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STATE PRE-EMPTION AND LOCAL LEGISLATION

Thomas M. Montgomery*

One pressing question currently facing local government is whether cities and counties have the power to legislate in particular fields. The basis for local legislation flows from article XI, section 11 of the California constitution, which provides: "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 the general laws."

In attempting to ascertain whether a local regulation is "in conflict" with the general laws, the situations generally fall into three categories. *First*, there is specific constitutional or statutory language reserving a field of legislation to the state.¹ *Second*, there are some instances in which the Legislature has stated that cities and counties may legislate in particular fields.² Some times such authority on the part of the local agency is qualified to the extent that the local regulation must be stricter than state law³ or impose equal or greater restrictions than those imposed by state law.⁴ If the Legislature has thus spoken, the only problem is to frame the local legislation so that it falls within the defined limits. *Third*, there are many situations in which there is state legislation in the

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¹ See, e.g., CAL. CONST. art. XX, § 22 in regard to the control of alcoholic beverages. CAL. VEH. CODE § 21, another example, reads as follows: "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein." This category and the second category which is mentioned herein-after in the body of this article are discussed in *Pipoly v. Benson*, 20 Cal. 2d 366, 371-72, 125 P.2d 482, 485 (1942).

² See, e.g., CAL. VEH. CODE § 21100 (processions or assemblages on highways, licensing and regulating operation of vehicles for hire and traffic regulation), CAL. BUS. & PROF. CODE § 11540.1 (regulating division of land which is not a subdivision) and CAL. HARB. & NAV. CODE § 660 (measures relating to use of undocumented vessels). An interesting provision is found in CAL. BUS. & PROF. CODE § 11525, which makes it mandatory that every county and city adopt an ordinance regulating and controlling the design and improvement of subdivisions.

³ CAL. HEALTH & SAF. CODE § 24247, dealing with air pollution control, falls into this category. This section commences with the following statement: "The Legislature does not, by the provisions of this chapter, intend to occupy the field."

⁴ CAL. HEALTH & SAF. CODE § 17951, regarding building regulations, is an example of this type of legislation.

field, but nowhere in the state law is there any express indication that local agencies may or may not legislate in the same field. It is in this third category that most of the problems have arisen. This article will deal with these problems.

BACKGROUND

The rule has been that if an entire field has been occupied by the state, there is no room for local regulation.⁵ The application of this rule has presented difficulty. Some of the older cases indicated that so long as no direct conflict exists as to the subject matter of regulation, the entire field has not been occupied by the state and the local agency is free to adopt further regulations.⁶ Perhaps the test in these cases was whether there was a conflict rather than whether the entire field had been occupied.

Although *In re Lane*⁷ is usually considered to be the landmark case in applying a new approach to test whether the Legislature has intended to occupy the entire field, there had been considerable erosion of the earlier view prior to *Lane*. The *Lane* case represents not so much a new concept as an explanation of what had already happened to the law.

TRANSITIONAL CASES

Probably the most important case decided prior to *Lane* was *Abbott v. City of Los Angeles*,⁸ in which a city "criminal registration act" was held unconstitutional because the state had already occupied or pre-empted the field in enacting parts of the Penal Code. The court stated:

While it is true that Penal Code, section 290 is the only criminal registration statute enacted by the state, a review of various related state enactments concerning recidivistic criminology leads unerringly to the conclusion that the Legislature has adopted a clear policy based upon the dual presumptions that certain criminals are recidivistic and

⁵ Language to this effect, citing a number of earlier cases, is contained in *Natural Milk Assn. v. City of San Francisco*, 20 Cal. 2d 101, 124 P.2d 25 (1942), as well as in *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

⁶ *In re Iverson*, 199 Cal. 582, 250 Pac. 681 (1926) stated that the state had not occupied the entire field in its detailed regulations for the issuance of prescriptions for alcoholic liquor; it is to be noted, however, that the state legislation expressly allowed local regulation, so the rule of the *Iverson* case is dictum and properly belongs in the second category listed at the beginning of this article. See cases collected in original dissenting opinion of *In re Lane* prior to the decision on rehearing, 367 P.2d 673, 675, 18 Cal. Rptr. 33, 39 (1962).

⁷ 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

⁸ 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).

others are not, and that certain types of crime require registration and others do not.⁹

The court also stated:

An examination of the Penal Code also indicates that the state Legislature has preempted the very field of registration as a means of apprehension of criminals. This it has done by expressly requiring registration in some instances and by inferentially rejecting it in others. Thus, in this basic respect the state statutes and the local ordinance are in conflict.¹⁰

In the *Abbott* case the court cited a number of California Supreme Court cases, in which certain fields had been pre-empted by the state. These fields were regulation of traffic on public highways,¹¹ presentation of claims for damages against local bodies,¹² tests for loyalty as prerequisite to public employment,¹³ and a county "right to work" ordinance.¹⁴ In commenting upon these cases the court stated that the fields mentioned

have all been held to have been preempted by the state, to the exclusion of local legislation, not because the language in the state statutes denied the subject matter to local bodies, nor because the local body attempted to enact a measure which would do violence to the already existing state provisions, but because there existed a statewide legislative scheme which was intended to occupy the field.¹⁵

The *Abbott* decision, relying on *Pipoly v. Benson*,¹⁶ deals with the meaning of the term "conflict" in the following manner: "Thus, the term 'conflict' as used in section 11 of article XI has been held not to be limited to a mere conflict in language, but applies equally to a conflict of jurisdiction."¹⁷ The court states that this definition is necessary in order to prevent dual regulations, which could result in uncertainty and confusion, and is not based upon the superior authority of the state.

⁹ *Id.* at 686, 349 P.2d at 982.

¹⁰ *Id.* at 685, 349 P.2d at 981-82.

¹¹ *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942).

¹² *Eastlick v. City of Los Angeles*, 29 Cal. 2d 661, 177 P.2d 558 (1947).

¹³ *Tolman v. Underhill*, 39 Cal. 2d 708, 249 P.2d 280 (1952); *Bowen v. Sargent*, 39 Cal. 2d 714, 249 P.2d 285 (1952).

¹⁴ *Chavez v. Sargent*, 52 Cal. 2d 162, 339 P.2d 801 (1959). The following language, which is contained in the concurring opinion of Justice McComb, states another ground for holding the ordinance invalid: "In addition, it is my view that the field has been occupied by the people of the United States and by the people of the State of California by the adoption of the Constitution of this state." 52 Cal. 2d at 217, 339 P.2d at 836. This statement has reference to the right of individuals to contract with each other.

¹⁵ *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 682-83, 349 P.2d 974, 980, 3 Cal. Rptr. 158, 164 (1960).

¹⁶ *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942).

¹⁷ *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 682, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960).

It is also pointed out in *Abbot* that article XI, section 11 of the constitution involves not only a delegation of power, but is also a limitation on the local body. Another significant point is contained in the following language:

When there is a doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, *the doubt must be resolved in favor of the legislative authority of the state.* . . .¹⁸

Although this rule purports to deal just with the question of whether a municipal or a state matter is involved, the court indicates that the rule applies to

prevent any legislation by a local body (other than in furtherance of the state law) when the entire field, that is the subject matter of the ordinance, has already been fully occupied by the state. Thus the constitution prohibits a city from imposing additional requirements in a state occupied field . . . or from punishing the same act denounced by state law. . . .¹⁹

It appears, therefore, that any doubt as to whether a field has been fully occupied by the state must be resolved in favor of the state.

Another leading case decided not long before *Lane* was *Agnew v. City of Los Angeles*.²⁰ There the court in a five-to-two decision held that the state, by the adoption of sections 7000-7145 of the Business and Professions Code, had pre-empted the field of regulating contractors. The dissent did not represent a judicial cleavage on the pre-emption issue. It was based upon the interpretation that the city ordinance in question was partially a license tax for revenue purposes; the regulatory portion dealt only with the quality and character of electrical installations, not with the qualifications of persons making installations.

THE LANE CASE

Viewed in the light of the California Supreme Court decisions of the two preceding decades, the case of *In re Lane*²¹ comes as something of an anticlimax. Carol Lane was convicted of two charges of the crime of "resorting," which was a violation of the Los Angeles Municipal Code. The evidence showed that in each instance the defendant had gone from the living room to the bedroom of her home for the purpose of having sexual intercourse with

¹⁸ *Id.* at 681, 349 P.2d at 979, 3 Cal. Rptr. at 163. (Emphasis added.)

¹⁹ *Id.* at 682, 349 P.2d at 979, 3 Cal. Rptr. at 163.

²⁰ 51 Cal. 2d 1, 330 P.2d 385 (1958). The *Agnew* case is among the cases cited and discussed in the *Abbott* case.

²¹ 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

a male to whom she was not married. In ordering the petitioner (the defendant in the criminal action) discharged from the custody on a writ of habeas corpus, the court framed the issue in this manner:

This is the sole question for us to determine: *Has the state adopted a general scheme for the regulation of the criminal aspects of sexual activity and determined, to the exclusion of local regulation, when sexual intercourse between persons not married to each other shall be criminal?*²²

The answer of the majority, in a five-to-two decision, was in the affirmative. The court, prior to enumerating laws which had been passed by the Legislature regulating various types of sexual activities, stated: "The Penal Code sections covering the criminal aspects of sexual activity are so extensive in their scope that they clearly show an intention by the Legislature to adopt a general scheme for the regulation of this subject."²³ After reviewing the state laws, the court noted that although state law prohibits living in a state of cohabitation and adultery, neither fornication or adultery alone, nor living in the state of cohabitation and fornication, has been made a crime in California. Relying on *Abbott* the court held: "It is therefore clear that the Legislature has determined by implication that such conduct shall not be criminal in this state."²⁴

Until *Lane* some continued to believe, in spite of the trend of the decisions, that local agencies could impose further regulations, regardless of state legislation. This point was squarely raised in Justice Dooling's dissenting opinion with Justice White concurring:

It has always been the law in this state, until this decision, that where the Legislature has prohibited certain conduct the cities and counties under the express grant of power contained in the California Constitution, section 11, article XI, could prohibit other and different conduct in the same field by local ordinance.²⁵

In answer to the dissent the majority opinion cited certain cases²⁶ which "specifically recognize that where the state has fully occupied the field, there is no room for additional requirements by local legislation."²⁷ The court held that any statements in the other cases

²² *Id.* at 102, 372 P.2d at 898, 22 Cal. Rptr. at 858.

²³ *Id.* at 103, 372 P.2d at 899, 22 Cal. Rptr. at 859.

²⁴ *Id.* at 104, 372 P.2d at 900, 22 Cal. Rptr. at 860.

²⁵ *Id.* at 112, 372 P.2d at 905, 22 Cal. Rptr. 865. The dissenting opinion makes reference to a more complete collection of cases supporting the rule asserted by the dissent which appeared in the original dissenting opinion (367 P.2d 673 at 675, 18 Cal. Rptr. 33, 39 (1961)) prior to the decision on rehearing.

²⁶ *In re Iverson*, 199 Cal. 582, 250 Pac. 681 (1926); *In re Simmons*, 199 Cal. 590, 250 Pac. 684 (1926); *Mann v. Scott*, 180 Cal. 550, 182 Pac. 281 (1919).

²⁷ 58 Cal. 2d at 105, 372 P.2d at 900, 22 Cal. Rptr. at 860.

cited²⁸ which would lead to a contrary conclusion had already been overruled by the *Pipoly*, *Agnew*, and *Abbott* cases.

Chief Justice Gibson wrote a concurring opinion and two of the justices who concurred in the majority opinion also concurred with him. He disapproved of some of the language of earlier cases and stated: "It is thus apparent that the enactment by the state of a comprehensive and detailed general plan or scheme with respect to a subject serves, without more, to occupy the field to the exclusion of local regulation."²⁹ The Chief Justice also pointed out, citing *Tolman v. Underhill*³⁰ and *Abbott*, that one of the factors to be taken into consideration is whether or not the subject calls for uniform treatment throughout the state. In reaching the conclusion that uniform treatment was required, he pointed out that in many areas "there is one continuous urban community, with boundary lines serving only to demark different political entities."³¹ He stated that in 1961 Los Angeles County alone contained seventy-one incorporated municipalities. To enforce different laws on one subject would result in much unnecessary confusion and uncertainty.

It is clear that the *Lane* case sounded the death knell to any philosophy holding that there is room for additional regulation of a local nature once the state has adopted a general scheme for the regulation of a field.

RECENT DECISIONS

The decisions subsequent to the *Lane* case dealing with pre-emption represent primarily the application of the pre-emption doctrine to various fields.

*In re Moss*³² was decided less than a month after the *Lane* case. In a habeas corpus proceeding arising out of a conviction for violation of a section of the Los Angeles Municipal Code prohibiting indecent shows, it was held that the state occupied the field by the enactment of various Penal Code sections. Justice White, one of the dissenters in the *Lane* case, concurred in the judgment and wrote a concurring opinion. He stated that he still

²⁸ *In re Hoffman*, 155 Cal. 114, 99 Pac. 517 (1909); *Odd Fellows' Cemetery Assn. v. City and County of San Francisco*, 140 Cal. 226, 73 Pac. 987 (1903); *In re Murphy*, 128 Cal. 29, 60 Pac. 465 (1900); *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799 (1893); *Ex parte Johnson*, 73 Cal. 228, 15 Pac. 43 (1887); and *In re Sic*, 73 Cal. 142, 14 Pac. 405 (1887).

²⁹ 58 Cal. 2d at 109, 372 P.2d at 903, 22 Cal. Rptr. at 863.

³⁰ 39 Cal. 2d 708, 249 P.2d 280 (1952).

³¹ 58 Cal. 2d at 111, 372 P.2d at 904, 22 Cal. Rptr. at 864.

³² 58 Cal. 2d 117, 373 P.2d 425, 23 Cal. Rptr. 361 (1962).

adhered to the views expressed in the dissenting opinions in the *Lane* case. He succinctly summarized his philosophy in the following language:

In other words, the mere fact that the Legislature has entered a certain field through legislation therein does not justify the implications that it has preempted that field to the exclusion of local legislation in the same field unless it can justly and reasonably be said that the local ordinance is in conflict with the Constitution or with the provisions of the state law.³³

His concurrence was on the ground that the ordinance did not involve new and additional regulations, but punished the same act denounced by state law. This, he believed, manifested the clear intention of the Legislature to occupy the field in its entirety, thereby creating a conflict and making the ordinance void.³⁴

The *Moss* case was relied on and a similar result reached in *Whitney v. Municipal Court*,³⁵ which involved a portion of the San Francisco Municipal Code prohibiting "any motion picture exhibition, or entertainment of any sort which is offensive to decency, or which excites vicious or lewd thoughts or acts . . . or which is lewd or obscene or vulgar . . . or so suggestive as to be offensive to the moral sense."³⁶

In *Mier v. Municipal Court*³⁷ it was held that "by virtue of section 311 of the Penal Code the state had occupied the field with respect to the criminal aspects of selling, distributing, keeping for sale, exhibiting, and advertising obscene and indecent publication"³⁸

A part of the Los Angeles Municipal Code prohibiting the possession of bookmaking notations was before the court in the case of *In re Loretizo*.³⁹ The court held that the state, through section 377a of the Penal Code, had occupied the field regarding the criminal aspects of wagering on horse races.

Another gambling case, *In re Allen*,⁴⁰ is of interest because of its dissenting opinion. The game involved was bridge. The majority opinion concluded that bridge is not predominantly a

³³ *Id.* at 120, 373 P.2d at 427, 23 Cal. Rptr. at 363.

³⁴ Justice Dooling, the author of the *Lane* dissents, did not take part in the *Moss* decision. He had retired a few days before, and Justice White retired on October 31, 1962, prior to the next pre-emption case coming before the California Supreme Court.

³⁵ 58 Cal. 2d 907, 377 P.2d 80, 27 Cal. Rptr. 16 (1962).

³⁶ *Id.* at 909, 377 P.2d at 81, 27 Cal. Rptr. at 17.

³⁷ 211 Cal. App. 2d 470, 27 Cal. Rptr. 602 (1962).

³⁸ *Id.* at 472, 27 Cal. Rptr. at 603-04.

³⁹ 59 Cal. 2d 445, 380 P.2d 656, 30 Cal. Rptr. 16 (1963).

⁴⁰ 59 Cal. 2d 5, 377 P.2d 280, 27 Cal. Rptr. 168 (1962).

game of chance. Justice McComb, who had written the majority opinion in the *Lane* case, wrote a dissenting opinion, concurred in by Justice Schauer, in which he decided that bridge is a game of chance. The dissent upheld the ordinance by concluding that there is room for local regulation in this field. This conclusion was based on the failure of the Legislature, during a period of over sixty years following a supreme court decision⁴¹ upholding the validity of further regulations in the field by a municipality, to take any action either to increase the scope of state regulation or to exclude local regulation. Unfortunately, there is no indication of the majority view on this point.

In re Koehne,⁴² *In re Zorn*,⁴³ and *People v. Lopes*⁴⁴ deal with "drunk ordinances," the first two involving Los Angeles and the last, Pomona. Each case held without dissent that the state had adopted a general scheme for the regulation of the criminal aspects of intoxication in a public place. These decisions resulted from the enactment in 1961 of section 647(f) of the Penal Code as a part of the new "disorderly conduct" law.⁴⁵

An interesting dictum is contained in *American Civil Liberties Union v. Board of Education*,⁴⁶ which involved the right to the use of a school building under the Civic Center Act. The court states that where a statute which authorizes local authorities to legislate is held unconstitutional on other grounds, this does not eliminate the statement of legislative intent authorizing local legislation. The court seemed to assume that a board of education has police power under article XI, section 11 of the constitution, although school districts are not mentioned in this provision.

The companion cases of *Professional Fire Fighters, Inc. v. City of Los Angeles*⁴⁷ and *International Assn. of Fire Fighters v. City of Palo Alto*⁴⁸ dealt with the question whether certain provisions of the Labor Code⁴⁹ and Government Code,⁵⁰ involving

⁴¹ *In re Murphy*, 128 Cal. 29, 60 Pac. 465 (1900).

⁴² 59 Cal. 2d 646, 381 P.2d 633, 30 Cal. Rptr. 809 (1963).

⁴³ 59 Cal. 2d 650, 381 P.2d 635, 30 Cal. Rptr. 811 (1963).

⁴⁴ 59 Cal. 2d 653, 381 P.2d 637, 30 Cal. Rptr. 813 (1963).

⁴⁵ The new statute and these decisions shifted the financial responsibility of caring for persons convicted of being drunk in public places from the cities to the counties in cases of county jail incarceration following arrests made in cities. Previously the responsibility had rested with the cities because incarceration was for violation of city ordinances, not the state law. See 22 OPS. CAL. ATT'Y GEN. 209 (1953).

⁴⁶ 59 Cal. 2d 203, 379 P.2d 4, 28 Cal. Rptr. 700 (1963).

⁴⁷ 60 A.C. 227, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

⁴⁸ 60 A.C. 246, 384 P.2d 170, 32 Cal. Rptr. 842 (1963).

⁴⁹ CAL. LAB. CODE §§ 1960-63. These sections are applicable to employees of fire departments and fire services of public agencies.

⁵⁰ CAL. GOV. CODE §§ 3500-09. These sections are applicable to public employees generally.

labor relations of public employers and employees, were applicable to firemen employed by chartered cities. The court stated that the controlling question was whether the matters involved were of municipal or state-wide concern. It concluded "that the Legislature was attempting to deal with labor relations on a state-wide basis,"⁵¹ and that state law controlled over charter provisions, ordinances, and other local regulations. The court stressed the fact that section 923 of the Labor Code set out general provisions applicable to labor and management throughout the state, that the Government Code⁵² narrowed the matter to public employees, and that other sections of the Labor Code⁵³ narrowed the matter further to fire department and fire service employees. In the *Professional Fire Fighters* case the court stated:

Labor relations are of the same state-wide concern as workmen's compensation, liability of municipalities for tort, perfecting and filing of claims, and the requirement to subscribe to loyalty oaths (see *Tolman v. Underhill*, 39 Cal. 2d 708 (249 P.2d 280)), all of which have been held to be governed by general law in contravention of local regulation by chartered cities.⁵⁴

The Appellate Department of the Superior Court of Los Angeles County, relying on the earlier case of *People v. Commons*,⁵⁵ held in *People v. Jenkins*⁵⁶ that the state had not pre-empted the field of regulation of deadly weapons by the enactment of section 12025 of the Penal Code so as to invalidate a section of the Los Angeles Municipal Code. The municipal code went beyond the state law and made it a crime for a guest riding in the back seat of a car to have a loaded revolver concealed under the carpet on the floor of the car. The court emphasized the statement of Chief Justice Gibson in his concurring opinion in the *Lane* case⁵⁷ to the effect that one of the factors to be considered is whether the subject calls for uniform treatment throughout the state. In this regard the court stated:

The danger from gunmen in a large city is much greater than in a sparsely settled rural area and is a more frequent occurrence. The weapon which the appellant had in his possession was not only dangerous and deadly but it was loaded. It is unthinkable that the Legis-

⁵¹ *Professional Fire Fighters Inc. v. City of Los Angeles*, 60 A.C. 227, 245, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).

⁵² CAL. GOV. CODE §§ 3500-09.

⁵³ CAL. LAB. CODE §§ 1960-63.

⁵⁴ 60 A.C. at 246, 384 P.2d at 169, 32 Cal. Rptr. 241.

⁵⁵ 64 Cal. App. 2d Supp. 925, 148 P.2d 724 (1944).

⁵⁶ 207 Cal. App. 2d Supp. 904, 24 Cal. Rptr. 410 (1962).

⁵⁷ *In re Lane*, 58 Cal. 2d 99, 110, 372 P.2d 897, 903-04, 22 Cal. Rptr. 857, 864 (1962).

lature intended to deny the public in Los Angeles the protection which the ordinance gives.⁵⁸

Later the same court that decided the *Jenkins* case considered the same provisions of the Los Angeles Municipal Code in *People v. Bass*,⁵⁹ although apparently a different subsection was involved. The defendant was charged with carrying a concealed knife, though not a switch-blade knife, over three inches in length. The applicable municipal code provisions, as paraphrased by the court, stated: "No person . . . shall wear or in any manner carry concealed upon his person . . . any dirk or dagger; any knife with a blade three inches or more in length, and any snap-blade or spring-blade knife, regardless of the length of the blade."⁶⁰ The court pointed out that The Dangerous Weapons Control Law⁶¹ made it a felony for one to carry a dirk or dagger concealed upon his person, and that in 1957 the Legislature had added section 653k to the Penal Code, making it a misdemeanor for one to carry concealed upon his person a switch-blade knife having a blade of over two inches in length. It also pointed out that the word "concealed" was deleted from section 653k in 1959, thereby causing still more of the field to be occupied. The court stated, in reversing judgment following conviction: "[W]e conclude that the Legislature, having prohibited the carrying of dirks, daggers and switch-blade knives, has not only itself not forbidden one to carry the knife possessed by the defendant, but has shut off the power of the City to forbid it."⁶²

It is not clear what the court in the *Bass* case intended to do with the *Jenkins* case.⁶³ There was no discussion of whether the subject called for uniform treatment throughout the state.

Still another portion of the Los Angeles Municipal Code is discussed in the case of *In re Martin*.⁶⁴ The provision required any person who desired to wear a mask or other disguise upon any street, sidewalk or park to obtain a permit before doing so. The court pointed out that section 185 of the Penal Code, dealing with masks, false whiskers, and other disguises, makes such disguises unlawful only if used in connection with the commission of a public offense or concealment, flight or escape following commission of a public offense. The Penal Code section does not require the act to occur in a public place. Also the court took note of section 650a

⁵⁸ 207 Cal. App. 2d Supp. at 907, 24 Cal. Rptr. at 412.

⁵⁹ 33 Cal. Rptr. 365 (1963).

⁶⁰ *Id.* at 366.

⁶¹ CAL. PEN. CODE §§ 12000-520.

⁶² 33 Cal. Rptr. at 368.

⁶³ *Id.* at 367.

⁶⁴ 221 A.C.A. 14, 34 Cal. Rptr. 299 (1963).

of the Penal Code,⁶⁵ which deals further with masks and disguises. It held that there was a conflict and that the Legislature had occupied the entire field, thus the municipal code section was void. The following language was used by the court in enunciating the rule:

It appears from the decisions that the general scheme for the regulation of a particular subject may be found in a single comprehensive statute such as the Vehicle Code, or in a section of the Penal Code, or in a multiplicity of code sections which in the aggregate spell a legislative attempt to occupy the whole or a part of the particular field of legislation.⁶⁶

In *Baldwin Park Water Dist. v. County of Los Angeles*⁶⁷ the court considered the validity of a county ordinance requiring a water utility certificate of registration or a water utility authorization prior to the construction of any portion of a water system which was subject to the ordinance. The ordinance stated that it was enacted for the purpose of obtaining a minimum level of fire protection in new subdivisions and residential, commercial, and industrial improvements. Certain technical details were set out, and discretionary authority was given to county officials in regard to some of these details. There was a provision for an appeal, first to an appeals board then to the board of supervisors.

The ordinance was attacked by water districts, of which four were irrigation districts, nine, county water districts, and one, a state water district. The court reviewed the various district acts and concluded that the Legislature did not intend that the districts in question should be subject to legislation by counties. It pointed out that all three types of water districts were allowed to include territory in more than one county, and that there would be confusion if each county and city in which a district had a portion of its territory were to impose its own regulations. The court also pointed out that, under state law, constructing a waterworks system for an irrigation district or a county water district "is within the duties of the district engineer or manager, subject to the approval of the board of directors of the district,"⁶⁸ while the ordinance required a county certificate of registration or a water utility authorization.

⁶⁵ CAL. PEN. CODE § 650a reads as follows: "It is a misdemeanor for any person, either alone or in company with others, to appear on any street or highway, or in other public places or any place open to view by the general public, with his face partially or completely concealed by means of a mask or other regalia or paraphernalia, with intent thereby to conceal his identity. This section does not prohibit the wearing of such means of concealment in good faith for the purposes of amusement, entertainment or in compliance with any public health order."

⁶⁶ 221 A.C.A. at 17, 34 Cal. Rptr. at 301.

⁶⁷ 208 Cal. App. 2d 87, 25 Cal. Rptr. 167 (1962).

⁶⁸ *Id.* at 96, 25 Cal. Rptr. at 173.

The court believed that various provisions of the ordinance, including a provision requiring an agreement to abide by the provisions of the ordinance and the appeal procedure, took the management and control of the district from the directors. Another conflict arose from provisions of the Water Code to the effect that the district shall determine how much water shall be available for fire protection and other uses. Finally the court stated: "The Water Code shows an intention by the Legislature to adopt a general and complete scheme and plan for conserving water, and regulating the production, control, distribution, and use of water by such water districts as those involved here."⁶⁹

The above case casts some doubt upon the rights of planning commissions, boards of supervisors, and city councils to impose water supply capability restrictions on subdividers as a part of the routine subdivision approval proceedings, at least when water is to be supplied by a water district. Although this point was not considered, the decision cites general state law⁷⁰ in regard to water matters, indicating that these matters are of state concern.

A county ordinance requiring a permit for land leveling involving an area greater than five acres was before the court in *County of Colusa v. Strain*.⁷¹ It was contended by the defendant that the state, by sections 720 to 730 and section 1487 of the Streets and Highways Code, had occupied the field. These sections protect state and county highways from damage caused by drainage from private lands. The purpose of the ordinance was much broader than the state law in that it applied without reference to roads. The court, in spite of the fact that the ordinance might prohibit what the state law also prohibits, stated that this would cause an invalidity only to the extent of the duplication. The ordinance was upheld on the ground that the Streets and Highways Code sections "do not disclose nor do they justify an inference of legislative intent to exclude local regulation of land leveling."⁷² The ordinance imposed detailed map requirements, gave certain powers to the road commissioner, and provided for an appeal to the board of supervisors. After disposing of the pre-emption question, the court discussed and upheld the police power of the county. There was no discussion, however, of another provision of the ordinance, not involved in the case, requiring a similar permit for changing the natural course of any channel or waterway. The court stated that

⁶⁹ *Id.* at 97, 25 Cal. Rptr. at 174.

⁷⁰ *Id.* at 89, 25 Cal. Rptr. at 169.

⁷¹ 215 A.C.A. 542, 30 Cal. Rptr. 415 (1963).

⁷² *Id.* at 549, 30 Cal. Rptr. 418.

it made no detailed exploration of the possibility of state control because the defendant had not raised the point.

CONCLUSION

With the multiplicity of state laws and a prognosis indicating no decrease in the activity of the Legislature, one can only predict further inroads upon the right of local agencies to legislate. Perhaps the impelling reason for the intrusion of the state is the need for uniformity in many fields, particularly in view of large concentrations of population, artificiality of political boundaries, and speed of communications. The need for uniformity is especially obvious when public morals are involved. Although the fiction persists that everyone is presumed to know the law, it is often unreasonable to expect a familiarity with rules of personal conduct which may vary widely from one political entity to another. Particularly in the multi-municipality urban situation, we are often involved with transitory situations, and to ascertain all the political boundaries and untangle the varied ordinances would be a task requiring an expert both in law and cartography.

The above remarks are not applicable to types of local regulation involving static situations such as the use of property and ordinances affecting certain businesses.

Perhaps the Legislature should study and clarify the situations in which it has expressed no direct intent.⁷³ If this is not done, we can look for continuing litigation in this area.

⁷³ S.B. No. 1348, introduced at the 1963 regular session of the California Legislature by Senators Holendahl, Lagomarsino and Christensen, would have added § 9613, as follows, to the Government Code: "It is not the intention of the Legislature to preempt any field, to the exclusion of counties and cities, and no statute or combination of statutes shall be interpreted as evidencing any such legislative intent, unless there is in effect a specific statutory declaration of intention of the Legislature to pre-empt the field." This bill was not enacted into law.