, 109 P. (2d) 1069.

Also especially disconcerting and tending to muddy the waters was the puzzling statement of Mr. Justice Henshaw in *Ex parte Lorenzen* (1900) 128 Cal. 431, 435, 61 Pac. 687, that the language of section 11 "is not to be construed as enlarging the power which municipalities theretofore enjoyed in these respects; but is merely an express grant of a power which they formerly possessed by implication." The statement was dicta, and seems to have been forgotten since. It might well be.

<sup>60</sup> *Griffin v. County of Colusa* (1941) 44 Cal. App. (2d) 915, 113 P. (2d) 270, Sup. Ct. *hearing den.*, county held to have power under section 11, though not under general laws, to admit persons to county hospital other than indigent sick or dependent poor, relying on *Goodall v. Brite*, *supra* note 59.

<sup>61</sup> (1900) 129 Cal. 567, 62 Pac. 97.

<sup>62</sup> (1936) 7 Cal. (2d) 384, 60 P. (2d) 847. In *Laguna Beach County Water Dist. v. Orange County* (1939) 30 Cal. App. (2d) 740, 87 P. (2d) 46, Sup. Ct. *hearing den.*, the court distinguished districts such as county water districts from municipal corporations on the ground that the latter are granted "broad police powers" under section 11.

<sup>63</sup> CAL. CONST. art. IV, §24.

<sup>64</sup> 129 Cal. at 574.

Mr. Justice McFarland thought it was dicta only, for he delivered a separate opinion, concurring on the *additional ground* that "the legislature cannot, *under any circumstances*, delegate to such a thing as a sanitary district *the power of enacting penal legislation*." "That power," he said, "must be confined to the municipalities mentioned in the Constitution which are given police powers, etc." The Justice also concluded that "The Constitution does not contemplate that the state should be overrun and overloaded with innumerable legislative bodies, each having power to make laws under which citizens may be sent to jail."<sup>65</sup>

Subsequently, in the *Gilbert* case,<sup>66</sup> decided in 1936, the point was expressly held. Pursuant to authority expressly given by the Port District Act of 1931 the Stockton Port District, organized under that act, passed a zoning ordinance, declaring violations criminal. The ordinance was held invalid solely on the ground appearing in the concurring opinion of Justice McFarland in the *Werner* case, viz. that since port districts were not mentioned in section 11 the legislature was prohibited from vesting them with power to make and enforce penal ordinances.

While it may well be questioned whether the framers of the constitution thought they were thus tying the hands of the legislature when they enacted section 11,<sup>67</sup> the *Werner* and *Gilbert* cases seem to establish that section 11 is not only a grant of power to counties, cities, towns and townships, but is also in effect a prohibition on the legislature vesting the power the section does grant in any agency other than those expressly designated. If section 11 were held to grant more than the power to enact penal ordinances and also to empower cities and counties to exercise all manner of other powers it would follow that none of these other powers could be conferred on districts either. Surely it could not have been the intention to hold that the legislature was without power to vest sanitary districts or port districts with such other powers, e.g. to transact the business of the district, to enter into contracts, construct works, etc. If it meant the latter, none of these powers—which are obviously essential to the

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<sup>65</sup> 129 Cal. at 575.

<sup>66</sup> *Supra* note 62.

<sup>67</sup> See *supra* note 17 and case of *Ebrite v. Crawford*, there cited, which indicates section 11 is not a limitation on the legislature conferring on cities power to act outside their limits, contra to the Washington case of *Brown v. Cle Elum*, there cited. And see dissenting opinion of Fullerton, J. in *Brown v. Cle Elum*, 261 Pac. at 113.

very operation of such districts, as well as of the innumerable other districts not named in section 11—could be conferred on such districts. If it meant that nearly every district in the state would be exercising their powers illegally, even though such powers had been specifically authorized by the legislature.

And still further support for the proposition that the power conferred by section 11 is a power to enact penal ordinances and nothing else, if indeed more were needed, is found in the case of *Merced County v. Helm*.<sup>68</sup> The rule was there declared that the power to require the licensing of business of various types is derivable from section 11 only to the extent that the licensing is for the purposes of regulation. If for purposes of revenue, authority other than section 11 must be found. Thus in the *Helm* case where a county ordinance imposed license taxes on the liquor business in excess of amounts needed for regulation and provided no criminal penalties for carrying on the business without a license, but only for a civil action to recover the tax due, the court held that the ordinance was not authorized by section 11, observing that "As the county has chosen by this ordinance to require a license tax for engaging in certain kinds of business, and that this tax shall be collected by suit and has fixed no penalty for engaging in the business, the ordinance is not to be regarded as the exercise of its police power, but rather as its desire to regulate the business and derive a revenue therefrom." We could find no plainer recognition than here that the power granted by section 11 is in fact limited to power to enact penal ordinances. And the *Helm* case has been followed on the point.<sup>69</sup>

It thus appears rather conclusively from the foregoing that the power vested in cities by section 11, far from being a charter or anything like a charter, has been whittled down to a mere power to make and enforce penal ordinances.

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<sup>68</sup> (1894) 102 Cal. 159, 36 Pac. 399.

<sup>69</sup> *In re Aki* (1917) 32 Cal. App. 483, 484, 163 Pac. 338; *Hill v. Eureka* (1939) 35 Cal. App. (2d) 154, 94 P. (2d) 1025, Sup. Ct. *hearing den.*

In Idaho where a constitutional provision similar to section 11 exists the same rule prevails, *State v. Nelson* (1923) 36 Idaho 713, 722, 213 Pac. 358, 361. Recently the court upheld an ordinance providing for parking meters but indicated that if the charges collected therefor exceeded the cost of regulation the ordinance would be void because of this principle. *Foster's Inc. v. Boise City* (1941) 63 Idaho 201, 217, 118 P. (2d) 721.

(b) *Whether city charters may impose limitations on Section 11 police power.*

A further problem—one as to which the California courts have very definitely not distinguished themselves up to now—is whether the power vested in cities by section 11, i.e. to make and enforce penal ordinances, may be still further whittled down by provisions contained in city charters purporting to impose limitations on the exercise of such power. Such limiting provisions are apparently without effect if inserted in Municipal Corporation Bill charters even though the latter are themselves “general laws,” because of the rule of *Ex parte Daniels*,<sup>70</sup> hereinafter referred to, that the “general laws” authorized by section 11 do not include laws merely banning city or county police regulations on a given subject, without the legislature itself having affirmatively occupied the field on that subject. As to the pre-1879 special charter cities it seems highly probable that one of the main purposes of section 11 must have been to free all such cities from limitations found in their charters on power to enact local, police, sanitary and other regulations; to give them full power to make such regulations subject to limitation only by general law. As to these cities it is hard to believe that limitations found in their unamendable pre-1879 charters<sup>71</sup> were intended to be binding after 1879. Freeholders charter cities would seem to stand in a somewhat different category, however. It may well have been argued as to them that section 6 of Article XI gave authority to frame a charter for their own government and such authority necessarily included power to prescribe limitations on the exercise of the police power by the city government. The California courts have never recognized any distinction between special and freeholder charter cities, however, in ruling on this question.

The first case on the point was *Foster v. Board of Police Commissioners*,<sup>72</sup> reviewed above, which held that section 11 police power was not subject to limitations found in a pre-1879 special city charter. The next case, viz., *Odd Fellows Cemetery Association v. San Francisco*<sup>73</sup> was to like effect. The first San Francisco freeholders charter,

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<sup>70</sup> *Infra* note 94.

<sup>71</sup> 30 CALIF. L. REV. 275.

<sup>72</sup> (1894) 102 Cal. 483, 37 Pac. 763.

<sup>73</sup> (1903) 140 Cal. 226, 73 Pac. 987. The ordinance was again upheld on the authority of the *Odd Fellows* case in *Laurel Hill Cemetery v. San Francisco* (1907) 152 Cal. 464, 93 Pac. 70.

adopted in 1899, provided that the board of supervisors had the power "to ordain, make, and enforce within the limits of the city and county all *necessary* local, police, sanitary, and other laws and regulations." Thereafter the board adopted an ordinance making it unlawful and criminal to bury dead bodies in San Francisco. The ordinance was attacked as invalid for the reason, among others, that while it was a "police regulation" it was not a "*necessary*" police regulation, within the charter. The court rejected the argument and upheld the ordinance, saying "The insertion of the word 'necessary' in the grant of power contained in the charter does not limit or restrict the power given to the city by the Constitution."

While the *Foster* and *Odd Fellows* cases thus seemed rather unequivocally to establish that city charters could not limit the police power conferred by section 11, five years later in *Grumbach v. Leland*<sup>74</sup> the court indicated that it regarded the question as still an open one. And in 1911 we find the court holding the direct opposite in *John Rapp & Son v. Kiel*.<sup>75</sup> There the first San Francisco freeholders charter prohibited the imposition of a license tax on merchants who were not required to obtain permits from the board of police commissioners as provided in the charter. The board passed an ordinance imposing such tax contrary to the prohibition, and making non-payment a misdemeanor. In an action to enjoin its enforcement the ordinance was held void because contrary to the charter prohibition. In reply to the argument that section 11 conferred the necessary authority Justice Angellotti, for the court, said simply, without citing or referring to the *Odd Fellows* case, that "it cannot now be doubted that the legislative body of a city having a freeholders charter may be limited by charter provision in the exercise of the police power conferred upon the city by the constitution of the state." For this, the court said, it was only necessary to refer to *In re Pfahler*<sup>76</sup>

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<sup>74</sup> (1908) 154 Cal. 679, 682, 98 Pac. 1059, stating "it would be unusual" to deprive the city council of powers conferred by section 11 "and while we are not to be understood as implying that this may not be done, it would require a clear enunciation in the organic law of a city to lead to the conclusion that it was intended to be done."

<sup>75</sup> (1911) 159 Cal. 702, 709, 115 Pac. 651.

<sup>76</sup> (1906) 150 Cal. 71, 81, 88 Pac. 270. Here an ordinance of Los Angeles prohibiting, within certain parts of the city, the slaughtering of animals the flesh of which is to be sold or offered for sale or eaten, was adopted by vote of the electors of the city, using the "initiative" procedure. It was contended that the ordinance was void under section 11 because the power there vested was vested in the legislative body of cities or counties and not the people. The court overruled the contention saying "The grant to

and *People ex rel. Wilshire v. Newman*.<sup>77</sup> The *Pfahler* case was not applicable for there the court conceded the authority of the *Odd Fellows* case. And the *Wilshire* case should have been held inapplicable for the reasons stated in the *Von Schmidt* case,<sup>78</sup> i.e., that it did not deal with a regulation of the conduct of citizens, and hence was not referable to section 11 at all. Thus in this rather careless way the law on this point was, once more, completely unsettled.

One year later, in *In re Montgomery*,<sup>79</sup> the supreme court again reversed itself on the point and reestablished the rule of the *Odd Fellows* case. The Los Angeles freeholders charter enumerated certain trades, callings, and occupations which the council was authorized to prohibit. The enumeration did not include the trade or occupation of operating a lumber yard, which the council thereafter by ordinance undertook to prohibit in certain parts of the city. Petitioner, who was imprisoned for violating the ordinance, sought his release on habeas corpus, contending that the ordinance was contrary to the charter and void, relying on the *Pfahler* and *Rapp* cases. Relief was refused on the ground that a freeholders charter could not limit the police power vested in cities by virtue of section 11. The court rested its decision squarely on the *Odd Fellows* case. As to the *Rapp* case and the *Pfahler* case on which the *Rapp* opinion had relied, the court incorrectly stated that "In both of them the court was passing upon the place of lodgment of the power of the city and not upon the limitation of the power itself."<sup>80</sup> As noted above this statement was true of the *Pfahler* case but not of the *Rapp* case. In the latter the question was not one of where the power to prohibit carrying on certain types of business without a license was lodged. The charter

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the 'city' is a grant to the municipal corporation itself" and that "The common council or other local legislative body and other charter officers do not constitute the 'city' but are merely agents or officers of the city." (p. 81.) It was up to the charter, the court said, to declare in whom the power conferred by section 11 shall be exercised and it was proper for the charter to provide for its exercise in whole or in part by the people by the initiative method. The supreme court does not seem so far to have held that any body other than the legislative body or the people may exercise section 11 police power. See statement in *In re Isch* (1917) 174 Cal. 180, 181, 162 Pac. 1026. Initiative ordinances are just as subject to the limitation in section 11, i.e. of not conflicting with general laws as are other ordinances. *Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 692, 235 Pac. 450; *Sawyer v. Board of Supervisors* (1930) 108 Cal. App. 446, 291 Pac. 892, Sup. Ct. *hearing den.*

<sup>77</sup> *Supra* note 20.

<sup>78</sup> *Supra* note 24.

<sup>79</sup> (1912) 163 Cal. 457, 125 Pac. 1070.

<sup>80</sup> 163 Cal. at 459, 460, 125 Pac. at 1071.

said very plainly that such power was not lodged anywhere. Since the power sought to be exercised was of the character familiarly exercised under section 11, quite plainly the court held, just as it said it did, that section 11 police power could be limited by charter provision.

At this point students of this field must have experienced almost total and complete bewilderment and with much justification might have thrown up their hands in despair. Some among them may have thought they could at least predict with reasonable assurance that the next decision on the point would be different from the last. And so it was. For in *In re Dees*<sup>81</sup> a district court of appeal followed the *Rapp* case in a situation involving similar facts and the same San Francisco charter provision. And in *In re Hadelor*,<sup>82</sup> decided three years later by another district court of appeal and once more involving similar facts and the same charter provision, the same holding was made. The *Dees* case made no effort to reconcile the *Montgomery* or *Odd Fellows* cases. The *Hadelor* case, on the other hand, took cognizance of the fact that the *Rapp* case had not mentioned the *Odd Fellows* case but held that since the *Montgomery* case had stated that the *Pfahler* and *Rapp* cases were distinguishable because passing on the place of lodgment of the power of the city, the *Rapp* case was still good law!

To complete the incredible cycle of vacillation on this point, in 1936 a district court of appeal in *Glass v. Fresno*,<sup>83</sup> without citing the *Rapp* case, upheld the power of Fresno, a freeholders charter city, to pass an ordinance prohibiting the collection and disposal of garbage except by the city, the court observing "The power to regulate the collection of garbage comes directly from section 11 of article XI of the State Constitution. This provision is self executing and contains a direct grant of power. *The charter of Fresno could not in any manner detract from such power.*"<sup>84</sup>

We thus find the California courts, without adequate analysis or consideration, giving a different answer to this question almost every time the point arises and that after we read the cases, spanning a period of some fifty years, while it seems reasonably clear that

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<sup>81</sup> (1920) 50 Cal. App. 11, 15, 194 Pac. 717. The *Dees* and *Rapp* cases were approved obiter in *In re Higgins* (1920) 50 Cal. App. 533, 536, 195 Pac. 740.

<sup>82</sup> (1923) 61 Cal. App. 630, 215 Pac. 562.

<sup>83</sup> (1936) 17 Cal. App. (2d) 555, 62 P. (2d) 765.

<sup>84</sup> 17 Cal. App. (2d) 560, 62 P. (2d) 768.

limitations in Municipal Corporation Bill charters on section 11 police powers are not binding on Municipal Corporation Bill cities, we still cannot say whether such limitations may be made by provisions of freeholders charters or pre-1879 special charters. There would seem to be a crying need for clarification and consistency by the supreme court on a matter as fundamental and as frequently arising as this. And it would also seem that the view of the *Rapp* case is sound as to freeholders charter cities and that section 11 ought not to be invoked to circumvent or evade charter limitations deliberately adopted by such cities. Power to impose such limitations seems fairly to be comprehended within the authority to frame a charter for its own government.

(c) *Whether section 11 power extends to state affairs.*

One reading section 11 for the first time would probably get the idea that the section was intended to vest powers of local self government on the specified localities and accordingly might expect that the courts would limit the authority to regulations of local affairs as distinguished from matters of state-wide concern. The use of the word "local", and its construction as modifying "police",<sup>85</sup> points strongly to the correctness of this conclusion.

Strangely enough, however, the California courts have assumed otherwise. While several district courts of appeal have stated or assumed, with very little discussion or analysis, that only regulations of "municipal affairs" are authorized by cities under section 11,<sup>86</sup> the supreme court has repeatedly stated or assumed,<sup>87</sup> also with very

<sup>85</sup> See *supra*, page 343.

<sup>86</sup> In the following cases it was assumed or stated that section 11 gives authority only over municipal affairs. *Whyte v. Sacramento* (1924) 65 Cal. App. 534, 224 Pac. 1008; *In re Pedrosian* (1932) 124 Cal. App. 692, 695, 13 P. (2d) 389. An extreme recent example is found in *Grier v. Ferrant* (1944) 62 Cal. App. (2d) 306, 144 P. (2d) 631, Sup. Ct. *hearing den.*, where it is said "Regulation by ordinance of the business of operating taxicabs upon the streets of a municipality is strictly a municipal affair, the regulation of which by municipalities is expressly authorized by section 11, Article XI of the constitution of this state." Compare *State v. Sherrill* (1944) ..... Ohio St. ...., 53 N. E. (2d) 501, which holds that since Ohio has two separate constitutional provisions, one like section 11 of article XI and the other giving cities powers of local self government, the framers of the constitution thereby indicated that the former provision did not include local affairs.

<sup>87</sup> The following cases state or assume that power conferred by section 11 vests in cities even though regulations relate to "state affairs". *Mann v. Scott* (1919) 180 Cal. 550, 556, 182 Pac. 281; *Ex parte Daniels* (1920) 183 Cal. 636, 192 Pac. 442; *In re Murphy* (1923) 190 Cal. 286, 212 Pac. 30; *Pipoly v. Benson* (1942) 20 Cal. (2d) 366, 125

little discussion or analysis, that the section authorizes police regulations by cities on both municipal and state affairs. The discussion of the point in the cases has been so meagre that one might well be justified in saying that not the weight of authority but the weight of unsupported categorical assumption favors the latter view. But that the latter view is the one now accepted by the supreme court, with or without reasons, seems plain enough. Thus the supreme court, after having first read the word "local" out of section 11 as a separate adjective modifying "regulations", as related above, followed this up by then reading—or rather categorically assuming—it out completely. Hence section 11 may now be taken to read "Any county, city, town or township may make and enforce within its limits all such police regulations as are not in conflict with general laws." In any event, as a result of all this, the issue of municipal affairs versus state affairs, so vital in determining the powers of freeholders charter cities, does not bear at all on the question of the scope of the power granted by section 11.

Accordingly section 11 assumes a very important additional role in the government of cities and counties. For it not only grants them authority to make police regulations as to municipal or county affairs, but it also grants such authority—exercisable within their limits only, of course—over state affairs as well. Section 11, therefore, constitutes not only a broad grant to cities and counties of home rule but is also a broad grant of power to them to share in state rule.

(d) *Withdrawal of section 11 power by other constitutional provisions.*

The power originally conferred by section 11 has not remained in cities and counties intact but has been partially withdrawn by other provisions of the constitution adopted in or subsequent to 1879.

Thus section 19 of Article XI which confers on cities the power to regulate the rates of the public utilities therein named, i.e. the supplying of light, water, power, heat, transportation, telephone service or other means of communication, was held impliedly to preclude a city

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P. (2d) 482; *In re Portnoy* (1942) 21 Cal. (2d) 237, 239, 131 P. (2d) 1; *Helmer v. Superior Court* (1920) 48 Cal. App. 140, 191 Pac. 1001, Sup. St. *hearing den.*; *Mountain View v. Southern Pac. R. Co.* (1934) 1 Cal. App. (2d) 317, 36 P. (2d) 650, Sup. Ct. *hearing den.*; *Borum v. Graham* (1935) 4 Cal. App. (2d) 331, 40 P. (2d) 866; *San Mateo v. Railroad Commission* (1937) 9 Cal. (2d) 1, 8, 68 P. (2d) 713; *People v. Willert* (1939) 37 Cal. App. (2d) (Supp.) 729, 733-734, 93 P. (2d) 872.

ordinance prohibiting the maintenance of any such utilities in the city.<sup>88</sup> And, in *Denninger v. Recorder's Court*<sup>89</sup> it was intimated that the effect of section 19 of Article XI was to withdraw the regulation of the rates of such utilities within the city from section 11, placing it thereafter in section 19 where it was not subject to being overridden by general laws. The question seems no longer of any importance because the subject of public utility rate regulation appears to have been completely removed from both sections 11 and 19 of Article XI and transferred to the Railroad Commission by section 23 of Article XII, as amended in 1914, at least as to all public utilities regulated by the Commission.<sup>90</sup> This section also made provision for the withdrawal from cities of all other section 11 police powers over public utilities if and when a majority of the qualified electors voted to surrender such powers to the Railroad Commission.<sup>91</sup>

Still further scaling down of the original grant of section 11 power was made in 1902 by the adoption of section 25½ of Article IV of the California constitution. The section provided that the legislature "may" provide for the division of the state into fish and game districts and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts. It was held to preclude city and county police regulations under section 11 on this subject, the word "may" being construed to mean "must".<sup>92</sup>

(e) "Unreasonable" regulations.

Finally, it has been said in a number of cases that section 11 does not embrace power to pass "unreasonable" ordinances. This

<sup>88</sup> *In re Smith* (1904) 143 Cal. 368, 77 Pac. 180.

<sup>89</sup> (1904) 145 Cal. 629, 79 Pac. 360. Here the court indicated that it believed section 11 authorized the regulation of gas rates by a public utility in the city but found it unnecessary to decide the question since section 19 of article XI very clearly authorized it. Section 33 of article IV of the constitution, giving the legislature extensive power to regulate public utility rates, was held not to impair the power granted by section 19 on the grounds (1) that section 33 does not apply within cities or (2) that it does not forbid city regulation unless and until the state acts to regulate.

<sup>90</sup> *Ex parte Martinez*, *supra* note 41, held that Sacramento retained power to regulate the rates of taxicabs even conceding they were public utilities, since the legislature had not brought taxicabs under the jurisdiction of the Railroad Commission. The proviso of section 23 of article XII was not discussed.

<sup>91</sup> *Key System Transit Co. v. Oakland* (1932) 124 Cal. App. 733, 13 P. (2d) 979.

<sup>92</sup> *In re Cencinino* (1916) 31 Cal. App. 238, 160 Pac. 167, invalidating ordinance forbidding shipping out of county, crabs and clams caught therein. Section 25½ of article IV was first construed as mandatory in *Ex parte Prindle* (Cal. App. 1905) 7 Cal. Unrep. 223, 94 Pac. 871.

means only that notwithstanding section 11 the due process and equal protection clauses of the California and Federal Constitutions still operate to forbid arbitrary or discriminatory regulations sought to be sustained under the police power, even though made by cities or counties.<sup>93</sup> This, of course, is self evident.

(f) *Recapitulation.*

To summarize, then, the power vested in cities and counties by section 11 of Article XI to make and enforce "all such local, police, sanitary and other regulations" has been limited to a power to make "police regulations" and this, in turn, has been limited to power to enact penal ordinances. It seems reasonably clear that the power may not be further limited by provisions of Municipal Corporation

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<sup>93</sup> Cases holding ordinances unreasonable or discriminatory and so not within section 11 are: *County of Los Angeles v. Hollywood Cemetery Assn.* (1899) 124 Cal. 344, 57 Pac. 153 (prohibiting establishment of new cemetery without permit but permitting burials in existing cemeteries); *In re Smith* (1904) 143 Cal. 368, 77 Pac. 180 (prohibiting gas works in certain area of county); *In re Blois* (1918) 179 Cal. 291, 176 Pac. 449 (providing for inspection fee for out-of-city laundries serving in city—five times as large as fee for laundries located in city); *La Franchi v. Santa Rosa* (1937) 8 Cal. (2d) 331, 65 P. (2d) 1301, 110 A.L.R. 639 (ordinance forbidding sale in city of milk not pasteurized therein held void because, among other reasons, in effect erecting tariff barrier); *Justesen's Food Stores v. Tulare* (1938) 12 Cal. (2d) 324, 84 P. (2d) 140 (ordinance forbidding selling of meats during certain hours void as discriminatory because exempting restaurants and others); *McKay Jewelers v. Bowron* (1942) 19 Cal. (2d) 595, 122 P. (2d) 543 (holding void an ordinance prohibiting the solicitation of sales of goods by merchants by the use of entrances, doorways or hallways abutting on public ways); *In re Luera* (1915) 28 Cal. App. 185, 152 Pac. 738 (making mere possession of intoxicating liquor a misdemeanor); *In re Robinson* (1924) 68 Cal. App. 744, 230 Pac. 175 (ordinance forbidding solicitation of orders for goods without a license except by agents of business established in city for three months or more held void as discriminatory); *In re Gatsios* (1928) 95 Cal. App. 762, 273 Pac. 826, Sup. Ct. *hearing den.* (exempting of Kosher meat markets from Saturday evening and Sunday closing requirement applicable to other meat markets is void); *In re Wacholder* (1934) 1 Cal. App. (2d) 254, 36 P. (2d) 705 (prohibiting selling of flowers without license and providing for forfeiture of \$500 if licensee did not remain in business for 180 days); *People v. Osborne* (1936) 17 Cal. App. (2d) (Supp.) 771, 59 P. (2d) 1083 (forbidding advertisement of barber prices); *In re Kazas* (1937) 22 Cal. App. (2d) 161, 70 P. (2d) 962 (establishment of minimum prices for barbers); *In re Landowitz* (1937) 22 Cal. App. (2d) 733, 71 P. (2d) 334 (same); *In re Herrick* (1938) 25 Cal. App. (2d) 751, 77 P. (2d) 262 (same); *In re Lyons* (1938) 27 Cal. App. (2d) 182, 80 P. (2d) 745 (prohibiting importation of garbage into county for use as feed for hogs); *Mansur v. Sacramento* (1940) 39 Cal. App. (2d) 426, 103 P. (2d) 221 (prohibiting employment of both husband and wife by city); *Ferran v. Palo Alto* (1942) 50 Cal. App. (2d) 374, 122 P. (2d) 965 (condemning ordinance imposing discriminatory license fee on out-of-city laundries taking orders in city).

Bill charters. Whether the power may be still further limited by free-holders charter or pre-1879 special charter provisions is highly debatable as of now with the last supreme court case on the point holding it could not. The power is not, however, conditioned by any further requirement that the regulation be of greater concern to the city than to the state as a whole or that it be a "municipal affair".

This then is the scope of the grant of power made by section 11. Obviously it is not only a very broad grant of home rule, but is also a grant of a broad power to share in state rule. But as above stated the grant is also conditioned by the added limitation written into section 11 itself, viz. that the regulations made pursuant thereto shall not be "in conflict with general laws." We pass now to a consideration of the scope of this limitation.

## (2) SCOPE OF LIMITATION ON GRANT OF POWER BY SECTION 11

Determination of the scope of the limitation that police regulations shall not be "in conflict with general laws" has occupied much of the time of the California courts. Two main problems have necessarily been presented, viz. (a) as to what constitutes a "general law" and (b) as to what constitutes a "conflict". They will be discussed in order.

### (a) "General laws" within section 11.

The question of what constitutes a "general law" within section 11 which will override conflicting city or county ordinances has been a rather troublesome one.

#### (i) *General laws of state legislature which are not "general laws" within section 11.*

While it might seem self-evident that any general law passed by the state legislature must also be a "general law" within section 11, such is not the case. Thus in *Ex parte Daniels*<sup>94</sup> the Motor Vehicle Act of 1917 prohibited the driving of motor vehicles at a designated place at a speed in excess of 20 miles per hour and further provided that "limitations as to the rate of speed herein fixed shall be exclusive of all other limitations fixed by any law of this state or any political subdivision thereof" and that, with exceptions not here material, "Local authorities shall have no power to enact, enforce or maintain any ordinance, rule or regulation in any way in conflict with, con-

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<sup>94</sup> (1920) 183 Cal. 636, 192 Pac. 442.

trary to or inconsistent with the provisions of this act . . . and no such ordinance, rule or regulation of said local authorities . . . shall have any force or effect". Notwithstanding this provision of the act Pasadena adopted an ordinance prescribing a maximum speed limit of 15 miles per hour at the place designated and Daniels was arrested under the ordinance for driving over 15 miles per hour although not in excess of 20 miles per hour. Contending that the ordinance was void because in conflict with the law he sought his release on habeas corpus. The supreme court agreed and ordered his release. It conceded, however, that "a mere prohibition by the state legislature of local legislation upon the subject of the use of streets, without any affirmative act of the legislature occupying the legislative field, would be unconstitutional and in violation of the express authority granted by the state constitution to the municipality to enact local regulations."<sup>95</sup> For this conclusion, not theretofore expressed in California cases, Justice Wilbur, speaking for the court, cited an Ohio case<sup>96</sup> decided under a constitutional provision<sup>97</sup> similar to section 11. It was then concluded, however, that "in construing these prohibitory clauses relating to the powers of local legislative bodies, such provisions should not be ignored as unconstitutional, if a reasonable or even a strained construction can be adopted which would give them a constitutional effect." It then placed such a construction on the act. It said that the provision showed a clear intention on the part of the legislature to declare that the limitation on speed fixed in the law should be the only limitation controlling the conduct of the driver of a motor vehicle upon the streets and highways of the state. The language that "the limitations as to the rate of speed herein fixed shall be exclusive of all other limitations" was thought to be especially significant.

In any event, the court, although invalidating the ordinance by only a 5 to 2 vote, was unanimous on the proposition that a general law which did no more than prohibit local bodies from enacting police regulations in a given field was not such a "general law" as is referred to in section 11. And the supreme court recently announced its continued adherence to that view, although by way of dicta only,

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<sup>95</sup> 183 Cal. at 641, 192 Pac. at 445.

<sup>96</sup> *Fremont v. Keating* (1917) 96 Ohio St. 468, 118 N. E. 114, holding unconstitutional a statutory provision that local authorities shall not regulate the speed of motor vehicles. Notwithstanding such provision it upheld an ordinance punishing exactly the same conduct as was punished by another general law.

<sup>97</sup> See *supra* note 3.

in the case of *Pipoly v. Benson*.<sup>98</sup> The view would seem to be sound. Certainly it is hard to believe that section 11 was intended to permit the legislature to deprive cities and counties of the power of making police regulations in any field where it had not made regulations of its own, i.e. to allow the creation of a "no-man's land" of immunity from all police regulation by either state or local governments.

The construction of the term "general laws" in section 11 made by the *Daniels* case thus appears to be sound and is now reasonably well established.

A second type of general law of the state legislature which is apparently no longer deemed a "general law" within section 11, having been withdrawn therefrom by the 1896 and 1914 amendments to section 6 of Article XI, is one respecting those "municipal affairs" of a special or freeholders charter city as to which such city has acquired an immunity from interference by the legislature, i.e. by virtue of having been granted a special charter prior to 1879 or having framed and adopted under section 8 of Article XI of the constitution, a charter for its own government which expressly authorizes the city to make police regulations respecting designated municipal affairs, or by virtue of its having framed and adopted a freeholders charter or an amendment thereof subsequent to 1914 which gives general power to make and enforce all laws and regulations in respect to municipal affairs.<sup>99</sup> Note should be made, however, that this exception has so far been declared by dicta only.<sup>100</sup> Recently it was held by the Ohio Supreme Court in *State v. Sherill*,<sup>101</sup> under a somewhat simi-

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<sup>98</sup> (1942) 20 Cal. (2d) 366, 370, 125 P. (2d) 482. It was also asserted by way of dicta in *Wilton v. Henkin* (1942) 52 Cal. App. (2d) 368, 372, 126 P. (2d) 425, Sup. Ct. *hearing den.* In *Wallace v. Regents of University of California* (1925) 75 Cal. App. 274, 242 Pac. 892, Sup. Ct. *hearing den.*, the rule of the *Daniels* case was applied by way of analogy in holding unconstitutional a law providing that "no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities" and upholding a rule of the Regents of the University of California requiring vaccination as prerequisite to admission, notwithstanding such law. It was conceded that if the legislature had occupied the field with affirmative regulations the rule of the Regents would have been void.

<sup>99</sup> *Pasadena v. Charleville* (1932) 215 Cal. 384, 10 P. (2d) 745; *West Coast Advertising Co. v. San Francisco* (1939) 14 Cal. (2d) 516, 95 P. (2d) 138.

<sup>100</sup> *Civic Center Assn. v. Railroad Commission* (1917) 175 Cal. 441, 445, 166 Pac. 351; *Ex parte Daniels*, *supra* note 94; *Atlas Mixed Mortar Co. v. Burbank* (1927) 202 Cal. 660, 262 Pac. 334; *In re Means* (1939) 14 Cal. (2d) 254, 259-260, 93 P. (2d) 105. And see cases cited *infra* note 105 which assumed that public utility police regulations on "municipal affairs" were not subject to general law.

<sup>101</sup> (Ohio St. 1944) 53 N. E. (2d) 501.

lar constitutional set-up, that their provision corresponding to our section 11 had nothing to do with powers of local self government, which were covered by a separate constitutional provision. While this holding may possibly invite a similar one here, i.e. that the regulations allowed by section 11 are not of municipal or local affairs but state affairs,<sup>102</sup> this seems unlikely, in view of the strong commitment otherwise, made in the public utility cases, hereafter referred to.

There has been one exception made to the apparent municipal affairs exception, however, i.e. in the matter of regulation of public utilities. When in 1911 the authority of both the Railroad Commission and of the legislature over public utilities was greatly expanded and regulatory powers of cities and counties over such utilities transferred to the Railroad Commission, a limitation was written into a proviso of section 23 of Article XII that the section "shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town" as a majority of the qualified electors thereof shall vote to retain and if the vote so taken shall not favor continuation of such powers they shall vest in the Railroad Commission, the powers to continue unimpaired until such election. In 1914 an amendment of section 23 of Article XII having for its primary purpose the withdrawal of all powers of public utility rate regulation from cities was submitted to the people and was approved. In making this amendment, however, the language of the above proviso of section 23 was substantially changed to read that the section "shall not affect such powers of control over public utilities as relate to the making and enforcement of *local, police, sanitary and other regulations*, other than the fixing of rates, vested in any city and county or incorporated city or town" as a majority of the qualified electors thereof shall vote to retain, and if they do not vote to retain them such powers shall thereafter vest in the Railroad Commission, the powers "*to continue unimpaired*" until such election.

The wording of the 1914 amendment reserving power to make "local, police, sanitary and other regulations", using as it did the exact language of section 11 seemed, *prima facie* at least, to be aimed

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<sup>102</sup> It might with considerable plausibility be asserted that a city should not, any more than the state (see *Ex parte Daniels*, *supra* note 94) be permitted to create a "no-man's land" in the field of criminal regulation, even if the regulations concern the city more than the state, by the simple device of adopting a charter making it immune from legislative regulation of its "municipal affairs"; that the criminal law of the state cannot be regarded as a strictly "municipal affair" under any circumstances.

at preserving all powers of regulation of utilities conferred on cities by that section other than the fixing of rates. Since all cities and towns of the state, whether special charter, freeholders charter or Municipal Corporation Bill had such powers, the phraseology looked like an attempt to withdraw all authority from the legislature and the Railroad Commission to interfere with that power and hence in effect to remove from the term "general laws" as used in section 11 any law respecting public utilities other than one fixing rates, unless and until a majority of the qualified voters voted to surrender the city's power over public utilities to the Railroad Commission.

However, notwithstanding some early sporadic utterances or perhaps even holdings<sup>103</sup> to that effect, the 1914 proviso was finally<sup>104</sup>

<sup>103</sup> In *Title Guarantee & Trust Co. v. Railroad Commission* (1914) 168 Cal. 295, 142 Pac. 878, the court seems to assume, although not very clearly, that the word "vested" in the 1911 proviso included powers conferred by section 11 and that such powers were vested in a sixth class Municipal Corporation Bill city. It also held that powers conferred by the Municipal Corporation Bill and other general laws in 1911 were "vested" within the proviso. A similar assumption was made in *Oro Electric Corp. v. Railroad Commission* (1915) 169 Cal. 466, 147 Pac. 118, where the court, in determining whether powers "vested" in Stockton, a freeholders charter city since 1889, within the 1911 proviso, examined "the various provisions, whether of statute, charter, or constitution" governing the city of Stockton, and found that neither the constitution nor the charter nor any statute gave such power. It did not refer to section 11 and it found that section 19 of article XI did not of itself confer power of rate regulation, even though the court had previously expressed a contrary view as to this. In *re Russell* (1912) 163 Cal. 668, 672, 126 Pac. 875. (Interestingly enough, the Russell interpretation was approved recently in *Mill Valley v. Saxton* (1940) 41 Cal. App. (2d) 290, 294, 106 P. (2d) 455, holding a city had direct authority under section 19 to acquire a public utility.) The assumption that powers may "vest" within section 23 of article XII even under a statute, which is necessarily repealable, is directly in conflict with the reasoning of the San Mateo case, *infra* note 104. *Red Bluff v. Southern Pac. Co.* (1919) 44 Cal. App. 667, 187 Pac. 152, Sup. Ct. *hearing den.*, actually held that Red Bluff, which was a sixth class Municipal Corporation Bill city in 1911 and 1914 could order a railroad to remove obstructions for a street, even though the Public Utilities Act gave such power to the Railroad Commission, the court apparently treating the power as being "vested" in a Municipal Corporation Bill city. *Switzler v. Atchison Topeka & S.F. R. Co.* (1930) 104 Cal. App. 138, 155-156, 285 Pac. 918, Sup. Ct. *hearing den.*, held that power to regulate the maximum speed of interstate trains in the city which Stockton had in 1914 by virtue of its charter was "vested" within section 23 of article XII even though not a "municipal affair". The case was followed in *Schultheiss v. Los Angeles Ry. Corp.* (1936) 11 Cal. App. (2d) 525, 54 P. (2d) 49, in upholding a Los Angeles ordinance making it unlawful to board a moving streetcar, the court not stating whether it regarded this as a "municipal" or "state" affair, upholding it on the ground it was a "police regulation" within section 23, not mentioning section 11.

<sup>104</sup> In *City of Los Angeles v. Central Trust Co.* (1916) 173 Cal. 323, 159 Pac. 1169, it seems to be assumed that section 23 of article XII, as amended in 1914, protects only freeholder or special charter cities respecting "municipal affairs", section 11 not being

construed otherwise in *San Mateo v. Railroad Commission*,<sup>105</sup> decided in 1937, where the court seized upon the word "vested" in section 23 in holding that only such regulatory powers as had been conferred by the city charter at the time the 1914 amendment to section 23 of Article XII went into effect and which were beyond interference or control of the state legislature because dealing with "municipal affairs" were "vested" in the sense referred to in the section. Powers conferred only by section 11 could not be deemed to have become

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cited. And in *Civic Center Assn. v. Railroad Commission* (1917) 175 Cal. 441, 452-454, 166 Pac. 351, the assumption is very clearly made that powers vested in cities by section 11 or by any other provision, which were subject to being overridden by general law before 1914 continue to remain so subject after 1914 notwithstanding section 23 of article XII. Hence since separation of grades on crossings of state railroads was a state and not a municipal affair, it was subject to the jurisdiction of the Commission rather than the city. The same assumption appears to be made in *San Bernardino v. Railroad Commission* (1923) 190 Cal. 562, 213 Pac. 980.

*Mountain View v. Southern Pac. Co.* (1934) 1 Cal. App. (2d) 317, 36 P. (2d) 650, Sup. Ct. *hearing den.*, was the first case to announce unequivocally and hold squarely that only powers affecting municipal affairs which a city had in 1914 were "vested" within section 23 of article XII and that powers existing at that time by section 11 of article XI were not so "vested".

<sup>105</sup> (1937) 9 Cal. (2d) 1, 68 P. (2d) 713. The case was subsequently followed in *People v. Willert* (1939) 37 Cal. App. (2d) (Supp.) 729, 93 P. (2d) 872, holding power to license operation of motor busses in city was not "vested" within section 23 because not dealing with "municipal affairs". It was again followed in *Bay Cities Transit Co. v. Los Angeles* (1940) 16 Cal. (2d) 772, 108 P. (2d) 435, condemning a Los Angeles ordinance designating routes to be followed by motor busses of a passenger stage corporation, which also approved *People v. Willett*. *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal. (2d) 779, 108 P. (2d) 430, condemned ordinance requiring two-man streetcars, where Railroad Commission had ordered one-man cars. *Asbury Rapid Transit System v. Railroad Comm.* (1941) 18 Cal. (2d) 105, 114 P. (2d) 573, held that Los Angeles could not grant certificates of convenience and necessity as to intra-city routes of motor carriers who also operated between Los Angeles and elsewhere. The court refused to split up the business and consider the regulation of the intra-city portion of it as a municipal affair.

The waters were somewhat muddled by the decision of *Wright v. Los Angeles Ry. Corp.* (1939) 14 Cal. (2d) 168, 177, 93 P. (2d) 135, which upheld a Los Angeles ordinance regulating the speed of street railways. The case gave no consideration whatever to the question of whether a municipal or a state affair was involved, saying simply that it was a "police regulation" that the city had power to enact, citing a case decided under section 11 of article XI. In the *Bay Cities* case, *supra*, the court distinguished the *Wright* case by saying it did not appear there that any order of the Railroad Commission had been made *conflicting* with the city ordinance (16 Cal. (2d) at 778). This assumes that a city may still regulate public utilities in any respect, even though the Railroad Commission has full power to regulate in all such respects and even though the affair is a state affair, as long as the Commission has not yet regulated in fact as to such matter. It thus concludes that section 23, article XII reads the same as section 11 of article XI and requires conflicting regulations before a local regulation gives way. But it does not

"vested" at that time because they were then subject to being overridden by conflicting general laws. But as to any city whose charter conferred no such powers at the time the 1914 amendment became effective, the court held section 23 reserved no power of public utility regulation even though it should subsequently adopt a freeholders charter or amend its existing one to confer such powers. Consequently San Mateo and Redwood City which were Municipal Corporation Bill cities in 1911 and 1914 but adopted freeholders charters conferring power to regulate public utilities in 1923 and 1929 respectively, and San Carlos, which was unorganized until 1925, when it organized as a Municipal Corporation Bill city and was such in 1937, had no powers of public utility regulation "vested" in or reserved to them under section 23. The supreme court reasoned that the proviso was inserted in section 23 solely to protect freeholders charter cities and to make it clear that the freeing of the legislature from constitutional restrictions in dealing with the Railroad Commission and public utilities would not free it from section 6 of Article XI.

The correctness of the *San Mateo* case may well be questioned, for it ignores the fact that the words found in section 23 of Article XII are those of section 11 of Article XI—not of section 6 of Article XI—and would seem for that reason to indicate an intention that to be within the proviso of section 23 powers need vest only in the limited sense that any section 11 power vests in a city, i.e. subject to divestment by "general law". Certainly the concepts "municipal affairs" and "local, police, sanitary and other regulations" were so well known in 1914 that it is difficult to conceive of a draftsman wishing to protect only freeholders charter cities in the exercise of municipal affairs not using the words "municipal affairs" rather than the language of section 11 which is applicable to all cities. The con-

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read the same. Section 11 says local regulations must not be "in conflict with general laws" while section 23, on the other hand, provides that "*powers*" of cities shall cease "so far as such powers shall conflict with the *powers so conferred upon the railroad commission*." It is with the powers conferred on the Commission that the city *powers* must not conflict, not their actual exercise.

If the Wright case, together with its interpretation in the Bay Cities Transit case, ultimately prevails it would seem to indicate, contrary to earlier intimations, that cities continue to retain all their non-municipal section 11 police powers over public utilities so long as the Railroad Commission has not actually regulated to the contrary. It would make it doubtful also whether a city which had voted to surrender its public utility powers to the Commission might not still exercise them as long as the Commission had not actually regulated.

struction adopted seems to bring about precisely the same result as if the proviso had been omitted. But however this may be, the court seems to have settled the point so that instead of a further exception to the rule that the term "general laws" includes all laws passed by the state legislature, we have an exception to the previous exception that general laws relating to municipal affairs are not within section 11, insofar as they so relate, i.e. the previous exception is not applicable to general laws insofar as such laws regulate public utilities in freeholders charter or special charter cities whose charter did not confer power of regulation of public utilities before the 1914 amendment of section 23 of Article XII even though such cities may have subsequently adopted or amended a freeholders charter purporting to confer such power.

Apart from the two foregoing exceptions, however, i.e. (i) laws merely prohibiting local regulation and (ii) those dealing with municipal affairs of freeholders or special charter cities, all general laws passed by the legislature of the state are also "general laws" within the meaning of section 11. Whether anything other than such general laws is included in the category is not entirely clear. It has been held that an order of a statewide board is not.<sup>106</sup> Neither is an act of Congress.<sup>107</sup> Whether, within section 11, a county ordinance is a "general law" as to a city in such county or an ordinance of a city is a general law as to the county in which such city is located has been a question of considerable difficulty.

(ii) *County ordinances as "general laws" for cities and vice versa.*

Section 11 confers on both counties and cities the power to make and enforce within their limits police regulations which are not in conflict with general laws. Since every city in the state necessarily lies in a county also, it is obvious that difficulties must arise when both city and county seek to enact police regulations applicable to the same territory. It was possible to contend that the county occupies towards its cities the same relation as does the state towards

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<sup>106</sup> *In re Means* (1939) 31 Cal. App. (2d) 290, 87 P. (2d) 894 (order of State Personnel Board). Ohio holds otherwise under its similar constitutional provision. Hitchcock, *supra* note 3, at 21 *et seq.*

<sup>107</sup> *In re Polizzoto* (1922) 188 Cal. 410, 412-413, 205 Pac. 676; *People v. Tomasovich* (1922) 56 Cal. App. 520, 539-540, 206 Pac. 119, Sup. Ct. *hearing den.* Both of these cases upheld a county ordinance declaring criminal the same acts as were so declared by the Volstead Act (41 Stat. 305). If an act of Congress were a "general law" within section 11 such a holding would be contrary to the *Sic* case.

its counties and that accordingly a county police ordinance is one of the "general laws" referred to in section 11 and overrides a conflicting city ordinance. With some plausibility the city might also claim that its police regulations should prevail over those of the county in the common territory and hence be deemed to be "general laws" within section 11, overriding the conflicting county regulations.<sup>108</sup> Section 11 obviously sheds but little light on this question for on its face it gives both the city and county equal power to make police regulations in the absence of conflicting general laws and says nothing as to which shall prevail if the city regulation conflicts with that of the county.

The first cases to speak on this question assumed that both the county and the city ordinance could be enforced in the same territory. Thus in *In re Lawrence*<sup>109</sup> a liquor dealer in the City of Modesto was required to obtain a license from the County of Stanislaus even though he had already obtained a license from the City of Modesto for the same activities, the court, without discussion, saying this was unobjectionable. And in *Ex parte Campbell*<sup>110</sup> a Pasadena ordinance prohibiting saloons in the city was upheld under section 11. To the argument that power to pass such regulations was in the county board of supervisors the court replied that the county had not in fact passed any regulations on the subject and moreover that "manifestly such regulations, if made, could not operate to divest the authorities of the city of the right to legislate on the same subject, and enforce such regulations within the city limits. *The regulations of the board of supervisors would not be a general law within section 11, article 11.*"

But in *Ex parte Roach*<sup>111</sup> decided in 1894, the court took a different view. It was held that an ordinance of Kings County regulating the hours during which retailers could sell liquor could not be enforced in the City of Hanford, which had an ordinance providing for the issuance of licenses to sell liquor and with which petitioner had complied. The court did not find an actual conflict between the city ordinance and the county ordinance. Indeed, apparently even counsel did not so contend. The court observed that since the limitation written in section 11 that regulations shall not be in conflict with general laws applies equally to regulations of the county and the city it can-

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<sup>108</sup> *Ex parte Mansfield* (1895) 106 Cal. 400, 39 Pac. 775.

<sup>109</sup> (1886) 69 Cal. 608, 11 Pac. 217.

<sup>110</sup> (1887) 74 Cal. 20, 25, 15 Pac. 318.

<sup>111</sup> (1894) 104 Cal. 272, 37 Pac. 1044.

not be held that "the regulation of either of these bodies is a general law for the other." It then rested its decision that the county ordinance could not be enforced in the city on the ground that "There cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdictions and privileges,"<sup>112</sup> and that "Full effect can be given to the section by holding that each has been given the exclusive right of legislation within its own boundaries." It added that "the principle of local government which pervades the entire instrument is convincible of the intention to withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confided to its control."<sup>113</sup> Clearly the decision was not based on conflicting ordinances, but on the theory that on the formation of a city the territory is withdrawn from all county jurisdiction, at least as far as police regulations are concerned.

Strangely enough, however, the next year the court limited the *Roach* case by saying it decided only that in case of conflict the city regulation prevails.<sup>114</sup> And several years later the court practically overruled it in *County of Los Angeles v. Eikenberry*<sup>115</sup> where it upheld a license tax imposed by the County of Los Angeles on liquor dealers carrying on business in the City of Los Angeles, even though the city had also exacted a similar license tax of such dealers. In distinguishing the *Roach* case the court said that there "It was held that there was a conflict between the two ordinances as to the police regulation, and that the county ordinance must give way to the ordinance of the city."<sup>116</sup>

The *Eikenberry* case was a decision in department, however. Later

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<sup>112</sup> See 1 McQUILLIN, MUNICIPAL CORPORATIONS (2d rev. ed. 1940) 775, §283. Necessarily, greater liberality is allowed where the question arises between a city or a county and a district, in which case conflicting police regulations are not involved, under the rule of the *Gilbert* case. In such cases the California courts now seem to require conflict in fact before one district must yield to another or to a city or county. *In re Wetmore* (1893) 99 Cal. 146, 33 Pac. 769 (city and school district); *Los Angeles City School Dist. v. Longden* (1905) 148 Cal. 380, 83 Pac. 246 (same); *Malaley v. Marysville* (1918) 37 Cal. App. 638, 174 Pac. 367 (same); *Allied Amusement Co. v. Bryam* (1927) 201 Cal. 316, 256 Pac. 1097 (street improvement district and two cities); *Redwood City v. Meyers* (1936) 18 Cal. App. (2d) 11, 62 P. (2d) 796 (city and county harbor district).

<sup>113</sup> 104 Cal. at 277, 37 Pac. at 1046.

<sup>114</sup> *In re Mansfield*, *supra* note 108, at 403.

<sup>115</sup> (1901) 131 Cal. 461, 63 Pac. 766.

<sup>116</sup> 131 Cal. at 465, 63 Pac. at 767.

on in the same year in *Ex parte Pfirrmann*<sup>117</sup> the supreme court, sitting in bank, in an opinion signed by six justices, repudiated the construction there given the *Roach* case and approved the broader view that the county could not exercise police power at all within a city, conflict or not, adding that "If for no other reason, the unfortunate results which would necessarily follow from a judicial holding that the powers of counties and municipalities derived from the constitution as to the enactment of police and sanitary measures within the municipality were concurrent, justified the conclusion declared in *Ex parte Roach*."<sup>118</sup> Unfortunately, however, the portion of the *Pfirrmann* opinion thus commenting on the *Roach* and *Eikenberry* cases, appears to be *dicta* only, although it did represent the considered views of six members of the court. In *Ex parte John*<sup>119</sup> a district court of appeal seemingly assumed that counties could exercise their police power within the limits of cities in the county, while in *People v. Velarde*<sup>120</sup> another such court assumed the contrary although expressing some doubt of the correctness of such assumption. In *In re Knight*<sup>121</sup> another district court of appeal held that an ordinance of Butte County prohibiting the sale of liquor was not applicable in the city of Oroville, relying on the *Roach* and *Pfirrmann* cases, but ignoring the *Eikenberry* case. However, the *Knight* case was one where the city in fact had in effect a conflicting ordinance licensing sales of liquor.

We thus find that here too a commonly recurring question has not been settled one way or the other. It would seem that the views of the *Roach* and *Pfirrmann* cases are correct since they tend to avoid conflicts between county and city enforcement authorities and do not result in residents of cities being deprived of adequate police protection. But whether they are or not, it would seem that a definite solution one way or the other is urgently demanded.

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<sup>117</sup> (1901) 134 Cal. 143, 66 Pac. 205.

<sup>118</sup> 134 Cal. at 145, 66 Pac. at 206.

<sup>119</sup> (1911) 17 Cal. App. 58, 118 Pac. 722.

<sup>120</sup> (1920) 45 Cal. App. 520, 526, 188 Pac. 59.

<sup>121</sup> (1921) 55 Cal. App. 511, 203 Pac. 777. This case was expressly followed in construing the similar Idaho constitutional provision (art. 12 §2) which the court erroneously described (see *supra* note 3) as "an exact copy" of section 11 of article XI of the California constitution. *State v. Robbins* (1938) 59 Idaho 279, 285, 81 P. (2d) 1078.

(b) *When regulations under section 11 are "in conflict" with general laws.*

The second main problem presented in determining the scope of the limitation found in section 11 is that of the meaning of the word "conflict" used therein.

The dictionary definitions of "conflict" stress "antagonism", "opposing action or tendency", "opposition" or "collision".<sup>122</sup> Where the city or county attempts to legalize an act which the legislature has prohibited<sup>123</sup> or to prohibit an act which the legislature has declared lawful<sup>124</sup> we have an obvious case of conflict to which the section is applicable. But where the ordinance and the state law each make criminal and punish exactly the same conduct, it might seem off-hand that there is no conflict and that both should stand. Such has been the conclusion in a majority of cases decided in other states.<sup>125</sup> But

<sup>122</sup> WEBSTER'S NEW INTERNATIONAL DICTIONARY (1934) 561.

<sup>123</sup> *Farmer v. Behmer* (1909) 9 Cal. App. 773, 100 Pac. 901, Sup. Ct. *hearing den.* (city could not license bawdy houses when state law prohibited them); *Mountain View v. Southern Pac. R. Co.* (1934) 1 Cal. App. (2d) 317, 36 P. (2d) 650, Sup. Ct. *hearing den.* (city could not authorize construction of road across railway track without approval of Railroad Commission as required by Public Utilities Act §43(a)).

In *In re Iverson* (1926) 199 Cal. 582, 587, 250 Pac. 681, the court said that if Los Angeles had attempted to provide by ordinance that prescriptions for intoxicating liquor were lawful if in amounts exceeding 16 ounces, the maximum allowed by state law, it would be in conflict and void.

<sup>124</sup> *Ex parte Keeney* (1890) 84 Cal. 304, 24 Pac. 34 (San Francisco could not prohibit interment of dead bodies except on certificate of attending physician where state law allows interment on certificates of *either* the attending physician, midwife or coroner). *Ex parte Grey* (1909) 11 Cal. App. 125, 104 Pac. 476. (San Jose could not make criminal the carrying on of occupation of plumber without license from board of police and fire commissioners where state law provided for licensing of plumbers by city boards of health or city health officers); *Pasadena v. Fox* (1936) 16 Cal. App. (2d) 584, 61 P. (2d) 332 (ordinance requiring fee for building permit conflicted with state law forbidding fees for all official services by county officer unless such fees prescribed by law); *In re Means* (1939) 14 Cal. (2d) 254, 93 P. (2d) 105 (city could not prohibit plumbers who had passed examination and satisfied other requirements of state law and were working on state project in city from practicing vocation in city without first passing examination and securing license from city).

In *In re Hoffman* (1909) 155 Cal. 114, 118, 99 Pac. 517, it is stated that a city ordinance providing that milk could be sold containing a *less* solid content than the minimum prescribed by state law would be void. *In re Maki* (1943) 56 Cal. App. (2d) 635, 644, 133 P. (2d) 64, declared that a city ordinance attempting to license physicians would be void because they are licensed pursuant to state law.

<sup>125</sup> Both Idaho and Ohio, who have constitutional provisions similar to section 11, hold that an ordinance punishing the same acts as a general law does not conflict therewith. *Village of Struthers v. Sokol* (1923) 108 Ohio St. 263, 140 N. E. 519, 521 (applying federal-state analogy of *United States v. Lanza* (1922) 260 U.S. 377); *State v. Preston*

it was ruled otherwise in California in the case of *In re Sic*,<sup>126</sup> decided in 1887. The conclusion was rested primarily on the premise that since the constitution provides that no one shall twice be put in jeopardy for the same offense, prosecution under the ordinance would prevent prosecution under the state law for the same conduct and hence there must necessarily be a conflict.

Three years later in *Ex parte Christensen*<sup>127</sup> the court held the *Sic* rule inapplicable to a San Francisco ordinance which prohibited and made a misdemeanor the carrying on of the retail liquor business without a license. Section 435 of the Penal Code made it a misdemeanor to carry on any business without a license required "by state law" and "state law" had been construed to include city and county ordinances.<sup>128</sup> The *Sic* case did not apply, said the court, because the state law did not itself define the offense but referred to the ordinance to do so. It is difficult to see how this circumstance can be accorded controlling significance, for it has always been permissible for a statute to incorporate other existing statutes by reference.<sup>129</sup> Accordingly the case looked like a substantial repudiation of the *Sic* rule. And so did *Ex parte Taylor*<sup>130</sup> decided later the same year. But the supreme court evidently entertained some doubt on the point in the *Taylor* case and so advanced the alternative ground of decision that even if the *Sic* rule were applicable, where prosecution is brought under the void ordinance rather than the valid general law punishing the same act, it should not be dismissed but should go forward under the law—

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(1894) 38 Pac. (Idaho) 694 (specifically rejecting *Sic* case). For many other authorities to like effect see Grant, *Penal Ordinances in California* (1936) 24 CALIF. L. REV. 123, 125-126.

<sup>126</sup> (1887) 73 Cal. 142, 14 Pac. 405. The court said that the federal-state analogy was not applicable as between a state and one of its cities, first, because the United States has no general criminal jurisdiction and second, because state laws and city ordinances all rest upon the same ultimate authority—the people of the state—and they aim at the same evil.

<sup>127</sup> (1890) 85 Cal. 208, 24 Pac. 747.

<sup>128</sup> *In re Lawrence* (1886) 69 Cal. 608, 11 Pac. 217; *Ex parte Mansfield* (1895) 106 Cal. 400, 39 Pac. 775; *Ex parte Stephen* (1896) 114 Cal. 278, 46 Pac. 86; *County of Plumas v. Wheeler* (1906) 149 Cal. 758, 768, 87 Pac. 909; *Ex parte Bagshaw* (1908) 152 Cal. 701, 703, 93 Pac. 864; *Ex parte Sweetman* (1907) 5 Cal. App. 577, 579, 90 Pac. 1069; *Arfsten v. Superior Court* (1912) 20 Cal. App. 269, 271, 128 Pac. 949, Sup Ct. hearing den.

<sup>129</sup> 59 C. J. 610.

<sup>130</sup> (1890) 87 Cal. 91, 25 Pac. 258.

a conclusion subsequently followed and now firmly established.<sup>131</sup>

The *Christensen* case was itself repudiated soon thereafter in *Ex parte Mansfield*<sup>132</sup> and *Ex parte Stephen*,<sup>133</sup> and the *Sic* rule reaffirmed. It has been consistently followed by the California courts ever since,<sup>134</sup> the most recent instance being in 1942 in *In re Portnoy*.<sup>135</sup> Moreover it was given a constitutional status in *In re Mingo*<sup>136</sup> which held that it could not even be changed by the legislature. In the *Mingo* case express permission was granted cities and counties to pass ordinances declaring criminal and punishing the same acts as were so declared and punished by state act. The court nevertheless held a city ordinance so providing to be void as in conflict with such general law. While it may be somewhat difficult to see how an ordinance can be said to be "in conflict" with a law which expressly permits it, the double jeopardy argument is obviously just as valid here as it was in the *Sic* case, so that any objection to it is really one to the *Sic* case itself rather than to this application of it.

Where local police regulations are not in direct conflict with general laws and do not duplicate general laws the problem is more difficult. How far may cities or counties make and enforce police regulations in a field in which the legislature has already made extensive regulations of its own? Does the legislature by making such regulations show an intention to occupy the field and shut out all local regulations therein and can that intention, if present, be given effect?

The California cases have shown little disposition to hold that action by the legislature in a given field, however extensive, precludes different action in the same field, even of a similar character,

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<sup>131</sup> *Ex parte Stephen* (1896) 114 Cal. 278, 46 Pac. 86; *In re Murphy* (1923) 190 Cal. 286, 291, 212 Pac. 30; *In re Von Purhacs* (1923) 190 Cal. 364, 212 Pac. 689; *In re Mingo* (1923) 190 Cal. 769, 771, 214 Pac. 850.

<sup>132</sup> (1895) 106 Cal. 400, 405, 39 Pac. 775.

<sup>133</sup> (1896) 114 Cal. 278, 46 Pac. 86.

<sup>134</sup> *In re Murphy* (1923) 190 Cal. 286, 212 Pac. 30; *In re Mingo* (1923) 190 Cal. 769, 214 Pac. 850; *In re Portnoy* (1942) 21 Cal. (2d) 237, 131 P. (2d) 1; *Arfsten v. Superior Court* (1912) 20 Cal. App. 269, 128 Pac. 949, Sup. Ct. *hearing den.*; *Humphrey v. U. S. Macaroni Co.* (1920) 49 Cal. App. 395, 193 Pac. 609; *Olivieri v. Police Court* (1923) 62 Cal. App. 91, 216 Pac. 44.

In *Helmer v. Superior Court* (1920) 48 Cal. App. 140, 191 Pac. 1001, Sup. Ct. *hearing den.*, the rule of the *Sic* case was obviously applicable but the court reached its decision on another ground.

<sup>135</sup> (1942) 21 Cal. (2d) 237, 131 P. (2d) 1.

<sup>136</sup> (1923) 190 Cal. 769, 214 Pac. 850.

by cities or counties. Thus in *In re Sic, supra*, the court, while holding that an ordinance prohibiting the smoking of opium in an opium den was invalid as conflicting, since the same offense was declared and punished by state law, was careful to limit its holding to just that. It did not "wish to be understood," it said, as holding that other provisions of the ordinance which make criminal other acts not punishable by the general law "are void because the legislature has seen fit to legislate upon the same subject."<sup>137</sup> And this was so even though the legislature had in fact enacted very extensive regulations in the narcotics field.

The views thus expressed by way of dicta were translated into express holdings in a series of cases starting with *Ex parte Hong Shen*<sup>138</sup> where the court upheld a San Francisco ordinance prohibiting the sale of opium except upon the prescription of a physician, even though the state law, while otherwise regulating the sale of opium very extensively, did not require such a prescription. "Particular acts," said the court, "may be far more injurious, while the temptation to commit them much greater in a crowded city than in the state generally" and that "state laws . . . cannot always answer the peculiar wants of particular localities."<sup>139</sup>

Thereafter the rule was further elaborated by the leading case of *In re Hoffman*<sup>140</sup> where a Los Angeles ordinance required milk sold in the city to contain three and one-half per cent of solids, which percentage was higher than that prescribed by a state law subsequently enacted (three per cent). The court upheld the ordinance on the ground that it imposed not fewer, but additional requirements than those of the state law and hence was not conflicting. It rejected the contention that the state by providing for a three per cent solid content not only expressly prohibited milk of lesser solid content, but showed an express intention to permit milk of a solid content in excess of three per cent.

The *Hoffman* case is usually regarded as establishing the general rule that if the ordinance imposes the same or fewer requirements

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<sup>137</sup> 73 Cal. at 149, 14 Pac. at 408.

<sup>138</sup> (1893) 98 Cal. 681, 33 Pac. 799.

<sup>139</sup> 98 Cal. at 685, 33 Pac. at 801.

<sup>140</sup> (1909) 155 Cal. 114, 99 Pac. 517. The earlier case of *In re Desanta* (1908) 8 Cal. App. 295, 96 Pac. 1027, was to the contrary on substantially the same facts, and must be deemed overruled. See *Ex parte John* (1911) 17 Cal. App. 58, 65, 118 Pac. 722.

than a state law on the same subject it is conflicting, but where it merely imposes additional or stricter requirements it is valid.

The *Hoffman* rule was subsequently applied in many other situations. Thus an ordinance fixing a lower maximum speed limit in certain areas of the city than those fixed by state law was held to impose additional requirements and hence not to be in conflict.<sup>141</sup> An ordinance requiring jay-walkers to cross at right angles and to yield the right of way to vehicles, even though the Vehicle Code imposed only the latter requirement, was upheld,<sup>142</sup> as was one requiring automobiles to stop a certain distance to the rear of parked street cars<sup>143</sup> or at cross-walks<sup>144</sup> even though the state law prescribed less stringent regulations. Recently in *Natural Milk Producers Ass'n v. San Francisco*,<sup>145</sup> San Francisco was held to have power to prohibit the sale of raw milk in the city unless pasteurized, even though no such requirement was provided by state law, which otherwise extensively regulated sales of milk. And in *In re Bell*<sup>146</sup> Yuba County was held to have power to make criminal and punish assault while in the act of picketing even though assault without more was made a crime by the Penal Code. Other ordinances similarly supplementing state laws have

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<sup>141</sup> *Ham v. County of Los Angeles* (1920) 46 Cal. App. 148, 189 Pac. 462, Sup. Ct. *hearing den.*; *Bellingham v. Cissna* (1906) 44 Wash. 397, 87 Pac. 481 (approved in *Hoffman* case, *supra* note 113, at 117).

In *Ex parte Snowden* (1910) 12 Cal. App. 521, 107 Pac. 724, the *Hoffman* rule was applied, erroneously, so it seems, to uphold a city ordinance fixing a higher maximum speed limit than that prescribed by state law—a situation to which the *Sic* rule seems plainly applicable.

Ohio has had much greater difficulty on this point. After first ruling as the *Hoffman* case ruled in *Village of Struthers v. Sokol* (1923) 108 Ohio St. 263, 268, 140 N. E. 519, it seems to have later reversed itself. See *Schneiderman v. Sesanstein* (1929) 121 Ohio St. 80, 167 N. E. 158. See *Hitchcock, op. cit. supra* note 3, at 21-30.

<sup>142</sup> *Quinn v. Rosenfeld* (1940) 15 Cal. (2d) 486, 102 P. (2d) 317. But see *Pipoly v. Benson* (1942) 20 Cal. (2d) 366, 374, 125 P. (2d) 482, which refuses to acknowledge that the *Quinn* case decided anything on this question. Moreover the *Quinn* case seems contrary to much that was later said and decided in the *Pipoly* case.

<sup>143</sup> *Mann v. Scott* (1919) 180 Cal. 550, 182 Pac. 281. Here the court held that the *Hoffman* rule was just as applicable where the general law relates to cities only as where it is applicable to both rural and urban areas alike as in the *Hoffman* case. *Ham v. County of Los Angeles* (1920) 46 Cal. App. 148, 189 Pac. 462, Sup. Ct. *hearing den.*, is to like affect. In *In re Smith* (1914) 26 Cal. App. 116, 146 Pac. 82, the court held otherwise but the case must be regarded as overruled. See *Ham v. County of Los Angeles, supra*, 46 Cal. App. at 155.

<sup>144</sup> *Borum v. Graham* (1935) 4 Cal. App. (2d) 331, 40 P. (2d) 866.

<sup>145</sup> (1942) 20 Cal. (2d) 101, 124 P. (2d) 25.

<sup>146</sup> (1942) 19 Cal. (2d) 488, 122 P. (2d) 22.

been upheld<sup>147</sup> as have many others which otherwise regulated in a field in which the state had also regulated quite extensively.<sup>148</sup>

<sup>147</sup> *Ex parte McClain* (1901) 134 Cal. 110, 66 Pac. 69 (San Francisco could make possession of lottery tickets a crime even though state law made only the sale thereof illegal); *In re Murphy* (1920) 128 Cal. 29, 60 Pac. 465 (city ordinance prohibiting games of chance upheld since game here involved, i.e. "keno", not denounced by Penal Code, although many other similar games were); *In re Iverson* (1926) 199 Cal. 582, 250 Pac. 681 (Los Angeles could forbid prescriptions for intoxicating liquors in excess of eight ounces although state law forbade them only if in excess of 16 ounces); *In re Simmons* (1926) 199 Cal. 590, 250 Pac. 684 (ordinance could prohibit liquor containing alcohol of more than  $\frac{1}{2}$  of 1% even though state law forbade it only if in excess of  $\frac{1}{2}$  of 1%); *In re Hoffman* (1909) 155 Cal. 114, 118, 99 Pac. 517 (declaring obiter that city in earthquake zone could restrict chimneys to lower height than maximum provided by state law); *In re Mathews* (1923) 191 Cal. 35, 214 Pac. 981 (Pasadena could prohibit as a nuisance the keeping of goats in city, even though this not among the nuisances named in §370 PENAL CODE or §§3479-3480 CIV. CODE); *Witt v. Klimm* (1929) 97 Cal. App. 131, 274 Pac. 1039, Sup. Ct. *hearing den.* (city could prohibit sale of milk therein unless pasteurized in city even where state law otherwise regulated sale of milk very stringently). *Cf. La Franchi v. Santa Rosa* (1937) 8 Cal. (2d) 331, 65 P. (2d) 1301 (similar ordinance void where extensive provision existed for state inspection in city of milk pasteurized outside—conflict held to exist and ordinance also held unreasonably discriminatory); *Ex parte John* (1911) 17 Cal. App. 58, 118 Pac. 722 (ordinance of county requiring permit of county health officer before dead bodies could be disinterred in county held not to conflict with state law requiring permit from city authorities before dead bodies could be disinterred or transported through streets of city, court reasoning contrary to *Ex parte Roach*, *supra* note 111, that ordinance applied to whole county, whereas law applied only to cities and that hence Hoffman rule applied. The case seems wrong if the disinterment involved occurred inside a city, since in that case the Roach and Pfirrmann cases, *supra* notes 111 and 28, would render the county ordinance inapplicable in the city. But if the act occurred outside the limits of any city the case could be supported on the ground that under the Roach and Pfirrmann cases the county ordinance is operative only outside the limits of cities and since the law was applicable only inside such limits there was no conflict. However, as noted above, the authority of the Roach and Pfirrmann cases is not unimpeachable); *Pemberton v. Army* (1919) 42 Cal. App. 19, 22, 183 Pac. 356 (ordinance requiring driver of vehicle in turning right from one street to another to turn the corner as near the right hand curb as possible, upheld even though state law only required vehicles turning right to keep to the right of the center of the intersection); *In re Boza* (1940) 41 Cal. App. (2d) 25, 106 P. (2d) 29 (city could ban intoxication in public place even though Alcoholic Beverage Control Act did not).

<sup>148</sup> *Ex parte Campbell* (1887) 74 Cal. 20, 15 Pac. 318 (city prohibition of saloons upheld notwithstanding state legislature recognized validity of liquor business and sought to promote it); *Ex parte Young* (1908) 154 Cal. 317, 320, 97 Pac. 822 (same for county); *Odd Fellows Cemetery Assn. v. San Francisco* (1903) 140 Cal. 226, 232, 73 Pac. 987 (city could prohibit burial of dead bodies in city limits, notwithstanding other extensive state regulations of burials which did not include this one); *Stanislaus County Dairymen's Protective Assn. v. County of Stanislaus* (1937) 8 Cal. (2d) 378, 65 P. (2d) 1305 (county ordinance providing for tuberculosis control area for slaughtering of cattle not in conflict with Agricultural Code provision authorizing Department of Agriculture to set up such districts where such district not yet actually set up in county

Under the rule of the foregoing cases many situations arise where conduct violative of a state law is equally violative of a municipal ordinance setting up even stricter standards. For example, if in the *Hoffman* case where the ordinance required milk sold in the city to contain 3.5 per cent fats and the state law required all milk sold anywhere in the state to contain 3 per cent fats a person selling milk containing 2 per cent fats violates both the ordinance and the law. May he be prosecuted under the ordinance? Clearly such prosecution would seem to violate the rule of the *Sic* case but California cases have not as yet settled the question whether it does. The early case

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by department); *Coelho v. Truckell* (1935) 9 Cal. App. (2d) 47, 48 P. (2d) 697, Sup. Ct. *hearing den.* (same); *Loftis v. Superior Court* (1938) 25 Cal. App. (2d) 346, 77 P. (2d) 491 (same); *Flynn v. Bledsoe Co.* (1928) 92 Cal. App. 145, 267 Pac. 887 (requiring parking of vehicles at 45° angle where Motor Vehicle Act did not regulate parking); *In re Lowenthal* (1928) 92 Cal. App. 200, 267 Pac. 886 (city ordinance forbidding sale of meats during certain hours not in conflict with state law, which dealt only with slaughtering animals); *Mecchi v. Lyon Van & Storage Co.* (1940) 38 Cal. App. (2d) 674, 681, 102 P. (2d) 422, Sup. Ct. *hearing den.* (city could require parallel parking on streets other than state highways even though Vehicle Code required angular parking on state highways and prohibited counties and municipalities from enforcing any ordinance on "a subject covered" by this part of act); *People v. Commons* (1944) 64 Adv. Cal. App. 578, 148 Pac. (2d) 724 (ordinance forbidding without permit possession in automobile of dangerous weapon capable of being concealed held not to conflict with state law forbidding carrying of concealed weapons); *Lindenbaum v. Barbour* (1931) 213 Cal. 277, 2 P. (2d) 161 (ordinance requiring motor vehicles to stop at boulevard stop signs upheld even though Motor Vehicle Act gave right of way to motorist first entering intersection).

The *Wyllie Local Option Law* (Cal. Stats. 1911, p. 599) prohibiting the sale of liquor in any city or supervisorial district outside any city in which the electors petition the governing body to call an election to vote on the question of prohibition of intoxicating liquors, and the majority of the voters approve prohibition, was held not a general law conflicting with city or county ordinances prohibiting the sale of liquor in the absence of the calling and holding of such an election. *In re Ellsworth* (1913) 165 Cal. 677, 133 Pac. 272 (county ordinance prohibiting sale of liquor except by hotels held valid as to parts of county which had not held elections under *Wyllie* law); *In re Anixter* (1913) 22 Cal. App. 117, 134 Pac. 193 (prohibiting solicitation or acceptance of orders for liquor); *Giddings v. Bd. Trustees* (1913) 165 Cal. 695, 133 Pac. 479 (city could prohibit liquor sales even after electors of city voted otherwise); *In re Anixter* (1914) 166 Cal. 762, 138 Pac. 353 (same); *In re Coombs* (1915) 169 Cal. 484, 147 Pac. 131 ("Nothing in the 'Wyllie Law' prevents a board of supervisors from exercising this power in any part of the county which has not been subjected to the prohibitive force of that law."). The earlier case of *In re Zany* (1912) 20 Cal. App. 360, 129 Pac. 295, held to the contrary but must be deemed overruled by *In re Ellsworth, supra*.

In *Kimmel v. Spokane* (1941) 7 Wash. (2d) 372, 109 P. (2d) 1069, an ordinance installing parking meters was held not to be in conflict with state laws regulating the parking of vehicles but saying nothing about meters.

of *Ex parte Snowden*,<sup>149</sup> decided a year after the *Hoffman* case, upheld on the authority of that case a Los Angeles ordinance which prescribed a higher maximum speed limit than was fixed by state law. Obviously every act condemned by the ordinance was equally condemned by state law and yet the ordinance was upheld. If the *Sic* rule is not applicable here it would seem by greater reason that it is not applicable in cases of common ground covered where the ordinance goes farther than the statute. But the answer to this may be simply that the *Snowden* case misapplied the *Hoffman* case and is wrong.

While the question has not been settled as of now, expressions are beginning to creep into opinions indicating that ordinances imposing stricter requirements than state law are valid only in so far as they do not punish the same acts as are punished by state law. Thus we find in *In re Portnoy*<sup>150</sup> the court saying "*Insofar as the provisions of Ordinance No. 248 purport to prohibit acts which already are made criminal by the Penal Code, it is clear that they exceed the proper limits of supplementary regulation and must be held invalid because in conflict with the statutes which they duplicate.*" And after citing the *Sic* and like cases the court concluded "Under the cases cited above there is no alternative to declaring section 4 invalid *to the extent of such duplication.*"<sup>151</sup> Similar language is found in *People v. Commons*,<sup>152</sup> where it is said that "the ordinance may prohibit the same acts which are forbidden by the state law, in which case the ordinance is void to the extent that it duplicates the state enactment."<sup>153</sup>

It would seem that if the rule of the *Sic* case is law in this state, and the supreme court has continued to say that it is, the rule is clearly applicable insofar as an ordinance and a law do cover common ground and that it should be so held.<sup>154</sup>

The frequent enactment and upholding of supplementary and additional municipal and county ordinances notwithstanding the existence of comprehensive regulations by the legislature in the same

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<sup>149</sup> (1910) 12 Cal. App. 521, 107 Pac. 724.

<sup>150</sup> *Supra* note 87.

<sup>151</sup> 21 Cal. (2d) at 240, 131 P. (2d) at 2.

<sup>152</sup> (L. A. Super. Ct. 1944) 148 P. (2d) 724.

<sup>153</sup> 148 P. (2d) at 727.

<sup>154</sup> See Grant, *Municipal Ordinances Supplementing Criminal Laws* (1936) 9 So. CALIF. L. REV. 95, 102-108, for more detailed discussion of this problem.

field indicates a decided reluctance on the part of the California courts to hold that the legislature has legislated so extensively as to "occupy the field" and to condemn on that ground ordinances which do not directly conflict with any general law. Certainly the cases are in marked contrast to those in the field of federal-state relations, where seemingly much less extensive congressional regulations than those involved in many of the California cases are held to occupy the field and prevent state regulation therein.<sup>155</sup> As a matter of fact with but few exceptions, nearly all of which appear to have been overruled,<sup>156</sup> the only cases thus far decided under section 11 which hold that state regulation occupies a field so as to preclude ordinances which do not directly conflict with them have been those where the legislature has expressly provided that there shall be no local regulations on a given subject.<sup>157</sup> Even there they reason, rather curi-

<sup>155</sup> See, for example, *Adams Express Co. v. Croninger* (1913) 226 U.S. 491; *Kansas City Southern Ry. Co. v. Van Zant* (1923) 260 U.S. 459; Note (1942) 30 CALIF. L. REV. 568.

<sup>156</sup> *In re Desanta* (1908) 8 Cal. App. 295, 96 Pac. 1027 (seemingly overruled by *In re Hoffman*, *supra* note 113); *In re Zany* (1912) 20 Cal. App. 360, 129 Pac. 295 (seemingly overruled by *In re Ellsworth*, *supra* note 148); *In re Smith* (1914) 26 Cal. App. 116, 146 Pac. 82 (overruled by *Mann v. Scott*, *supra* note 143); *In re Simmons* (1925) 71 Cal. App. 522, 235 Pac. 1029 (seemingly overruled by *In re Simmons*, *infra* note 160); *People v. Huchstep* (1931) 114 Cal. App. (Supp.) 769, 300 Pac. 448 (forbidding any lights on rear of car other than those required by state act—void but court relies partially on case of *Lindenbaum v. Barbour* (Cap. App. 293 Pac. 829, overruled on hearing by supreme court (1931) 213 Cal. 277, 2 P. (2d) 161).

<sup>157</sup> *Ex parte Daniels* (1920) 183 Cal. 636, 192 Pac. 442, held void a Pasadena ordinance providing 15 miles per hour speed limit for automobiles, where state law fixed limit of 20 miles per hour and also expressly provided that limitations fixed by state law were exclusive of those of political subdivisions. In *In re Murphy* (1923) 190 Cal. 286, 212 Pac. 30, the state law fixed a maximum speed limit. A San Francisco ordinance prohibiting unsafe operation of vehicles generally was held void because the legislature had in the Vehicle Act expressly authorized local legislation in certain fields other than this, thereby showing an intent to prohibit it—or to occupy field completely as to speed limit. In *Atlas Mixed Mortar Co. v. Burbank* (1927) 202 Cal. 660, 262 Pac. 334, a provision of Motor Vehicle Act fixing maximum load of vehicles using city streets but giving cities power to permit a higher maximum load on city streets other than state highways but prohibiting cities fixing a lighter maximum load on state highways, held to invalidate Burbank ordinance providing a lower maximum on city streets. In *Sawyer v. Board of Supervisors* (1930) 108 Cal. App. 446, 453, 291 Pac. 892, Sup. Ct. *hearing den.*, the State Dam Act, purporting to vest exclusive jurisdiction in State Water Department to supervise the construction, enlargement, alteration and repairs of dams in California and forbidding city and county regulations, held to invalidate Napa County ordinance regulating size of dams. See discussion by Judge Shaw in *People v. Commons* (1944) 64 Adv. Cal. App. 578, 148 Pac. (2d) 724, at 727-728, where this is also recognized, the lack of an affirmative declaration not to occupy appearing to have been a controlling consideration.

ously, so it seems, that while (as above noted) the general laws referred to in section 11 do not include laws merely prohibiting local regulation in a field without itself otherwise legislating therein, provisions banning local regulations when coupled with affirmative regulation by the legislature itself are indicative of an intention to occupy the field exclusively and to legalize conduct in the field not prohibited by the legislature. The reasoning seems to be that where such a prohibitory clause appears it is equivalent to a declaration that all acts in the field not prohibited are expressly made legal. This line of reasoning was followed in the recent cases of *Pipoly v. Benson*<sup>158</sup> and *Wilton v. Henkin*,<sup>159</sup> which held city ordinances forbidding all jay-walking invalid because of the provisions of the Vehicle Code requiring only that a jay-walker shall yield the right of way to vehicles, solely because of the provision of the Vehicle Code prohibiting local regulations in this field.

On the other hand, the California courts have held that provisions of state laws declaring that local regulations in the field shall be permitted, while not of themselves authorizing ordinances which actually conflict with state law, are indicative of a legislative intention not to occupy the field, thus justifying local regulations in it.<sup>160</sup> In view of the infrequency with which the state has been held to occupy the field, especially in the absence of provisions purporting to prohibit local regulation, a declaration expressly permitting local regulation would seem rather redundant. However, it does serve to clarify situations where prohibitory provisions also exist whose scope is not clear, or to create exceptions to such provisions even when clear.

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<sup>158</sup> (1942) 20 Cal. (2d) 366, 125 P. (2d) 482.

<sup>159</sup> (1942) 52 Cal. App. (2d) 368, 126 P. (2d) 425, Sup. Ct. *hearing den.*

<sup>160</sup> *In re Iverson* (1926) 199 Cal. 582, 250 Pac. 681 (Los Angeles ordinance forbidding medical prescriptions for intoxicating liquors for amounts in excess of eight ounces held not to conflict with Wright Act, the state prohibition law, which only banned prescriptions in excess of 16 ounces where state act provided that nothing in the act "should be construed as limiting the power" of any city or county to prohibit the manufacture, sale, transportation or possession of intoxicating liquors); *In re Simmons* (1926) 199 Cal. 590, 250 Pac. 684 (same provision stressed in upholding ordinance prohibiting maximum alcoholic content lower than maximum set by state law); *Lindenbaum v. Barbour* (1931) 213 Cal. 277, 282, 2 P. (2d) 161 (general law expressly allowing local ordinances requiring vehicles to stop before entering boulevards if stop signs posted); *Natural Milk Producers Assn. v. San Francisco* (1942) 20 Cal. (2d) 101, 124 P. (2d) 25 (provision that certain part of Agricultural Code is not a limitation on the power of a municipality or county to provide for reasonable additional regulations not in conflict therewith requiring standards higher than the maximum requirements for the grades of milk established therein).

Hence the conclusion as to whether the legislature has or has not occupied the field seems so far to have been influenced almost entirely by whether the legislature has affirmatively declared its intent to do so by prohibiting local regulations therein. This has resulted in frequent use by the legislature in state police regulations of provisions either expressly prohibiting or expressly permitting local regulations in specified parts of the field.<sup>161</sup> Thus the 1943 legislature added section 459.1 to the Vehicle Code providing that the provisions of the Code regulating pedestrians "shall not be deemed to prevent local authorities, by ordinance, from adopting ordinances prohibiting pedestrians from crossing roadways at other than cross-walks" thereby changing the rule of *Pipoly v. Benson* and *Wilton v. Henkin, supra*.

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<sup>161</sup> The Vehicle Code, enacted in 1935, is the best example of this. The code contains fifteen separate "Divisions". The first eight Divisions say nothing of either prohibiting or permitting local regulations. Division 9, dealing with "Traffic Laws", on the other hand provides that local authorities shall not enact ordinances on matters covered by the Division "unless expressly authorized herein" (§458). The next section (§459) expressly authorizes local regulations on eight specific kinds of traffic matters. Additional fields of permissible local traffic regulation were added in 1943 by section 459.1 (prohibition of jay-walking or making of turning movement by any vehicle at any intersection), section 459.2 (establishment of cross-walks between intersections) and section 459.3 (regulation of vehicular traffic on private roads leading to private airports where such roads expressly open to public). Section 472 implies that local parking regulations are permissible. Other local traffic regulations are authorized by section 476(c)2, and prohibited by section 575(c). Division X, dealing with "Equipment" on motor vehicles, contains no provisions either expressly prohibiting or expressly allowing local regulation. Division XI deals with "Size, Weight and Loading of Vehicles." Sections 712, 713 and 714 authorize local authorities to increase or reduce maximum weight limits. Divisions IXa, XII, XIII and XIV contain no provisions either forbidding or permitting local regulations. In view of the foregoing, it might well be contended that the legislature has shown an intention to occupy the fields covered by Divisions IX and XI to the extent indicated, but that all other fields are open to local regulations.

The Agricultural Code is now virtually without provisions either affirmatively prohibiting or affirmatively permitting local regulation. Section 203 seemingly permits local regulations on animal quarantine while section 304 forbids higher local requirements for meat inspection. In 1941 section 451 of the Code then affirmatively permitting supplemental local regulation imposing higher minimum standards for milk, and which was relied on to some extent in *Natural Milk Producers Assn. v. San Francisco, supra* note 160, was amended to strike out this language. But no section actually prohibiting such supplemental local regulation was substituted and it is therefore difficult to see why such an ordinance as was then upheld is not still valid under the *Hoffman* case.

The Health and Safety Code, on the other hand, contains provisions expressly enjoining upon counties and cities the duty of enacting "ordinances necessary for the preservation of public health . . . not in conflict with general laws. . . ." See CAL. HEALTH & SAFETY CODE, §§450, 500.

The Business and Professions Code impliedly allows licensing of pharmacists by cities or counties. CAL. BUS. & PROF. CODE §4064.

## CONCLUSION

While section 11 of Article XI has been widely heralded as a salutary provision guaranteeing home rule for California cities and counties, the foregoing would seem to indicate that such claims are largely spurious. While the section probably had as its original purpose the freeing of pre-1879 charter cities from the many and confusing restrictions of their old charters, particularly in view of their inability to obtain amendments of such charters after 1879, it is not clear that it accomplished even that, as shown above. On the other hand, it seems to have accomplished two purposes which very probably were not contemplated by the framers, viz. (1) in giving cities and counties power without prior legislative authorization to make and enforce within their limits police regulations on matters which are either of exclusive state concern or of greater concern to the state than to the city or county and (2) in barring the legislature from granting police powers to public corporations and districts other than those specified in section 11.

That the latter two results are not necessarily desirable ones would seem apparent. As to the first there would not seem to be any greater reason for allowing cities or counties in the absence of legislative authorization to meddle in state affairs, even where those affairs occur within city or county limits, than there is for allowing the state without prior authorization by cities to meddle in the affairs of cities. And as to the second, it seems unwise to construe section 11, as it was construed in the *Gilbert* case, as prohibiting the legislature from vesting police powers in entities other than cities and counties. While conflicting police regulations by overlapping districts are not ordinarily to be favored it would seem that the legislature can and should be trusted to regulate any such conflicts by legislation in the usual course. And it would seem highly desirable in many cases that the legislature have authority to confer police power on such districts.

As a grant of power to cities and counties to make and enforce police regulations respecting "municipal affairs" section 11 does not appear to serve any useful purpose, for every city and county of the state has that power anyhow by statutory or charter provision<sup>162</sup> and

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<sup>162</sup> As to the two special charter cities of the state, viz. Alviso and Gilroy, adequate police power will be found in their respective charters. See Alviso Charter (Cal. Stats. 1852, p. 222; Cal. Stats. 1849-50, p. 129) §3. ("to pass such other By-Laws and ordinances for the regulation and police of such town, as they shall deem necessary");

it is unthinkable that it or any substantial part of it would ever be repealed. And as to freeholder and special charter cities such repeal could not be made by the legislature anyhow—at least to the extent that, and so long as some police regulations are considered to be “municipal affairs”.

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Gilroy Charter (Cal. Stats. 1869-70, p. 263 at 265) §9 (“to regulate for the protection of health, cleanliness, ornament, peace and good order of the city”).

Section 764(1) and (19) of the Municipal Corporation Bill (CAL. GEN. LAWS, Act 5233) gives very broad police powers to the two fifth class Municipal Corporation Bill cities of the state, *viz.* Santa Ana and Woodland, section 764(19) being a facsimile of section 11.

Section 862.1 of the Municipal Corporation Bill and following sections give adequate police power to the some 225 sixth class Municipal Corporation Bill cities of the State. (See 30 CALIF. L. REV. 42-44, to which should be added Mendota, Fresno County, incorporated June 17, 1942.) Section 862.1 gives such cities power “To pass ordinances not in conflict with the constitution and laws of this state or of the United States.”

As to the freeholder charter cities, their charters (see citations at 30 CALIF. L. REV. 41-42) seem adequate to confer broad police powers as to municipal affairs. As to those adopted or amended subsequent to 1914 and giving a general power over municipal affairs obviously the authority is adequate. See Alameda Charter (1917) art. I §1-2(d) (added by amendment in 1937, see Cal. Stats. 1937, p. 2881); Albany Charter (1927) §3; Alhambra Charter (1915) art. VI, §37; Berkeley Charter (1909) §115 (added by amendment in 1921, see Cal. Stats. 1921, p. 2023); Compton Charter (1925) art. III §1; Fresno Charter (1921) art. I §1; Glendale Charter (1921) art. III §1; Huntington Beach Charter (1937) art. III §2; Inglewood Charter (1927) art. III §3; Long Beach Charter (1921) art. IV §2; Los Angeles Charter (1925) art. I §2(4); Oakland Charter (1911) §49a (added by amendment, see Cal. Stats. 1941, p. 3400); Oroville Charter (1933) art. III §1; Pacific Grove Charter (1927) §5; Palo Alto Charter (1909) art. II §25 (added by amendment, Cal. Stats. 1933, p. 2747); Pasadena Charter (1901) art. I §2(11) (added by amendment, Cal. Stats. 1923, p. 1663, Cal. Stats. 1931, p. 2603); Petaluma Charter (1911) art. III §72 (added by amendment, Cal. Stats. 1933, p. 3259); Redondo Beach Charter (1935) art. III §3; Riverside Charter (1929) art. I §3; Sacramento Charter (1921) art. II §2; San Diego Charter (1931) art. I §2; San Francisco Charter (1931) §2; San Jose Charter (1915) art. I §2a (added by amendment, see Cal. Stats. 1933, p. 3226); Santa Barbara Charter (1927) art. I §2(4); Santa Monica Charter (1907) art. II §1(23) (added by amendment, Cal. Stats. 1940, Ex. Sess., p. 191); Stockton Charter (1923) art. III §1; Visalia Charter (1923) art. III §1.

As to other freeholder charter cities the charter powers also seem adequate. See Bakersfield Charter (1915) art. III §12 (to “make and enforce local police, sanitary and other regulations”); Burbank Charter (1927) §3 (“may exercise all powers necessary or appropriate to a municipal corporation and the general welfare of its inhabitants, which are not prohibited by the constitution and which it would be competent for this charter to set forth particularly or specifically”); Chico Charter (1923) art. II §6 (“To exercise police powers and make all necessary police and sanitary regulations”); Eureka Charter (1895) art. III §61 (“To make and enforce all such local, police, sanitary and other regulations as are not in conflict with general laws and the provisions of this charter.”); Grass Valley Charter (1921) art. I §2 (“To make and enforce ordinances for the protection of the health, morals, peace, safety, comfort and convenience of the people”); Marysville Charter (1919) art. II §5 (incorporating §4408 POL. CODE as it then existed

On the whole, therefore, it is not clear that section 11 of Article XI has fulfilled the purpose its framers probably intended, or that it has not introduced much uncertainty and confusion into California municipal corporation law without resulting in any tangible compensating benefits. It would be difficult to demonstrate that California needs it any more than the forty-four states who do not now have such a constitutional provision need it.

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and giving power among others "To make by-laws and ordinances not repugnant to the Constitution and laws of the United States or of this state."); Modesto Charter (1911) art. III §4(18) ("To exercise police powers and make all necessary police and sanitary regulations."); Monterey Charter (1925) §4 (same as Burbank, *supra*); Napa Charter (1915) §4 ("all powers . . . conferred on municipalities by the constitution and laws of the state of California which it would be lawful for this charter specifically to enumerate"); Piedmont Charter (1923) §3 (same as Burbank, *supra*); Pomona Charter (1911) art. VII §54(9-31, 33, 36, 37, 38, 55, 56, 59); Porterville Charter (1927) §4 (same as Burbank, *supra*); Redwood City Charter (1929) §3 (*ibid.*); Richmond Charter (1909) art. II §1(6) (same as Chico, *supra*); Roseville Charter (1935) art. IV §1 (same as Burbank, *supra*); Salinas Charter (1919) §3 ("It shall possess and may exercise all municipal powers not inconsistent with the Constitution of the State of California"); San Bernardino Charter (1905) §40(2) ("To make and enforce all such local, police, sanitary and other regulations as pertain to municipal affairs"); San Buenaventura Charter (1933) art. IV §1 (same as Burbank, *supra*); San Leandro Charter (1933) art. IV §1 ("shall have the right and power to make and enforce within its limits such local, police, sanitary, and other laws and regulations in respect to municipal affairs as are not in conflict with general laws, subject only to the restrictions and limitations provided in this charter."); San Luis Obispo Charter (1911) §34 ("subject to the express limitations of this charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the constitution of the state"); San Mateo Charter (1923) §3 (same as Burbank, *supra*); San Rafael Charter (1913) art. III §16 (same as Chico, *supra*); Santa Clara Charter (1927) art. II §1(w) ("To do and perform any and all other acts and things appropriate to a municipal corporation, which are not specifically forbidden by the constitution or laws of the state or which may be for the general welfare and good of the people of said City of Santa Clara"); Santa Cruz Charter (1911) art. I §40 ("To do and perform whatsoever is necessary or convenient in municipal administration for the benefit of the inhabitants of the city"); Santa Rosa Charter (1923) §3 (same as Burbank, *supra*); Tulare Charter (1923) §3 (*ibid.*); Vallejo Charter (1911) §49(1) ("To make and enforce local, police, sanitary and other laws and regulations"); Watsonville Charter (1903) art. II §50 (pass all regulations and measures deemed expedient and necessary "for the promotion and protection of the health, comfort, safety, life, welfare, and property of the inhabitants of the city, the preservation of peace and good order, the promotion of public morals, and the suppression of vice in the city.").

Section 4041.1 of the Political Code gives to county boards of supervisors power "to make and enforce such rules and regulations for . . . the preservation of order, . . . as may be necessary."