PHILADELPHIA HOME RULE AND CITY-COUNTY CONSOLIDATION UNDER THE PENNSYLVANIA CONSTITUTION

The home rule and city-county consolidation amendments to the Pennsylvania constitution,[1] together with the legislation enacted pursuant thereto,[2] ultimately will require the Supreme Court of Pennsylvania to delineate the scope of the substantive powers devolved upon the City of Philadelphia and the extent to which these powers are subject to the control of the General Assembly.[3]

Historically, municipalities have been viewed as creatures of the state, existing at its sufferance.[4] They exercise only those powers "granted in *express words*" and "those *necessarily or fairly implied* in or *incident* to the powers expressly granted. . . ." [5] Dissatisfaction with the legislative exercise of the Commonwealth's virtually complete control of municipal government fomented an effort to shift the locus of local government powers to the municipalities themselves, in the belief that a government framed by the municipality, with officers chosen by the electorate and responsible to it, and exercising plenary powers over its local affairs is better equipped than the General Assembly to cope effectively with local problems.[6] In response to this pressure, an amendment to the Constitution in 1922 provided that "cities . . . may be given the right and power to frame and adopt their own charters and to exercise the powers . . . of local self-government, subject . . . to such restrictions, limitations and regulations, as may be imposed by the Legislature." [7]

Requisite enabling legislation was not forthcoming until the passage of the First Class City Home Rule Act of 1949,[8] which authorized the framing and adoption of a charter by the city of Philadelphia [9] and the exercise

1. PA. CONST. art. XV, § 1 (home rule); PA. CONST. art. XIV, § 8 (1951) (city-county consolidation).

2. PA. STAT. ANN. tit. 53, §§ 13101-16, 13131, 13133, 13151-57 (Purdon 1957); PHILADELPHIA HOME RULE CHARTER ANN. (1951) (hereinafter cited as CHARTER).

3. See McGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE—1916-1930, at 310-12 (1933).

4. Trenton v. New Jersey, 262 U.S. 182, 187 (1923); Commonwealth v. Moir, 199 Pa. 534, 541, 49 Atl. 351, 352 (1901); Philadelphia v. Fox, 64 Pa. 169, 180 (1870); 1 DILLON, MUNICIPAL CORPORATIONS § 98 (5th ed. 1911); CHICAGO HOME RULE COMMISSION, REPORT 193 (1954).

5. 1 DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911); American Aniline Products, Inc. v. Lock Haven, 288 Pa. 420, 423, 135 Atl. 726, 727 (1927); Lesly v. Kite, 192 Pa. 268, 274, 43 Atl. 959, 961 (1899).

6. See 6 PA. LEG. J. 6167-6205 (1951).

7. PA. CONST. art. XV, § 1 (1922). The home rule amendment allows cities of any particular class to be given the power to adopt charters. *Ibid.*

8. PA. STAT. ANN. tit. 53, §§ 13101-16, 13131, 13133, 13155-57 (Purdon 1957).

9. Philadelphia is the only city of the first class in the Commonwealth. "Those [cities] containing a population of one million or over shall constitute the first class." PA. STAT. ANN. tit. 53, § 13101 (Purdon 1957).

by it of "all powers relating to its municipal government . . . to the full extent that the General Assembly may legislate in reference thereto . . . and with like effect," [10] subject to specified limitations.[11] A charter was framed by a charter commission and adopted by the electorate of the city on April 17, 1951, with an effective date of January 7, 1952.[12] Despite the grant of authority, there still remains for judicial determination the extent to which the General Assembly can legislate in conflict with the charter or ordinances emanating from the city.

The grant of home rule authority over municipal affairs did not encompass the existing government of the county of Philadelphia,[13] a political unit geographically coextensive with the city of Philadelphia. An amendment adopted at the general election of November 6, 1951 [14] attempted to facilitate the consolidation of Philadelphia's city and county affairs into a single working government.[15] Subsequently, a consistent formulation of the steps necessary to effectuate this consolidation has been developed by the courts.[16]

I. Effectuation of City-County Consolidation

A. *Consolidation Under the Charter*

The Pennsylvania Supreme Court early established that the city-county consolidation amendment is self-executing to the extent that all county offices became city offices, without legislative action, immediately upon adoption of the amendment.[17] This proposition is clearly substantiated by the language of clause (1) of the amendment:

> "In Philadelphia all county offices are hereby abolished, and the city shall henceforth perform all functions of county government within

10. Pa. Stat. Ann. tit. 53, § 13131 (Purdon 1957).

11. Pa. Stat. Ann. tit. 53, §§ 13131, 13133 (Purdon 1957).

12. There were certain exceptions to the January 7, 1952 effective date, not here material. Charter, Section A-200. See Mortimer v. Philadelphia Civil Serv. Comm'n, 380 Pa. 520, 112 A.2d 151 (1955). *But cf.* American Federation of State Employees v. Philadelphia, 83 Pa. D. & C. 537 (C.P. 1952).

13. See Pa. Const. art. XIV, §§ 1-7; Pa. Stat. Ann. tit. 53, §§ 7101-8802 (Purdon 1957). See also Lennox v. Clark, 372 Pa. 355, 361, 363, 370, 93 A.2d 834, 837, 838, 841 (1953).

14. Pa. Const. art. XIV, § 8, cl. 7. Note that the amendment was adopted subsequent to the adoption of the home rule charter but prior to its effective date. See text at note 12 *supra.*

15. See Cornman v. Philadelphia, 380 Pa. 312, 111 A.2d 121 (1955). "Consolidation of County and City functions was unquestionably wise. Geographically the area of the City and of the County was identical. On occasion governmental functions conflicted or were duplicated. In the interest of efficiency and economy, it was regarded wise to have a single directing head." *Id.* at 314, 111 A.2d at 123.

16. The large number of decisions on the consolidation amendment and the home rule charter have been attributed to the political conflicts induced by patronage pressures. See statement of Hon. Joseph E. Clark, Jr., then Mayor of Philadelphia, to the Chicago Home Rule Commission on March 15, 1954. Reprinted in Chicago Home Rule Commission, Report 346, 356 (1954).

17. Lennox v. Clark, 372 Pa. 355, 363-64, 93 A.2d 834, 838 (1953); Carrow v. Philadelphia, 371 Pa. 255, 258-59, 89 A.2d 496, 498 (1952).

its area through officers selected in such manner as may be provided by law." [18]

The extent to which the First Class City Home Rule Act and the subsequently enacted home rule charter transferred jurisdiction over the consolidated county offices from the state legislature to the city remained unclear.[19] The court in *Carrow v. Philadelphia* [20] applied the home rule charter to county offices, holding that under the charter county employees could not be dismissed without cause.[21] The succeeding case of *Lennox v. Clark* [22] extended the applicability of the charter to county officers, by requiring them to abide by the sections of the charter governing legal counsel for municipal offices [23] and the supplying of information to city officials.[24] While both *Carrow* and *Lennox* applied the home rule charter to former county offices on matters that can generally be characterized as "personnel" or "internal administration," neither case decided whether the city, acting under the charter without further legislative action by the General Assembly, could alter the functions of the former county offices or integrate them with those performed by the municipal government under the charter. The court in *Lennox* expressly distinguished the charter's applicability to matters of "personnel" in the former county offices from its effect on the "duties or functions" performed by such offices,[25] in order to avoid a final determination of the meaning of an ambiguous limitation on municipal authority contained in clause (7) of the amendment:

> "Upon adoption of this amendment all county officers shall become officers of the city of Philadelphia, and until the General Assembly shall otherwise provide, shall continue to perform their duties and be elected, appointed, compensated and organized in such manner as may be provided by . . . the Constitution and the laws of the Commonwealth in effect at the time this amendment becomes effective. . . ." [26]

The extent of the city's powers relative to consolidation must be determined by the nature of the limitation imposed by the words, "until the

18. PA. CONST. art. XIV, § 8, cl. 1 (1951). See Butcher v. Philadelphia, 380 Pa. 290, 292, 110 A.2d 349, 351 (1955); Lennox v. Clark, 372 Pa. 355, 363-64, 93 A.2d 834, 838 (1953).

19. See text at pp. 87-89 *infra.*

20. 371 Pa. 255, 89 A.2d 496 (1952).

21. *Id.* at 261, 89 A.2d at 499. See CHARTER, Section A-104.

22. 372 Pa. 355, 93 A.2d 834 (1953).

23. *Id.* at 369, 93 A.2d at 841. See CHARTER, Sections 4-400(a), 8-410.

24. *Ibid.* See CHARTER, Sections 8-103, 8-104. The court also held that under Section A-104 employees had the privilege of taking a qualifying test to satisfy civil service requirements, 372 Pa. at 368, 93 A.2d at 840; and that under section 10-107, officers and employees are prohibited from engaging in political activity, *id.* at 369, 93 A.2d at 841. For other decisions reached in *Lennox* see note 48 and text at note 91 *infra.*

25. *Id.* at 363, 93 A.2d at 837-38.

26. PA. CONST. art. XIV, § 8, cl. 7 (1951).

General Assembly shall otherwise provide." [27] That the limiting phrase modifies "officers," and, further, that no reference to county employees appears, is obvious. Thus, employees are not within the express contemplation of the limitation. Implicit inclusion of employees within the limitation by the phrase, "officers . . . shall continue to perform their duties and be . . . organized" as provided by existing law, was rejected in *Lennox* on the ground that "duties" referred to the substantive purpose for which the office was established, and not the ancillary power to control employees,[28] and that "organized" referred to the positions of the officers and not to their employees.[29] Therefore, the limitation in the amendment applied, if at all, only to the performance of the substantive functions by the county officers; other matters relating to the county officers and their offices were properly within the scope of the powers devolved upon the city in the home rule enabling legislation.

Whether the limitation, as defined, had any practical impact was decided in *Commonwealth ex rel. Truscott v. Philadelphia.*[30] A city ordinance abolishing the Board of Revision of Taxes,[31] a former county office, was declared unconstitutional as a violation of the limitation clause of the consolidation amendment because it had been enacted without enabling legislation from the General Assembly.[32] The majority relied on the literal meaning of the amendatory language, holding that consolidation of functions must await future legislative action by the state.[33] The dissent maintained that the limitation was meant to apply only on the contingency that a home rule charter was not adopted by the City of Philadelphia.[34]

Appraisal of the *Truscott* decision requires an understanding of the chronology of both the consolidation amendment and the home rule legislation. The amendment passed the General Assembly for the first time in 1949, at the same session that the First Class City Home Rule Act became law. Achievement of home rule, however, under the terms of the enabling legislation awaited formulation and adoption of a charter by Philadelphia.[35] There being no guarantee that a charter would soon be adopted, the possibility remained in 1949 that city-county consolidation

27. That cities possess an inherent right of local self-government which can, in the absence of a grant from the state legislature, serve as a repository for the exercise of municipal law-making powers has been effectively disclaimed. McBain, *The Doctrine of an Inherent Right of Local Self-Government I*, 16 COLUM. L. REV. 191 (1916); McBain, *The Doctrine of an Inherent Right of Local Self-Government II*, 16 COLUM. L. REV. 299 (1916). See 1 DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). See, *e.g.*, Commonwealth *ex rel.* Truscott v. Philadelphia, 380 Pa. 367, 369, 111 A.2d 136 (1955); American Aniline Products, Inc. v. Lock Haven, 288 Pa. 420, 423, 135 Atl. 726, 727 (1927); Lesly v. Kite, 192 Pa. 268, 274, 43 Atl. 959, 961 (1899).

28. 372 Pa. 355, 364, 379, 93 A.2d 834, 838, 845 (1953).

29. *Id.* at 364, 93 A.2d at 838.

30. 380 Pa. 367, 111 A.2d 136 (1955).

31. PHILADELPHIA ORDINANCES 561-66 (Aug. 16, 1954).

32. 380 Pa. at 376, 111 A.2d at 139, 140.

33. *Ibid.*

34. *Id.* at 383, 387-89, 111 A.2d at 139, 140.

35. See text at note 8 *supra.*

might be achieved without a shift to the city of power over its municipal affairs. Further uncertainty was engendered by the fact that constitutional amendment requires passage by two consecutive General Assemblies,[36] elected biennially,[37] followed by approval of the state electorate.[38] The amendment by its own terms became effective on the date of its popular approval at a general election, November 6, 1951.[39] This uncertainty as to the status of the county offices and the performance of their functions necessitated the inclusion of an appropriate clause in the original amendment. Meanwhile, a charter was framed and adopted on April 17, 1951, but, by its own terms, it did not become effective until January 7, 1952, two months subsequent to the effective date of the consolidation amendment.[40] There are, thus, reasonable grounds for construing the limitation as an alternative in the event that the city failed to adopt a charter. Nevertheless, the argument can be made that the General Assembly intended to retain control of the functions of the county offices regardless of the possibility of home rule.[41]

While legislative history is inconclusive, language in another clause of the consolidation amendment tends to support the position of the dissent. Clause (5) makes the provisions of the home rule amendment applicable "to the functions of the county government hereafter to be performed by the city government." [42] This clause suggests that the General Assembly contemplated a transfer of all its power over county offices by writing in a policy favoring home rule. That the legislature could cede control over county government to the city in advance of the adoption of the consolidation amendment and a charter and contingent thereon was settled by the decision in *Lennox*.[43] While the clause is inconclusive, the acknowledged purpose of both the home rule act and the consolidation amendment was to permit local control of municipal affairs.[44] Allowing the city to reorganize the former county functions in the absence of a clear mandate to the contrary would have been consistent with that end.

B. *Consolidation Under the Statutes*

Truscott v. Philadelphia left two alternatives for the completion of city-county consolidation. The General Assembly could either directly integrate functions of the county offices within the framework of the city government or, by further enabling legislation, allow the city itself to in-

36. PA. CONST. art. XVIII, § 1.
37. PA. CONST. art. II, § 2.
38. PA. CONST. art. XVIII, § 1.
39. PA. CONST. art. XIV, § 8, cl. 7.
40. CHARTER, Section A-200.
41. This argument must rest on the contention that "laws of the Commonwealth" in the limiting clause, see text at note 26 *supra*, excludes the enabling act and the charter, and refers only to the state laws substantively regulating the functions of the county offices.
42. PA. CONST. art. XIV, § 8, cl. 5.
43. 372 Pa. 355, 93 A.2d 834 (1953).
44. See text at note 6 *supra*.

tegrate the functions under the charter in accord with the home rule doctrine of municipal self-government. The only objection to this alternative, that the limitation in clause (7) of the consolidation amendment makes direct action by the General Assembly mandatory, was rejected in *Commonwealth ex rel. Truscott v. DiLauro,*[45] which held that both the home rule amendment and the consolidation amendment negated such an interpretation.[46] The act validated by the *DiLauro* case permitted the city to consolidate the functions of certain of the former county offices[47] which the *Lennox* case had found to be subject to consolidation under the amendment. Reorganization of the remainder of these offices must await future legislative action.[48]

Although the power of the city to consolidate duties of former county officers is dependent upon permission of the legislature,[49] the ability of the legislature to undo consolidation once it has been authorized appears to be severely limited by the decision in *Meade v. Clark.*[50] The legislature enacted a measure making the "provisions . . . contained in the Philadelphia Home Rule Charter relating to civil service and prohibiting political activity. . . ." inapplicable to the officers and employees of four former county offices.[51] Authority for such an act was sought in clause (2) of the consolidation amendment:

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45. 387 Pa. 506, 128 A.2d 348 (1957).

46. *Id.* at 512-13, 128 A.2d at 350-51. Although the court did not cite any particular language in the consolidation amendment to support its position on the ability of the legislature to delegate power to the city to alter the organization of former county offices, it would seem that the language of clause (5) is decisive: "The provisions of article fifteen, section one of the Constitution [providing for home rule] shall apply with full force and effect to the functions of the county government hereafter to be performed by the city government." PA. CONST. art. XIV, § 8, cl. 5. See Commonwealth *ex rel.* Truscott v. Philadelphia, 380 Pa. 367, 382, 111 A.2d 136, 142 (1955) (concurring opinion). See text at notes 42-44 *supra.*

47. PA. STAT. ANN. tit. 53, § 13132 (Purdon 1957) (Coroner, Recorder of Deeds, City Treasurer, Clerk of the Court of Quarter Sessions, Oyer and Terminer and General Jail Delivery and the Board of Inspectors of Philadelphia County Prison). Only the office of City Treasurer was involved in the litigation in the instant case. In October 1953 the city passed an ordinance, pursuant to the enabling legislation, *supra,* changing the office from an elective to an appointive one. PHILADELPHIA ORDINANCES 549-54 (Oct. 16, 1953). Quo warranto proceedings were brought to remove defendant who had been appointed City Treasurer subsequent to the November 1953 election, and to substitute in his stead the winner of that election. Held, for the appointee. 387 Pa. 506, 128 A.2d 348 (1957).

48. The offices of Register of Wills and Prothonotary, denominated as county offices in the constitution, PA. CONST. art. XIV, § 1, were held in *Lennox* not to be county offices for the purposes of the consolidation amendment. 372 Pa. at 370-72, 93 A.2d at 841-42. Since both the Register of Wills and the Prothonotary were specifically given the power to appoint their employees by the judiciary article of the constitution, PA. CONST. art. 5, § 7 (Prothonotary), § 22 (Register of Wills), the court, relying on the handy rule of construction that a general provision does not impliedly repeal a specific provision, held the consolidation amendment to be inapplicable. 372 Pa. at 370-72, 93 A.2d at 841-42. Consolidation of these two offices will require constitutional amendment. See Burke, *Courts and City-County Consolidation in Philadelphia,* 57 DICK. L. REV. 24 (1952).

49. Commonwealth *ex rel.* Truscott v. Philadelphia, 380 Pa. 367, 111 A.2d 136 (1955). See text at notes 30-44 *supra.*

50. 377 Pa. 150, 104 A.2d 465 (1954).

51. PA. STAT. ANN. tit. 53, § 13154 (Purdon 1957) (Sheriff, City Commissioners, Board of Revision of Taxes, Registration Commissioners).

> "Local and special laws, regulating the affairs of the city of Philadelphia and . . . prescribing the powers and duties of officers of the city of Philadelphia, shall be valid notwithstanding the provisions of section seven of article three of this Constitution." [52]

Section seven of article three prohibits the General Assembly from enacting any local or special legislation in twenty-eight categories, two of which are "regulating the affairs of . . . cities" [53] and ". . . prescribing the powers and duties of officers in . . . cities." [54] The court held that since the consolidation amendment's exceptions to the prohibitions on legislative action were worded identically with two of the prohibitions, the remaining twenty-six prohibitions were operative.[55] The act was then held invalid on two grounds. First, relating by its own terms to the city of Philadelphia, it violated the prohibition against local legislation "incorporating cities . . . or changing their charters." [56] Second, by distinguishing, without reasonable basis for the classification, the officers and employees of these four city offices from other officers and employees similarly situated, it violated the constitutional prohibition against special legislation "granting to any . . . individual any special privilege or immunity. . . ." [57]

The remedy for the first of these constitutional defects is apparent. If the act by its terms had referred to cities of the first class rather than specifically to the city of Philadelphia, it would not have constituted local legislation.[58] Nevertheless, the act would still have conferred a special "privilege or immunity" on the individuals designated. Although the holding of the *Meade* case is factually limited to four of the former county offices,[59] any classification based purely on the distinction between former county and former city offices would appear to be unreasonable, since all county offices became offices of the city at the adoption of the consolidation amendment.

However, the *Meade* case pertains to problems of personnel and administration and not to the substantive functions of the former county offices. Again a "personnel-function" distinction may be drawn, not on the basis of express words in the consolidation amendment, but rather on the basis of the proper spheres of state and local control.[60] Thus, a former county office performing substantive functions of state-wide concern could

52. PA. CONST. art. XIV, § 8, cl. 2.

53. PA. CONST. art. III, § 7, cl. 2.

54. PA. CONST. art. III, § 7, cl. 15.

55. 377 Pa. at 154-55, 104 A.2d at 467.

56. PA. CONST. art. III, § 7, cl. 11. 377 Pa. at 155-56, 104 A.2d at 467.

57. PA. CONST. art. III, § 7, cl. 26. *Id.* at 155-57, 104 A.2d at 467, 468.

58. Perkins v. Philadelphia, 156 Pa. 554, 27 Atl. 356 (1893); Commonwealth *ex rel.* Fertig v. Patton, 88 Pa. 258 (1879); Wheeler v. Philadelphia, 77 Pa. 338 (1875); Massey v. Philadelphia, 1 Week. Notes Cas. 140 (Pa. 1874). *But cf.* Philadelphia v. Westminster Cemetery Co., 162 Pa. 105, 29 Atl. 349 (1894).

59. See note 51 *supra.*

60. *Cf.* Lennox v. Clark, 372 Pa. 355, 363-64, 93 A.2d 834, 838 (1953). See text at note 25 *supra.*

hardly be deemed beyond the reach of the General Assembly.[61] Were the city, acting under appropriate state enabling legislation, to abolish a county office that performed certain state functions without providing for their assumption by another department of the city administration, the state would probably be empowered to undo the consolidation to the extent necessary to assure their performance. Such a result rests on a theory of the sovereignty of the state as to matters of state-wide concern.[62] Whether the "personnel-function" dichotomy permits the state to undo the consolidation of functions that are "properly" within the sphere of municipal affairs depends in turn upon the extent to which the General Assembly, having once granted home rule powers to the city of Philadelphia, can subsequently legislate in conflict with the charter and the ordinances enacted under it.[63]

II. Home Rule Independence Under the Constitution

A. *Scope of the Original Grant*

The home rule amendment to the Pennsylvania Constitution did not directly grant governmental power to any city in the Commonwealth. It did provide that

> ". . . cities of any particular class, may be given the . . . power to frame and adopt their own charters and to exercise the powers . . . of local self-government, subject . . . to such restrictions, limitations and regulations as may be imposed by the Legislature." [64]

The amendment necessitates appropriate enabling legislation before local charter-making can be undertaken. The First Class City Home Rule Act [65] constituted a grant of power to Philadelphia, the only first class city in the Commonwealth,[66] to legislate with respect to its municipal functions as fully as the General Assembly was empowered to act,[67] subject to specified exceptions.[68] The most important of these is a denial of municipal power to legislate in conflict with a state act that is "applicable in every part of the Commonwealth" [69] or "applicable in all the cities of the Commonwealth." [70] There is nothing in the language of the enabling act which qualifies this exception. Presumably, a provision in the charter must fall, even though it relates to "municipal functions" if it conflicts with a state

61. See Ebald v. Philadelphia, 387 Pa. 407, 128 A.2d 352, 354 (1957); Lennox v. Clark, 372 Pa. 355, 378, 93 A.2d 834, 845 (1953).
62. *Ibid.*
63. See text at pp. 95-97 *infra.*
64. Pa. Const. art. XV, § 1.
65. Pa. Stat. Ann. tit. 53, §§ 13101-16, 13131, 13133, 13155-57 (Purdon 1957).
66. See note 9 *supra.*
67. Pa. Stat. Ann. tit. 53, § 13131 (Purdon 1957).
68. Pa. Stat. Ann. tit. 53, §§ 13131, 13133 (Purdon 1957).
69. Pa. Stat. Ann. tit. 53, § 13133(b) (Purdon 1957).
70. Pa. Stat. Ann. tit. 53, § 13133(c) (Purdon 1957).

legislative act of general application.[71] On the other hand, the enabling act provides that charter provisions and amendments governing "municipal functions" and not subject to an exception supersede any existing state law to the extent that the two are in conflict.[72] Absent any conflict between a state law and the charter, existing state law affecting the organization or powers of the city remains in force.[73]

Any supersedure of an act of the state legislature by the charter must be premised on a preliminary finding that the subject matter of the superseding charter provision is within the province of the city's "municipal functions." [74] Charter provisions failing to meet this requirement must fall as being outside the scope of the grant of powers in the enabling act.[75] Clearly the personnel relationship between the city and its employees and the form of the governmental structure are within its contemplation.[76] The grant of the power of taxation to maintain the operations of the city, however, is apparently little more than a gesture when viewed in the light

71. *But see* Ebald v. Philadelphia, 387 Pa. 407, 128 A.2d 352 (1957), which apparently confines the applicability of the enabling act's limitations on supersedure to "substantive matters of state-wide concern." *Id.* at 410, 128 A.2d at 354. For a statement of the enabling act limitations see text at notes 69-70 *supra.* For a discussion of narrow view taken by the court in construing the limitations see text at notes 89-95 *infra.*

72. PA. STAT. ANN. tit. 53, § 13111 (Purdon 1957). "Any new charter or amendments to the [new] charter . . . shall become the organic law of the city. . . . So far as the same are consistent with the grant of powers and the limitations . . . prescribed [in the enabling act], they shall supersede any existing charter and all acts . . . local, special, or general, affecting the organization, government and powers of such city, to the extent that they are inconsistent or in conflict therewith." Although the section mentions only supersedure by the charter or by amendments to it, courts have taken the view that the section encompasses ordinances, regulations and rules enacted under the charter. Ebald v. Philadelphia, 387 Pa. 407, 128 A.2d 352 (1957). *Cf.* Warren v. Philadelphia, 382 Pa. 380, 115 A.2d 218 (1955); Philadelphia Civil Serv. Comm'n v. Eckles, 376 Pa. 421, 103 A.2d 761 (1954).

73. PA. STAT. ANN. tit. 53, § 13111 (Purdon 1957). "All existing acts or parts of acts and ordinances affecting the organization, government and powers of the city, not inconsistent or in conflict with the organic law so adopted, shall remain in full force."

In Kelly v. Philadelphia, 382 Pa. 459, 115 A.2d 238 (1955), a municipal zoning ordinance was invalidated for failing to comply with a pre-charter statute governing the procedure for enactment of zoning ordinances by cities of the first class. PA. STAT. ANN. tit. 53, §§ 14755-56 (Purdon 1957). While the charter contained no special procedural requirements for the enactment of zoning ordinances, it did provide a uniform procedure for the adoption of all city ordinances, CHARTER, Sections 2-201(5), 2-201(7), the terms of which had been compiled within the enactment of the ordinance in question. The court, applying the canon of construction that a general law does not repeal a special law unless the intent to do so clearly appears, PA. STAT. ANN. tit. 46, § 563 (Purdon 1952), held that the special state law prescribing local zoning ordinance procedure was an exception to the general procedure prescribed in the charter; and that both provisions, being compatible, could be given effect. 382 Pa. 459, 472, 115 A.2d 238, 244. Such reasoning forecloses the problem of supersedure. Having construed the charter to be inapplicable to a situation that it fairly meant to cover, the resulting finding of consistency was inevitable. It seems that a proper approach would have been first to determine whether there was a conflict, and then to have applied the enabling act provision on supersedure. Such an approach would have produced a decision contrary to that reached by the court.

74. PA. STAT. ANN. tit. 53, § 13131 (Purdon 1957).

75. *Ibid.*

76. Gaul v. Philadelphia, 384 Pa. 494, 121 A.2d 103 (1956); Cornman v. Philadelphia, 380 Pa. 312, 111 A.2d 121 (1955); Lennox v. Clark, 372 Pa. 355, 93 A.2d 834 (1953); Carrow v. Philadelphia, 371 Pa. 255, 89 A.2d 496 (1952).

of the limitations in the enabling act.[77] That the city possesses a police power to act for the health and welfare of its inhabitants was expressly acknowledged in *Warren v. Philadelphia*[78] which upheld a city rent control ordinance.[79] But the limits of the city's "municipal functions" are yet to be judicially determined.[80]

Recognizing that the city can act in a particular area does not establish that city action must necessarily supersede action of the state in the same area.[81] Determination of the scope of the city's municipal functions for the purpose of supersedure should entail considerations different from those associated with the determination of the city's power to act in the absence of state regulation.[82] Any attempted delineation of these functions for the purpose of supersedure must recognize that municipal functions and state affairs are not mutually exclusive;[83] that the question is one of degree. In some cases the court apparently bases its decision on a determination of the extent to which municipal activities alter the positions of those outside the city's jurisdiction.[84] In these cases once the court has established that certain municipal activities affect other portions of the state to a minimal degree, it then determines that the activity should reasonably be free of state control by characterizing it as a "municipal function."[85] Other municipal laws having a substantial impact on those outside the city are more properly the subject of state regulation alone. But in still other cases courts have precluded municipal action, even though

77. PA. STAT. ANN. tit. 53, §§ 13133(a)(8)-(9) (Purdon 1957). See PA. STAT. ANN. tit. 53, § 15971 (Purdon 1957).

78. 382 Pa. 380, 115 A.2d 218 (1955). Implicit in the court's holding is a recognition that a municipality, acting under a home rule charter, may affect private law, at least insofar as the effect is occasioned through the implementation of a valid regulatory policy. In this connection, see AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (1953).

79. PHILADELPHIA ORDINANCES 256-68 (April 13, 1954).

80. See Vitacolonna v. Philadelphia, 382 Pa. 399, 115 A.2d 178 (1955) (upheld Philadelphia's water metering program).

81. PA. STAT. ANN. tit. 53, §§ 13133(b)(c) (Purdon 1957). See Lennox v. Clark, 372 Pa. 355, 378, 93 A.2d 834, 845 (1953); Ebald v. Philadelphia, 387 Pa. 407, 128 A.2d 352, 354 (1957).

82. Some authorities maintain that drawing a rational distinction between municipal and state affairs is impossible, with the result that courts are usually left with a political decision that could best be resolved by the legislature. See Fordham & Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 25 (1948). See also AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6, comment 3 (1953).That there is a meaningful distinction between matters of municipal and state concern was suggested but its nature was not disclosed in Richland, *Constitutional City Home Rule in New York: II,* 55 COLUM. L. REV. 598, 627-28 (1955).

83. See McGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE—1916-1930, at 317 (1933); McBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 307-10 (1916); Fordham & Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 25-26 (1948).

84. See Ebald v. Philadelphia, 387 Pa. 407, 128 A.2d 352, 354 (1957). No attempt is made to resolve the method of distinguishing between state and municipal affairs. The text statement is merely a rationalization of what courts appear to do. See generally McBAIN, *op. cit. supra* note 83, at 317-51.

85. See Lennox v. Clark, 372 Pa. 355, 378, 93 A.2d 834, 845 (1953); Ebald v. Philadelphia, 387 Pa. 407, 128 A.2d 352, 354 (1957).

the measure has no impact on persons outside the city, on the basis that the subject matter is solely of state concern.[86] Thus, there is no consistent approach to the resolution of the problem. The line of demarcation cannot clearly be discerned.[87] Yet it would seem that regardless of the basis of classification there are certain areas of regulation, notably that area governed by the police power, in which both jurisdictions have concurrent interests.[88] For example, the interests of Philadelphia may require additional highways to connect the city with New Jersey and Pennsylvania highway systems. The state, on the other hand, might foster its economic prosperity as a whole by incorporating a road through Philadelphia into its highway development program. Under these circumstances the proposed highway is the concern of both. The city and the state might act in harmony but conceivably representation of the different interests might produce conflicting results. In this case the city ordinance, even though related to a municipal function—providing roads of ingress and egress from Philadelphia—should not supersede the state highway act, since, if a choice must be made, ultimately the interest of the state cannot be subordinated to that of the city.

The extent to which the charter does in fact supersede pre-existing acts of the General Assembly has been expanded by the Supreme Court beyond the plain meaning of the limitation on supersedure in the enabling act.[89] In *Lennox v. Clark* [90] the court held that the limitation of powers in the enabling act encompassed only "substantive matters of State-wide concern. . . ." [91] Thus, in *Ebald v. Philadelphia* [92] a regulation of the Philadelphia Civil Service Commission limiting disability compensation for policemen was upheld despite a conflicting state act that was applicable throughout the state. Similarly, in *Addison's* case,[93] the Supreme Court validated a Philadelphia charter provision making the Civil Service Commission's decision on the merits final.[94] The court applied the "substantive matter of State-wide concern" test in holding that the charter superseded a state act of general applicability which provided for judicial review on the merits of all local civil service commission decisions.[95]

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86. Although Pennsylvania has yet to decide the matter, the experience of other states would seem to indicate that education is a state matter which cannot be regulated by municipalities. See McGOLDRICK, *op. cit. supra* note 83, at 320-23.

87. See note 83 *supra*. See also Greenwood, *Powers of Municipal Corporations—Including Home Rule*, 22 TENN. L. REV. 480, 482-85 (1952).

88. See McBAIN, *op. cit. supra* note 83, at 308-09. See also Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66, 69-74 (1952).

89. See text at notes 69-70 *supra*.

90. 372 Pa. 355, 93 A.2d 834 (1953).

91. *Id.* at 379, 93 A.2d at 845.

92. 387 Pa. 407, 128 A.2d 352 (1957).

93. 385 Pa. 48, 122 A.2d 272 (1956).

94. CHARTER, Section 7-201.

95. 385 Pa. at 55, 122 A.2d at 275. Most states that have considered the problem presented by the *Addison* case have reached a contrary result, holding that the jurisdiction of the courts is a state matter, foreclosed to municipalities. See McGOLDRICK, *op. cit. supra* note 83, at 324-26.

The results of these cases can best be explained by the fact that all of them dealt with the administration and personnel of the city and not with the citizenry at large. A broader ground would be that none of the provisions sustained had any material effect on persons in other portions of the state. Only *Ebald* involved a conflict with the exercise of the state police power,[96] but the court's resolution of the problem appears sound for the aforementioned reasons.

B. *Legislative Withdrawal of Home Rule Powers*

The question of legislative authority to modify or withdraw home rule powers can arise in two ways. First, the state legislature could amend the enabling act to directly deprive the city of a power previously exercised; and second, the legislature could pass an act—applicable to cities of the first class, or applicable to all cities but not a "substantive matter of state-wide concern"—which conflicts with the charter or an ordinance enacted under it, indirectly modifying the municipal exercise of power under the enabling act.

The Pennsylvania constitution provides that home rule power may be given by the General Assembly "subject to such restrictions, limitations and regulations, as may be imposed by the legislature." [97] The amendatory language may give rise to two conflicting positions, each of which purports to explain the ensuing relationship of the legislature and home rule city to the grant of the powers of "local self-government." The first position asserts that the constitution made the legislature the donee of a power to grant municipal home rule. When once home rule is granted, it is to be likened to a completed gift and cannot be unilaterally retracted. Under this view the amendment's limitation clause means only that home rule may be granted piecemeal. Home rule would be a one-way street. The second position states that the source of municipal power under the amendment is the legislature, and that what the legislature can give it can take away. Under this construction the limitation in the amendment is effective both at the time of the original grant and at a subsequent time. Support for this theory is sought in the traditional, pre-home rule concept of the city as a dependent agency of the state.[98] Neither position is foreclosed by the language of the amendment.[99]

The *Ebald* case and other decisions in which the charter has been held to supersede acts of the General Assembly are not binding, for all such

96. As a practical matter the disability payments are a form of workman's compensation for public employees. Had the city enacted a disability payments ordinance for private as well as public employees, the court probably would have been harder put to sustain the ordinance.

97. PA. CONST. art. XV, § 1.

98. See text and notes at notes 4-5 *supra*.

99. The only court to have ruled directly on the issue held home rule to be legislative in origin and subject to revision at the pleasure of the legislature. McHenry v. Clark, 87 Pa. D. & C. 348, 359 (C.P. 1953), *rev'd on other grounds sub nom.* Clark v. Meade, 377 Pa. 150, 104 A.2d 465 (1954). An annotation to the Home Rule Charter incorporates the contrary theory. CHARTER, SECTION 1-100 (Annot. 3).

cases have involved statutes enacted prior to the effective date of the charter.[100] Dictum in the *Addison* case [101] would seem to suggest that the court considers home rule a constitutional grant. The court compared the popular adoption by a city of its own charter with the pre-home rule situation in which city power was determined under a direct legislative grant.

> "Whether a municipal charter comes into being by direct statutory grant of the legislature or by adoption by the constituent electorate in the exercise of power constitutionally reposed, it is as much legislative in the one instance as in the other and has equal legal force and standing in both. Indeed, a constitutionally permissible adoption of a municipal charter by the electorate is not one whit less in dignity than a statute of the legislature granting a charter." [102]

While the court could adopt from such a statement the principle that state acts supersede the charter only on substantive matters of state-wide concern, it is not bound to do so. In *Schultz v. Philadelphia,*[103] decided four days after *Addison,* dictum of the court clearly enunciates that home rule is legislative in origin, and, therefore, subject to change in the discretion of the General Assembly.

> "If the City does possess . . . power it can be only by virtue of the grant made to it by the Legislature of the right of self-government, since all powers of every municipality . . . are solely derivative; a city is not a sovereign political entity but is strictly the creature of the Legislature." [104]

If this traditional view of the role of the city is maintained in a case requiring the court to hold on the issue, the dependent position of Philadelphia would be unchanged despite its self-adopted charter, and the constitutional amendment would have accomplished no more than to quell any doubts as to the validity of legislative home rule.

Neither a constitutional nor a legislative grant of home rule contemplates complete independence of the local unit from the state.[105] The generalized policy of both forms of home rule appears to be that matters affecting only the municipality should be left to municipal control, while matters materially affecting those outside the city should be resolved by the legislature.[106] At first glance this policy would appear to dictate a result

100. The superseded statute in the *Ebald* case was an amendment enacted between the date of adoption of the charter and its subsequent effective date. 387 Pa. 407, 128 A.2d 352, 354 (1957).

101. 385 Pa. 48, 122 A.2d 272 (1956).

102. *Id.* at 57, 122 A.2d 275-76.

103. 385 Pa. 79, 122 A.2d 279 (1956).

104. *Id.* at 83-84, 122 A.2d at 281.

105. See note 6 *supra.*

106. See text and notes at notes 82-88 *supra.*

forbidding legislative withdrawal of municipal powers that are not "substantive matters of state-wide concern." Yet the difficulty in drawing a rational distinction between state and municipal affairs suggests that the court can do no more than make arbitrary decisions, particularly in view of the fact that many matters materially affect both the city and the state, making some sort of concurrent jurisdiction desirable.[107] Further, experience might prove the breadth of powers delegated to the city to have been unwise in light of state conduct in an area, with need for continual adjustments as time and conditions change. Legislative determination of these essentially political questions would appear to be more appropriate. Constitutional home rule would place a premium on legislative guesswork in making the original grant. Were the court made the final arbiter in such a situation, errors illuminated by experience could not be readily redressed, with recourse only to the time consuming process of constitutional amendment.

Paradoxically, recognition of power in the legislature to withdraw home rule powers or to restrain their exercise imposes a responsibility on the legislature, the lack of which originally gave impetus to the home rule movement. A minimum standard of responsibility is suggested by the court in *Ebald,* which refused to infer from the passage of an act of general applicability an intent to supersede the home rule charter in the absence of an express statement to that effect.[108] Such an approach has the advantage of requiring legislative cognizance of its actions which affect the exercise of municipal powers under the charter. Beyond this judicially imposed standard, responsibility of the legislature regarding municipal affairs must be left to the democratic processes in selecting members of the General Assembly. These in turn can be fostered only by public awareness and understanding of the issues involved in striking the balance between state and local power.

H. L.

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107. *Ibid.*

108. 387 Pa. 407, 128 A.2d at 354.