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Local Government—1962 Tennessee Survey

*Gilbert Merritt, Jr.**

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Local government cases usually make dry reading, but this year one unusual dispute gives some insight into the customs and courthouse politics in one of Tennessee's smaller counties. The county judge and the county register of deeds (a lady) disagreed about office space in the courthouse. The county judge wanted to swap offices with the lady, but she refused. So after talking to the sheriff about it, the judge knocked holes in the lady's wall; whereupon she got an injunction. Judge Shriver, speaking for the court of appeals, said the sheriff could not give the judge permission to knock the lady's wall down. Judge Shriver found a section of the Tennessee Code vesting in the quarterly county court supervision of the courthouse and observed, in passing, that "learned counsel failed to take note of" this code section which solves the whole problem for everyone concerned.¹

The disputes in the other local government cases to be discussed are not quite so personal, but many of the cases are of special importance, growing out of efforts to change the boundaries and structure or improve the services of local government. Several settle

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1. *Driver v. Thompson*, 358 S.W.2d 477, 479 (Tenn. App. M.S. 1962).

complex questions of constitutional law relating to home rule, consolidation of local governmental functions, and the validity of local legislation which conflicts with general law.

I. LIMITATIONS ON LEGISLATIVE CONTROL OF LOCAL GOVERNMENT

Tennessee's constitution, like the constitutions of most states, contains several provisions limiting the power of the legislature to pass private or special legislation affecting units of local government. There were five survey cases interpreting three of these limiting provisions.

A. *Municipal Home Rule*

The lengthy home rule section of the state constitution, quoted in the footnote below, was adopted in 1953 and was designed to prevent legislative control of the internal affairs of municipalities choosing to adopt "home rule."² The legislature may pass private legislation affecting a county or a non-home rule municipality alone so long as the chief legislative body or the people of the local government

2. "[1] Any municipality may by ordinance submit to its qualified voters in a general or special election the question: 'Shall this municipality adopt home rule?'

"[2] In the event of an affirmative vote by a majority of the qualified voters voting thereon, and until the repeal thereof by the same procedure, such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.

"[3] Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by General Act of the General Assembly. The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered.

"[4] A charter or amendment may be proposed [a] by ordinance of any home rule municipality, [b] by a charter commission provided for by Act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon, [c] or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters for a home rule municipality not less in number than ten (10%) per cent of those voting in the then most recent general municipal election." TENN. CONST. art. 11, § 9.

For a good brief discussion of home rule, see Fordham, *Local Government in the Larger Scheme of Things*, 8 VAND. L. REV. 667 (1955). See also AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR HOME RULE (1953); Bromage, *Home Rule NML Model*, 44 NAT'L MUNIC. REV. 132 (1955); Fordham, *Home Rule AMA Model*, 44 NAT'L MUNIC. REV. 137 (1955).

ratifies the legislation.³ But the home rule section of the constitution requires that the legislature act upon home rule municipalities "only by laws which are general in terms and effect." The basic theory is that a home rule municipality may act without seeking prior state approval but remains subject to all limitations imposed by *uniform* state action.

Since 1953 only 10 of Tennessee's 284 municipalities have adopted home rule, and *Washington County Election Commission v. Johnson City*⁴ is the first reported case interpreting the home rule section of the constitution. Prior to the institution of the suit, the voters of Johnson City answered affirmatively the home rule question submitted by ordinance under paragraph one of this section. This action prevented the legislature from amending the city's charter, and so the city operated for a while under its existing charter before an attempt was made to adopt a new one drafted by an elected charter commission. Under the home rule section, a charter may be proposed to the voters (1) by ordinance, (2) by a charter commission established under legislative act, and (3) by a charter commission elected "pursuant to a petition . . . signed by" not less than ten per cent of the voters.⁵ The last of these three methods was used, and a petition was filed calling for the election of charter commissioners.

By suit for declaratory judgment, the local election commission, which was to hold the election for members of the charter commission, questioned the source of its own authority to hold the election and the qualifications, compensation, terms of office, and duties of the charter commission. It asked the court to determine whether the home rule section is "self-executing" allowing the home rule municipality to fill in these details by ordinance without requiring state legislative or judicial implementation. With clarity, Justice Felts established as self-executing the portion of the home rule amendment permitting the drafting of a charter by commissioners selected in an election called for by petition. The court reasoned that this constitutional provision assumes the existence of the procedures for selecting the commissioners and further "assumes" that these procedures may be established "by the legislative body of the municipality."⁶ The case holds that this portion of the home rule amendment relating to the drafting of charters, as well as the portion permitting a municipality to adopt home rule, is not dependent upon prior action by the state legislature. Justice Felts' interpretation of this portion of the home rule provision is surely correct in view of the fact that the

3. TENN. CONST. art. 11, § 9, para. 2.

4. 209 Tenn. 131, 350 S.W.2d 601 (1961).

5. See note 2 *supra* at paragraph 4 in brackets.

6. 209 Tenn. at 140, 350 S.W.2d at 605.

provision allows a charter to be proposed by a commission established under legislative act and says that "in the absence of such act"⁷ a charter may be drafted by commissioners selected in an election called for by petition.

B. "Suspension" of General Law by Private Act

The constitutional limitation on legislative control of local government which has proved most troublesome for the courts is the first sentence of section 8 of article XI, originally adopted in the Constitution of 1834 and carried over in the present Constitution of 1870. This sentence provides that the legislature "shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for individuals inconsistent with the general laws of the state" Since its adoption in 1834, the courts have construed this provision to prohibit forms of special legislation relating to "individuals" which conflict with general law, but originally the sentence was held inapplicable to special legislation inconsistent with a general law relating to local governments because counties and municipalities are not "individuals," the word used in the constitutional provision.⁸ This distinction no longer exists, however, because gradually the courts applied the sentence to invalidate types of legislation relating to units of local government on the theory that the legislation affected not only a county or municipality in the abstract but also the "individuals" subject to its jurisdiction.⁹

The local government cases in which the section has been applied are numerous and inconsistent.¹⁰ The principles underlying the decisions are often unclear because the court simply states its decisions in the form of conclusions that the special legislation either does or does not conflict with general law. In each session the legislature continues to exclude certain counties and towns from the operation of general laws, and the courts need to formulate the set of principles which control their decisions in these cases so that a measure of order and predictability can be brought to this important area of constitutional and local government law.

Before discussing the survey cases applying this section of the

7. Note 2 *supra*, at paragraph 4 in brackets.

8. *E.g.*, *State v. Wilson*, 80 TENN. 246 (1883); *State v. Rauscher*, 69 Tenn. 96 (1878).

9. See, *e.g.*, *Board of Educ. v. Shelby County*, 207 Tenn. 330, 339 S.W.2d 569 (1960); *State ex rel. Bales v. Hamilton County*, 170 Tenn. 371, 95 S.W.2d 618 (1936); *Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798 (1907); *Coyne v. City of Memphis*, 118 Tenn. 651, 102 S.W. 355 (1907); *Redistricting Cases*, 111 Tenn. 234, 80 S.W. 750 (1903).

10. See the synopses of the numerous cases cited in 17 TENN. DIG. *Statutes* §§ 74, 91-94 (1948).

constitution, I want to illustrate the inconsistent pattern of the precedent with which the supreme court is faced. In one case, the general act required the allocation of school funds between county and city school systems according to the number of children in each system, but it expressly allowed this allocation principle to be altered by private act. A private act requiring that Memphis and Shelby County apportion school funds on a fifty-fifty basis was invalidated on the ground that Tennessee's uniform system of public education demands that local allocation formulas conform to the allocation formula provided by general law.¹¹ Yet in two earlier cases involving the state's uniform system of public education the court upheld a private act deviating from general law by establishing a different system for hiring, discharging, and promoting teachers¹² and a private act authorizing the establishment of a municipal school system in a manner inconsistent with general law authorizing the creation of such school systems.¹³

The state supreme court has upheld private acts applicable to only one county or municipality in the following kinds of cases: (1) private acts allowing special ad valorem tax levy in excess of the maximum allowed to counties by general legislation;¹⁴ (2) private act changing county court form of government established by general act to council-manager or commission form of government;¹⁵ (3) private act authorizing operation of electric power company by municipality in manner inconsistent with a general law empowering municipalities to operate such utilities;¹⁶ (4) private act authorizing refunding of municipal bonds in manner not authorized by general bond law.¹⁷ On the other hand, the supreme court has invalidated private acts in the following types of cases: (1) private act fixing compensation of clerk of local court at a sum below that provided by general law;¹⁸ (2) private act allowing justices of the peace to serve on county board of education when not allowed to do so by general act;¹⁹ (3) private act authorizing taxation of taxicabs when general law prohibited such taxation;²⁰ (4) private act declaring city charter

11. Board of Educ. v. Shelby County, 207 Tenn. 330, 339 S.W.2d 569 (1960).

12. Knoxville v. State *ex rel.* Hayward, 175 Tenn. 159, 133 S.W.2d 465 (1939). *But cf.* State *ex rel.* Bales v. Hamilton County, *supra* note 9 (private act establishing minimum salary level for teachers in one county invalidated).

13. Robertson v. Englewood, 174 Tenn. 92, 123 S.W.2d 1090 (1939).

14. Cincinnati, N.O. & T.P. Ry v. Rhea County, 194 Tenn. 167, 250 S.W.2d 60 (1952).

15. Ragon v. Thrasher, 194 Tenn. 463, 253 S.W.2d 31 (1952).

16. Tennessee Elec. Power Co. v. City of Chattanooga, 172 Tenn. 505, 114 S.W.2d 441 (1936).

17. Soukup v. Sell, 171 Tenn. 347, 104 S.W.2d 830 (1937).

18. Freeinan v. Swan, 192 Tenn. 146, 237 S.W.2d 964 (1951).

19. Algee v. State *ex rel.* Makin, 200 Tenn. 127, 290 S.W.2d 869 (1956).

20. City of Memphis v. Yellow Cab, Inc., 201 Tenn. 71, 296 S.W.2d 864 (1956).

could be modified only by act of legislature when general law provided other methods for altering or repealing existing charters;²¹ (5) private act abolishing and re-establishing office of superintendent of public schools in a manner different from that provided by general law;²² (6) private act creating municipal board of election commission to hold elections for municipal offices when general law empowered county election commissions to hold such elections.²³

This inconsistent pattern of prior cases increased the difficulty of the supreme court's task in deciding four local government survey cases challenging special legislation under this section of the constitution. In two of the cases, the private acts were upheld; in one, the private act was invalidated; in the other, the court upheld a private act open to two constructions by adopting the construction which would not place it in conflict with general law.

In *State ex rel. Taylor v Rasnake*,²⁴ a county board of education transferred a principal with permanent tenure from one school to another at a reduced salary in the face of a special teacher's tenure act for the county preventing the board from reducing the salary of such an employee when changing him from one position to another. The general teacher's tenure act allows the school board to transfer teachers within the system; and the silence of the general act with respect to salary reduction appears to permit the board to transfer a teacher to a new location at a reduced salary. There is a conflict between the general and private acts in the sense that a board operating under the general act is free from the transfer restrictions imposed by the private act. Counsel for the board asked the court to follow *State ex rel. Bales v. Hamilton County*,²⁵ in which the court invalidated a private act imposing on Hamilton County a minimum salary scale for teachers because it was in conflict with the general law which imposed no such restrictions on other counties. Justice Burnett ignored the similarity between the two cases and upheld the private act in the *Rasnake* case saying, "the Private Act before us was passed for the purpose of advancing education" by giving teachers "a reasonable protection of not being transferred to a position paying a lower salary without first being given notice and having charges preferred against them." "This act," he explained, "instead of being contrary to the General School Law . . . is substantially in compliance there-

21. *Furnace v. City of Dayton*, 197 Tenn. 447, 274 S.W.2d 6 (1954).

22. *Hamilton County v. McCanless*, 199 Tenn. 128, 285 S.W.2d 118 (1955).

23. *Clark v. Vaughn*, 177 Tenn. 76, 146 S.W.2d 351 (1951) (a well-considered opinion by Justice Chambliss emphasizing the importance of statewide uniformity of election laws).

24. 209 Tenn. 229, 352 S.W.2d 427 (1961).

25. 170 Tenn. 371, 95 S.W.2d 618 (1936).

with, though in some instances the wording may be different."²⁶

The general law in *State ex rel. Town of Arlington v. Shelby County Election Commission*²⁷ allowed each incorporated town in a county one representative in the county's legislative body without regard to population, and the court invalidated a private act for the state's largest county designed partially to correct the malapportionment of the legislative body by limiting such representation to towns with populations over 1000. The legislature passed the private act in 1935 leaving the town without a representative until 1961 when this suit testing the private act was filed. The private act "is in direct contravention of this general statute," Justice White declared, "and, if held constitutional, would deny to the citizens of the City of Arlington the same representation in their county court as granted to the citizens of other incorporated towns of the state"²⁸

The general law in *White v. Davidson County*²⁹ allows the sheriff to purchase supplies out of the fees of his office and the question was whether the private act should be construed to require that his purchases be made through the county purchasing agency. The court construed the private act as inapplicable to the sheriff's office because "it is the court's duty to adopt the construction that would save the statute."³⁰

In *Frazer v. Carr*,³¹ opponents attacked the consolidation of local governments in Nashville and Davidson County on several grounds, one of which was that the private act establishing the metropolitan charter commission suspended general law. The 1957 general enabling act allowing consolidation in counties with populations over 200,000 requires as a first step toward consolidation that the county and its largest city by concurrent ordinances authorize the establishment of a charter commission. Under the general act the concurrent ordinances could provide for the selection of a charter commission in one of two ways—either by election at large, or by appointment by the chief executive officers of the county and city. In 1961 this general act was amended by allowing a charter commission to be created by private act, and a private act was then passed appointing the commissioners to draft a consolidation charter for Nashville and Davidson County. Opponents challenged the charter on the ground that the private act creating the charter commission was invalid. They cited the *Shelby County School Board*³² case heretofore mentioned in

26. 209 Tenn. at 234, 352 S.W.2d at 429.

27. 209 Tenn. 289, 352 S.W.2d 809 (1961).

28. *Id.* at 303, 352 S.W.2d at 815.

29. 360 S.W.2d 15 (Tenn. 1962).

30. *Id.* at 20.

31. 360 S.W.2d 449 (Tenn. 1962).

32. Note 11 *supra*.

which a private act requiring the allocation of school funds on a fifty-fifty basis between city and county school systems was invalidated because the general law required allocation according to school population, though it expressly allowed the allocation formula to be changed by private act. The court chose not to follow this case, however, and upheld the private act apparently on the ground that the problems of consolidation vary from one locality to another and special legislation to initiate consolidation in a particular area may be needed. Since there is no need for uniform state action in this respect, the court found a reasonable basis for the special legislation.

It is apparent from the foregoing discussion that the cases decided under this section will not support the proposition that special legislation which conflicts with or deviates from general law is necessarily invalid. Though the court does not often phrase its decisions in terms of a principle of equal protection, the cases, while inconsistent, indicate that the purpose of this section of the constitution is to prevent legislation which singles out one locality for special treatment in the absence of a reasonable basis for the deviation from general law.

The court often seems to be considering a number of factors in deciding cases under this section. The purpose of the general act and the nature of the conflict created by the private act are important considerations. For example, if the general act is designed to establish *minimum* standards, a private act which raises these standards for a particular locality will usually be upheld while a private act lowering them will usually be invalidated.³³ Another important question is whether the field of legislation covered in the general act demands uniform state action. For example, some statutes establishing procedures would become worthless if undermined by a patchwork of special legislation while no important interest is disturbed if some procedure-creating statutes are changed for one locality. A third factor is whether the special legislation is beneficial. Often, needed reforms in general law come first by private act for one locality, and later the general law is repealed and the private act expanded into a general act with state-wide application.

One can perhaps state the principles underlying these cases as follows: A private act which deviates from general law is invalid if the activity or field of legislation covered by the general law requires uniform legislation throughout the state. If the field of

33. Compare *State ex rel. Taylor v. Rasnake*, *supra* note 24 (private act upheld giving teachers in one locality more protection than general act designed to establish minimum standards for protection of teachers), with *Freeman v. Swan*, *supra* note 18 (private act invalidated fixing compensation of clerks at sum below that provided by general act).

legislation covered by the general act does not require uniform state action, the private act is valid unless it establishes standards "lower" than those of the general act. These principles require the court to examine closely the purposes of the general act, to evaluate the need for uniform state action and determine whether the standards established by the private act are "higher" or "lower" than those of the general act.

It would be helpful not only to the bar but also to the legislative branch if the court would set out more clearly the reasons underlying its decisions in this area of local government law. In one sense the court makes the decision more palatable by stating it in terms of whether the private act does or does not conflict with general law. It indicates that a rule is being applied and lends a note of inevitability to the decision. In fact, however, it is difficult to predict decisions and the law will remain in a state of confusion so long as the court does not state the policy reasons which give support to its holdings.

C. *Special Legislation Altering Term of Local Office*

The second paragraph of article XI, section 9 of the constitution, adopted in 1953, prohibits the legislature from abolishing a local office by *special act* or altering the term or salary thereof "prior to the end of" the term. The purpose of this amendment is to protect the officeholder from hasty legislative action which singles him out for special treatment, but it allows the alteration of local offices by general act.

Because the Nashville consolidation charter altered local offices prior to their expiration and was drafted by a committee appointed by special act, the question was raised in the metropolitan government case³⁴ whether this constitutional provision limits the power of the legislature to consolidate local governments by *private act*. The last paragraph of article XI, section 9, also adopted in 1953, says that the legislature "may provide for the consolidation" of a county with the municipalities therein. If the provision prohibiting alteration of terms of office were construed as a limitation on the consolidation power, it would mean that the consolidation power may be exercised only through *general* legislation since consolidation of local functions usually requires the alteration of offices and departments prior to the expiration of the terms of present officeholders. The court found it unnecessary to decide this question, however, because one section of the 1957 *general* consolidation enabling act provides that "after said consolidation no officer or agency . . . shall retain any right . . .

34. *Frazer v. Carr*, *supra* note 31.

unless this chapter or the charter of the metropolitan government shall expressly so provide"³⁵ The court held that the local officers were abolished by this general law rather than private act even though in the final analysis it was within the discretion of the charter commission appointed by private act to retain or eliminate such offices. Since the framers of the consolidation amendment apparently intended to allow consolidation by private act,³⁶ the court could have reached the same conclusion by holding that the limitation on legislative power expressed in the abolition-of-office provision of the constitution does not apply to the power granted in the consolidation provision because consolidation by private act would otherwise be practically impossible. The case holds that the provision is not violated by a general law giving a local charter commission created by private act the power to alter offices prior to the expiration of their terms but leaves open the question whether this may be done by a private consolidation act.

II. ALTERATION OF LOCAL GOVERNMENTAL BOUNDARIES AND STRUCTURE

A. Annexation

Unlike cities in many states, Tennessee cities may annex territory by ordinance without a petition or vote of the people in the city or the annexed area when, in the words of the statute, "it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered" unless annexation takes place.³⁷ The statute provides for judicial review to determine whether the annexation is "unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality."³⁸ In *State ex rel. Schmittou v. City of Nashville*³⁹ and *State ex rel. Hardison v. City of Columbia*,⁴⁰ the Tennessee Supreme Court upheld annexation ordinances of Nashville and Columbia annexing 42 square miles (80,000 people) and 900 lots (1827 people) respectively. The court upheld the annexations on the ground that they raise a "fairly debatable question . . . as to whether or not the ordinance is reasonable."⁴¹ It appears that the court has concluded that it need not

35. TENN. CODE ANN. § 6-3702 (Supp. 1962).

36. See Mendelson, *Consolidation of County and City Functions and Other Devices for Simplifying Tennessee Local Government*, 8 VAND. L. REV. 878, 881 (1955).

37. TENN. CODE ANN. § 6-309 (Supp. 1962).

38. TENN. CODE ANN. § 6-310 (Supp. 1962).

39. 208 Tenn. 290, 345 S.W.2d 874 (1961).

40. 360 S.W.2d 39 (Tenn. 1962).

41. 360 S.W.2d at 41; 208 Tenn. at 301, 345 S.W.2d at 879.

determine that the annexation is either "necessary" or "reasonable." The issue is whether the question of the reasonableness of the annexation is "fairly debatable."

In the *Columbia* case considerable evidence was taken so that the court was in position to say "not only is the fact question of the necessity of this annexation a fairly debatable question, but it seems to us that the weight of the evidence clearly preponderates in favor of the reasonableness and necessity of these ordinances."⁴² The procedure followed in the *Nashville* case was more unusual. The chancellor sustained the city's demurrer. The supreme court affirmed this ruling by judicially noticing the contents of a planning study which would provide a rational basis for the action of the city council, thereby making the question of reasonableness "fairly debatable."⁴³ In neither case did the court examine the question of whether all of the annexed territory was needed. Nor did it specifically discuss factors which courts sometimes consider in reviewing the reasonableness of annexations such as the number of residents of the annexed area earning their living in the cities, the need for central administration of the whole area, the sewage, water, garbage collection and fire protection needs of the area, the effect upon the city if these services are not provided and the capacity of the city to provide the services.⁴⁴

A large number of considerations may enter into the local political decision concerning annexation—public opinion, need for municipal revenue, comparative tax rates, land use patterns of the city and the annexed area, the quality of schools, sewage and water services, fire and police protection, racial characteristics, party politics, even religion. It is easy to see why the court wants to stay out of this type of political controversy. It is difficult to formulate any judicial principles for evaluating the reasonableness of annexation. While an argument can be made that the court should attempt to provide some principles governing reasonableness,⁴⁵ from my own point of view the court is right to devise a standard that will allow the political solution to stand unless the annexation is irrational and amounts to a clear abuse of legislative power.

42. 360 S.W.2d at 41-42.

43. *But cf.* *State ex rel. Campbell v. Mayor & Aldermen*, 207 Tenn. 593, 341 S.W.2d 733 (1960) and *City of Knoxville v. State ex rel. Graves*, 207 Tenn. 558, 341 S.W.2d 718 (1960), indicating the question of reasonableness of annexation ordinance cannot be decided on demurrer.

44. See, e.g., *Henrico County v. City of Richmond*, 177 Va. 754, 15 S.E.2d 309 (1941).

45. See Ryman, *Local Government Law—1960 Tennessee Survey*, 13 VAND. L. REV. 1177, 1179-82 (1960).

B. Consolidation

Previous sections of this article and the survey article dealing with constitutional law have discussed a number of the issues raised in *Frazer v. Carr*,⁴⁶ in which the supreme court sustained the consolidation of Nashville and Davidson County. Two issues remain for discussion: (1) the validity of the taxing plan for the new metropolitan government established by its charter, and (2) the validity of the provisions of the charter relating to the school system.

1. *The Taxing Plan.*—The general purpose of the metropolitan charter is to merge the City of Nashville and Davidson County and their separate agencies into one governmental unit with jurisdiction co-extensive with the county. The boundaries of the old City of Nashville are retained for taxing purposes, however. Under the charter the old city is called the "Urban Services District," while the whole area of the county including the Urban Services District is called the "General Services District."⁴⁷ These are taxing and service districts. Property in the old city is subject to taxation in both districts. The metropolitan tax assessor assesses the property for taxation in both districts, and the metropolitan trustee collects the taxes for both.

The 1957 consolidation enabling act requires the metropolitan charter to adopt this two-district taxing plan.⁴⁸ In theory at least, its purpose is to establish a different tax rate for property owners receiving services like sewage and fire protection not received by property owners outside the urban services district. In fact, however, the taxes paid under this plan in many instances do not reflect the services actually received by the property owner. This situation arises because the tax rates throughout each district are uniform though services throughout each district are not uniform. For example, some property owners in the general services district may receive sewage and water while others do not. Yet the tax rate throughout the district is the same.

An alternative to this taxing plan would be one which allows the legislative body of the metropolitan government to create taxing districts with different tax rates depending on the services received. This would allow the local legislative body annually to change the boundaries of the districts and levy taxes under differential tax rates which reflect the services actually being received by the taxpayer at

46. 360 S.W.2d 449 (Tenn. 1962). The issues raised in this case relating to suspension of general law and alteration of local office were discussed *supra* at pp. 806-08. See Kirby, *Constitutional Law—1962 Tennessee Survey*, 16 VAND. L. REV. 649, 650-55 (1963) for discussion of the issue relating to delegation of legislative power to a local charter commission.

47. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, CHARTER § 1.03 (1962).

48. TENN. CODE ANN. § 6-3711(e)-(j) (Supp. 1962).

the time. The draftsmen of the 1957 enabling act rejected this alternative on the ground that it would probably violate article XI, sections 28 and 29 of the state constitution which, in numerous cases, have been interpreted to require that the tax rate throughout the incorporated area of a municipality be "equal and uniform."⁴⁹ In order to avoid unconstitutionality, the draftsmen of the 1957 act adopted the two-district approach requiring that the consolidation charter establish an urban services district co-extensive with the old city and a general services district co-extensive with the county. Since the adoption of the 1957 act, there has been some concern that this plan may likewise be invalid in view of the fact that it does provide for a measure of differential taxation within the same municipality by creating two taxing districts with different tax rates.

The supreme court upheld this two-district taxing plan in *Frazier v. Carr*, rejecting the argument that it violates the uniformity requirement of section 28 of the constitution. The court reasoned that "the needs and services of the two [districts] are different, thereby requiring a different tax rate" and to charge the same tax rate to property owners who do not receive similar services "actually ignores the principle of equal and uniform taxation."⁵⁰

The real significance of the opinion lies in the fact that it may indicate the court is willing to accept a plan of differential property taxation based on services received. The broad language of the opinion and the court's recognition of the unfairness of requiring property owners to pay the same taxes when they do not receive approximately the same services suggests that the court may accept a plan of differential taxation which more accurately reflects these services. Many other states allow such differential taxation under similar constitutional provisions,⁵¹ and perhaps the obstruction to effective local government caused by a narrow reading of section 28 of the constitution can now be removed in Tennessee.

2. *The Metropolitan School System.*—In upholding the legislative design for public education adopted by the Nashville Metropolitan Charter, the court removed another obstruction to effective local government in metropolitan areas. The effect of this portion of the opinion is to allow metropolitan county governments established under the 1957 enabling act to escape the rigid general laws applicable

49. TENN. CONST. art. 2, § 28 provides in part as follows: "All property shall be taxed according to its value . . . so that taxes shall be equal and uniform throughout the State." Section 29 says: "The General Assembly shall have the power to authorize the several counties and incorporated towns of this State to impose taxes . . . and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

50. 360 S.W.2d at 455-56.

51. See NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION (Mich. Legal Studies Series 1959).

to counties such as the general law requiring the superintendent of schools to be elected by the county's legislative body or by the people rather than by the board of education. If the court had decided that metropolitan county-wide governments are required to follow the general laws applicable to counties in formulating consolidation plans, such governments would lose the flexibility always possessed by the municipal form of government, thereby losing many of the advantages of consolidation.

The court held that, while the charter provisions relating to the school system do deviate from earlier general law applicable to counties, they were adopted under the 1957 general enabling act which allows the charter to merge or alter the duties of local officers. Thus, with respect to consolidated governments, the 1957 act and charter provisions adopted under it supercede and render inapplicable earlier general law governing the county form of government.⁵²

C. Utility Districts

Two cases raise the question: how you get rid of utility districts whose services are unsatisfactory? The utility district act gives each utility district incorporated under it an *exclusive* franchise in the area it serves until revoked by the county legislative body and the power to sell its services within a city if it is granted permission to do so by the city.⁵³ The county legislative body apparently cannot modify the exclusive nature of the franchise (1) unless the district fails "to furnish any of the services which it is . . . authorized to furnish," or (2) unless "the public convenience and necessity requires other additional services."⁵⁴ In order to prevent local acts which interfere with utility districts incorporated under it, the act, which provides a method for incorporation by the county legislative body, declares that it is "complete in itself" and other laws do "not apply."⁵⁵

In one survey case, a city, despite a local act prohibiting it from granting exclusive franchises, permitted a natural gas utility district incorporated under the utility district act to extend its services to customers within the city.⁵⁶ The city then apparently decided to let another utility provide the same services and argued it could do so because the local act prevented it from granting an exclusive fran-

52. 360 S.W.2d at 456.

53. TENN. CODE ANN. § 6-2607 (Supp. 1962).

54. *Ibid.*

55. TENN. CODE ANN. § 6-2627 (1956). But the supreme court has allowed the creation of utility districts by private act, *Whedbee v. Godsey*, 190 Tenn. 140, 228 S.W.2d 91 (1950).

56. *City of Crossville v. Middle Tennessee Util. Dist.*, 208 Tenn. 268, 345 S.W.2d 865 (1961).

chise. The utility district argued that once it extended its services within the city it had an exclusive franchise under the general utility district act until revoked by the county legislative body. Relying on an earlier case saying that the general act provides the only method for modifying an exclusive franchise, the supreme court adopted the utility district's argument and observed that the city's remedy is to ask the county legislative body to modify the exclusive nature of the district's franchise within the city.

It appears from the opinion that the area of the city where the district extended its services was not actually within the boundaries of the utility district as incorporated. If so, the holding is questionable because the exclusive franchise feature of the act applies only "in the area embraced by the district," not to the area outside the district into which the utility is permitted to extend its services.⁵⁷

In the other case, the question arose whether the section of the utility district act allowing the county legislative body to modify an exclusive franchise authorizes the legislative body to detach territory from one utility district and add it to another.⁵⁸ The supreme court held that the legislature did not delegate this power to the county legislative body and indicated that the correct procedure, if conditions allowing franchise modification are present, is for the county court to modify the original district's exclusive franchise, permitting the other utility district to compete by extending its services into the area formerly served exclusively by the original district.

III. INTER-GOVERNMENTAL RELATIONS—ALLOCATION OF TVA TAX EQUIVALENTS BETWEEN CITY AND COUNTY

The Tennessee Valley Authority sells at wholesale rates the power generated at its various installations to municipalities operating systems for distributing electric power to consumers and controls the resale price and the disposition of electricity revenues by the municipalities. TVA controls resale prices and the disposition of revenues by contract in order to keep electric power rates low and to curtail the pressures on municipalities to maintain high rates and drain off the revenues for general municipal purposes. But section 13 of the TVA act does allow municipalities to use some electricity revenues for general municipal purposes by authorizing TVA to insert in its contracts provisions permitting

the resale of power at rates which may include . . . tax equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any

57. TENN. CODE ANN. § 6-2607 (Supp. 1962).

58. Consolidated Gray-Fordtoen-Colonial Heights Util. Dist. v. O'Neill, 209 Tenn. 342, 354 S.W.2d 63 (1962).

distribution system or property owned by the municipality . . . conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of state or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the state in which the municipality is situated shall provide for the proper distribution to the state and county of any portion of tax equivalent so collected by the municipality in lieu of state or county taxes upon any such distribution system or property.⁵⁹

TVA has exercised the power granted in this section by inserting a provision in its contracts allowing the municipality to receive and use without encumbrance electricity revenues equal to city *and county* property taxes which would be paid if the municipality's electrical distribution properties were privately owned. Neither TVA through its contracts, nor the state by general legislation, requires the municipality to pay over to the county the tax equivalent money which is calculated by applying the county tax rate to the value of these properties.⁶⁰ Thus, the municipality establishes the value of its electrical distribution system by traditional methods of evaluation, applies the municipal tax rate and the county tax rate, and then refuses to turn over to the county the electricity revenues equal to county taxes. In fact, there is a question whether municipalities could pay over these county tax equivalents if they wanted to because state law does not authorize such generosity, nor does it authorize the counties to accept such payments.⁶¹

*City of Tullahoma v. Coffee County*⁶² is a declaratory judgment action in the federal court to determine whether section 13 of the TVA act requires a city to pay over to the county those TVA tax equivalents it receives by applying the county tax rate to the value of its electrical distribution properties. All parties apparently concede that under section 13 TVA could enter into contracts which have no provision for the payment of tax equivalents of any type to municipalities. It could allow municipalities to charge high rates and use their revenues as they see fit. But when TVA does permit payments measured by both city and county tax rates, must the payments be conditioned on distribution to the county of its share? The federal district court held that this condition is mandatory rather than permissive under the act and that TVA is required to insert such a provision in its contracts with municipalities. The court further declared that, since TVA has failed to place this requirement in its

59. 48 Stat. 58 (1933), as amended, 16 U.S.C. § 831(L) (1958).

60. See Tennessee Revenue Bond Law, TENN. CODE ANN. §§ 6-1301 to -1318 (1956) and Tennessee Municipal Electric Plant Law, TENN. CODE ANN. §§ 6-1501 to -1537 (1956).

61. See the authorities cited in note 60 *supra*.

62. 204 F. Supp. 794 (E.D. Tenn. 1962).

contracts, the county can recover its share of the tax equivalents from the municipality in the federal court. The case has now been argued on appeal in the United States Court of Appeals for the Sixth Circuit and is awaiting decision.⁶³

The federal district court overlooked, and the parties have not raised in their briefs on appeal, the serious questions of constitutional law and federal jurisdiction which underlie the issue of statutory construction. While Congress certainly has the power to authorize TVA to place contractual conditions upon the sale of power to municipalities, does Congress or the federal court have the power to require or order one unit of local government to pay money in its general fund derived from electricity revenues to another unit of local government in the absence of such a clause in the contract—when neither local government is authorized under state law to pay over or receive the revenues? This is a difficult and unexplored question of federal-state-local relations which deserves thoughtful treatment. We will leave it for next year's survey article to consider the question in detail after the *Tullahoma* case is decided on appeal.

63. *City of Tullahoma v. Coffee County*, appeal docketed, No. 15,078, 6th Cir., 1962.