IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

RECORD NO. 4219

JOHN HENRY ALLEN,
Plaintiff in Error,

v.

CITY OF NORFOLK,
Defendant in Error.

PETITION FOR REHEARING

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To the Honorable Justices of the
Supreme Court of Appeals of Virginia:

Your petitioner, City of Norfolk, respectfully applies for a rehearing of the above matter.

PRELIMINARY STATEMENT

The brief of the Plaintiff in Error, John Henry Allen, failed to raise the question of whether Section 29-23 of the Code of the City of Norfolk was "inconsistent" with Section 18-301 of the State Code, contrary to Section 1-13.17 of the State Code. The

opinion rendered by this Court on March 15, 1954 in the above matter was predicated entirely upon the belief that the ordinance was "inconsistent" with Section 18-301. Because the City has not been heard on the question of "inconsistency," and because it believes that the said opinion is contrary to the decisions of previously decided Virginia cases not heretofore brought to the Court's attention, as well as being contrary to the great weight of authority throughout the United States, and because of the harmful effect upon municipalities which will result if the opinion is permitted to stand as written, it is respectfully requested that the Court examine the authorities hereinafter cited on the points on which the Court appears to rest its opinion.

ARGUMENT

I.

THE OPINION RENDERED BY THE COURT IN ALLEN v. CITY OF NORFOLK, IS CONTRARY TO PREVIOUSLY DECIDED VIRGINIA CASES, AS WELL AS TO THE GREAT WEIGHT OF AUTHORITY IN THE UNITED STATES.

There is no legal inconsistency between the statute and the ordinance. "In testing validity of city ordinance challenged as 'inconsistent' with state statute, word 'inconsistent' means *contradictory* in sense that the two legislative *provisions cannot coexist*, and not mere lack of uniformity in detail . . . 'Inconsistency' implies opposition; antagonism; repugnance. One definition of 'inconsistency' given by the lexicons is repugnance, and one definition given of 'repugnance' is 'inconsistency.' These words, though not exactly synonymous, may be, and often are, used interchange-

ably, *and such are their use in regard to statutes, as being inconsistent.*" (Italics supplied.) *Words and Phrases*, Permanent Edition, Vol. 20, pp. 549, 550. See *Bodkin* v. *State* (Neb.), 272 N. W. 547; *Swan* v. *U. S.* (Wyo.), 9 P. 931, 933; *Mobile* v. *Collins* (Ala.), 130 So. 369; *Brotherhood of Staionary Engineers* v. *St. Louis* (Mo.), 212 S. W. 2d 454. A statute cannot be legally inconconsistent with the constitution unless the two are opposed to each other. *Commonwealth* v. *Staunton Telephone Co.*, 134 Va. 291. "Webster defines 'inconconsistent' as 'incompatible,' and says things are 'incompatible' when they *cannot coexist*, and *further that they are inconsistent when they are opposed to each other.*" (Italics supplied.) *Commonwealth* v. *Staunton Telephone Co.*, supra, p. 302. Where the word "inconsistency" appears in a statute it *must not* be loosely construed. It does not mean merely, inharmonious, in appropriate, illogical, unsymmetrical, but connotes impossibility of concurrent operative effect. *Belknap* v. *Shock* (W. Va.), 24 S. E. 2d 457, 460. And an ordinance is not invalid as being "inconsistent" contrary to state law where the ordinance includes additional requirements not found in a statute on the same subject. *Fox* v. *City of Racine* (Wisc.), 275 N. W. 513, 514, 515; *Phelps Inc.* v. *City of Hastings* (Neb.), 42 N. W. 2d 300, 303; *Borok* v. *Birmingham* (Ala.), 67 So. 389; *Heller* v. *Dept. of Health of N. Y.*, 86 N. Y. S. 2d 419. "Generally an ordinance prescribing an offense may be *supplementary to*, or *in aid of a statute* relating to the same subject. Accordingly the view has been taken that an ordinance relating to offenses is not necessarily *inconsistent* with a state statute on the same subject because it provides *for greater restrictions* or *prescribes higher standards* than the statute." (Italics supplied.) *McQuillin, Municipal*

Corporations, 3rd Ed., Vol. 6, Sec. 23.07, p. 394, and Sec. 24.54, p. 561. See also 43 C. J. Sec. 220, pp. 219, 220 and footnote; 37 Am. Jur. Sec. 165, p. 790. An ordinance which enlarges on a statute covering the same subject matter is not *inconsistent* with the statute *unless the statute expressly restricts* legislation on the subject to the limits of the statute itself. *Fox* v. *City of Racine*, supra, p. 515; *Smith* v. *Town of Notasulga* (Ala.), 59 So 2d 674; *State* v. *Womach* (Mo.), 196 S. W. 2d 809; *Dowdell* v. *Beasley* (Ala.), 82 So. 40. "Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance *goes further* in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. *Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.*" (Italics supplied.) 37 Am. Jur. Sec. 165, p. 790; *Fox* v. *City of Racine*, supra, p. 515.

A city is not prohibited from adopting ordinances dealing with gambling which enlarge on the state gambling statute where the city by its charter has the power to enact such ordinances "as shall appear necessary for securing the peace and good government" of the city. *Greenville* v. *Klemmis* (S. C.), 36 S. E. 727, 729. *Seattle* v. *MacDonald* (Wash.), 91 P. 952. See Sec. 15-556, Code of Va., 1950, which gives the council

of any city power "to preserve peace and good order" in said city. Sec. 15-556 applied in *Repass* v. *Town of Richlands*, 163 Va. 1112, where ordinance enlarged on state statute governing the sale of beer. Thus, the mere fact that an ordinance enlarges on a state statute does not make it inconsistent therewith. A difference in penalty prescribed by a statute and ordinance will not make the ordinance "inconsistent" with a statute on the same subject matter. *Salt Lake City* v. *Kusse* (Utah), 85 P. 2d 802. "A municipal ordinance is not in *conflict* with a statute authorizing its adoption because of a difference in penalties. Thus, further and additional penalties may be imposed by ordinance than are imposed by statute, without creating *inconsistency*, and, conversely, at least in some instances lesser penalties may be imposed by the ordinance for violation than by the statute without *conflict*." (Italics supplied.) 37 Am. Jur. Sec. 165, p. 791. *Shaw* v. *Norfolk*, 167 Va. 346.

It would seem that all courts, text writers, and treatises recognize that where the word "inconsistent" is used in statutes and constitutional provisions "inconsistent" means repugnant, opposed to, or in conflict with. An ordinance cannot be "in conflict with" or "opposed to", hence, "inconsistent with", unless the ordinance is in contravention of at least some primary purpose of the statute. *Lynchburg* v. *Dominion Theaters*, 175 Va. 35; *Shaw* v. *Norfolk*, supra; *Phelps, Inc.* v. *City of Hastings* (Neb.), supra.

At pages 7 and 8 of the typewritten opinion in *Allen* v. *Norfolk* the Court states:

> "It is obvious that the provisions of this ordinance that declare that possession of certain indicia of the offense shall be prima facie evidence of guilt and permit proof of a former conviction, are inconsistent with Section 18-301. Thus it is rendered invalid by Section 1-13.17 which expressly prohibits legislation by a city that is inconsistent with state law."

It is admitted that a variance between the statute and the ordinance exists. However, a variance does not constitute an inconsistency as that word is applied to ordinance and statute, statute and statute, and statute and constitution. *Words and Phrases*, Permanent Edition, Vol. 20, p. 549; *Belknap* v. *Shock* (W. Va.), 24 S. E. 2d 457, 460; *Commonwealth* v. *Staunton Telephone Co.*, 134 Va. 291. It is submitted that if the opinion in the *Allen* case remains in the records as written a complete new legal definition of the word "inconsistent" as used in statutes and constitutions will be adopted, and that such interpretation will itself be inconsistent with previously decided Virginia cases and with all leading authorities in the United States.

II.

Where the City Has the Power to Enact Ordinances Dealing With An Offense Covered by the State Law, It Is the Duty of the Court to Reconcile the Statute and Ordinance Where Possible and Give Effect to Both.

Municipalities may enact ordinances dealing with offenses on which the state has already acted. *Repass*

v. *Town of Richlands*, 163 Va. 1112; *Elsner Bros.* v. *Hawkins*, 113 Va. 47; *Lynchburg* v. *Dominion Theaters*, 175 Va. 35; *Shaw* v. *Norfolk*, 167 Va. 346; 37 Am. Jur. Sec. 166, p. 792; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 6, Sec. 23.10, p. 401. Whether the city may adopt an ordinance dealing with the same offense as a state law must be determined from its charter and from the legislative intent, said intent to be determined from the statute creating the offense. *Lynchburg* v.. *Dominion Theaters*, supra. If the state law does not expressly provide a limitation to its own prescription, a city may enlarge on its provisions so long as the state law and the ordinance do not conflict. *Repass* v. *Town of Richlands*, supra. There can be no conflict unless the ordinance grants a license which the state law prohibits, or contravenes some primary purpose of the state law. *Shaw* v. *City of Norfolk*, supra; *Lynchburg* v. *Dominion Theaters*, supra.

Lynchburg v. *Dominion Theaters*, supra, makes it clear that the legislative intent must be found in the statute. Where the state law is silent on the question of intent this Court may infer from such silence either that the Legislature intended to monopolize the field or that such control is to be exercised concurrently with the various cities and towns throughout the Commonwealth, however, it is a rule of general law that where the statute is silent the ordinance may speak. *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 6, Sec. 21.35, p. 250. Whether this Court will let the ordinance speak in the language used should be based on the need in the particular locality for which the ordinance purports to speak. "A matter such as *gaming* or selling of intoxicating liquors may in its broad social

aspects be of state concern but in its *particular complications* or other aspects, varying with locality, also of peculiar municipal concern." (Italics supplied.) *McQuillin*, supra, Sec. 23.01, p. 378. "Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns, which the more sparsely settled portions of the country find unnecessary . . . an ordinance that aids state legislation as to *gaming*, at least one that merely regulates and does not prohibit, is not objectionable on the ground of conflict with the state legislation." (Italics supplied.) *McQuillin*, supra, Sec. 21.36, pp. 260, 261. "In many states it is held that under a general delegation of power a municipal corporation may regulate acts or impose penalties for acts which by the statutes of the state are regulated or declared to be crimes. *The reasons underlying this view are that the exigencies of municipal life require more rigid regulation than is required in rural sections of the state . . .*" (Italics supplied.) 37 Am. Jr., Sec. 166, pp. 792, 793; *Heller* v. *Dept. of Health of N. Y.*, 86 N. Y. S. 2d, 419. The temptation to commit certain offenses is greater in cities than in rural areas, and the resulting injury constitutes *particular injury* to the local inhabitants beyond and in addition to the state inhabitants, *McQuillin*, supra, Sec. 23.10, p. 405; 37 Am. Jur. Sec. 166, p. 793, and as aforestated gambling is a matter which varies in its particular complications which make it peculiarly municipal concern. *McQuillin*, supra, Sec. 23.01, p. 378. "It is generally presumed that conditions exist which make an ordinance necessary or proper for the welfare of the community; that the legislative body investigated and found conditions such that the legislation which it enacted was appropriate; and that a municipal council

acted with full knowledge of the conditions relating to the subject of the municipal legislation." 37 Am. Jur. Sec. 177, p. 812.

The Legislature has delegated to the City of Norfolk full police powers, said powers to be found in its charter provisions and by specific statute. See Acts 1918, Ch. 34, (Norfolk Charter), Sec. 2, Subsections 16, 25, 26, and 27, and Section 15-556 of the Code of Virginia, 1950. It is clear that in the absence of Section 18-301 those provisions are broad enough to permit the city to adopt ordinances prohibiting gambling within the city. If this be true the provisions give the city such power as much as if the words "power to prohibit gambling" were written in the charter. This power is equal to that of the state. *Elsner Bros.* v. *Hawkins*, supra. It would seem that before this power could be denied there would have to be some specific language in the statute paralleled from which the Court could infer that the Legislature intended to revoke that power. "A general law does not deprive a municipality of specific statutory or *charter power* to legislate on the same subject. Statutes or charter provisions may give to cities the police power of the state as to acts which might be made minor offenses by the state and as to acts that state law never has proscribed." (Italics supplied.) *McQuillin*, supra, Sec. 23.03, p. 383. It is respectfully submitted that the City of Norfolk has the power to concurrently legislate on the subject of gambling within its jurisdiction.

In *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 6, Sec. 21.35, at pp. 249, 250 under the heading "Reconciliation of Statutes and Ordinances" it is said:

"Statutes and ordinances are to be reconciled where possible and effect given to both. So long as a statute and ordinance on the same subject do not conflict, they both will stand or supplement each other merely. It is only in case of conflict between the public general law and an ordinance that the general law prevails over the ordinance . . ."

"Before a court is justified in holding that an ordinance is superseded or void because in conflict with a state law, it must appear that it is in *direct conflict* with some particular state law . . . Moreover, the mere fact that an ordinance covers a phase of a particular matter that is not covered by a subsequently enacted statute dealing with the matter does not make the ordinance in conflict with, or repealed by, the statute. In *particulars* where the statute is silent the ordinance may speak." (*Italics supplied.*)

Once it has been determined that the city under its general police powers has the power to adopt an ordinance dealing with the particular offense the following rule is applicable:

"The General Assembly is a coordinate branch of the state government, and so is the law making power of municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. Where, therefore, municipal corporations or their officers are acting within well recognized powers, or exercising discretionary power, the courts are wholly unwarranted in interfering unless fraud is shown, or the power or discretion is being manifestly abused to the oppression of the citizen.

> "It has been repeatedly decided by this court, and well recognized by text-writers, and in the decided cases in other jurisdictions as settled law, that courts can interfere only to prevent a fraudulent and manifestly abusive or oppressive exercise of the powers conferred upon the council of a city by its charter or the general law, since the discretion of municipal corporations, within the sphere of their powers, is as wide as that possessed by the government of a state." *Polglaise's case*, 114 Va. 850, 860, 861; affirmed in *Hopkins* v. *Richmond*, 117 Va. 692,710.

Obviously, the above statement is subject to the provisions of Section 1-13.17 of the Code of Virginia, 1950, however, as aforestated Section 29-23 creates no legal inconsistency contrary to that section.

III.

The Opinon Rendered in ALLEN v. NORFOLK is Contrary to the Rule of SHAW v. NORFOLK.

On page six of the typewritten opinion rendered in *Allen* v. *Norfolk* the Court stated that Section 1-13.7 (sic) was not cited, relied upon or discussed in the *Shaw* case. It said that the Court did not deem the variance in penalty sufficient to invalidate the ordinance because of *conflict*, and added that since Section 1-13.17 was not discussed the Court did not decide whether a variance of penalties made the ordinance invalid because it was *inconsistent* with the state law. The Court then states:

> "The charter of the city limits the maximum punishment that may be imposed for violation of ordinances of this character to six months imprison-

> ment in jail and a $500 fine. *Thus it is clear that the city cannot enact an ordinance in which the punishment prescribed would be the same as that fixed in Section 18-301*, providing one year as the maximum term of imprisonment." (*Italics supplied.*)

This language has led to a general belief that the *Shaw* case has been overruled and that no city could enact an ordinance which deals with an offense already defined by state law unless the penalties provided are identical. If this be true the *Allen* opinion is contrary to the great weight of authority in previously decided cases throughout the United States and by this court. *Shaw* v. *Norfolk*, 167 Va. 346; *Salt Lake City* v. *Kusse* (Utah), 85 P. 2d, 802; *St. Louis* v. *Klausmier* (Mo.), 112 S. W. 516; *In re Calhoun* (Ohio), 94 N. E. 2d 388; 37 Am. Jur., Sec. 165, p. 791; *McQuillin, Municipal Corporations*, Vol. 6, Sec. 23.05, p. 387, footnote 51. For more than fifteen years municipalities in this Commonwealth have relied on the words of Mr. Justice Hudgins set forth in the *Shaw* case to guide them in adopting ordinances dealing with offenses on which the state has acted. In stating that there could be no conflict, hence no legal inconsistency, unless the ordinance made a right of that which the state made a wrong, or vice versa, Mr. Justice Hudgins adopted for this state the view recognized by every authority in the United States. It is submitted that *Muscoe* v. *Commonwealth*, 86 Va. 443, cited in the *Allen* case as having applied Section 1-13.17, stands for the same rule. In the *Muscoe* case this Court said that an ordinance which purported to give a right to Charlottesville city policemen to make an arrest without a war-

rant for a misdemeanor not committed in their presence would be invalid since the state law provided that no such arrest could be made without a warrant. Thus, the holding of that case is that such ordinance is *inconsistent* with the state statute if it gives a *right* of that which the state law has made a *wrong*.

It is respectfully submitted that, as shown by the aforestated authorities, the opinion in the *Shaw* and *Allen* cases are irreconcilable on the question of variance in punishment prescribed, and that if the Court intended to overrule the *Shaw* case it should do so in plain language so that the lower courts, as well as the councils of the various municipalities, may be guided on the problem of varying penalties.

Cities and towns in this Commonwealth have relied on the following words of Mr. Justice Hudgins adopted from *Struthers* v. *Sokol*, (Ohio) 140 N. E. 519, 521, and recited at p. 353 of *Shaw* v. *Norfolk*, supra:

> "No *real* conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa. *There can be no conflict* unless one authority grants a permit or a license to do an act which is forbidden or prohibited by the other."
>
> "A *police ordinance* is not in conflict with a *general law* upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted from the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance." (*Italics supplied.*)

IV.

SECTION 18-301 IS NOT SUFFICIENTLY COMPREHENSIVE TO COMBAT EACH STEP IN THE CONDUCT OF THE NUMBERS GAME.

Section 18-301 was first enacted in 1860, and has remained unchanged for ninety-four years. See Code 1860, Ch. 198, Paragrah 13, p. 807; Code 1887, Section 3826, p. 906; Code 1919, Section 4693. In 1918 the Legislature granted the powers heretofore mentioned to the city of Norfolk. It is submitted that by such act the Legislature, realizing that councils of cities could best combat the evil of policy games, granted authority to the city to enlarge upon Section 18-301. Because the Legislature meets only once in every two years it would seem that it is logical to believe it intended to permit the councils of the various cities who meet every week to tighten the state law as needed in the particular locale. Below are excerpts from two crime committee reports which are convincing proof of the need for more comprehensive law than that heretofore adopted by the state.

The May 2, 1951 issue of the New York Times carried the Kefauver Committee Report in which it was said that "the survivors of the murderous underworld wars of the prohibition era" are now the operators of vast policy syndicates. At paragraph six the committee stated that "gambling profits are the principal support of big time racketeering and gangsterism . . . Thus, the two dollar horse bettor and the *five cent numbers* player . . . provide the moneys which enable underworld characters to undermine *our institutions.*" (Italics supplied.) Adopting the language applicable

to the city of Norfolk we find that it is the five cent numbers player who supplies the money which enables the underworld to undermine our institutions. In 1949 our principle crime combatting institution was shattered when two members of the police department admitted taking bribes from the primary numbers racketeer in the city, and one of these men further admitted that he was the agent of that racketeer in paying similar bribes to more than twenty other members of the department. See *Benson* v. *Commonwealth*, 190 Va. 744 and record filed with the petition. As a result of this revelation and pursuant to the long time practice in Virginia a special grand jury was appointed to probe the unlawful activities of the policy game racketeers so prevalent in Norfolk. *Benson* v. *Commonwealth*, supra, p. 748; *Hausenfluck* v. *Commonwealth*, 85 Va. 702. The following are excerpts of their findings and recommendations as reported in the March 12, 1949 issue of the Norfolk Virginian-Pilot:

> "3. The numbers racket has been carried on openly in Norfolk."
>
> "5. Morale and discipline of the police force is at a low ebb. Police officers lack confidence in the integrity and sincerity of their superior officers."
>
> "15. Jail sentences should be meted out to persons found guilty of participating in the numbers game, *particularly those who are chronic offenders.*" (Italics supplied.)

The policy game as operated in Norfolk is not a small time operation to be taken lightly and not dealt with severely. The following articles concerning the

numbers racketeer referred to heretofore appeared in the Norfolk newspapers:

> "An early morning explosion smashed eleven windows in the home of Carvel "Cocky" Benson, 40, yesterday, the second such blast in the home at 6020 Sewells Point Road in the past eleven days . . . the home of Benson, former Norfolk numbers racket chief . . . was rocked by a lesser blast on August 21st at 4:50 A. M. . . ." Norfolk Virginian-Pilot, September 2, 1951.
>
> "Hired thugs blamed for home blast . . . out of town hoods have been imported to Norfolk to erase Carvel "Cocky" Benson, the former numbers racket boss said today . . ." Norfolk Ledger-Dispatch, September 1, 1951.

Benson no longer maintains headquarters in Norfolk, however, through his agents, like John Henry Allen, his operations continue in the city.

The mode of operation is different. No longer does the big time promoter appear in Norfolk. No longer does the writer have printed slips in duplicate or triplicate. As shown in the case at bar, and in the case of *Ransom* v. *City of Norfolk* now pending before this Court, the writer has had to resort to writing on his hand or on small scraps of paper, and quickly calling the "numbers" in to his promoter. It is submitted that the state law is adequate to convict the promoter and pick up man, without evidence of a sale, who have in their possession large amounts of writing which indicate a lottery. *Abdella* v. *Commonwealth*, 174 Va. 450; *Motley* v. *Commonwealth*, 177 Va. 806; *Quidley* v. *Com-*

monwealth, 190 Va. 1029. However, said law is not sufficient to secure conviction of those such as John Henry Allen without such evidence. A law which provides a remedy for those with large quantities of lottery slips in their possession but cannot suppress those with small amounts of the same lottery slips is not comprehensive enough to combat the evil which the Constitution orders prohibited. As said by Mr. Justice Spratley in *Quidley* v. *Commonwealth*, supra, at p. 1038: "Each step constitutes aid in its conduct." Section 29-23 is that remedy, supplementing the state law, which can, without unduly oppressing the rights of any individual fill that gap in the state law.

CONCLUSION

For the reasons assigned, and in view of the authorities cited herein, which were not brought to the Court's attention at the first hearing of this case, it is respectfully submitted that this is a proper case for a rehearing and the City of Norfolk prays that such be granted. If, however, the Court feels that such is not the case, we most respectfully request that the opinion heretofore rendered be reviewed in the light of the herein cited authorities so as to indicate the extent to which the said authorities are not to be accepted as the law in Virginia, and that some expression be made as to whether the cited Virginia authorities are specifically overruled.

Respectfully submitted,

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