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Only three cases are assigned to this field for the abbreviated survey period and in one of these, the court avoided the constitutional question. In the other two cases the constitutional issues were not difficult and the results reached should cause neither surprise nor controversy among survey readers.

I. Equal Protection—Racial Discrimination

Turner v. Randolph[1] is another step in the slow but steady elimination of racial discrimination in governmental facilities and services. Negro residents sued to compel desegregation of the public libraries of Memphis and Shelby County. The defendants agreed as to all library facilities except washrooms, lavatories and toilets and pleaded as their defense a city ordinance which required separate washroom facilities for white and black races in all buildings used by the public. The United States district court held the ordinance unconstitutional as applied to public libraries and ordered desegregation of these facilities along with all other facilities of the libraries. Restrooms, lavatories and toilet facilities were found by the court to be "essential in the proper operation of the library units themselves." It was unnecessary for the court to consider whether the ordinance could be applied constitutionally to other types of buildings and it limited its decision to the particular facilities involved.

This decision should come as no surprise to those who have followed the course of desegregation decisions since the public schools decision in *Brown v. Board of Education*[2] overruled the "separate but equal" doctrine.[3]

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1. 195 F. Supp. 677 (W.D. Tenn. 1961).
2. 347 U.S. 483 (1954).
3. The opinion in the present case relied in part upon McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), which was decided before the separate-but-equal doctrine was overruled; it held that classroom, library and cafeteria segregation of a single Negro graduate student in a state university denied him equal protection of the laws in violation of the fourteenth amendment. However, it is difficult to see how separate toilet facilities could handicap Negroes in their use of Memphis' library

The *Turner* case's holding as to toilet facilities follows a virtually unbroken line of federal decisions dealing with all types of publicly operated facilities including recreational parks,[4] golf courses,[5] swimming pools,[6] restaurants,[7] and employment services.[8] It should be apparent to all by now that no governmental facility or service may be operated except upon the basis of equal availability to all members of the public without discrimination in any form on account of color or race.

The defendants attempted to support the ordinance as an exercise of the police power by offering proof tending to show a high incidence of venereal disease among Negroes and the possibility of such diseases being communicated through toilet facilities. The court considered this evidence but rejected it with the statement that "no scientific or reliable data have been offered to demonstrate that the joint use of toilet facilities by the races . . . would constitute a serious danger to the public health, safety or welfare."[9]

This finding may suggest to some that a contrary holding might have been reached if stronger proof were made on these factual contentions. It is doubtful that a factual defense of this type can ever be used successfully to defend racial segregation. Even if the alleged factual justification were established, the result of the segregation would be to bar any member of one race from using the particular public facility assigned to the opposite race regardless of his individual condition of health. By the same token, it would admit all members of the opposite race regardless of health. An undiseased Negro would be compelled to use a toilet which presumably is a greater danger to his health than that used by a white person in the same condition of health. This discrimination would result solely because of their differences in race and it would thus deny the Negro equal protection of the laws as that guarantee is currently applied.

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facilities in the same way that segregating the Oklahoma student handicapped his pursuit of effective graduate instruction.

4. City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960); Department of Conservation & Development v. Tate, 231 F.2d 615 (4th Cir. 1960); Dawson v. Mayor & City Council, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955); Shuttlesworth v. Gaylord, 6 RACE REL. L. REP. 1101, (N.D. Ala. 1961).

5. City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957); Ward v. City of Miami, 151 F. Supp. 593 (S.D. Fla. 1957).

6. City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956).

7. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); Brooks v. City of Tallahassee, 6 RACE REL. L. REP. 1099 (N.D. Fla. 1961).

8. Pryor v. Poirier, 6 RACE REL. L. REP. 1098 (D. Kan. 1961).

9. 195 F. Supp. at 680.

II. Home Rule—Self-Executing Constitutional Provisions

A section of the home rule amendments to the Tennessee constitution[10] was construed to be self-executing in *Washington County Election Comm'n v. City of Johnson City*.[11] Three separate methods are provided for proposing amendments to the charter of a home rule city: (1) by ordinance of the city's legislative body, (2) by a charter commission elected as provided by act of the General Assembly, or (3) in the absence of such legislation, by a seven-member charter commission elected pursuant to a petition signed by 10% of the voters of the city. Since the legislature had not provided an applicable procedure for the election of a charter commission, the voters of Johnson City followed the third route and petitioned the county election commission to conduct a municipal election of a charter commission. In an equity proceeding between the city and the election commission, the city sought to enjoin election of a commission pursuant to the petition alleging that the pertinent constitutional provisions were ineffective without implementing legislation. In a decision clearly dictated by the langnage of the constitution[12] and the history of these provisions,[13] the supreme court affirmed the chancellor and held the provisions to be self-executing, thus allowing election of the charter commission to proceed.

The principal problem faced by the court was whether the constitutional language was sufficiently detailed to create rights enforceable by the courts. Although the question is primarily one of intent and a provision of a constitution as detailed and code-like as Tennessee's should be presumed to be self-executing,[14] a constitutional provision can be self-execut-

10. Tenn. Const. art. XI, § 9. For a general discussion of these amendments and their background, see Hunt, *Constitutional Law—1954 Tennessee Survey*, 7 Vand. L. Rev. 763 (1954).

11. 350 S.W.2d 601 (Tenn. 1961).

12. "A charter or amendment may be proposed by ordinance of any home rule municipality, 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 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 of 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. XI, § 9. It is evident that the second method of amendment is to be pursuant to enabling legislation and that the third is intended for the situation where the legislature fails to provide a statutory procedure, clearly contemplating its availability although the legislature has not acted.

13. The court relied upon the fact that in the 1953 Constitutional Convention these provisions were explained on the floor as being intended "to make it unnecessary to have the workability of the plan implemented by legislation . . . to make it self-executing, so that the legislature would not have to pass an enabling act." 350 S.W.2d at 604.

14. Early state constitutions and the federal constitution were generally only outlines of government which sought only to establish governmental machinery and

ing "only so far as it is susceptible of execution."[15] An issue in the *Johnson City* case was whether the provision in question was too general and incomplete to be capable of self-execution. If held to be self-executing, the city asked the court to construe it and determine such questions as the terms, qualifications and compensation of commission members. The court found none of these omissions to be fatal, filled some by interpretation and held that other details could be filled in by act of the city's legislative body.

The *Johnson City* decision is both sound as a matter of constitutional interpretation and wholesome for the implementation of municipal home rule in Tennessee. If the provision for popular initiation of charter amendments had not been held to be self-executing, it would have enabled inaction of the legislature to defeat the intended rights of city voters to institute amendatory procedures.[16]

III. MISCELLANEOUS

In *State ex rel. Lewis v. Tennessee*,[17] the court avoided a constitutional decision by finding the question to be moot. Lewis was arrested and confined for public drunkenness upon a warrant of arrest and mittimus issued by a deputy clerk of a general sessions court. A petition for habeas corpus was filed alleging unconstitutionality of the law authorizing clerks of general sessions courts to issue warrants and other process.[18] The trial judge denied the petition and Lewis appealed. In the meantime, the grand jury returned a no true bill and Lewis was released. Since the relator was no longer in custody, the habeas corpus petition on his behalf had become

secure certain fundamental rights to the people; their provisions were not generally presumed to be self-executing. Most modern state constitutions are detailed codes which are intended to operate directly upon the people in the same manner as statutes, and their provisions are generally presumed to be self-executing. 11 AM. JUR. *Constitutional Law* § 72 (1937).

15. Davis v. Burke, 179 U.S. 399, 403 (1900).

16. A principal reason that constitutions are generally presumed to be self-executing is that any other construction would enable legislatures to nullify provisions merely by failure to enact implementing legislation. "[A] constitutional provision should never be construed as dependent for its efficacy and operation upon legislative will. . . . So that when the provision of a Constitution . . . forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of the grievance." Swift & Co. v. City of Newport News, 105 Va. 108, 52 S.E. 821, 824 (1906). By the same token, the legislature cannot defeat constitutional rights created by self-executing provisions by enacting conflicting legislation or creating remedies inadequate to protect the right. Way v. Barney, 116 Minn. 285, 133 N.W. 801 (1911).

17. 347 S.W.2d 47 (Tenn. 1961).

18. TENN. CODE ANN. § 18-410 (Supp. 1961).

moot.[19] It was therefore unnecessary to decide the constitutional question and the appeal was dismissed.

19. Upon appeal from a denial of the writ of habeas corpus, where the relator is no longer in custody by reason of acquittal, expiration of sentence or otherwise, the appeal generally will be dismissed, since the sole object of the writ is to test the lawfulness of the confinement and obtain release of the prisoner. Weber v. Squier, 315 U.S. 810 (1942); United States v. Brilliant, 274 F.2d 618 (2d Cir. 1960); Witte v. Ferber, 219 F.2d 113 (3d Cir. 1955); 39 C.J.S. *Habeas Corpus* § 118 (1944).