Home Rule - Identical Tax Levied by Illinois' Home Rule County and by Municipalities Creates No Conflict

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HOME RULE—Identical Tax Levied by Illinois’ Home
Rule County and by Municipalities Creates No Conflict.

The Local Government Article of the 1970 Illinois constitution
grants home rule powers to Cook County and to municipalities having
populations of 25,000 or more. Other counties may eventually qual-
ify for home rule powers under the provision and any municipality
may elect by referendum to receive such powers. The article also
provides that if there is a conflict between the ordinance of a muni-
cipality and the ordinance of a home rule county, the municipal
ordinance will prevail within its jurisdiction. The resolution of con-
flicts and possible conflicts under these provisions is likely to de-
termine the relative powers of counties and municipalities, and thus the
impact of their new home rule powers.

In the past few months several Illinois supreme court decisions have
been rendered interpreting the home rule provisions of the 1970 Illinois
constitution. Of particular importance is the case of City of Evan-
ston v. County of Cook, which dealt with the problem of identical taxing
ordinances enacted by a home rule county and home rule municipal-
ities. The decision held that there was no conflict between the ordi-
nances within the meaning of the conflict resolution provision of the
constitution. This decision sets the tone for the future development of
the county-municipality power relation.

In order to put the decision in perspective, it is necessary to have
an understanding of the background of the concept of home rule in
general and the concept of home rule which developed in the Sixth
Illinois Constitutional Convention, specifically. The grant of home rule
powers to qualifying municipalities and counties made in the 1970 Illi-
nois constitution was an attempt to give local units of government the
tools with which to deal with local problems. It was also an attempt
to reverse the presumption about the powers inherent in local gov-
ernment. In the absence of such a grant, Dillon’s Rule prevails:

2. ILL. CONST. art. VII, § 6(c) (1970).
3. See S. Bloom, Inc. v. Korshak, 52 Ill. 2d 56, 284 N.E.2d 257 (1972); Bridgman
v. Korzen, — Ill. 2d —, — N.E.2d — (1972); Kanellos v. County of Cook, 53 Ill. 2d
161, 290 N.E.2d 240 (1972); Oak Park Federal Savings and Loan v. Village of Oak
4. 53 Ill. 2d 312, 291 N.E.2d 823 (1972) [hereinafter cited as City of Evanston].
It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.5

Justice Dillon emphasized the impact of this subordinate relationship of the city to the state in his opinion in an 1868 Iowa case:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature may, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporations could not prevent it. We know of no limitations on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.6

This creature concept has caused one writer to use an infant-parent analogy in describing the dependency of Illinois cities on action by the state and the need for express authorization for any action to deal with city problems under the 1870 Illinois constitution.7 It has been said that this creature concept may have been the natural outgrowth of a rural era and a general distrust of cities.8

Today the cities are faced with problems of police protection, education, transportation, housing, and pollution, to name a few. The necessity of receiving authorization from the state legislature for solution of these problems reduces the city government’s ability to respond promptly and efficiently to the needs of its people.9 The Commission on Urban Area Government portrayed the creature concept as an outdated one:


8. Id. at 250.

This 19th Century concept that local government exists for the convenience of the State is an untenable position in this era of urban crisis and is rejected by the Commission. It creates antagonism toward the Legislature among local officials and confusion among the public as to where responsibility truly lies. Most importantly, it limits the assumption of local responsibility and discourages local creativity.10

The counties are similarly subordinate to the state in the absence of any provision for home rule. However, counties are generally organized by the state for the purpose of political organization and administration; and their creation is not dependent on local initiative as is generally true of the creation of municipalities.11 But with the expansion of large urban areas to include major portions of some counties, the county may take on more importance as a unit of government potentially capable of dealing with metropolitan problems. One observer has noted the following:

Since two-thirds of all American metropolitan areas are conveniently located within the confines of a single county, the county seems an appropriate starting place for effective urban government. Moreover the placement of responsibility with the county is more likely to be achieved than is the creation of new metropolitan forms despite the increasing appearance of metropolitan councils of government. Even where the county is but one of many countries comprising the metropolitan area, effective intergovernmental cooperation is far more feasible among a few counties than with innumerable municipalities, school and special districts and authorities which interlace the metropolitan area.12

THE ILLINOIS BACKGROUND

At the time of the convening of the Sixth Illinois Constitutional Convention, there were in existence over 6500 units of local government—50% more than in any other state.13 The need to reduce the number of governmental units operating within metropolitan areas enunciated above was echoed by the Report of the Committee on Local Government at the Sixth Illinois Constitutional Convention (1970).14 In fact,

13. 4 PROCEEDINGS 3024 (Delegate John C. Parkhurst, Chairman, Committee on Local Government). 14. 7 PROCEEDINGS 1592.
the proposal of the committee included a preamble which mentioned
the goal of deterring the proliferation of units of local government, re-
ducing the present number of units, minimizing duplication and over-
lapping of taxing jurisdictions, and promoting intergovernmental co-
operation.16 The failure of this committee proposal to be adopted in
the draft of the constitution submitted by the convention to the citizens
was attributable to the desire to eliminate preambles to each section
of the constitution rather than to adverse sentiment of the conven-
tion.16

The Committee on Local Government of the Sixth Illinois Constitu-
tional Convention (hereinafter referred to as the Local Government
Committee or the Committee) felt that counties as well as municipali-
ties should receive home rule, noting that fifteen states had already
given home rule to counties.17 The Committee noted that with in-
creasing urbanization, counties had become suitable natural units of
government for coordination of services within their boundaries
in both incorporated and unincorporated areas in addition to their orig-
inal function as administrative units of state government.18 The
Committee also saw the strengthening of county government in metropo-
litan areas as a way of eliminating duplication and overlapping of
local units of government.19

Many individuals and groups went on record before the Local Gov-
ernment Committee as favoring home rule.20 One group also offered
criticism.21 The Advisory Commission on Intergovernmental Relations
suggested that some units given home rule powers may be too small to
be able to handle local problems, that economies of scale may be over-
looked in the effort of each unit to solve its own problems, and that
home rule units may ignore the effects of the exercise of their en-
larged powers on neighboring units.22 An individual also went on
record as a critic of home rule to some extent.23 Professor James M.
Banovetz asserted that there was no evidence that home rule states

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15. Id.
16. 4 PROCEEDINGS 3032-38.
17. 7 PROCEEDINGS 1631.
18. 7 PROCEEDINGS 1631-32.
19. Id.
20. Among them were Richard J. Daley, Mayor of Chicago; the League of Women
   Voters; the Illinois Municipal League; the Chamber of Commerce of the United States;
   the Commission on Urban Area Government, formed pursuant to an Illinois Executive
   Order; and the Advisory Commission on Intergovernmental Relations, a federal group,
   7 PROCEEDINGS 1607-11.
21. 7 PROCEEDINGS 1611-12.
22. Id.
23. 7 PROCEEDINGS 1613-14.
have made more progress toward solution of urban problems than other states. He also pointed out that an adequate tax base and broad revenue powers are crucial to the effectiveness of home rule.\textsuperscript{24}

The need for local autonomy was expressed by Delegate John G. Woods, member of the Local Government Committee, in the debates of the constitutional convention as the need to handle locally such problems as curbing the illicit sale of “goof balls” to minors and the licensing of building contractors and plumbers in order to ensure the quality of construction. The then existing structure of power required action by the General Assembly in the nature of general legislation—not referring to any one municipality by name, but granting the power to all municipalities of the same population class—to allow a municipality to take such action. Delegate Woods suggested that home rule power to take such action independently would free the General Assembly from handling minor bills on matters of specific rather than general concern.\textsuperscript{25}

Delegate Woods went on to mention how Illinois’ grant of home rule would differ from that of other states. It would be a broad grant of power supplemented by the specific enumeration of some powers considered particularly crucial to the success of the home rule concept in order to prevent the erosion of home rule power which had occurred elsewhere.\textsuperscript{26} Article VII, Section 6(a) of the 1970 Illinois constitution now provides that,

\begin{quote}
Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.
\end{quote}

Another unique feature of the 1970 Illinois constitution as proposed and adopted which was noted by Delegate Woods was the recognition of concurrent exercise of power by the state and home rule units.\textsuperscript{27} Article VII, Section 6(i) provides as follows:

\begin{quote}
Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.
\end{quote}

\begin{itemize}
\item \textsuperscript{24} Id.
\item \textsuperscript{25} 4 PROCEEDINGS 3039.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\end{itemize}
Ohio has followed a scheme of judicial preemption by interpreting the exercise of a power by the state as occupation of the field, thus prohibiting home rule units from exercising concurrent power. The inclusion of Section 6(m) in Article VII also serves to discourage judicial construction which would limit home rule powers: “Powers and functions of home rule units shall be construed liberally.”

Further illustrating the impact of the Illinois concept of home rule are the facts that (1) the Illinois grant of home rule is made directly to the units of local government; (2) the Illinois provision requires no home rule charter to be enacted; and (3) the exercise of home rule power under the Illinois plan is optional. Since the grant is made directly to the units of local government rather than being dependent on the enactment of enabling legislation by the General Assembly, the grant is immediately effective and not subject to the imposition of conditions by the legislature except as permitted by the Local Government Article of the constitution. The absence of a requirement of a home rule charter as a condition precedent to home rule status also has the effect of making the grant of power immediately effective: referendum approval necessitated by enactment of a charter can result in delay or frustration of the acquisition of home rule powers. The optional nature of the home rule power results from the fact that units automatically granted home rule status need not exercise their powers, and units not included under the automatic grant may elect to obtain the status. The immediacy and flexibility of powers provided by the form of grant enhance self-determination at the local government level.

**TAXING POWER OF HOME RULE UNITS**

The taxation power of home rule units is of particular importance in the overall scheme, since without revenue, the right to “exercise any power and perform any function pertaining to” the government and affairs of the unit has a hollow ring. As the Committee stated in its report, “in the simplest terms, urban areas need more money if they are to survive and grow.” It was felt that, because the power to tax is so essential to meaningful home rule, it should be mentioned specifically in the grant of powers to prevent the courts from excluding the

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29. 7 PROCEEDINGS 1616-19, 1628-37, sections corresponding to ILL. CONST. art. VII, §§ 6(a), 6(b) (1970).
31. 7 PROCEEDINGS 1623.
It is the taxation power of home rule counties which was at stake in the City of Evanston case to be discussed in this article.

The sections of the Local Government Article of the 1970 Illinois constitution which are primarily relevant to the discussion of the power of taxation are Sections 6(a), 6(e)(2), 6(g), 6(h), 6(i), and 6(1). The relevant portion of Section 6(a) is set forth above. It grants the taxing power to home rule units subject to limitation only as provided in Article VII, Section 6.

The first limitation is set out in Section 6(e)(2): “A home rule unit shall have only the power that the General Assembly may provide by law . . . (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.” Thus, the power to levy an income or occupation tax is permitted only by the grace of the state legislature, as were all powers with respect to local units of government prior to 1970.

Article VII, Section 6(g) provides for control by the state legislature over the taxing power, but only by an extraordinary majority:

The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this section.

Arguing for the three-fifths requirement relative to state control Delegate Philip J. Carey, Vice-chairman of the Local Government Committee, stated during the debates that “home rule has not been effective in any state of the fifty states; and we will be the first state to have successful home rule if we require the extraordinary majority.” Delegate Carey referred to the usual provision in other state constitutions establishing home rule that all powers of the home rule units be subject to limitation by the state legislature. One writer notes that even where local governments are given home rule they are often faced with severe restrictions on imposition of new taxes. However, by requiring an extraordinary majority of each house to curb taxing power, the balance of power regarding taxation in Illinois was to be weighted strongly in favor of the home rule unit.

Article VII, Section 6(h) allows the state legislature by a simple ma-
majority to declare its own exercise of some home rule unit functions or powers exclusive, thereby denying the exercise of such functions or powers to home rule units. However, the power to tax is not subject to such limitation. This section states as follows:

The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function of subsection (1) of this section.

Section 6(i) of Article VII provides for concurrent exercise of power by the state and home rule units:

Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

Taking Sections 6(h) and 6(i) together, the taxing power of a home rule unit cannot be denied by state occupation of the field. Adding the effect of Section 6(g), no limits may be placed on the general taxing power (other than on income or occupations) or on the special taxing power granted by Section 6(1).

To round out the picture, Section 6(l) provides for special assessments and for additional taxes for limited areas within a home rule unit according to law which are provided special services. Such taxing powers may not be limited or denied by the General Assembly.

In summary, the state cannot preempt an area of taxation solely by levying its own tax, nor by doing so and declaring by a simple majority that such exercise is exclusive. The only method by which the state legislature may limit or deny the right of a home rule unit to levy a tax other than an income tax or an occupational tax is to pass specific legislation by a three-fifths majority of each house so limiting or denying a taxing power.

The only other subsection of the home rule section of the Local Government Article which is relevant to this discussion of the case of City of Evanston is Section 6(c) which provides as follows: "If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction." The Local Government Committee in its report suggested that in some cases municipalities might not object to the exercise of a function within their boundaries. The report goes on to say,

In other cases however, city officials may object to the assertion of county authority within municipal boundaries, and there may
be differences or actual conflicts and inconsistencies between municipal and county legislation.\textsuperscript{35} The Committee chose to prefer municipalities over counties in the case of conflict since it considered municipalities presently the most important general purpose local unit of government.\textsuperscript{36} However, powers granted the county by state statute would continue to prevail over municipal authority.

THE Evanston Case

The main issue presented in the City of Evanston case was "whether a home-rule county tax may be imposed upon the sales of motor vehicles within the corporate limits of a municipality when that municipality has adopted an ordinance imposing a substantially identical tax."\textsuperscript{37} More broadly stated, the question was whether a municipal taxing ordinance preempts a similar tax ordinance enacted by the home rule county within which the municipality is located. The application of Article VII, Section 6(c) to the taxing power was to be decided.

The facts were that the Cook County Board of Commissioners, pursuant to the home rule status of Cook County (the only county to qualify for the automatic grant of home rule powers), enacted an ordinance levying a tax on the retail sale of motor vehicles effective January 1, 1972. Subsequently, the City of Evanston adopted an ordinance taxing the retail sales of motor vehicles using the same schedule of taxes as the Cook County ordinance. The Evanston ordinance included a passage which attempted to deny the county the right to levy a similar tax within municipal boundaries:

Section 25-59. The tax herein imposed is in addition to all other taxes imposed by the Government of the United States or the State of Illinois. No county or other unit of local government may impose a tax on the retail sale of new motor vehicles within the City of Evanston, and any ordinance of the County of Cook or other unit of local government, heretofore or hereafter adopted, which is construed to impose a tax on the retail sale of new motor vehicles in the City of Evanston, shall be in conflict with this ordinance within the meaning of §6(c) of Article 7 of the Illinois Constitution of 1970. This ordinance shall prevail within the jurisdiction of the City of Evanston upon its effective date and any conflicting ordinances of the County of Cook or other unit of local gov-

\textsuperscript{35} J. Proceedings 1647.
\textsuperscript{36} J. Proceedings 1648-49.
\textsuperscript{37} City of Evanston, 53 Ill. 2d at 315, 291 N.E.2d at 824.
ernment, which may be in effect on that date or hereafter enacted
shall not be effective within the City. 38

In February 1972, Arlington Heights, Oak Park, Niles and Berwyn
enacted similar ordinances, followed by Des Plaines in March. Evan-
ston, Arlington Heights and Oak Park filed a suit for declaratory judg-
ment and injunction against Cook County in February seeking relief
based on a conflict of their municipal ordinances with the county ordin-
ance. A temporary injunction was granted and funds collected by
Cook County pursuant to its ordinance within the boundaries of the
plaintiffs were placed in a separate account subject to a final adjudica-
tion of the controversy. The City of Des Plaines, the Village of Niles
and the City of Berwyn were subsequently permitted to intervene as
additional parties plaintiff and the temporary injunction was made
applicable to funds collected within their boundaries.

Defendant's motion for summary judgment was granted in April
1972. The Circuit Court of Cook County held that Article VII, Section
6(c) did not apply to tax ordinances and that there was no conflict
between the Cook County ordinance and the similar ordinances of
plaintiffs. The plaintiffs appealed the decision to the Appellate Court
of Illinois, but by motion of plaintiffs pursuant to Rule 302(b) of
the Supreme Court of Illinois, the case was transferred to the supreme
court. The high court affirmed the lower court decision in November
1972. 39

The majority opinion written by Justice Ryan noted that all parties
to the suit were home rule units and had the authority under Article
VII, Section 6(a) of the 1970 Illinois constitution to levy a tax on
the sale of new motor vehicles within their boundaries since the Gen-
eral Assembly had not enacted any restraining legislation regarding such
a tax under the three-fifths provision, Section 6(g) of Article VII.

Although the wording of the municipal ordinances attempted to es-

tablish a conflict between the municipal tax and the county tax, the
municipalities' labeling of the county ordinance as conflicting did not
make it so. The court omitted discussion of the wording of conflict,
so inconsequential it deemed the words to be.

The court rejected plaintiffs' argument that the levy of identical
taxes by both a home rule county and a municipality fitted the con-
stitutional concept of conflict. For the meaning of the word conflict,

38. EVANSTON, ILL., ORDINANCE 6072 (January 31, 1972) (Ordinance to Provide for
a Tax on the Retail Sale of New Motor Vehicles).
39. City of Evanston, 53 Ill. 2d at 319, 291 N.E.2d at 827.
plaintiffs had resorted to the concept of preemption which relied for its application on the field of taxation's concept of double taxation. Plaintiffs had urged that double taxation is never to be presumed to be the intent of the legislature (assuming that the drafters of the constitution have the role of the legislators) and that in order for that effect to be found by the court it must be clear that the legislature intended it.

The cases mentioned by the court as holding against double taxation involved two nonproperty tax assessments by the same government. In *People ex rel. Lindheimer v. Schweitzer*, a tax was levied in 1932 to pay an original indebtedness and another was levied in 1935 to pay a second series of refunding bonds for the same debt. Since there was specific separate authority for each tax and each was imposed alike on all property in the district and imposed in a different taxing period, both taxes were upheld. The two taxes thus did not constitute double taxation. In *N.Y. Central R.R. v. Stevenson*, the plaintiff was taxed under the Incorporation Fee Act and under the Public Utilities Act at the time of incorporation. Both taxes were paid to the State, both were measured by the amount of stock authorized to be issued, and both were exacted for the privilege of exercising a corporate franchise. The presumption against double taxation led to a holding that the second act superseded repugnant provisions of the first, and only one tax was due.

The *City of Evanston* decision cited five cases in which the Supreme Court of Illinois had found that taxation of property by two different governmental units for a similar purpose was dual taxation but not double taxation. *People ex rel. Hanrahan v. Caliendo* involved taxation of real property by the City of Chicago and by an urban transportation district for transportation purposes. The decision stated, "the simple fact that both the city of Chicago and the District may tax the same property does not violate the uniformity requirement." *Kucharski v. White* involved a similar case in which a municipality and a special district were both taxing the same real property for library purposes. Again the court held that different public authorities may tax within parts of the same territory. *People ex rel. Witte v. Franklin* and *Board of Highway Comm. v. City of Bloomington*, cited by

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40. 369 Ill. 355, 16 N.E.2d 897 (1938).
41. 277 Ill. 474, 115 N.E. 633 (1917).
42. 50 Ill. 2d 72, 277 N.E.2d 319 (1971).
43. Id. at 84, 277 N.E.2d at 326.
44. 42 Ill. 2d 335, 247 N.E.2d 428 (1969).
45. 352 Ill. 528, 186 N.E. 137 (1933).
46. 253 Ill. 164, 97 N.E. 280 (1912).
the court, dealt with taxation by two governmental bodies for pauper relief and roads and bridges, respectively. Their holdings were consistent with the two above cases, as was People ex rel. Darnell v. Woodward which dealt with taxation for secondary education.

The double taxation concept evidently was derived from the constitutional requirement of uniformity of taxation on real property found in both the 1870 and 1970 Illinois constitutions and from the companion requirement of uniformity of assessment of subjects and objects of nonproperty taxes or fees found in both constitutions. Uniformity regarding property was interpreted to mean that a certain section of real estate in a taxing district could not be taxed twice for the same purpose in the same year without taxing the entire area a second time.

There are two distinctions which might be made between the cases mentioned by the court as invalidating one tax on the basis of double taxation and the cases upholding taxation by two units of government. The first distinction is that cited by the plaintiff-municipalities—the difference between nonproperty taxation and property taxation. The second distinction is the one approved by the court—the difference between taxation of a source by one taxing unit twice as opposed to taxation by two overlapping taxation units. The first distinction does not appear to be the telling one since the uniformity principle of the constitution applies to both nonproperty taxation and property taxation. Thus, the second distinction takes on more significance, with taxation by one government twice for the same purpose being held in disfavor as double taxation and simultaneous taxation by overlapping units (as in the facts of the City of Evanston case) being found to be unobjectionable dual taxation.

The double taxation argument of the plaintiffs in the City of Evanston case involving interpretation of the conflict clause is an attempt to show a preference for the municipalities' taxes by showing a state policy against overlapping exercise of taxing authority. However, the 1970 Illinois constitution accepts the concept of overlapping exercise of power regarding the state and local units in Section 6(i) of the Local Government Article.

The Illinois constitution does away with the idea that concurrent exercise results in preemption—an interpretation used in the home rule

47. 285 Ill. 165, 120 N.E. 496 (1918).
49. ILL. CONST. art. IX, §§ 2, 9 & 10 (1870) and ILL. CONST. art. IX, § 2 (1970).
area by other states but pointedly avoided by the drafters of the 1970 Illinois constitution. Several sections of the Illinois constitution provide for concurrent exercise of powers by the state and by home rule units, for limitation of home rule powers by action of the state legislature, and for limitation of concurrent exercise of powers by a home rule county and a municipality in situations where the ordinances of the units "conflict." Therefore, the notion that concurrent exercise of power results in preemption of power by the favored unit as applied in courts of other states in the absence of any specific provisions for concurrent powers, such as are found in the Illinois constitution, is inapplicable to the Illinois experience.

The court in this case turned to the debates of the Sixth Illinois Constitutional Convention for enlightenment as to the meaning of the term "conflicts" as used in Section 6(c). The court noted that throughout the discussion of Section 6(c) the area of taxation was not mentioned as an area of potential conflict. The court cited the Report of the Committee as recognizing "the problem of legislating in the same field by both a municipality and a home-rule county not as a question of preemption of authority but as a matter of resolving conflicts in ordinances."

One commentator has declared that comments of the Chairman of the Local Government Committee during the debates make it clear that "conflicts" would include both contradictions between home rule county ordinances and municipal ordinances and occupation of the field by the municipality and would apply to such areas as zoning, licensing and taxation.

The comments of Delegate John C. Parkhurst, Chairman of the Committee, during the convention debates did include use of the term preemption with reference to the effect that legislation by a municipality would have on legislation in the same field by a home rule

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51. See generally Glander and Dewey, Municipal Taxation: A Study of the Pre-emption Doctrine, 1948 Ohio St. L.J. 72; 4 Proceedings 3090 (Delegate Philip Carey citing the experience of Ohio, Texas and California); 4 Proceedings 3331 (Delegate Thomas C. Kelleghan citing the Baltimore, Md. experience regarding minimum wage standards); Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).
52. ILL. Const. art. VII, § 6(i) (1970); see p. 486, supra.
53. ILL. Const. art. VII, §§ 6(e)(2), 6(g), 6(h) (1970); see pp. 485-86, supra.
54. ILL. Const. art. VII, § 6(c) (1970).
55. City of Evanston, 53 Ill. 2d at 317, 291 N.E.2d at 826.
56. Id. (citing 7 Proceedings 1591, 1646-50).
county. Delegate Parkhurst did mention the taxing power as one of the home rule powers which might be subject to preemption. It is not clear that he had considered the case of dual taxation, specifically, with reference to conflict since taxation was not among the graphic examples used with reference to ousting the county's authority. Since these comments of Delegate Parkhurst were impromptu oral ones made in response to requests for explanation of Section 6(c) of Article VII, they may justifiably be given less weight than the written annotation to the section in the Report of the Committee and the common meaning of the word "conflicts" found in the constitutional language.

Other delegates mentioned pollution control and business hours for taverns as possible areas of conflict. The fields of legislation mentioned by the delegates during the debates generally were ones in which there are likely to be inconsistencies: a requirement by the county that taverns close at midnight would be inconsistent with a municipal ordinance providing that taverns close at 2:00 a.m.; a municipal zoning regulation providing that a particular block be restricted to residential use only would be inconsistent with a county regulation permitting heavy industrial use in that block. The court implied that taxation is a field apart from these in its operation.

58. "Section 3.3 [now art. VII, § 6(c)] has to do with the conflict situation at the local level. We thought about this a long time, ... and we have no controversy on it, as far as I know. The provision simply says, in so many words, that when a county exercises home rule powers countywide, the county may have its power usurped or preempted in a city within that county, if the [city] exercises the power, also.

"In this context, you might think about zoning. Zoning power, of course, by statute is given to counties, and the county can zone completely within the county and even across municipal boundary lines, but if the city within the county adopts its own zoning ordinance, that pre-empts and the county can't zone within that city." 4 PROCEEDINGS 3026;

"If a home rule power is exercised by a county, it is intended ... by [section] 3.3 that that power could be exercised countywide—countywide—the issuance of bonds, the incurring of debt, the licensing, the taxing power could be countywide, not just within the unincorporated area. ... However, it is clearly stated in 3.3 that if the county did that and some municipality wanted to pre-empt the county in the exercise of that particular power—let's assume a licensing power—the municipality could do it and thus reassume the jurisdiction of that particular matter and oust the county." 4 PROCEEDINGS 3049, (Emphasis supplied.);

Following a discussion of the licensing of Fuller Brush men in which Delegate Parkhurst stated that if a municipal ordinance set different standards from the county's ordinance, the municipality's ordinance would prevail within the municipality, he went on to summarize: "[w]hat [section 3.3] says is that the county can exercise home rule powers countywide; but if a municipal ordinance, as provided by law, within that county does the same thing, the municipal ordinance prevails." 4 PROCEEDINGS 3123.

59. See note 58, supra.

60. See p. 491, supra.

61. "[T]his [section] involves the conflict, if you will, or the question of what happens when you've got a city and a county ordinance in the same territory on the same subject. ... [W]e should not allow, for example, a weak county ordinance on air or water pollution or on garbage dumps to completely emasculate a strong city ordinance in this area." 4 PROCEEDINGS 3120 (Delegate Paul F. Elward).

62. 4 PROCEEDINGS 3124 (Delegate Donald D. Zeglis).
The reason taxation is different is that the purpose is not to regulate an activity but to obtain income for the governmental unit. There is nothing theoretically inconsistent about taxation of personal income by both the federal government and the state government—in Illinois they co-exist. The taxed individual pays twice, but the funds go to two different governmental levels. A similar situation is presented in this Illinois supreme court case: one source is taxed by two different governmental units, both possessing the authority to so tax. Enforcement of the county tax ordinance need not render the municipal one ineffective since revenue, not regulation is the goal.

The court reasoned that since revenue is such an essential ingredient in home rule effectiveness\(^6^3\) and counties had been included in the grant of home rule powers in the hope of strengthening county government,\(^6^4\) home rule county revenue power should not be limited by the decision of a municipality to enact similar taxing ordinances.

The complaint of the plaintiff-municipalities that Cook County could dry up sources of revenue by imposing a burdensome tax on them first was answered by the court with the suggestion that abuses be resolved by action of the General Assembly by a three-fifths vote of each house to limit or deny a taxing power to a home rule unit.\(^6^5\) As the court was not obliged to offer any solution, the one offered should probably not be criticized too sharply; however, this solution to the drying-up revenue problem is somewhat unsatisfactory. If the General Assembly were to enact legislation by the required three-fifths of each house limiting the rate of taxation on a particular source of revenue, there might be a problem regarding what share of that rate each home rule unit taxing that source would be allowed or whether the municipality by taxing at the full rate allowed would be able to create a conflict within the meaning of Section 6(c).

Other possible solutions to the problem are that the home rule units use more creativity in selection of sources of revenue and develop coordination among units of local government in close proximity. The cigarette tax imposed by the City of Chicago which was recently held to be within the home rule powers\(^6^6\) has not been copied by any of the adjoining municipalities, nor has Cook County yet levied a tax on

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63. City of Evanston, 53 Ill. 2d at 318, 291 N.E.2d at 826 (citing Cohn, Municipal Revenue Powers in the Context of Constitutional Home Rule, 51 Nw. U.L. Rev. 27 (1956)).
64. City of Evanston, 53 Ill. 2d at 318, 291 N.E.2d at 826 (citing 7 PROCEEDINGS 1649 (Report of the Committee on Local Government)).
65. City of Evanston, 53 Ill. 2d at 319, 291 N.E.2d at 827.
the sale or use of cigarettes. If all the neighboring municipalities did enact such a tax, it would raise revenue for all the units and leave few sources for tax-free cigarettes which now render the scheme ineffective.

The dissenting opinion\(^67\) relied upon quotations from the convention debates. The quotations discussed conflicts as regards regulatory ordinances in terms of preemption in order to show that conflict in the context of Section 6(c) could mean assertion of authority with regard to the same subject by two overlapping units of government as well as outright contradictions and inconsistencies between ordinances of the overlapping units. As was pointed out above, however, Section 6(c) is worded in terms of "conflicts" between a home rule county ordinance and an ordinance of a municipality, not in terms of overlapping by a home rule county ordinance of a municipal ordinance. Although preemption may be the natural result of the application of Section 6(c) to similar regulatory ordinances because such ordinances pertaining to the same subject tend to contradict one another, the same is not necessarily true with regard to similar taxation ordinances.

The dissenting opinion points to the 1959 legislation providing that counties be authorized to levy a retailer's occupation tax only within unincorporated areas as an example of an attempt to avoid dual taxation (taxation by two overlapping taxing authorities) because municipalities were authorized to impose a similar tax. It concludes that the purpose of Section 6(c) was similarly to prevent dual taxation:

In our opinion one of the purposes of section 6(c) was to prevent a home-rule county from putting municipalities to the choice of foregoing necessary revenue on the one hand, or imposing an economic disadvantage upon businesses located within their borders on the other. The recognition of authority in a home-rule county to levy a tax of this kind upon transactions which take place in the unincorporated areas of the county will fully meet the needs of the county without adversely affecting the power of home-rule municipalities to raise necessary funds.\(^68\)

However, the home rule powers granted by the 1970 Illinois constitution to counties were not limited to the unincorporated areas as was the authority to levy a retailer's occupation tax. Since dual taxation had previously existed in the state without seeming to cause a conflict,\(^69\) it would seem logical that a change in the policy of permitting

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\(^67\) Written by Justice Schaefer, representing the views of Chief Justice Underwood and Justice Davis as well as himself.

\(^68\) City of Evanston, 53 Ill. 2d at 324, 291 N.E.2d at 829-30.

\(^69\) See pp. 489-90, supra.
dual taxation would have been banned more specifically by Section 6(c) if indeed that were a part of the purpose of the section.

CONCLUSION

The decision itself is so terse as to present little material for analysis. In deciding that Section 6(c) of Article VII of the 1970 Illinois constitution does not apply to the imposition of identical taxes by a home rule county and a home rule municipality, the court did not stress the differences between the method of operation of regulatory ordinances to which the section admittedly does apply and taxing ordinances: it merely relied on the fact that there was no mention of taxing ordinances during discussion in the convention of the county-municipal conflict section 70 and that dual taxation by different local governmental bodies has been accepted in Illinois. In its effort to be brief and to the point the majority opinion also made no mention of the fact that the word preemption was indeed used during floor debate 71 with reference to the operation of Section 6(c), although largely in conjunction with contradictory licensing or zoning ordinances—perhaps an unintentional use of the word preemption for conflict.

However brief the decision, the court did construe the word “conflicts” found in the constitution in its ordinary meaning, that is, showing incompatibility, irreconcilability or interference. It found taxation of the same source of revenue—new motor vehicle sales—by both municipality and home rule county to be compatible activities. 72 The fact that the plaintiffs’ interpretation of conflict as including occupation of the field or preemption was not accepted by the court sets Illinois apart from the states which use preemption as a method of determining the limits of power of home rule units.

The decision does permit Cook County and any other county which may eventually qualify as a home rule unit to raise revenue without the necessity of receiving permission from the state and without the possibility of preemption by municipalities. With revenue powers relatively unrestricted, the county may be able to take on more responsibility for countywide problems.

Municipalities will be able to tax local sources of revenue but must concern themselves as must home rule counties with the total revenue burden imposed by various units on those sources.

If the decision had been that Section 6(c) did apply to the con-

70. See pp. 491-92 and note 58, supra.
71. See note 58, supra.
72. City of Evanston, 53 Ill.2d at 318-19, 291 N.E.2d at 826.
current exercise of the taxation power and municipalities could displace the county with respect to any revenue source, there would have been the potential for limiting the county to dependency upon the unincorporated areas and non-home rule municipalities (which do not have the authority to enact a taxing ordinance without permission from the state) for revenue. The ability of the county to function within the municipal areas would probably have decreased, without sufficient funds countywide programs would have to be more limited. Moreover, there might have been a tendency to create even more special districts to handle problems which span municipal boundaries.

In order for the county to be a viable unit of local government and not simply an arm of the state, it must have revenue powers. The decision to construe home rule county revenue powers broadly is a victory for those who hope that the county government can eventually take the place of some of the special districts and by coordination bring more efficient government to metropolitan areas.

The court is not likely to go to the extreme of letting all home rule counties do as they please, however. In another recent decision the Illinois supreme court held that Cook County did not have the authority to collect real estate taxes quarterly rather than biannually as provided by state law.\textsuperscript{73} Home rule municipalities are also finding a few rocks in their path, as in the recent case deciding that legislation by the General Assembly was necessary before a home rule unit could impose additional taxes upon an area within its boundaries for the provision of special services to the area.\textsuperscript{74}

The holding of the \textit{City of Evanston} case is narrowly drawn to apply to the case of taxation of the same transaction in absence of state restriction by a home rule county and by home rule municipalities. The holding can be extended to include non-home rule municipalities having the authority to tax the transaction. However, the court did not hold that Section 6(c) is totally inapplicable to the dual exercise of taxation authority. Therefore, as hinted earlier,\textsuperscript{75} action by the General Assembly to limit the total rate of taxation on a particular transaction could produce an arguable case of conflict between a municipal tax equal to the allowable rate and a home rule county tax on the same transaction.

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\textsuperscript{73} Bridgman v. Korzen, — Ill. 2d —, — N.E.2d — (1972).
\textsuperscript{75} See p. 493, supra.