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Overlapping, Duplication and Conflicts Among Municipal Corporations

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OVERLAPPING, DUPLICATION AND CONFLICTS AMONG MUNICIPAL CORPORATIONS

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There is a well-known principle of municipal government that there cannot be two municipalities possessed of the same or similar powers, privileges and jurisdiction covering the same territory at the same time. Perhaps the earliest expression of this principle may be found in an early English dictum to that effect where the court explains why such a proposition must be true, *viz.*, "[F]or, instead of good order, that would only be productive of anarchy."[1] Whether in our conglomerate of municipalities we have abided by this principle or have created duplications, overlappings and conflicts due to the vast multiplicity of municipal units is an issue which will bear study.

It will appear that the courts have not been unduly disturbed by the inconveniences, the probability of litigation, the uneconomical operation of public business or even the anarchy which are inherent in any scheme which departs measurably from the principle that coterminous units should not have the same or similar powers, either wholly or in part. Due or even excessive deference has been shown to the legislative will where the creating statutes have been drawn without adequate care.[2]

The areas of conflict occur in the main: (a) where municipal units have to some extent identical or overlapping powers given by statute, (b) where they occupy overlapping territory, (c) where the question of priority arises between annexation and incorporation, (d) where one unit seeks to exercise police power over the property or activity of another, (e) where one unit levies special assessments on the property of another for improvements and (f) where a successor incorporation has been effected prior to a proper termination of an earlier one.[3]

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1. The King v. Pasmore, 3 T.R. 199, 243, 100 Eng. Rep. 531, 554 (K.B. 1789). See 1 McQUILLIN, MUNICIPAL CORPORATIONS § 3.02 (3d ed. 1949); 1 DILLON, MUNICIPAL CORPORATIONS § 354 (5th ed. 1911); 62 C.J.S., *Municipal Corporations* §§ 85, 86 (1949).

2. See Phillips, *Legal Position of Local Units of Government in Pennsylvania*, 13 TEMP. L.Q. 466, 468 (1939). "[T]he apparent severity of constitutional restrictions against special legislation was softened considerably by an almost universal willingness of state supreme courts to permit legislative classification of local units for regulatory purposes." But in Elliott v. Wille, 112 Neb. 78, 198 N.W. 861, *rev'd on rehearing*, 200 N.W. 347 (1924), it was held that a special function unit must have a basis in public convenience and welfare to be determined by some competent authority outside the fiat of the organizers.

3. An interesting result may occur upon the consolidation of two units (which subject is not discussed herein). After the consolidation of the city and county of San Francisco, an action for damages was brought against the

A. UNITS HAVING SOME IDENTICAL POWERS

It is not uncommon for sanitary or other special districts to be established within or partly within the limits of municipalities which themselves have the power to make adequate provision for means of protecting the public health, and in this way an overlapping arises. In one case, a small town sought to nullify the creation of such a district on the ground that the town itself had authority to provide for such needs. The authority of the town had not been specifically denied by the statute creating the district, and the town urged that two municipalities with identical powers could not coexist. In sustaining the creation of the sanitary district, the court suggested that possibly the town did not have equal ability to provide adequate sanitation, and ignored the matter of probable conflict.[4] The result may be the same where utility districts are created within the boundaries of which exist cities having full power to develop public utilities.[5]

The conflict may arise even with the *ad hoc* units (special units frequently for temporary purposes) themselves. Thus in one case[6] there were two drainage districts having a common outlet. A statute authorized the creation of a third district to deepen the outlet, perhaps for the very purpose of avoiding a clash between the first two.[7]

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new unit for the death of an infant, negligently caused at a hospital of the defendant. Under the law of California a county was not liable for such negligence but a city might be. It was held that the consolidation was to be regarded as a city and so was liable. Beard v. City and County of San Francisco, 79 Cal. App.2d 753, 180 P.2d 744 (1947). This case has to that extent the appearance of a merger rather than a consolidation.

4. Aurora v. Aurora Sanitation Dist., 112 Colo. 406, 149 P.2d 662 (1944).

5. Royer v. Public Util. Dist., 186 Wash. 142, 56 P.2d 1302 (1936). See also People *ex rel.* Tuohy v. Chicago, 399 Ill. 551, 78 N.E.2d 285 (1948) (a special slum clearance project created within Chicago, though Chicago had slum clearance power).

6. Maulding v. Skillet Fork River Outlet Union Drainage Dist., 313 Ill. 216, 145 N.E. 227 (1924).

7. In *Special Municipal Corporations*, 18 NAT. MUNIC. REV. 319 (1929), Professor Guild reports the existence in the United States of 89 names or titles of these *ad hoc* units, of which there are forty-seven varieties with as many purposes. He defends the creation of them on various grounds, one being the opportunity thus to evade inconvenient debt limitation statutes. According to J. C. Phillips, *supra* note 2, there were in 1939 more than 175,000 municipal units of all types in the United States. FORDHAM, LOCAL GOVERNMENT LAW 25 (1949), cites the report of the Bureau of the Census of 1942 to the effect that there were then 155,116 governmental units in the country. See also MUNICIPAL YEAR BOOK 15-24 (1947), showing that roughly three-fourths of these were *ad hoc* units. William Anderson placed the total at 165,049 units. ANDERSON, THE UNITS OF GOVERNMENT IN THE UNITED STATES (1934). Fordham further cites the Census Bureau report of 1942 to the effect that there were 116,878 special function units of which 108,579 were school districts. FORDHAM, *op. cit. supra*, at 27. See also Note, *Overlapping Municipalities*, 16 NAT. MUNIC. REV. 795 (1927).

The record shows that within St. Louis County, outside the City of St. Louis, there are 94 incorporated cities, towns and villages. Each one of them is subject to taxation by at least three *ad hoc* units, such as school, sanitary, fire and water districts. These taxes are paid in the aggregate to 61 different collectors. There is a pressing need for unified sewer and transportation systems for St. Louis and these municipalities. Whether they can be secured without

Sometimes the court does observe that a conflict may develop. In a Texas case where a water control district was set up within the limits of a city, the court stated that it was presumed that the city would adjust its conflicts with the district by agreement but, absent such agreement, the court would later resolve the conflict.[8] So in Illinois[9] where a problem of slum clearance and rehousing was involved, the two units, the housing authority and the city, could exercise similar powers. The court observed that these powers should be so exercised as not to bring the two units into conflict in doing identical work for the same area. "It is inconceivable that both corporations should enter into a program of slum clearance by which one would be duplicating the work of the other." One may easily suspect that advocates of slum clearance in Chicago used this method to force the city's hand by inducing the legislature to create the special district. It is fair to inquire why, at least for this occasion, the city was not expressly deprived of the slum clearance power, thus avoiding possible conflicts, unless the city charter stood in the way. The legislature in this manner may deal with a municipality reluctant to take measures esteemed desirable by the legislature. In these cases the ancient principle that two units cannot exist having identical powers in the same area was clearly overlooked.

Yet there is strong authority the other way. Thus it has been held that two drainage districts could not exist with similar powers in the same area, though the second one was intended primarily to be concerned with a different stream, where the legislature had not granted separate powers.[10]

So in Oregon a water district, embracing the limits of two towns together with some added territory, was organized to supply water for the entire area. This authority would clearly conflict with the powers of the towns already in existence and was held to be invalid.[11] So also

a consolidation of all is highly questionable, due to their conflicting interests. Compare the situation in Milwaukee County, Wisconsin, where in addition to the City of Milwaukee there exist six cities and six villages. See Maruszewski, *Legal Aspects of Annexation as it Relates to the City of Milwaukee,* [1952] WIS. L. REV. 622, 623 nn.1,2.

8. Pelly v. Harris County Water Control & Improvement Dist., 145 Tex. 443, 198 S.W.2d 450 (1946).

9. People *ex rel.* Tuohy v. Chicago, 399 Ill. 551, 78 N.E.2d 285 (1948).

10. People *ex rel.* Bancroft v. Lease, 248 Ill. 187, 93 N.E. 783 (1910); *cf.* People *ex rel.* Shamel v. Baldridge, 267 Ill. 190, 108 N.E. 49 (1915); People *ex rel.* Smerdon v. Crews, 245 Ill. 318, 92 N.E. 245 (1910) (overlapping districts forbidden). In State v. Beacham, 125 N.C. 652, 34 S.E. 447 (1899), where a Board of Health was authorized to prepare rules and regulations pertaining to matters of health which, when published, would become ordinances of the city, it was held that the city commissioners were thereby deprived of power to pass ordinances covering the same matters. A similar result was had in New Orleans v. Riisse, 164 La. 369, 113 So. 879 (1927), where the Port of Orleans, also an *ad hoc* unit, was empowered to make traffic regulations within its area, which authorization was held to exclude a similar exercise by the city council.

11. State *ex inf.* Flaxel v. Chandler, 180 Ore. 28, 175 P.2d 448 (1946). See Priest v. James, 125 Ore. 72, 265 Pac. 1092 (1928) (where an area has been or-

in the State of Washington, if a city has power over drainage and diking, a drainage district covering the same area is not validly established unless it embraces other territory.[12]

It has been held that when its territory is later annexed by a municipality, a water district may still issue its bonds for the acquisition of waterworks, canals, conduits, reservoirs and land for water storage and irrigation equipment, though probably such powers may have belonged to the annexing unit such as was the Sacramento Municipal Utility District.[13] Such a practice it would seem may conflict with the long range plans of the municipality. In one case of annexation of a sanitary area by a city, however, the district was dissolved and its functions were assumed by the city, just as happens where a city annexes a village.[14]

A common phenomenon exists in many states where, though schools and education are properly the concern of the municipal government, yet school districts organized within the governmental unit have independent control over school matters. They frequently do not have direct power of taxation for school support but may require the municipal council to exercise the taxing power to the extent they need.[15]

B. Overlapping Territory

1. *In General*

Chicago Packing Co. v. Chicago[16] is a most interesting early case which seems to violate the early principle against the existence of two units with overlapping governmental power in the same area at the same time. The Illinois statute gave to cities and villages the power to regulate the management and construction of packing houses within their own limits and to the distance of one mile beyond. In the *Chicago Packing Co.* case the defendant packing company was located within the boundaries of the town of Lake which had licensed it under its ordinance. The defendant was also doing business, however, within one mile of the city of Chicago, which city claimed the power by ordinance to license defendant because it was within the one mile

ganized as a port authority, another port authority cannot be set up within the confines of the first); Rathfon v. Payette-Oregon Slope Irrigation Dist., 76 Ore. 606, 149 Pac. 1044 (1915) (two overlapping irrigation districts, each with power to tax, cannot coexist).

12. Weatherwax v. Grays Harbor County, 116 Wash. 212, 199 Pac. 303 (1921). See also Public Util. Dist. v. Superior Ct., 199 Wash. 146, 90 P.2d 737 (1939) (public utility district cannot be created with power to tax for the purpose of constructing or purchasing public utility plants within the confines of two cities with similar powers).

13. Galt County Water Dist. v. Evans, 10 Cal. App.2d 116, 51 P.2d 202 (1935).

14. Stone Co. v. Reilly, 158 Cal. 466, 111 Pac. 373 (1910).

15. See Aurora v. Aurora Sanitation Dist., 112 Colo. 406, 149 P.2d 662 (1944); Kuhn *ex rel.* McRae v. Thompson, 168 Mich. 511, 134 N.W. 722 (1912).

16. 88 Ill. 221 (1878). This case is interpreted in 1 DILLON, MUNICIPAL CORPORATIONS § 354 n.2 (5th ed. 1911).

limit. In a prosecution by the City of Chicago for failure to obtain a license, the defense was that the defendant had received a previous license from the town of Lake. It was held that this was not a good defense. A small village, the court observed, should not have the power to control matters pertaining to the health of the people of a large city and thus be able to create a possible nuisance. "[T]he fact that the city charter [of Lake] of 1867 empowered the municipality, in terms, to license this character of establishments, and the general law [later passed and conferring regulatory power over business within the one mile limit] has omitted those express terms [power to license packing houses], can have no bearing on the construction that shall be given to this latter act."[17] "[T]he General Assembly, rather than subject our large cities to such hazards from smaller municipalities in their immediate vicinity, would have repealed the charters of the latter, or at least curtailed their power."[18] Thus the court made over the charters of the two cities and violated the ancient principle above referred to by a course of argument neither clear nor persuasive.

It is a common thing for statutes to permit municipalities to regulate businesses within a stated distance of their boundaries. Suppose that a certain business is operating within the borders of two or more units thus extended. It could be argued (a) that the first to regulate had priority, (b) that the closer one prevailed, (c) that as in the *Chicago Packing Co.* case all had the power of control, (d) that the largest city should prevail, and finally (e) that in view of the conflict none could assert such power. This confusion could evidently be avoided by the drafting of the statute with greater care.

In Alabama it has been held that the nearer or nearest town has priority, there being three municipalities in a certain case, within the space of 5500, 5700 and 6500 feet, respectively, of the business.[19] In another Alabama case, however, priority in time was adopted as the applicable rule, though the court also commended the view respecting the nearer one. Alabama also suggests by way of illustration that throughout the country there is much imitation of the federal rule of overlapping governments, each limited and superior within its own sphere, but no key to the solution of this matter is given.[20] In still another Alabama case[21] it was declared that both cities had jurisdiction equally under the statute, but it was further said that a judgment against the defendant for the violation of the ordinance of one municipality could be pleaded in bar to an action on the ordinance of the other for the same offense. It seems strange to assert that the offense

17. *Id.* at 224.
18. *Id.* at 228.
19. City of Graysville v. Johnson, 33 Ala. App. 479, 34 So.2d 708, *cert. dismissed*, 35 So.2d 339 (1948).
20. Homewood v. Wofford Oil Co., 232 Ala. 634, 169 So. 288 (1936).
21. Hammonds v. City of Tuscaloosa, 21 Ala. App. 286, 107 So. 786 (1926).

against each ordinance would be the same, even though the act is identical, since it is commonly held that when an act becomes an offense against the laws of more than one jurisdiction, more than one offense arises and punishment for each is not double jeopardy.[22] In an early California case also it was held that though a city had licensed the operation of a saloon, the county within which the city was situated might likewise do so under the terms of the state constitution. No notice was taken of the resulting confusion in case there should be a conflict in the regulations.[23]

In a Colorado case, however, where the defendant's saloon had been licensed by the county for the period of one year and within the year the area where the saloon operated was incorporated, it was held that the county license continued for its full period, but the implication is that after the year the county lost its power to license.[24] In West Virginia in the case of *New Martinsville v. Dunlap*,[25] the county undertook to license the operation of a saloon which was within the limits of town *A* and also within the one mile limit of another town *B*. It was held that *B* had no authority in the matter and the defendant, who was being prosecuted for failure to obtain a license from *B*, prevailed by the consent of town *A* rather than by license from the county. Thus location within a municipality prevailed over the extended limits of another one.

2. *Overlapping and Debt Limitation*

There is a rather general agreement that the debts of a Board of Education are not affected by constitutional or statutory debt limitations of the municipality within which the board operates. This is due to its semi-independent existence even though in such cases frequently the board does not have the power to levy a tax directly but may require the municipality to do so. In a Kentucky case this interpretation was strengthened by the fact that the limitation was expressly applied to each unit.[26]

22. See 6 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 23.10-23.13 (3d ed. 1949); Note, 21 ILL. L. REV. 287 (1926). See also State v. Lee, 29 Minn. 445, 13 N.W. 913 (1882).

23. *Ex parte* Lawrence, 69 Cal. 608, 11 Pac. 217 (1886).

24. People v. Rains, 20 Colo. 489, 39 Pac. 341 (1895).

25. 33 W. Va. 457, 10 S.E. 803 (1890).

26. Board of Educ. v. National Life Ins. Co., 94 Fed. 324 (8th Cir. 1899); Campbell v. Indianapolis, 155 Ind. 186, 57 N.E. 920 (1900); Coppin v. Board of Educ., 155 Ky. 387, 159 S.W. 937 (1913); *Ex parte* Newport, 141 Ky. 329, 132 S.W. 580 (1910); Kelley v. Brunswick School Dist., 134 Me. 414, 187 Atl. 703 (1936); Kuhn *ex rel.* McRae v. Thompson, 168 Mich. 511, 134 N.W. 722 (1912); House v. School Dist., 120 Mont. 319, 184 P.2d 285 (1947); Sanders v. County Ct., 115 W. Va. 187, 174 S.E. 878 (1934); Lippert v. School Dist., 187 Wis. 154, 203 N.W. 940 (1925); *cf.* Paine v. Port of Seattle, 70 Wash. 294, 127 Pac. 580 (1912) (Port of Seattle is independent as to debt though it embraces King County and several cities and school districts). By a Kentucky statute in cities of the 4th class the Board of Education is not an independent corporation and its bonds are a part of the municipal debt. Walsh v. Pineville, 152 Ky. 556, 153 S.W. 1002 (1913).

The City of Philadelphia furnishes another illustration of debt limit evasion,[27] in that the city evaded the debt limit statute when it was found necessary to enlarge its sewer system and water works. The arrangement it made was to convey these facilities to a grantee, the Philadelphia Authority, which was to perform the needed enlargement. The grantee leased these systems back to the city for a period of thirty years at an annual rental sufficient to pay the entire cost of the improvements. The city was to charge and collect rentals on these structures and pay them over.

But such a subterfuge was regarded as too obvious in a similar case in Maine.[28] One of the cities in that state desired to erect a much needed city hall but had no funds. It thereupon created the New City Hall Building Commission, such creations being permissible under the statute. The city then transferred the land for the location of the building to the commission in the form of a lease. The court regarded the commission as a mere agency for the city, and the plan was held to be an invalid subterfuge. In another case, likewise, where a special taxing district was created for the construction of technical high schools and the sole reason for its existence was to avoid the debt limit, the plan was not sustained.[29] In cases where the city and the special district are not independent of each other, if such there be, but the latter has the taxing power, or is semi-independent but does not have the taxing power,[30] or is independent and has separate taxing power, but the debt limit of the two must be combined, the rule of first come first served would apply and the later unit seeking credit may find the limit already reached, even though such unit be of the higher grade.[31]

City of Stamford v. Town of Stamford[32] is an illusration of independent units but joint debt. The City of Stamford occupied about 80% of the township area. The case involved a petition for a declaratory judgment as to whether the limit of the indebtedness of the city was affected by the debt of the township. It was held that under the statute the debt of each was limited to 5% of their aggregate property lists. The town and city, however, had not been consolidated, apparently because they were not entirely coterminous.[33]

27. Williams v. Samuel, 332 Pa. 265, 2 A.2d 834 (1938). *Cf.* Hansen v. Havre, 112 Mont. 207, 114 P.2d 1053 (1941). See Notes, 48 MICH. L. REV. 1016 (1950), 34 MINN. L. REV. 360 (1950), for similar cases arising in Michigan and Indiana.

28. Reynolds v. Waterville, 92 Me. 292, 42 Atl. 553 (1898).

29. Cerajewski v. McVey, 225 Ind. 67, 72 N.E.2d 650 (1947). See Notes, 25 IND. L.J. 325 (1950), 48 MICH. L. REV. 1016 (1950), 14 N.Y.U.L.Q. REV. 263 (1937), 3 WIS. L. REV. 352 (1926).

30. See Jones v. Board of Educ., 191 Ky. 198, 229 S.W. 1032 (1921).

31. City of Stamford v. Town of Stamford, 107 Conn. 596, 141 Atl. 891 (1928).

32. 107 Conn. 596, 141 Atl. 891 (1928), 38 YALE L.J. 120 (1929).

33. A letter from the mayor of Stamford, dated September 9, 1952, reads in part as follows:

> This situation (independent coexistence of township and city) at one time was not uncommon in the State of Connecticut, as attested to by the fact that dual governments have existed, until recently, in the following

It is evident that the statute does not apply to the situation where the debt obligation does not become a charge upon the property of the municipality as in the Philadelphia case above. Thus it does not apply where a housing project is to be maintained by a housing authority the obligations of which are to be secured by a mortgage upon its own property and are payable out of its own assets.[34]

C. Priority between Annexation and Incorporation

It seems that when an annexation proceeding of a given area has been initiated by a municipality, such area cannot during the process become separately incorporated.[35] Conversely, it is true that when a certain area is in process of incorporation it cannot be annexed by a city until after the incorporation proceeding is terminated.[36] Thus the proceeding first begun has priority, though this rule would not apply

communities: Danbury, New London, Norwich, City of Willimantic in Windham, and Danielson.

To appreciate this situation fully, one must understand that the original townships, as set up by the General Assembly, included large areas of land for a state the size of Connecticut. Over the years, it was found that certain portions of a town developed more rapidly than the remaining section and that, because of this growth, certain municipal services became necessary to the orderly conduct of its affairs. For example, all of the town needed educational, welfare, road services, etc. However, the more populated areas required a round-the-clock police and fire protection, health and sanitation.

In order to provide these latter services, residents of the populated section obtained charters from the General Assembly, incorporating them into separate city districts, within the town, which gave them the power to levy taxes to defray the expenses of the added services which they needed.

The people in the outlying districts, having no need for these additional services, of course would not be interested in being taxed for them. The town government continued to function, as formerly, under a Board of Selectmen, responsible directly to the Town Meeting. The city operated within the town, with a mayor and a common council or a board of aldermen providing the new services.

You are quite correct in observing that there was a great deal of duplicity and it was for this reason that Stamford, as well as most of the other towns mentioned above, have now consolidated under one government. *Signed,* Thomas F. J. Quigley, Mayor, City of Stamford, Connecticut.

See Spencer, *Cities Within Cities,* 37 NAT. MUNIC. REV. 256 (1948), for an interesting article naming several cities where this situation occurs and discussing some governmental perplexities, but not noting any litigation arising therefrom.

34. See Edwards v. Housing Authority, 215 Ind. 330, 19 N.E.2d 741 (1939); State *ex rel.* Webster Groves Sanitation Sewer Dist. v. Smith, 337 Mo. 855, 87 S.W.2d 147 (1935).

35. State *ex inf.* Goodman v. Smith, 331 Mo. 211, 53 S.W.2d 271 (1932); Houston v. State, 142 Tex. 190, 176 S.W.2d 928 (1943); Ft. Worth v. State, 186 S.W.2d 323 (Tex. Civ. App. 1945); State *ex rel.* Binz v. San Antonio, 147 S.W.2d 551 (Tex. Civ. App. 1941). For a rather full development of this matter see Maruszewski, *Legal Aspects of Annexation as it relates to the City of Milwaukee,* [1952] WIS. L. REV. 622, 629, 637, 639. The significance of the institution of an annexation and of an incorporation proceeding is here set out with citations of Wisconsin cases.

36. Taylor v. Fort Wayne, 47 Ind. 274 (1874); El Paso v. State *ex rel.* Town of Ascarate, 209 S.W.2d 989 (Tex. Civ. App. 1947).

where the annexation or incorporation was defectively undertaken.[37] An area once annexed by one unit cannot thereafter be annexed by another,[38] which is perhaps the equivalent of declaring that one municipality cannot annex only a part of another incorporated unit.[39] Where a unit invalidly established has issued bonds, the same area being later validly organized is not liable on the bonds.[40] It seems also that one unit cannot incorporate another within itself unless legislation has been provided for such an event.[41]

It has been held that where a city annexes a special district area such as a drainage district which has the power to float bonds, the city cannot take over the existing powers of the district.[42] The contrary seems to be more reasonable, however, if one may assume that the powers of the special district are within the general authority of the annexing city.[43]

D. Police Power Exercised by One Unit over the Property and Activity of Another

One of the important issues which suggests conflicts between municipal units is whether the one, usually a city or town, may exercise police powers over the property and activity of the other, commonly a county or special district, within the borders of the former.

Must a normal school board[44] obtain from the city within which it is proposed to construct an education building a city permit as private persons must do? May the city prescribe school buildings regulations for the structures and require a building permit?[45] A city in Kentucky has been held incapable even of requiring fire escapes to be installed on a state building for the blind.[46] It has been declared in Missouri that the city could not prescribe the method of sewage disposal for school buildings,[47] but in a later case in which there was apparently

37. Popenfus v. Milwaukee, 208 Wis. 431, 243 N.W. 315 (1932).
38. Galena Park v. Houston, 133 S.W.2d 162 (Tex. Civ. App. 1939).
39. State *ex rel.* Hilton v. Brookside, 161 Minn. 171, 201 N.W. 139 (1924); Borough of Darby v. Borough of Sharon Hill, 112 Pa. 66, 4 Atl. 722 (1886).
40. Beyer v. City of Athens, 249 Fed. 849 (6th Cir. 1918).
41. Borough of Darby v. Borough of Sharon Hill, 112 Pa. 66, 4 Atl. 722 (1886).
42. Harris County Drainage Dist. v. Houston, 35 S.W.2d 118 (Tex. Com. App. 1931); *see* Allied Amusement Co. v. Bryam, 201 Cal. 316, 256 Pac. 1097 (1927).
43. Stone County v. Reilly, 158 Cal. 466, 111 Pac. 373 (1910); *In re* Sanitary Board, 158 Cal. 453, 111 Pac. 368 (1910).
44. Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).
45. Salt Lake City v. Board of Educ., 52 Utah 540, 175 Pac. 654 (1918). The answer here was generally "No," but it could require the placing of fire alarms or telephones in all the buildings.
46. Kentucky Inst. for Blind v. Louisville, 123 Ky. 767, 97 S.W. 402, 31 A.L.R. 450 (1906) (State did not waive its power of direct control over its property).
47. Board of Education v. St. Louis, 267 Mo. 356, 184 S.W. 975 (1916). In Water-Supply Co. v. Albuquerque, 9 N.M. 441, 54 Pac. 969 (1898), where the city sued a water supply company to prevent the shutting off of water from school buildings, it was held that there could be no recovery because this was not a city purpose.

no change in the applicable statutes it was decided that the city had authority to inspect the boilers of the school buildings and the smokestacks, and collect inspection fees therefor.[48] It may also require school janitors to be firemen or engineers licensed by the city in order to qualify for the operation of steam boilers even though the state had authorized the school structures.[49]

The Missouri cases of boiler inspection and janitor qualification seem inconsistent with the denial of the power of a city to direct sewage disposal, but they do accord with the decisions in several other states. Thus in California a city may regulate the building of public schools and may require building permits.[50] In Massachusetts the authority to control the storage and disposal of refuse through regulations affecting the health of the community had been entrusted in one case specifically to a special Board of Health which had not acted. Under these circumstances the city was permitted to exercise its police power in the matter.[51] In Kentucky, though the city cannot require fire escapes to be installed in a refuge for the blind, it has been held that where there is a conflict between the local board of health and the city, the latter may order persons who are afflicted with smallpox to be removed to its pest house, even though the Board of Health does not think this action to be advisable. The conflict here is not between city and state but between a city and an *ad hoc* unit.[52] In *State* ex rel. *Freeman v. Zimmerman*,[53] the school board, acting under a city ordinance, had authority to require the vaccination of school pupils. There was, however, no conflict of authority.

Illinois has taken an emphatic position upon the matter of city regulation of county buildings. Thus in *Cook County v. Chicago*,[54] it was held that the construction of a county jail within the city limits must conform structurally to city requirements; that general rather than local policies of government attach to the county and the powers of the latter do not include the police power. The California case, *Pasadena School District v. Pasadena*,[55] was cited and the precedent followed to the effect that a school board must submit plans and specifications for its buildings to the city inspector.

48. Kansas City v. School Dist., 356 Mo. 364, 201 S.W.2d 930 (1947).
49. Kansas City v. Fee, 174 Mo. App. 501, 160 S.W. 537 (1913). In Smith v. Board of Educ., 359 Mo. 264, 221 S.W.2d 303 (1949), the City of St. Louis was held to have the power to regulate the sanitary conditions of the 42 restaurants operated by the St. Louis Board of Education. Yet it could not compel the same Board to take out a permit for the construction of school buildings which would regulate the ventilation and plumbing. The court believed that the control of sanitary conditions of school buildings was by statute vested in the school board. Board of Educ. v. St. Louis, 267 Mo. 356, 184 S.W. 975 (1916).
50. Pasadena School Dist. v. Pasadena, 166 Cal. 7, 134 Pac. 985 (1913).
51. Commonwealth v. Hubley, 172 Mass. 58, 51 N.E. 448 (1898).
52. Hengehold v. Covington, 108 Ky. 752, 57 S.W. 495 (1900).
53. 86 Minn. 358, 90 N.W. 783 (1902).
54. 311 Ill. 234, 142 N.E. 512, 31 A.L.R. 442 (1924).
55. 166 Cal. 7, 134 Pac. 985 (1913).

It is submitted that the California-Illinois rule in this respect is the only practical one. A city which has extensive duties respecting safety from fire, and the health, convenience and happiness of its citizens, may well be seriously thwarted by violations of its policies, especially with respect to fire control, sewage disposal, height of buildings and general policy even including matters of aesthetics. No case seems to say clearly that *ad hoc* units and counties may or may not violate zoning restrictions. Surely, however, Illinois would not permit a county jail to be built in a zone restricted to residence or in close proximity to schoolhouses. Apparently no such conflict has ever arisen; at least this writer has not found any. All other inferior units should be subject to the city's zoning laws.

The result in *People* ex rel. *Carroll v. Lakewood*[56] is analytically difficult in view of the Illinois position that the municipality wherein county property is found has police and regulatory power over it. In that case a certain park area had been conveyed to Grafton township prior to the creation of the village of Lakewood. On the establishment of the latter covering the area of the park, the village extended its police powers over the park with respect to health, sanitation, public order, and morals and had specifically regulated the use of bathing suits and bathing beaches. It had also cancelled the lease by the township to one Foster of a certain small wooden building used for the sale of merchandise of the character commonly bought by park visitors. It was held that the other police regulations were valid but that the village had no power to prevent the concession to and sale of this merchandise by Foster under the pertinent statutes applicable to park commissioners. The difficulty here is to find a distinction in the statutes between the police control approved and that not approved. Conflicting policies between commissioners and village may well arise. It is somewhat similar to the holding in another case[57] mentioned above that although a city could not regulate the building of school scructures or require a building permit, it still might require the installation of fire alarms and telephones.

Here also comes the interesting case[58] where county and city were in conflict over the policing of a certain seawall which was both a protection against storms and a heavily traveled street. The city claimed full police power because a street was involved. It therefore assumed control over traffic and proceeded to construct parking meters on the street borders. Galveston County asked an injunction against the installation of parking meters on the ground that they would collect fiotsam and debris and thus endanger the effectiveness of the wall as

56. 368 Ill. 209, 13 N.E.2d 275 (1938).
57. Salt Lake City v. Board of Educ., 52 Utah 540, 175 Pac. 654 (1918).
58. City of Galveston v. Galveston County, 159 S.W.2d 976 (Tex. Civ. App. 1942).

a defensive barrier to the storm waters of the gulf. The court decided that the principal object of the construction of the seawall was not the creation of a street as such, but it was intended primarily as a protection against storms. Considering the history of the legislation which authorized the structure, it was not hard to conclude that the county police power in this one respect should prevail over that of the city, though otherwise the regulation of traffic was an obligation of the city.

Several cases hold that a city may abate a nuisance maintained by the county within the city limits. Thus, a village may abate a liquor store which the county had set up.[59] Another illustration is from Tennessee where the city prosecuted successfully the agent of the county for maintaining horse racks around the courthouse enclosure. These horse racks were declared to be a nuisance. So also the city may cause to be removed a jail and cesspool from the county square.[60]

E. SPECIAL ASSESSMENTS

Special assessments also create conflicts between municipal units when the one denies the authority of the other to levy them. A considerable number of states hold that a municipality cannot charge special assessments for the improvement of the property of another unit. The usual reasons are (a) that there is no power to tax unless such power is specifically granted, (b) to levy a tax would simply shift the burden from one governmental unit to another, and (c) the land of a state agency is no more to be assessed than land held directly by the state. The principle of governmental immunity is thus applied even to local units.

So in Kentucky it was held that public school grounds as well as those of the Kentucky Reform School were not chargeable with the costs of street improvements.[61] A long list of cases may be found also in Missouri which have consistently held that such special assessments are invalid.[62] These cases involve school grounds, courthouse squares and the like. A Missouri statute passed in 1931 permitted cities, towns and villages to charge school districts proportionately for the construction and maintenance of sewers serving them but went no further.[63]

59. Coulterville v. Gillen, 72 Ill. 599 (1874).
60. City of Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S.W. 1008 (1893). There is a dictum to the same effect in City of Victoria v. Victoria County, 94 S.W. 368 (Tex. Civ. App. 1906), *rev'd on other grounds*, 100 Tex. 438, 101 S.W. 190 (1907).
61. Louisville v. McNaughten, 19 Ky. L. Rep. 1695, 44 S.W. 380 (1898); Louisville v. Leatherman, 99 Ky. 213, 35 S.W. 625 (1896).
62. City of Edina v. School Dist., 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532 (1924).
63. Normandy Consol. School Dist. v. Wellston Sewer Dist., 77 S.W.2d 477 (Mo. App. 1934). The earliest Missouri case, however, was *contra*. St. Louis Pub. Schools v. St. Louis, 26 Mo. 468 (1858).

Massachusetts also had taken this position in an early case involving a county courthouse square.[64]

Occasionally a distinction is made between special assessments for the improvement of property not at the time used for a public purpose, such as an empty lot, and land used for a governmental purpose, such as a courthouse square or school grounds. The former is occasionally held assessable.[65]

On the other hand Illinois supports the view that municipal lands within the limits of a city should bear their own improvement costs.[66] In harmony with this view, Colorado has declared that such improvements and assessments therefor are justified on the ground of being of purely local concern.[67] It holds that the principle of exemption from taxation of governmental property does not apply because special assessments are neither property nor excise taxes and, in fact, do not constitute taxation,[68] and further, that this result is the only equitable one. The same rule is found in Kansas, Louisiana, Montana and Oklahoma.[69] The fact that the lien for the charges cannot be foreclosed does not prevent the right to it from accruing.[70]

In Montana a special assessment for street sprinkling along school grounds was not sustained for the reason that it was not a permanent improvement.[71] The general principle however of liability for improvements is recognized there.[72] In Florida the same statute on

64. Worcester County v. Worcester, 116 Mass. 193 (1874). Note, ANN. CAS. 1917D 843, asserts that the same rule applies as well in Alabama, Georgia, Nebraska, Tennessee and Texas. *Cf.* 63 C.J.S., *Municipal Corporations* § 1332 (1950); 38 AM. JUR., *Municipal Corporations* § 393 (1941); 16 MCQUILLIN, MUNICIPAL CORPORATIONS § 38.74 (3d ed. 1949).

65. *In re* Auditor Gen., 199 Mich. 489, 165 N.W. 771 (1917). *Cf.* State *ex rel.* Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638 (1928); Blythe v. Tulsa, 172 Okla. 586, 46 P.2d 310 (1935).

66. Adams County v. Quincy, 130 Ill. 566, 22 N.E. 624 (1889); Scammon v. Chicago, 42 Ill. 192 (1866). *But see* West Chicago Park v. Chicago, 152 Ill. 392, 38 N.E. 697, 701 (1894).

67. Board of Commissioners v. Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919).

68. See also among others holding that such assessments are not taxes: Board of Commissioners v. Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919); Adams County v. Quincy, 130 Ill. 566, 22 N.E. 624 (1889); Kalispell v. School Dist., 45 Mont. 221, 122 Pac. 742 (1912); see also 16 MCQUILLIN, MUNICIPAL CORPORATIONS § 14.46 (3d ed. 1949); 4 DILLON, MUNICIPAL CORPORATIONS §§ 1430-1469 (5th ed. 1911); *cf.* Harlan County v. Thompson, 125 Neb. 65, 248 N.W. 801 (1933).

69. Board of Commissioners v. Ottawa, 49 Kan. 747, 31 Pac. 788 (1892); Monroe v. Ouachita Parish School Bd., 172 La. 861, 135 So. 657 (1931); Town of Franklinton v. Policy Jury of Washington, 126 La. 2, 52 So. 172 (1910); State *ex rel.* Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638 (1928); Ford v. Great Falls, 46 Mont. 202, 127 Pac. 1004 (1912); Kalispell v. School District, 45 Mont. 221, 122 Pac. 742 (1912).

70. Board of Commissioners v. Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919); Blake v. Tampa, 115 Fla. 348, 156 So. 97 (1934); Monroe v. Ouachita Parish School Bd., 172 La. 861, 135 So. 657 (1931); Blythe v. Tulsa, 172 Okla. 586, 46 P.2d 310 (1935).

71. Butte v. School District, 29 Mont. 336, 74 Pac. 869 (1904).

72. Ford v. Great Falls, 46 Mont. 202, 127 Pac. 1004 (1912).

taxation which is held not to relieve municipal property, though it does not mention special assessments specifically, does relieve federal property from such charges. Florida has now passed a statute covering the whole matter which permits special assessments in such cases.[73]

It seems, in view of this diversity, that the tax exemption statutes have usually not been drawn with care, and it is left to inference whether special assessments are included. The chaotic condition of such statutes has been the subject of comment.[74] There seems to be no sufficient reason why government property should escape this burden any more than should the property of charitable units.[75]

An unusual illustration of municipal duplication involving overlapping assessments has appeared in Arkansas. The particular problem referred to has not so far been discovered by the present writer to exist save in Arkansas. G. D. Walker states that "Few states have been more abundantly blessed (or cursed) with special improvement districts than Arkansas."[76] He cites no other states on conflicting tax titles in his article on overlapping improvement districts.

In *Street Improvement District v. Pinkert*[77] there was a sewer district which overlapped completely, so far as appears, the area embraced within a street district. The sewer district had been created first. Each special district had levied taxes to pay for improvements which each had individually constructed, each had issued bonds and sold them and had been obliged to sell the area covered for unpaid tax assessments, and each, having bought the area in at the sale had purportedly taken title. Thereafter the sewer district had resold its interest to one Pinkert and the street district had resold to McMinn. Pinkert sued to quiet title, making McMinn defendant. The Street District then intervened and claimed the right to a second foreclosure and sale for later tax assessments, in the face of the fact that it had already conveyed its title to McMinn. It was held (a) that no right of priority of title or interest arose to the sewer district because of its earlier creation or earlier foreclosure and sale, (b) that Pinkert and McMinn were joint tenants, their interests corresponding to the sums

73. Gainesville v. Alachua County, 69 Fla. 581, 68 So. 759, Ann. Cas. 1917D 843 (1915).

74. Kalispell v. School District, 45 Mont. 221, 122 Pac. 742 (1912).

75. See Mullins v. Mt. St. Mary's Cemetery Ass'n, 239 Mo. 681, 168 S.W. 685 (1914); Buffalo City Cemetery v. Buffalo, 46 N.Y. 506 (1871). In 39 NAT. MUNIC. REV. 87 (1950), may be found a statement of policy by the American Municipal Association (Dec. 2, 1949) with respect to relations between governments to the effect *inter alia* that the federal government should provide for payments in lieu of taxes and that state governments should place no service burdens upon municipalities.

76. 1 ARK. L. REV. 32 (1947). In the two volume work, SLOAN, THE LAW OF IMPROVEMENT DISTRICTS IN ARKANSAS (1928), there is scarcely any reference to the overlapping of districts on the territory of each with respect to taxing. See *id.* at § 897. This may indicate that the problem of overlapping taxation has arisen largely since 1928.

77. 253 S.W.2d 780 (Ark. 1952).

each had paid to satisfy liens, and that (c) the right of a later foreclosure for later assessments still existed in the taxing unit, though the earlier claims were still wholly unsettled.

Though a statute purported to declare the order in which such claims could be settled, the statute was of doubtful application and seems not to have had any effect upon the result. The court suggested that three theories or starting points for the solution of the problem of conflicting titles and liens existed. The first was that the first district to foreclose could do so free of all other liens, and could get a clear title, after which presumably no further levy could be made by another unit, inasmuch as municipal property is not usually subject to special taxation. The second was that the last foreclosure and sale afforded a similar priority to the later purchaser. These two were rejected, perhaps because of the difficulties which would arise in the sale of securities by the municipal units through the adoption of either rule. The third rule, that the districts or their transferees become tenants in common, was adopted.

In another case[78] the older unit, a levee district, had issued bonds. The Improvement District later did the same. The latter covered about two-thirds of the area of the former. The latter unit defaulted on its bonds and was placed in the hands of a receiver. Thereafter the Levee District sold the common territory for unpaid taxes and bought it in. In the foreclosure proceedings the Improvement District, the receiver and the trustee for the bondholders were made parties defendant. The court took the view that the Levee District could not sell the area free from past tax obligations of the other unit, but could sell it free from other future tax assessments of a different unit, and that the land was still liable for later assessments made by the levee unit.

It appears that each unit may enforce its liens for taxes without reference to the other.[79] In another case,[80] however, it was held that after a unit had foreclosed its tax lien and bought in the land, it could not foreclose again on itself for subsequent tax claims. This, however, is inconsistent with the later case, above, to the effect that a foreclosure does not prevent the same unit from having a later tax claim.

Confusion seems worse confounded by these Arkansas overlapping units and special taxing assessments, statutes and decisions. Why should two or more units be created for almost but not quite the same purpose in the same area, such as sewer districts, improvement dis-

78. Board of Commissioners v. Board, 181 Ark. 898, 28 S.W.2d 721 (1930).
79. Deaner v. Gwaltney, 194 Ark. 332, 108 S.W.2d 600 (1937). In six tax sales, four were void and two were valid. The land is always sold subject to all liens existing at the time of sale. Oliver v. Gann, 183 Ark. 959, 39 S.W.2d 521 (1931).
80. Crowe v. Wells River Sav. Bank, 182 Ark. 672, 32 S.W.2d 617 (1930).

tricts, drainage districts,[81] and others acting concurrently when the entire power could be given to one? This would avoid all the conflicting tax assessments, sales and liens. How can prior and subsequent purchasers have an exact equality of interest? How can a unit having foreclosed and taken title, foreclose again while it still has title? How may one unit sell and convey while the title is in another unit?[82] How can there be two owners at the same time, each claiming the entire interest under a valid sale?

There is the further difficulty that one governmental or *ad hoc* unit can levy a special tax upon the property of another. Not even the state which buys a given area for taxes can free its land of the *ad hoc* unit's encumbrances.[83]

F. Successive but Coexisting Incorporations

Can a subsequent incorporation be validly made while a prior one occupying all or part of the same area purports to exist? It is to be assumed that as matters subsequently turn out, the creation of the prior unit was invalid or its continued existence has become questionable. In *Enterprise v. State*[84] an incorporation of detached tracts had been undertaken. The legislature by special act had purported to validate the alleged incorporation. Thereafter, before any test of the statute had been made, a new incorporation of a part of the area was set up in a formally correct manner. Thereupon quo warranto proceedings were brought against the second incorporation. It was held that quo warranto would not lie inasmuch as all the prior acts, legislative and otherwise, were void.

In an early English case[85] it was held that where the former unit had been so reduced by the negligence of the authorities that it was inadequate for the purpose of government, it was automatically dissolved and a new one without further reference to it could be created. A case arose in Alabama rather similar to the English case here cited.[86] For many years the officers of a town did not function and there were no elections. On the assumption that the charter had been forfeited

81. Thus in Thibault v. McHaney, 119 Ark. 188, 177 S.W. 877 (1915), a drainage district had been set up. After that a levee district was created. The contractors to build the levees arranged with the contractors of the drainage district to build the levees needed in the levee district.

82. Deaner v. Gwaltney, 194 Ark. 332, 108 S.W.2d 600 (1937).

83. Crowe v. Wells River Sav. Bank, 182 Ark. 672, 32 S.W.2d 617 (1930); *In re* Gould, 110 Minn. 324, 125 N.W. 273 (1910).

84. 29 Fla. 128, 10 So. 740 (1892). See also State v. Winter Park, 25 Fla. 371, 5 So. 818 (1889) (where a de facto unit existed in the same area later incorporated, it was held that though the second unit was valid its functions were in abeyance until the ouster of the former). See 62 C.J.S., *Municipal Corporations* § 83 (1949).

85. The King v. Pasmore, 3 T.R. 199, 243, 100 Eng. Rep. 531 (K.B. 1789). See 2 McQuillin, Municipal Corporations § 8.03 (3d ed. 1949).

86. Butler v. Walker, 98 Ala. 358, 13 So. 261 (1893).

by this neglect, a new municipality was created and two elections of officers were successively held. On a petition for the ouster of the newly elected second set of officers for usurpation, it was held (a) that the first charter had not been forfeited by non-user, (b) that the new incorporation was void, but (c) that the first set of officers, though irregularly elected under this organization, were de facto officers of the prior municipality, and (d) that the later election held under the de facto incumbents made their successors de jure officers. This would seem to be the modern and sound approach and is a position preferable to that taken by the English court.

Where a unit has not been properly created but nevertheless issues bonds, and further, while an action is pending on the bonds, a new unit is validly established, the latter is not liable on the bonds. In such a case liability would arise only by specific declaration of the legislature.[87]

Conclusion

The principle that there should not be two municipalities possessed of the same or similar powers, privileges and jurisdiction (or even some of them) within the same area at the same time seems almost too self-evident to be arguable. This principle has been needlessly violated, sometimes to a greater and sometimes to a lesser degree by the drafters of statutes who have not visualized the possibilities of future conflicts. In general, the statutes should clearly assign powers and duties to the one and deny them to the other. Where the geographical areas of each are distinct and each has powers similar to those of the other the powers as well as the territory should not overlap. Thus, if two municipalities have the power, each to regulate the conduct of a particular business, *e.g.,* a packing plant, one is likely to command a thing which the other prohibits.

There has been very little constitutional or statutory tinkering with the matter of debt limitations as affected by overlapping of taxing units. No doubt it would be difficult to foresee what emergencies may arise to make close regulation impracticable. One solution may be to give wider powers to cities and reduce the number of *ad hoc* units. To abolish school districts, however, within a municipality, thus throwing an unwanted responsibility upon councilmen, would probably not be wise. The school system needs a different type of control. We can probably trust the courts to decide whether or not a proposed method of escaping the statutory debt limit is a mere sham.

The incorporation of additional villages and towns goes on apace, attributable largely, no doubt, to local pride rather than to a striving for local benefits. It can scarcely be argued that the existence of

87. Beyer v. Athens, 249 Fed. 849 (6th Cir. 1918).

ninety-four such units in St. Louis County, Missouri, is economically or socially beneficial. The unification of the sewer and the transportation systems, to name two only, is thus either hindered or prevented. However, when a larger city has the power to annex adjoining territory whose inhabitants desire their own small organization, the general principle is that the first to act may decide the issue. The statutes on the matter moreover should be drafted with the view of providing for the greater general public convenience. The annexation is likely to be more generally beneficial.

Whether one municipality should have police power over the property and activity of another within its boundaries should in general be answered in the affirmative and zoning ordinances should be obeyed by all units which come in some way into another municipality's confines. The city should have the power to abate nuisances from whatever source and take needed measures for problems of health and safety. Should the obligation of zoning laws apply to the state as well as to municipal units?

Suppose a state university is established within the city borders. It may even include a farm whereon pigs, chickens, cattle and sheep are maintained for experimental purposes. Must the buildings be constructed under city zoning regulations? Should the university, on the other hand, be regarded as a direct arm of the state and so free from municipal regulation? Undoubtedly the state may free its creation from local control if it so chooses. Probably any unit which is directly and importantly concerned with state affairs would not be subject to local control. School districts, however, existing within the city as minor units may well be under city requirements until the state chooses to interfere. If this be true then public school buildings should conform to municipal building regulations.

It is believed that the case is already made out for special taxation levied for improvements on the property of one unit, by a superior unit within which its property is found. Federal legislation providing for the payment for similar improvements should exist also.

In Arkansas, however, the taxing of a municipal area under the control of another one so that the procedure ultimately is equivalent to each unit taxing the other, seems wholly undesirable. In general both the overlapping of territory and of powers, especially the taxing power, is unfortunate.

Finally, the American view seems preferable to that stated in an early English case respecting the forfeiture of a charter by non-user. If no court test has been made the Alabama holding that the charter and the original powers still exist seems acceptable.