Vanderbilt Law Review

Volume 14
Issue 4 *Issue 4 - October 1961*

Article 10

10-1961

Constitutional Law -- 1961 Tennessee Survey

James C. Kirby, Jr.

CONSTITUTIONAL LAW—1961 TENNESSEE SURVEY

JAMES C. KIRBY, JR.*

Although a relatively small number of cases turned upon constitutional questions during the survey period, some important decisions were handed down in this area. In five separate decisions legislation was declared unconstitutional. The impact of the constitutional decisions varies from the right to millions of dollars in school funds in Shelby County and the salary of the clerk of General Sessions Court of Clay County to approval of permanent tenure for all franchised automobile dealers in the state. The scope of governmental power over the administration of estates, condemnation of private property and the pursuit of private businesses brought forth important and far-reaching judicial pronouncements. Two cases are witness to the diminishing concern for protection of contractual rights as such from legislative infringement. Although most decisions dealt with constitutional limitations on legislative power over business, private property and governmental functions, in one decision the fundamental procedural rights of one accused of crime were upheld in order to free him.

I. RIGHT TO JURY TRIAL IN EMINENT DOMAIN—APPLICABILITY OF HARMLESS ERROR STATUTE WHERE RIGHT TO JURY TRIAL IS CONSTITUTIONAL

Shook & Fletcher Supply Co. v. City of Nashville[1] is a decision

*Chief Counsel, Subcommittee on Constitutional Amendments, Committee on the Judiciary, United States Senate, Washington, D.C.

1. 338 S.W.2d 237 (Tenn. 1960).

which may have serious long-range implications in the Tennessee law of eminent domain. The overloading of the trial dockets of circuit courts by condemnation cases is a subject of great concern in Tennessee. The legislature might well determine that this condition should be remedied by some sort of streamlined procedure or, at least, that jury trials should be limited to cases where demanded by landowners. In most states, condemnation awards are determined by appraisers or commissioners without the intervention of a common-law jury at any stage.[2] A jury trial in eminent domain is not essential to due process of law under the fourteenth amendment to the United States Constitution and similar state constitutional provisions,[3] but the *Shook & Fletcher* case indicates that there is a constitutional right to a jury trial in eminent domain proceedings in Tennessee by virtue of article 1, section 6 of the state constitution.[4] If so, the legislature is powerless to provide any different procedure.

The city of Nashville was condemning property for highway purposes in connection with the Capitol Hill Redevelopment Project. The right to take was admitted and the only issue was the amount of damages. Both parties appealed from the jury's verdict, the landowner protesting a remittitur and the city assigning errors in the court's charge to the jury. The trial judge had erroneously instructed the jury that it would disregard uncorroborated testimony of a witness who had testified falsely in any respect.[5] The city argued that this charge denied its right to a jury trial by invading the jury's exclusive function to determine the weight of evidence. The landowner argued that the city had not been prejudiced by this instruction because of the nature of the evidence and that the harmless error statute[6] was therefore applicable. In reversing and ordering a new

2. 18 AM. JUR. *Eminent Domain* § 337 (1938).

3. Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897); Bauman v. Ross, 167 U.S. 548 (1897); *In re* Third St., 177 Minn. 146, 225 N.W. 86 (1929); Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 70 S.W. 721 (1902); Backus v. Lebanon, 11 N.H. 19 (1840); City of Mitchell v. Western Pub. Serv. Co., 124 Neb. 248, 246 N.W. 484 (1933); JAHR, EMINENT DOMAIN VALUATION AND PROCEDURE § 246 (1953).

4. "The right of trial by jury shall remain inviolate . . . ."

5. That such a charge is erroneous see Tennessee Cent. R.R. v. Morgan, 132 Tenn. 1, 175 S.W. 1148 (1915); Frierson v. Galbraith, 80 Tenn. 129 (1883). A proper charge is that the jury "may disregard" or "would be warranted in disbelieving" the uncorroborated testimony of a witness whom it finds to have testified falsely in one respect. Garland v. Mayhall, 17 Tenn. App. 449, 68 S.W.2d 482 (M.S. 1933).

6. TENN. CODE ANN. § 27-117 (1956). "No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account of the improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial."

trial, the court of appeals refused to assess the effect of the erroneous instruction; it reasoned that the harmless error statute was not applicable because the city had a constitutional right to trial by jury.

Whether state constitutional provisions merely preserving the right to jury trial apply to a particular type of case depends upon whether such right existed in that type of case by statute or common law when the state's constitution was adopted. If so, it is frozen into the constitution by a constitutional guarantee that the right to jury trial shall remain inviolate.[7] Since there was no common law right to trial by jury in eminent domain,[8] this question then turns upon whether a pre-existing statutory right has been frozen into the state's constitution.[9] As in many states, in Tennessee this question is complicated somewhat by our adoption of successive constitutions, in 1796, 1834 and 1870. The constitutions of 1796 and 1834 did not require trial by jury in eminent domain proceedings in Tennessee[10] and it was first granted by statute in the Code of 1858.[11] The question in the present case was whether this statutory right under the Code of 1858 became a constitutional right under the provision of the constitution of 1870 guaranteeing that the right of trial by jury shall remain inviolate—which was merely a restatement of the same provision from the earlier constitutions.[12] The landowner argued that where successive constitutions have been adopted in a state, whether there is a constitutional right to jury trial is to be determined by reference to the common law at the time of the adoption of the first state constitution, a proposition supported by the weight of authority[13] and by previous judicial declarations in Tennessee.[14]

7. State *ex rel* Timothy v. Howse, 134 Tenn. 67, 183 S.W. 510 (1916).

8. Bauman v. Ross, 167 U.S. 548 (1897); Portneuf Irrigating Co. v. Budge, 16 Idaho 116, 100 Pac. 1046 (1909); Note, 18 Am. & Eng. Ann. Cas. 680.

9. Massachusetts has held that its constitution guarantees trial by jury in eminent domain proceedings because of a statutory right in effect when its constitution was adopted. Sawyer v. Commissioner, 182 Mass. 245, 65 N.E. 52 (1902).

10. In the 1831 Compilation by Haywood and Cobb, paragraph 19, under the caption "Roads, Bridges and Ferries," provision is made for a jury of view but not for intervention of a common law jury of 12 men.

11. The 1858 Code provisions have been brought forward in TENN. CODE ANN. § 23-1418 (1956).

12. State *ex rel* Timothy v. Howse, 134 Tenn. 67, 183 S.W. 510 (1916).

13. "Generally, where successive constitutions have been adopted in a state or the provisions in the Constitution relating to jury trial have been changed from time to time, the right continues to exist with the same meaning, extent, and application that it had at common law and at the time of the adoption of the first state constitution, and an intervening extension of the right by statute is not preserved by a subsequent adoption of a new Constitution or change in the constitutional provisions relating to the right. Sometimes, however, a new constitutional provision is so worded as to preserve as constitutional a statutory extension of the right before its adoption." 31 AM. JUR. *Jury* § 12 (1958); *In re* Moynihan, 332 Mo. 1022, 62 S.W.2d 410 (1933); Town of Montclair v. Stanoyevich, 6 N.J. 479, 79 A.2d 288 (1951).

14. In State *ex rel* Timothy v. Howse, 134 Tenn. 67, 183 S.W. 510, 514

The court rejected this contention with the statement that "we do not so construe the Constitution or the cases which have dealt with this subject." Reliance was based principally upon article XI, section 1, of the constitution of Tennessee, which provides that all laws not inconsistent with the constitution shall continue in force until altered or repealed by the legislature. This provision was also contained in both of Tennessee's earlier constitutions[15] and it has never been given the effect of freezing purely statutory rights into the constitution.[16] Indeed, it seems to be merely a statement that the constitution did not affect previous statutes which were not in conflict with it[17] and it expressly recognizes the power of the legislature to alter or repeal such statutes, which is repugnant to the concept of a constitutional guarantee.

The court also stated, however, that the right of trial by jury in eminent domain "cannot be taken away by implication, but can only be taken away, if at all, by an express act of the Legislature," thus leaving the way open, if the occasion arises, to hold that the legislature can eliminate jury trials in eminent domain proceedings and substitute determination of damages by administrative proceedings.

The applicability of the harmless error statute where constitutional rights are involved is also an interesting issue in the *Shook & Fletcher* case. It should not be construed as holding that the harmless error rule can never be applied in any case where there is a constitutional right to trial by jury.

The harmless error statute, by its terms, is applicable to review of all verdicts and judgments in all civil and criminal causes.[18] Before its enactment in 1911, the appellate courts had applied it as a rule of practice in criminal cases, where trial by jury has always been a constitutional right,[19] but the harmless error statute, like any other, cannot be applied to deprive a litigant of a constitutional right. An erroneous instruction of the sort given in *Shook & Fletcher* operates

(1915), after quoting article I, section 6 of the 1870 constitution, the court stated: "The same language was used to express the guaranty in the Constitutions of 1834 and 1796 and its meaning as to the nature of the 'right' is to be gathered from that language used in the earliest Constitution."

15. See annotations under TENN. CODE ANN., *Tenn. Const.*, art. XI, § 9, note 1 (1956) ("Historical Background").

16. See Norton v. Brownsville, 129 U.S. 479 (1889); Pepper & Co. v. Wills, 54 Tenn. 35 (1871).

17. The original purpose of the provision in the constitution of 1796 was to bring forward the laws of North Carolina when Tennessee became a state. Its provisions were contained in the cession act of North Carolina, N.C. Pub. Acts 1789, ch. 3, § 1, condition 8. See Fields v. State, 8 Tenn. 167 (1827); Brice v. State, 2 Tenn. 254 (1814); Glasgow v. Smith, 1 Tenn. 144 (1799).

18. See note 6 *supra*.

19. See Munson v. State, 141 Tenn. 522, 213 S.W. 916 (1919).

to withdraw evidence from the jury. To this extent such an instruction invades the jury's constitutional function and denies a constitutional right. In this aspect, the present case is but an application of the fundamental principle that error is never harmless, but always prejudicial, if it denies a fundamental constitutional right.[20] An appellate court will not assess the prejudicial effect of the error in such a case.

II. Due Process

A. Adequate Provision for Compensation in Eminent Domain

Catlett v. State[21] was a proceeding by the state to condemn land for highway purposes. By demurrer, the landowner challenged the constitutionality of the statute under which the state proceeded, chapter 216 of the Public Acts of 1959.[22] This statute was a considerable improvement and modernization of Tennessee's eminent domain proceedings, patterned to a great extent after comparable federal legislation.[23]

When proceedings are instituted, the condemner must deposit in court its estimate of a proper award. If the landowner wishes to contest the amount of damages, he may except to the condemner's allowance and obtain a jury trial[24] on the question of damages, but nevertheless withdraw the deposit. If the jury's award is greater than the deposit, he is entitled to the difference plus interest from the date proceedings were instituted. If the award is less, the landowner must refund the excess, with interest.

The Tennessee statute added an important and controversial innovation to the federal model, however, by providing that no trial upon the issue of damages may be had until six months after completion of the project for which the land was taken, or until twenty-

20. 5A C.J.S. *Appeal & Error* § 1709, at 840 (1958). Other instances in which the courts have refused to apply the harmless error rule include procedural errors denying an accused's right to be apprised of the charges against him, Vinson v. State, 140 Tenn. 70, 203 S.W. 338 (1918); the right that the jury judge the law as well as the facts, Dykes v. State, 201 Tenn. 65, 296 S.W.2d 861 (1956); Ford v. State, 101 Tenn. 454, 47 S.W. 703 (1898); and the accused's right to confront the witnesses against him, Watson v. State, 166 Tenn. 400, 61 S.W.2d 476 (1933).

21. 336 S.W.2d 8, 337 S.W.2d 462 (Tenn. 1960).

22. Tenn. Code Ann. §§ 23-1528 to -1541 (Supp. 1961).

23. 46 Stat. 1421 (1931), 40 U.S.C. § 258 (1958). Unlike the federal statute, Tennessee's does not provide for passage of title to the condemner upon institution of proceedings and deposit of the estimated award. The landowner has 5 days to challenge the right to take, failing which, possession may be taken. For a general discussion of the provisions of the 1959 legislation, see Byrne, *Condemnation Trials, 1959 Legislation,* 26 Tenn. L. Rev. 486 (1959).

24. No jury of view intervenes. There is no constitutional requirement of a jury of view. Stokes v. Dobbins, 158 Tenn. 350, 13 S.W.2d 321 (1929).

four months from the commencement of the proceedings, whichever is earlier.[25]

This delayed trial provision was the basis of the landowner's claim of unconstitutionality of the entire statute. A three-member majority of the supreme court held the delayed trial provisions to be unconstitutional *in toto*. Two members agreed as to the provision for six months' delay after project completion but would have sustained delaying trial merely until completion of the project, subject to the two-year maximum. All members agreed that the unconstitutional provisions should be elided and the balance of the statute upheld.

To delay access of an injured party to the courts for redress is not unconstitutional per se. In the exercise of its police power, the state may do so when the provision for delay bears some reasonable relation to a valid legislative purpose.[26] The time of determination and payment of compensation for taking private property is an element of the right to "just compensation" which is expressly guaranteed by the fifth and fourteenth amendments to the United States Constitution[27] and by the constitutions of Tennessee[28] and all other states.[29] Although it is not essential that compensation be paid coincidentally with the taking,[30] the legislature must provide for payment within a reasonable time and cannot delay payment indefinitely.[31] How-

25. TENN. CODE ANN. § 23-1532 (Supp. 1961).

26. 16A C.J.S. *Constitutional Law* §§ 712, 719. The opinion of the court in the instant case relied upon the provisions of TENN. CONST. art. I, § 17, that "all courts shall be open . . . and justice shall be administered without delay." However, as Judge Swepston points out in his separate concurring opinion, this provision in state constitutions generally is deemed to be only declaratory of fundamental principles and a mandate to the courts, rather than creating new rights or limiting legislative power. 16A C.J.S. *Constitutional Law* § 709(b); Scott v. Nashville Bridge Co., 143 Tenn. 86, 223 S.W. 844 (1920). Satisfaction of due process is the usual test for laws delaying enforcement of rights.

27. Bauman v. Ross, 167 U.S. 548 (1897).

28. TENN. CONST. art. I, § 21.

29. JAHR, EMINENT DOMAIN VALUATION AND PROCEDURE § 36 (1953). North Carolina's Constitution has no express guaranty but its courts have recognized the right to compensation as founded on natural justice. City of Raleigh v. Hatcher, 220 N.C. 613, 18 S.E.2d 207 (1942).

30. Simms v. Memphis C. & L.R.R., 59 Tenn. 621 (1874). In Nashville Housing Authority v. Doyle, 197 Tenn. 555, 276 S.W.2d 722 (1955), construing an earlier statute, the court stated that when title passes to the condemner, payment must be "immediate." As noted by Judge Swepston in his concurring opinion in the instant case, this statement was not only dictum but erroneous, because "It has been established in this state for a 100 years or better that no constitutional provision requires actual prepayment before property is taken." 337 S.W.2d at 464. If payment is delayed, provision for interest on the award satisfies the requirement of just compensation which must be an amount sufficient to produce the full equivalent of the value of the property paid contemporaneously with the taking. United States v. Klamath Indians, 304 U.S. 119 (1938); JAHR, *op. cit. supra* note 29, § 176 (1953).

31. Maury County v. Porter, 195 Tenn. 116, 257 S.W.2d 16 (1953) (holding unconstitutional a provision for 12 months' delay of trial after completion of the project). JAHR, *op. cit. supra* note 29, § 38.

ever, the landowner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed.[32]

The minority and majority agreed in the instant case that to arbitrarily require that the landowner wait until six months after completion of a project was unreasonable because his damages could be ascertained just as readily immediately upon completion of the project. The minority would have sustained the provision for delay until project completion, subject to the two-year maximum, on the grounds that incidental damages, which should take into account both incidental benefits and detriment to the remaining land,[33] may be better ascertained after the taking has occurred and the improvements are completed. In the view of the majority, although this might be true in some instances, it could not justify such a delay of the day in court of any and all landowners under all circumstances.[34]

As stated by Chief Justice Burnett:

> We thus think on the basis of common sense and justice and under the constitutional provision in question that a reasonable delay in allowing the landowner his full right in court as to compensation is perfectly satisfactory, but to delay it years or months without having any factual situation to support whether or not such a delay is reasonable, such an act, or portion thereof, stating this is invalid. What constitutes a reasonable time, of course, depends upon the facts and circumstances of each particular case, and is to be decided in each case as a question of fact as these things arise.[35]

The majority indicated its agreement with a West Virginia decision which upheld a similar statute providing only for "reasonable delay" where the question of reasonableness was left for determination by the courts.[36]

The application of the doctrine of elision[37] to uphold the balance of the eminent domain statute gave the court little trouble, since the

32. Cherokee Nation v. Southern Kan. Ry., 135 U.S. 641 (1890).

33. TENN. CODE ANN. § 23-1414 (Supp. 1961); State v. Rascoe, 181 Tenn. 43, 178 S.W.2d 392 (1944).

34. *Accord,* Commonwealth v. Werner, 280 S.W.2d 214 (Ky. 1955). Where an entire tract is taken, the only element of damages is the fair market value of the property at the time of the taking, and no legitimate purpose would be served by delaying trial until project completion.

35. 336 S.W.2d at 11.

36. Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331 (1937).

37. The doctrine of elision allows the upholding of a statute despite the invalidity of a portion thereof where a complete enactment remains without the stricken provision and it appears clearly that the legislature would have enacted the statute without such a provision. Davidson County v. Elrod, 191 Tenn. 109, 232 S.W.2d 1 (1950); Edwards v. Davis, 146 Tenn. 615, 244 S.W. 359 (1922). Even with a separability clause, the doctrine is to be applied "with hesitation." Mensi v. Walker, 160 Tenn. 468, 475, 26 S.W.2d 132, 135 (1930).

statute contained a separability clause and the court concluded that a workable legislative scheme remained. The delayed trial provisions were held not to be such an inducement to the passage of the balance of the law that the legislature would not have passed it without them.[38]

B. Regulation of Businesses and Professions

Regulation of businesses and professions under the police power and resulting challenges of violation of due process of law were involved in two cases decided by the Supreme Court of Tennessee during the survey period. The most important is *Ford Motor Co. v. Pace*,[39] which, with two minor exceptions, upheld the constitutionality of the Motor Vehicle Commission Act.[40] This case is treated in the survey article on sales but it deserves reference here because it illustrates the expanding scope of the courts' deference to legislative exercise of the police power in regulation of private business pursuits.

This 1955 legislation is a detailed and far-reaching regulation of the distribution and sales of motor vehicles in Tennessee. It establishes a motor vehicle commission, each member of which must be a licensee under the act, and which is appointed by the Governor from a list certified by the Tennessee Automotive Association. The commission is empowered to make rules and regulations for the licensing of manufacturers, distributors, wholesalers, auto auctions, dealers and salesmen. The act sets forth qualifications for licensees, prescribes license fees and defines gronnds for denial or suspension of licenses. A detailed list of undesirable business and trade practices, such as misleading advertising, requiring that retail purchasers accept special accessories, etc., are listed among the grounds for revocation of salesmen's or dealers' licenses. A similar group of condemned practices concerning the manufacturer-dealer relationship is listed as grounds for revocation of manufacturers' or distributors' licenses. They in-

38. This may be questioned. The provision for a deposit of an estimated award by condemning authorities would appear to have been closely related to the delayed trial provisions. The court had previously held unconstitutional a condemnation statute which delayed both trial and payment until twelve months after project completion. Maury County v. Porter, 195 Tenn. 116, 257 S.W.2d 16 (1953). The legislature may have intended advance payment of the estimated award as provisional compensation during the period of delay. Without the benefit to the state of the delayed trial provisions, the legislature might well have chosen not to extend to landowners the benefit of the advance deposit provisions; this provision, theoretically, could result in the state becoming a creditor of the landowner if a contested award turns out to be less than the amount deposited. With no delayed trial provision, there is little reason for a landowner to receive an estimated award at the time of taking.

39. 335 S.W.2d 360 (Tenn. 1960). An appeal was dismissed by the United States Supreme Court for want of a properly presented federal question. 364 U.S. 444 (1960).

40. TENN. CODE ANN. §§ 59-1701 to -1720 (Supp. 1960).

clude: (1) refusing to deliver a vehicle to a dealer within 60 days if it has been advertised for immediate delivery; (2) attempting to "induce" a dealer to enter into any agreement with a manufacturer, or to do any other act "unfair to said dealer," by threatening to cancel any franchise or contractual agreement; (3) offering to sell to a dealer any supplies or materials as a part of negotiations for extending or renewing a franchise agreement, whether or not made a prerequisite to the renewal of the agreement; (4) cancelling a dealer's franchise "without due regard to the equities of the said dealer and without just provocation," regardless of the terms of the cancelled franchise;[41] (5) refusing to allow the dealer to determine the mode of transportation for delivery of new motor vehicles; and (6) attempting to enter into a franchise agreement with a dealer who does not have, at that time, facilities to provide services guaranteed by new car warranties.

The act provides finally in general terms for hearings and judicial review of denial, revocation, and suspension of licenses by the commission.

The lower court had declared the act as a whole and each particular part to be unconstitutional. The grounds of the chancellor's decision does not appear but a myriad of constitutional objections were raised. Most of the objections which have been raised in the past on constitutional grounds to administrative regulatory agencies were brought forth by the manufacturer and rejected by the supreme court. The act was held not to be invalid as a burden on interstate commerce because it applies to all persons and transactions within its scope regardless of interstate or intrastate character. The features of the act tending to perpetuate dealers in their franchises were held not to violate the state constitution prohibition against monopolies.

Powers given to the commission to promulgate regulations were held not to be an unconstitutional delegation of legislative power. The fact that the commission is to be composed of licensees certified by the Tennessee Automotive Association was held not to render the act unconstitutional because of any presumed bias or partiality upon the part of the association's members. The absence of specific procedural provisions for the conduct and review of the commission's hearings was likewise held not to be fatal; the naked provision for a hearing was construed to require a hearing which meets requirements of due process.[42]

The court treated as a more substantial question whether the

41. The Courts' upholding of this section is discussed under impairment of contract obligations. See p. 1183 *infra*.

42. Richardson v. Reese, 165 Tenn. 661, 57 S.W.2d 797 (1933).

business of selling motor vehicles so affects the public health, safety and welfare as to be subject to regulation and licensing in the exercise of the state's police power. The court had held recently in *Livesay v. Tennessee Board of Examiners in Watchmaking*[43] that the business of watch-repairing is not sufficiently related to the public welfare to be within the police power and justify state licensing and regulation. There the court had held that the mere opportunity for a dishonest person to defraud his customer in pursuit of a private occupation does not justify regulation under the police power, or else the legislature could conceivably regulate any business pursuit.[44] The court distinguished the *Livesay* case on the grounds that the legislature could reasonably find that the automobile industry so affected the state's economy as to justify regulation of sales and distribution. It also noted that automobile dealers are "economic dependents" of the company whose cars they sell.[45]

After holding the subject matter of the statute to be within the scope of the police power,[46] the court then considered the reasonableness of the particular means adopted to protect the economically dependent automobile dealers and the public's interest in the automobile industry. All provisions of the act were upheld except two of the grounds for revocation of manufacturers' licenses. The second section listed above, concerning attempts to induce dealers to enter agreements with manufacturers, or to do any other "unfair act," by threatening to cancel franchises was held to be "arbitrary and capricious."[47] The prohibition of "inducement" was regarded as going so far as to include mere salesmanship. The subsection requiring manufacturers to allow dealers to choose modes of transportation for new cars was also stricken on the grounds that it bore no reasonable relationship to the legislative purpose.[48]

The other principal due process problem is whether the franchise cancellation provisions are sufficiently definite to apprise a manufacturer or distributor of the actions which could lead to license

43. 323 S.W.2d 209 (Tenn. 1959).
44. For a criticism of the *Livesay* case, see Overton, *Constitutional Law—1959 Tennessee Survey*, 12 VAND. L. REV. 1096 (1959).
45. The court quoted a statement by Mr. Justice Black in his dissent in Ford Motor Co. v. United States, 335 U.S. 303, 323 (1948).
46. The automobile industry has almost universally been held to be within the scope of police power. Rebsamen Motor Co. v. Phillips, 226 Ark. 146, 289 S.W.2d 170 (1956); Nelson v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939); Ohio Motor Vehicle Dealer's and Salesmen's Licensing Bd. v. Memphis Auto Sales, 103 Ohio App. 347, 142 N.E.2d 268 (1957); Annots., 126 A.L.R. 740 (1940), 134 A.L.R. 647 (1941), 57 A.L.R.2d 1268 (1957).
47. *Contra*, E. L. Bowen & Co. v. American Motors Sales Corp., 153 F. Supp. 42 (D. Va. 1957).
48. *Accord*, General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956).

revocation in a particular instance. The court stated that it felt the provisions could be administered fairly by applying the ordinary meaning of the terms.[49]

Legislation similar to the Tennessee act has been adopted in several states and has met with varying treatment in the courts.[50] The present decision is consistent with the trend of the cases.

In *Hooper v. State*,[51] the defendant had been convicted of practicing dentistry without a license. In a very brief opinion affirming his conviction, the supreme court reaffirmed its prior decisions holding that due process is not denied by the Tennessee statute creating a board of dental examiners, defining the practice of dentistry and prohibiting its practice without a license.

C. Limitations Affecting Probate of Wills

Doughty v. Hammond[52] involved the rights of innocent purchasers of land from heirs as against a devisee under an unprobated will. The decedent died August 6, 1958, and an administrator was promptly appointed. On September 7, 1958, a suit for partition of land owned by decedent at his death was filed by one of the heirs. After findings by the master upon an order of reference that the decedent had died intestate, the property was sold on August 13, 1959, one year and seven days after the date of death. In March, 1960, a holographic

49. *Accord,* Best Motor & Implement Co., v. International Harvester Co., 252 F.2d 278 (5th Cir. 1960); Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940). In A.F.L. Motors, Inc. v. Chrysler Motors Corp., 183 F. Supp. 56 (D. Wis. 1960), a restraining order which had been granted to a dealer in state court prior to removal was dissolved because the court could not say that the dealer would probably be successful in his action to enjoin a manufacturer from cancelling a franchise in violation of a similar Wisconsin statute. The court was unable to ascertain with sufficient definiteness the meaning of the words "unfairly," "the equities of said dealer" or "without just provocation," and its discussion indicates the difficulties which may confront the courts if manufacturers are bold enough to risk the license revocation provisions and test the act's application in specific instances. The district court stated:

> "There are many, many circumstances when the meanings of these words comes into question. Who is to decide? Is a jury or court to rewrite every contract entered into by an automobile dealer to apply the thoughts of that jury or of that judge as to what 'is unfair' and as to what 'is inequitable'? If so, in these cases, there is a situation set up where the parties are subject to the whims, likes and dislikes, prejudices or misconceptions of juries or judges. No attorney could conscientiously advise a client as to what contract provisions would be valid." 183 F. Supp. at 59.

50. See Best Motor & Implement Co. v. International Harvester Co., 252 F.2d 278 (5th Cir. 1960); A.F.L. Motors Inc. v. Chrysler Motor Co., 183 F. Supp. 56 (D. Wis. 1960); Willys Motors, Inc. v. Northwest Kaiser-Willys, 142 F. Supp. 469 (D. Minn. 1956); General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956); Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940); Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955).

51. 334 S.W.2d 730 (Tenn. 1960).

52. 341 S.W.2d 713 (Tenn. 1960).

will, dated March 15, 1951, was discovered. The will devised the property to a third person, not an heir of decedent. In an action for declaratory judgment filed by the purchasers, it was held that they acquired good title under the partition sale and that the devisee had no rights in the land.

Ordinarily, the rule of *caveat emptor* applies to purchasers at a voluntary partition sale and the purchaser acquires only the title of the parties whose interest is sold for partition.[53] Since 1957, a Tennessee statute has provided that after one year from the date of a decedent's death, a bona fide purchaser for value from his heirs takes title free of claims under an unprobated will.[54] The *Doughty* decision arose on demurrer, which conceded the purchaser's lack of knowledge of the will and challenged this statute as depriving the devisee of property without due process of law.

The right to dispose of, and succeed to, property by will is purely statutory and the state may limit, condition, or even abolish the right as it chooses.[55] Since a will is ambulatory, rights of devisees arise only upon the death of the testator which, in this case, occurred after the statute in question became effective. Thus the devisee took the land upon the testator's death subject to this statutory regulation designed to expedite administration of estates and favor free alienability of the property of deceased persons. This one-year limitation has the same effect as a statute of limitations upon offering a will for probate, but without provisions for tolling the period of limitation. Comparing this one-year period with other statutes of limitations in Tennessee, the court noted that there are many others of one-year or less.[56] The court then held the one-year period to be reasonable when considered with the valid legislative purpose of expediting administration of estates.[57]

Suppose the testator had died before the enactment of the statute

53. Barksdale v. Keisling, 13 Tenn. App. 699 (M.S. 1931); 40 AM. JUR. *Partition* § 89 (1942); 2 GIBSON, SUITS IN CHANCERY § 587 n.7 (5th ed. 1956). TENN. CODE ANN. § 16-110 (Supp. 1961) provides that in such cases the clerk's deed implies a covenant of seisin and warranty of title by the parties whose interest is sold, unless otherwise directed in the decree.

54. TENN. CODE ANN. § 30-610(4) (Supp. 1961). Other provisions of section 30-610 provide that purchasers from heirs within one year from death take subject to the claims of creditors if administration is granted within the year; after one year, if administration has not been granted, a purchaser takes clear of debts of which he has no knowledge.

55. Irving Trust Co. v. Day, 314 U.S. 556 (1942); 57 AM. JUR. *Wills* § 52 (1948).

56. Apart from the statute in question, there is no statutory limitation in Tennessee on the time within which a will may be probated. See First Fed. Sav. & Loan Ass'n v. Dearth, 198 Tenn. 311, 279 S.W.2d 503 (1955); Alsobrook v. Orr, 130 Tenn. 120, 169 S.W. 1165 (1914).

57. *Accord,* State *ex rel* Bier v. Bigger, 352 Mo. 502, 178 S.W.2d 347 (1944), upholding a Missouri statute which absolutely bars probate after one year from the granting of letters of administration.

and the land had already vested[58] in the devisee when the statute became effective? As in the case of statutes of limitations affecting existing causes of action, due process should require only that a reasonable time be allowed to protect the vested right by offering the will for probate. Alabama held that its statute of limitations upon probate started running immediately upon enactment against persons claiming under unprobated wills of testators who died before the effective date of the legislation.[59] North Carolina reached a similar result under a statute similar to Tennessee's except that it allows a two-year period for probate before the devisee's rights are cut off by a sale by heirs.[60] It is safe to assume that the result in the *Doughty* case would have been the same if the testator had died before the effective date of the statute.

III. Impairment of Contract Obligations

In two cases legislation was upheld over the objection that it impaired the obligation of contract in violation of article I, section 10 of the United States Constitution and article I, section 20 of the Constitution of Tennessee.[61] One involved private contracts and the other a contract between a municipality and a public utility. The cases illustrate the almost total demise of the contract impairment limitation as a separate principle of constitutional law.

A. Private Contracts

In *Ford Motor Co. v. Pace*,[62] which is also discussed in the due process section of this article, and in the survey article on sales, the Supreme Court of Tennessee upheld a provision of the Tennessee Motor Vehicle Commission Act which had the effect of writing new terms into franchise agreements between automobile manufacturers and dealers. Section 1714(h)4 of Tennessee Code Annotated makes it grounds for revocation of a manufacturer's license if he cancels the franchise or selling agreement of a dealer "without due regard to the equities of the said dealer and without just provocation." The section goes on to make non-renewal of a franchise or selling agreement "without just provocation or cause" an unfair cancellation and cause

58. Title to realty under a will passes to a devisee upon the death of the testator. 4 Page, Wills 508 (3d ed. 1941).

59. Gilbert v. Partain, 222 Ala. 459, 133 So. 2d (1931). The testator died in 1917 and the 5-year limitation on probate was enacted in 1924. The will was held barred from probate when offered in 1929, 5 years and 3 months later.

60. Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919).

61. The language of both the state and federal constitutional provisions is the same, prohibiting any law "impairing the obligation of contract."

62. 335 S.W.2d 360 (Tenn. 1960), *appeal dismissed*, 364 U.S. 444 (1960).

for license revocation regardless of the provisions of the franchise or selling agreement. Thus, if a franchise or selling agreement is cancellable at the option of the manufacturer or has a stated termination date after which it must be renewed, the manufacturer is not free to exercise these contractual rights as originally agreed upon with the dealer. The law's effect is to grant perpetual tenure to dealers who were franchised on other terms unless the statutory considerations of fairness and equity are satisfied in any cancellation or failure to renew.

By dealing expressly with voluntary contractual relationships and, in effect, changing the terms of existing contracts, the statute clearly impairs contract obligations within the meaning of the constitutional prohibition.[63] However, the court had previously determined that regulation of the sale and distribution of motor vehicles and the relationship between dealers and manufacturers was a proper subject for the exercise of the state's police power. Persons who contract concerning matters subject to regulation under the police power do so subject to the possible exercise of that power although it may be latent at the time their agreement was made.[64]

The inquiry as in other police measures is simply whether the particular regulatory measure is reasonably related to the end sought to be attained by the exercise of the police power, the same test of validity for all legislation challenged under the due process clause. If requirements of due process are met, the fact that contractual obligations are impaired does not limit the state's police power.[65] Thus, recording acts may apply to deeds executed before their passage.[66] Lottery tickets[67] or contracts for the sale of beer,[68] which were valid when made, may be invalidated by subsequent legislation prohibiting their subject matter.

It is one thing incidentally to nullify a contract or relieve one of

63. "[L]egislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court." Northern Pac. Ry. v. Duluth, 208 U.S. 583, 591 (1908).

64. Kindleberger v. Lincoln Nat'l Bank, 155 F.2d 281 (D.C. Cir. 1946), *cert. denied*, 329 U.S. 803 (1947).

65. "[T]he interdiction of statutes impairing the obligation of contract does not prevent the State from exercising such powers as are vested in it for the promotion of the commonweal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . . In other words, . . . parties by entering into contracts may not estop the Legislature from enacting laws intended for the public good." Manigault v. Springs, 199 U.S. 473, 480 (1905).

66. Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830).

67. Stone v. Mississippi, 101 U.S. 814 (1879).

68. Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1877).

a contractual liability in the interests of the public welfare and quite another to impose directly upon a party a contractual relationship which he never intended to assume, as is done by the perpetual tenure effects of this statute. It is almost a form of involuntary servitude of automobile manufacturers to dealers. Granting that this is within the power of the legislature in a proper case, it would seem that the presumption of constitutionality should be reversed in such a case and that an affirmative showing of factual justification should be required before such a statute is upheld.[69] However, similar legislation to that involved here has been upheld in other jurisdictions.[70]

B. Public Grants

A utility district operating a natural gas distribution system was prosecuted for excavating in the streets in violation of a city ordinance in *City of Paris v. Paris-Henry County Public Utility District.*[71] A city ordinance in 1956 granted to the defendant utility district "the exclusive right and franchise" to lay, construct, and maintain gas pipes in its streets and alleys and to operate a gas distribution system within the city for a period of twenty-five years. A condition of the franchise was that the defendant convey to the city all of its assets upon the city's payment of all of defendant's indebtedness, which was recited as consideration for all rights and privileges granted by the city and in lieu of all fees, charges, and licenses which the city might impose therefor.

In 1959, the city of Paris enacted an ordinance requiring permits for excavations in the city streets, regulating the manner of such excavations and even requiring public liability insurance for indemnification of the city. The ordinance also imposed fees for the excava-

69. A comparable case to the present one is Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), sustaining the mortgage moratorium legislation of Minnesota. This act left defaulting mortgagors in possession during an extended period for redemption from foreclosure sales subject to the requirement that they pay a reasonable rental to be determined by the courts. It was sustained as "emergency legislation" justified by serious economic depression.

70. *Accord,* Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc., 142 F. Supp. 469 (D. Minn. 1956); 10 VAND. L. REV. 441 (1957); Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955). The Minnesota statute upheld in the *Willys Motors* case made it a misdemeanor for a manufacturer to unfairly cancel a dealer's franchise. The Wisconsin statute upheld in *Kuhl,* like the Tennessee statute, merely made it grounds for revocation of the dealer's license. Where such provisions are penal, they have been held to apply prospectively only, and not to enforcement of contracts existing at the time of enactment, else they violate the ex post facto prohibition. General Motors Corp. v. Blevins, 144 F. Supp. 301 (D. Colo. 1956); Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940); But *cf.* Best Motor & Implement Co. v. International Harvester Co., 252 F.2d 278 (5th Cir. 1960).

71. 340 S.W.2d 885 (Tenn. 1960).

tion permits on a graduated scale according to the size of the proposed excavation, but not to exceed $100 for each permit. The utility district admitted that it had excavated the streets without obtaining the required permits but defended the prosecution on the grounds that the enforcement of the 1959 ordinance against it was an unconstitutional impairment of its contract with the city as contained in the prior ordinance.[72] The city recorder adjudged the utility district guilty but the circuit court sustained its defense and dismissed the cases. On appeal, the supreme court reversed, holding the ordinance to be a valid exercise of the city's police power which could not be limited by the prior contract.

The supreme court first construed the challenged ordinance as being reasonable and constitutional on its face and within the police power of the city to protect the health and safety of the public in its use of the streets.[73] The court rejected the defendant's contention that the ordinance conferred arbitrary power to refuse permits altogether and construed the ordinance as requiring the issuance of permits as a ministerial duty upon the filing of an application containing the required information and agreements.[74]

The ordinance's requirement of permit fees from the defendant presented a more difficult issue because its contractual rights and duties under the prior ordinance were expressly in lieu of "all fees, charges or licenses" imposed by the city for the rights and privileges granted under the franchise, which included the right to construct gas pipes in the streets. The court held that the charges for excavation permits were not "fees" within the meaning of the franchise. They were viewed as being exacted by the city as an incident of its administration of a valid police power regulation where it acts in a governmental, rather than proprietary, capacity.[75]

72. The grant of a franchise by a municipality to a public utility for uses of the public streets is a contract creating a property right, binding upon the city in its proprietary capacity, and subject to the constitutional protection against impairment of contract. Chattanooga v. Tennessee Elec. Power Co., 172 Tenn. 524, 112 S.W.2d 385 (1938); Louisville v. Cumberland Tel. & Tel. Co., 224 U.S. 649 (1912).

73. Similar regulations, including the requirement of a permit, have been generally upheld. The permit is an incidental means of enforcement, designed to inform the city when and where excavations are to be made and to enable it to insure in advance that proper precautions will be taken for the protection of the public. Iowa City v. Iowa City Light & Power Co., 90 F.2d 679, (8th Cir. 1937); Louisville Gas & Elec. Co. v. Commissioners of Sewerage, 236 Ky. 376, 33 S.W.2d 344 (1930); City of Carthage v. Garner, 209 Mo. 688, 108 S.W. 521 (1908); City of Buffalo v. Stevenson, 207 N.Y. 258, 100 N.E. 798 (1913); 64 C.J.S. *Municipal Corporations* §§ 1692(b), 1694 (1950).

74. The ordinance provided that applications "shall be rejected or approved by the City Manager within twenty-four (24) hours," but apparently it granted no discretion to the city manager and contemplated issuance of permits upon filing of applications in the required form.

75. As an example of a fee received by a city in its proprietary capacity,

This issue depended upon whether the permit fees were for revenue or regulatory purposes.[76] It was not shown that the fees received by the city would amount to more than its costs of enforcing the police regulation. Where it is contended that a license fee is invalid as a revenue measure, it must appear on the face of the ordinance or by proof that it was in fact intended to be a revenue, and not a police, measure.[77] The court did not deal with the fact that the amount of the fee was based upon the size of the excavation, even though this has a doubtful relation to the expenses of the city in processing applications. Viewing the permit fee as merely an incident of a police regulation applicable to all members of the public who engaged in the regulated activity, the conclusion followed that the utility was subject to all the provisions of the regulation. The city could not contract away its power to enact and enforce police regulations for the protection of the public.[78] Since this power was not subject to contractual limitation and the franchise was construed as not covering regulatory fees, there had been no impairment of contract.

As these two cases demonstrate, it scarcely pays a litigant to rely upon contractual rights in resisting the application of measures claimed to have been enacted in the exercise of the police power, whether the contract be public or private in nature. The subordination of public grants to the police power and the expansion of the due process clause have rendered the impairment of contract clause a "fifth wheel to the Constitutional Law coach."[79] If the regulation is

the court cited Lewis v. Nashville Gas & Heating Co., 162 Tenn. 268, 40 S.W.2d 409 (1931), which dealt with a municipal franchise conditioned upon the utility's payment of a specified percentage of its receipts to the city. In the *Lewis* case, the state's resumption of regulation of the utility's rates was held not to abrogate the city's contract rights.

76. If a fee is exacted primarily to regulate activity dangerous to the public, or deemed to be specially in need of public control, and compliance with certain conditions is required in addition to the payment of the prescribed sum, it is a license fee imposed in the exercise of the police power, 53 C.J.S. *Licenses* § 3, at 452 (1948). The purpose, not the name which the legislature places on the charge, is controlling. Fox Film Corp. v. Trumbull, 7 F.2d 715 (D. Colm. 1925); Paramount Pictures Distrib. Co. v. Henneford, 184 Wash. 376, 51 P.2d 385 (1935).

77. Rutherford v. City of Nashville, 168 Tenn. 512, 79 S.W.2d 581 (1935). The fact that some revenue is derived by the city incidentally does not render a regulatory fee invalid as a tax so long as there is a reasonable relation between the charge and the regulatory objective. Porter v. City of Paris, 184 Tenn. 555, 201 S.W.2d 688 (1947).

78. A public contract is void if it is construed as purporting to limit exercise of the police power because "it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety." Northern Pac. Ry. v. Duluth, 208 U.S. 583, 598 (1908).

79. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 362 (rev. ed. 1952). The obligation of contracts clause reached its ascendancy in constitutional interpretation in the years immediately following the war between the states when the corporate form and public grants to corporations became widespread. The decline of the importance of the clause first appeared at about the turn of the century. It was raised in almost 25% of

sustained under the police power, the impairment of contract clause will not avail. Where the regulation is not sustained, the due process of law clause furnishes a sufficient basis for declaring it unconstitutional.

IV. SEPARATION OF POWERS—JUSTICIABLE CONTROVERSIES

Jurisdiction of the courts to review qualifications of county election commissioners was the principal issue in *Buford v. State Board of Elections*.[80] Two citizens and registered voters of Clay County petitioned the Circuit Court of Davidson County for a writ of certiorari to review the action of the state board of elections in appointing elections commissioners for Clay County. It was alleged that the board had appointed two commissioners who were not properly qualified and that the appointments were made unlawfully without notice and public hearing required by law.[81]

The Circuit Court for Davidson County issued the writ, ordering the board to certify its records to the court, and overruled the board's motions to quash the writ for lack of jurisdiction. The board then filed its petition for certiorari and supersedeas in the supreme court alleging that the circuit court was without jurisdiction to issue the writ. The supreme court ruled for the board, holding that the petitioners, as mere voters and private citizens, had no special interest apart from the general public, and lacked standing to maintain the action.

In this respect, the decision applies established principles of justiciability and standing to sue. The judicial power is limited to justiciable cases or controversies; those claiming to be aggrieved by such action of a governmental agency must complain of a special injury "not in common with the body of the citizens."[82]

The court's opinion in the *Buford* case then goes a bit further,

---

the cases challenging state legislation in the United States Supreme Court between 1888 and 1910. From 1910 to 1921, the proportion shrank to 15%, and from 1921 to 1930, it fell to 9%. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 91-100 (1938). The moratorium statutes of the thirties caused a revival in its invocation, but this was only a "flash in the pan" and cases raising it now very seldom reach the United States Supreme Court. CORWIN, *op. cit. supra* at 362.

80. 334 S.W.2d 726 (Tenn. 1960).

81. The claim of a right to notice and hearing would probably not have been upheld even if considered on the merits. TENN. CODE ANN. § 29-211 (1956) provides only that the board's meetings shall be public and preceded by published notices.

82. Patton v. Chattanooga, 108 Tenn. 197, 65 S.W. 414 (1901). Statutory certiorari is available only to one "who may be aggrieved by any final order or judgment of any Board or Commission functioning under the laws of this state" where no other procedure for review is provided by law. TENN. CODE ANN. § 27-901 (1956). See East Ridge v. Chattanooga, 191 Tenn. 551, 235 S.W.2d 30 (1950).

stating that whether a member of a county election commission is qualified for office is a "political question," and that its determination "rests entirely with the state board of elections."[83] This should not be taken to mean that qualifications of commissioners of elections is a question outside the jurisdiction of the courts regardless of how it arises. Section 2-1003 of Tennessee Code Annotated sets up certain specific qualifications for commissioners of elections. It excludes certain public officials from serving, makes it a misdemeanor for disqualified persons to serve, and provides that if disqualified persons are elected, they shall forfeit the office. It is doubtful if the court intended to preclude all judicial remedies for enforcement of these statutory qualifications. A quo warranto type proceeding under Tennessee Code Annotated section 23-2801[84] should be available to enforce the statutory forfeiture of his office against any election commissioner who is disqualified.[85] The court doubtless intended only to say that the board of elections, and not the courts, is the judge of the qualifications of appointees with respect to their general fitness for office.[86] It should not be assumed that the state board of elections is free to ignore the statutory qualifications of election commissioners. In other jurisdictions mandamus has even been granted to compel appointment of election officials who meet statutory qualifications.[87]

V. Class Legislation

A dispute over division of county school funds gave rise to an interesting decision in *Board of Education v. Shelby County*.[88] Since 1925, the General Education Act has directed division of local school

83. The court cited Jared v. Fitzgerald, 183 Tenn. 682, 195 S.W.2d 1 (1946), where members of the public, none of them candidates for office, had sought to set aside a primary election, alleging various violations of election laws but without charges of fraud or that any irregularities had affected the results of the election. The decision was adverse to the plaintiffs but it turned on their lack of standing to sue, not upon absence of jurisdiction over the subject matter of the suit.

84. This section allows an action in the name of the state against any person who "unlawfully holds or exercises any public office or franchise" or whenever "any public officer has done, or suffered to be done, any act which works a forfeiture of his office."

85. *Cf.* Algee v. State *ex rel* Makin, 200 Tenn. 127, 290 S.W.2d 869 (1956); State *ex rel* Bryant v. Maxwell, 189 Tenn. 187, 224 S.W.2d 833 (1949); State *ex rel* Harris v. Brown, 157 Tenn. 39, 6 S.W.2d 560 (1928).

86. The opinion does not indicate the specific grounds which were alleged to make the appointed officials unqualified for office. It shows only that the petitioners alleged that they were "not properly qualified."

87. State *ex rel* Patton v. Houston, 40 La. Ann. 393, 4 So. 50 (1888); State *ex rel* Kelleher v. St. Louis Pub. Schools, 134 Mo. 296, 35 S.W. 617 (1896); Baird v. Kings County, 138 N.Y. 95, 33 N.E. 827 (1893); Bogges v. Buxton, 67 W. Va. 679, 69 S.E. 367 (1910).

88. 339 S.W.2d 569 (Tenn. 1960).

funds among counties, cities and school districts on the basis of average daily attendance.[89] Since 1947, it has contained a proviso purporting to allow a different basis of division in particular counties if so provided by private act.[90]

Beginning in 1929, a series of private acts applying only to Shelby County provided for equal division of local funds between the Memphis and Shelby County school systems.[91] After the home rule amendments to the Tennessee constitution were adopted in 1953, the legislative bodies of the city and county each approved the succeeding private acts. Average daily attendance figures in 1959 would have entitled the city to 77% of the local funds. After the county school board had issued and divided eight million dollars in school bonds, the city and city school board filed suit claiming $2,189,600 of the proceeds, in addition to the four million dollars which had already been paid pursuant to the private legislation and thirty years of practice between the two systems.

The supreme court upheld the city's contention that both the current private act and the proviso of the General Education Act which authorized it were unconstitutional. However, the ruling was applied only prospectively and the city was held not to be entitled to share in the 1959 bond proceeds on the basis of average daily attendance.

The court viewed the General Education Act as providing a uniform system of public education in all counties throughout the state. It could conceive of no possible reasonable basis for separate classification of Shelby County, or any other county, which would allow local departure from the manner of distributing school funds established by the general law. In the words of Special Justice Marable, this could "possibly result in as many different methods of allocating local school funds as there are counties or school systems in the State, and could easily open the flood-gates leading to other such changes in the general law to the end that our single uniform system of public education would be destroyed, and chaos in our educational system would, indeed, be the consequence."

The fact that Shelby County is the state's largest, the only basis

89. TENN. CODE ANN. § 49-206(5) (1956); TENN. CODE ANN. §§ 79-711 to -712 (Supp. 1961). If county school bonds are payable only from taxes levied outside cities or school districts operating their own schools, no such division is required. TENN. CODE ANN. § 49-715 (1956).

90. The General Education Acts of 1947, 1949, 1951, 1953, 1955, and 1957 all provided that the average daily attendance provisions should apply "unless otherwise provided by Private Act" and "should not be construed to affect" the particular private act then applying to Shelby County. Chapter 14 of the Public Acts of 1959 provided that local systems might continue or determine to divide local funds on a different basis "by Act of the Legislature as in Chapter 711 of the Private Acts of 1947, as amended."

91. Tenn. Priv. Acts 1929, ch. 752; Tenn. Priv. Acts 1937, ch. 488; Tenn. Priv. Acts 1947, ch. 351; Tenn. Priv. Acts 1955, ch. 351.

argued as supporting the classification, was considered to bear no reasonable relationship to varying the average daily attendance formula which was designed to give each local system a fair share of school funds and afford every child the same opportunity to obtain an education regardless of his place of residence. With no reasonable basis for the classification, the special treatment of Shelby County became an invalid suspension of the general law in favor of the citizens of a particular county, which violates article XI, section 8, of the state constitution. Both the private acts suspending the general law and the enabling provisos of the General Education Act which authorized such suspension were held to be on the same grounds and subject to the same infirmity.[92]

The defendants argued that since the private legislation affected Shelby County in its exercise of a governmental function, the legislature could properly pass special legislation affecting it. But whether a county is affected in a governmental or proprietary capacity is immaterial if the special act conflicts with the general law of the state and there is no reasonable basis for classification.[93]

The fact that the Memphis Board of Commissioners had approved the private act pursuant to the home rule amendments was held not to lend validity to otherwise unconstitutional class legislation. The purpose of the home rule amendments is only to require local approval, by referendum or vote of the city or county legislative body, as a condition precedent to enactment of the type of local legislation which was previously enacted exclusively by private act of the legislature.[94] Home rule does not detract from the constitutional prohibition against special or class legislation.[95] Nor did the home rule procedure estop the city from later raising the constitutional question or amount to a waiver of its rights to test the act's constitutionality.[96]

---

92. Invalidating the enabling proviso of the general law may appear to be a holding in advance that no such private legislation can ever be justified. However, the court noted that the language added nothing to the legislature's authority to pass private legislation; if otherwise valid, it could take such action regardless of whether it had given itself previous authorization. The instant case then does not mean that there could never be any conceivable justification for separate treatment of any county with respect to division of local school funds.

93. Davidson County v. City of Nashville, 190 Tenn. 136, 228 S.W.2d 89 (1950); Town of McMinnville v. Curtis, 183 Tenn. 442, 192 S.W.2d 998 (1946).

94. For discussion of the purpose and effects of the home rule amendments, see Kirby, *Constitutional Law—1960 Tennessee Survey*, 13 VAND. L. REV. 1021, 1026 (1960); Hunt, *Constitutional Law—1954 Tennessee Survey*, 7 VAND. L. REV. 763, 768 (1954).

95. Cagle v. McCanless, 199 Tenn. 128, 285 S.W.2d 118 (1955).

96. TENN. CODE ANN. §§ 49-711 to -712 (Supp. 1961) provides that the governing body of any city or special school district may waive all or part of its share of county bond proceeds by ordinance or resolution. The instant case does not deal expressly with these provisions except to discuss the

A severability clause enabled the court to elide the invalid provision of the General Education Act and uphold the balance of its provisions, thus leaving the average daily attendance formula applicable to Shelby County. With Solomon-like wisdom, the court then held that the eight million dollar county bond issue should be divided equally, as provided in the unconstitutional private act, but that in the future such funds would be divided according to the general law of the state. Since 1948, the county had sold nine bond issues for school purposes and all had been divided under the unconstitutional fifty-fifty formula. The county issued the 1959 bonds without any notice that the city would assert a claim in a larger share. Here, the court applied principles of equitable estoppel, citing statements that parties may so deal with each other upon the strength of an unconstitutional statute that neither may invoke the aid of the courts to undo what they themselves have done.[97]

On the whole, a reasonable accommodation of principles of equity, constitutional law and orderly administration of government appears to have been attained by the court in an extremely difficult case.

Clay County v. Stone[98] was a suit by a clerk of circuit and criminal courts who also served as clerk of the Court of General Sessions of Clay County to determine his rights to compensation under the Anti-Fee Act.[99] Plaintiff's total fees earned as clerk of circuit and criminal courts did not amount to his statutory minimum, and the question was whether his fees earned as clerk of the general sessions court should be added before computating the amount to be paid from the county general funds to provide his minimum statutory salary. Plaintiff contended that the county should pay him the difference between his statutory salary and the fees that he collected from the circuit and criminal courts without regard to his fees collected as clerk of the general sessions court.

The private act creating the General Sessions Court for Clay County[100] had specified that the clerk of the circuit and criminal courts should also act as clerk of the new court and should be paid a specified salary for his additional duties. In an unreported case, this salary provision, like others in similar private acts for other counties, had been declared unconstitutional as class legislation in violation of

doctrines that waiver requires full knowledge of one's rights and cannot deprive one of his right to raise the question of unconstitutionality. Presumably, these provisions would be treated as delegations to the local governing bodies of power to suspend the state's general law and a local governing body's action would be treated the same as the private act which was stricken in the instant case.

97. State v. Hobbs, 194 Tenn. 323, 250 S.W.2d 549, 553 (1952); Roberts v. Roane County, 160 Tenn. 109, 123; 23 S.W.2d 239, 243 (1929).

98. 343 S.W.2d 863 (Tenn. 1961).

99. TENN. CODE ANN. §§ 8-2401 to -2416 (Supp. 1961).

100. Tenn. Priv. Acts 1949, ch. 285.

article XI, section 8 of the state constitution, because it suspended the provisions of General Anti-Fee Act relating to clerks of circuit and criminal courts.[101] Subsequently, by Tennessee Public Acts of 1959, chapter 109,[102] the legislature established general sessions courts throughout the state (with a few specified exceptions) and provided that the clerk of the circuit court in each county should act as clerk of the newly created general sessions court except where a private act creates a separate office of clerk.[103] The 1959 legislation also provided that the fees earned as clerk of the general sessions court should constitute part of the fees of the office of circuit court clerk, and that the clerk should receive such additional compensation for his services as general sessions court clerk as might be provided by private act then in effect or thereafter enacted.[104] This provision for additional compensation is substantially the same as Tennessee Code Annotated section 8-2411, a previous amendment to the Anti-Fee Act. For the same reasons for which private acts to the same effect had previously been stricken, the court held unconstitutional the additional compensation provisions of section 8-2411.[105]

Just as a private act could not destroy the uniform compensation purpose of the Anti-Fee Act, the provision authorizing such private acts without any basis for classification among counties was also unconstitutional. The result is laudable since a contrary holding would have enabled private legislation to return these dual clerks to the old discredited fee system under which public officials were encouraged to increase their personal compensation by increasing the fees of their offices.[106]

Instead of appointing the circuit court clerk to a second office, the

101. Anderson v. Maury County, 193 Tenn. 62, 242 S.W.2d 81 (1951); Freeman v. Swan, 192 Tenn. 146, 237 S.W.2d 964 (1951); Carmichael v. Hamby, 188 Tenn. 182, 217 S.W.2d 934 (1948). However, in Freshour v. McCanless, 200 Tenn. 409, 292 S.W.2d 705 (1956), where the private act created a new office of clerk of the general sessions court, instead of merely imposing these duties upon another clerk, the Anti-Fee Act was held inapplicable because it did not schedule maximum compensation for clerks of general sessions courts.

102. TENN. CODE ANN. §§ 16-1101 to -1124 (Supp. 1961).

103. TENN. CODE ANN. § 16-1116 (Supp. 1961).

104. TENN. CODE ANN. § 18-408 (Supp. 1961).

105. Although the court does not expressly so state, the same reasoning would seem to invalidate section 18-408, the similar provision of the 1959 General Sessions Court Act.

106. However, under the holding in Freshour v. McCanless, *supra* note 101, the salaries of general sessions clerks serving under private acts establishing separate offices apparently may still vary from county to county since they are not limited by the Anti-Fee Act. Their status was not expressly changed by the general sessions court legislation of 1959. Section 16-1116 provides that such clerks shall continue to serve in accordance with the provisions of the private acts creating their offices and section 16-1122, dealing with the fees of the office, provides only that "after payment of the compensation of the clerk" all fees shall be paid into the general funds of the county. Under Durham v. Dismukes, 333 S.W.2d 935 (Tenn. 1960), general sessions courts

1959 legislation was viewed as merely giving him additional duties ex officio and adding the fees of the ex officio duties to those of his principal office for determination of fees and salary under the Anti-Fee Act. By this holding, the court was able to avoid a contention that it was a violation of article 2, section 26 of the state constitution[107] for the same person to hold more than one lucrative office.

VI. Ex Post Facto Laws

Some subtle principles of statutory interpretation were combined with the constitutional prohibition against ex post facto laws[108] in *Stinson v. State*,[109] with the result of terminating six years of proceedings in a criminal prosecution for robbery. In 1954, the defendant was indicted by Shelby County for robbery and also as a habitual criminal. He was found guilty on both counts and was sentenced to 15 years for robbery and to life imprisonment on the habitual criminal count. At this time, the law of Tennessee provided a maximum penalty for robbery of not less than five nor more than twenty-five years. The robbery statute was then amended in 1955 to set the punishment at from five to fifteen years, except that if the robbery is accompained by use of a deadly weapon, punishment shall be death by electrocution, subject to commutation by the jury.

In a habeas corpus proceeding in 1959, the conviction was held void by the Criminal Court for Davidson County because of defects in the habitual criminal conviction. The defendant was remanded to local custody and held for a new trial under the 1954 indictment. This indictment was then quashed upon motion of the attorney general and the defendant was reindicted for the same offenses under a new indictment. This resulted in conviction on both counts and a new sentence to life imprisonment, which was appealed in the present case. The supreme court reversed.

The amendatory 1955 legislation changing the penalty for robbery repealed by implication the prior robbery statute under which the defendant was first indicted.[110] The repeal of a penal statute operates

are treated as local county courts subject to home rule; therefore a clerk's salary provisions under private acts should be subject to home rule procedures.

107. "No Judge of any Court of law or equity, Secretary of State, Attorney General, Register, Clerk of any Court of Record, or person holding any office under the authority of the United States, shall have a seat in the General Assembly; nor shall any person in this State hold more than one lucrative office at the same time; provided, that no appointment in the Militia, or to the office of Justice of the Peace, shall be considered a lucrative office, or operative as a disqualification to a seat in either House of the General Assembly."

108. U. S. CONST. art. I, § 10; TENN. CONST. art. I, § 20.

109. 344 S.W.2d 369 (Tenn. 1961).

110. Haley v. State, 156 Tenn. 85, 299 S.W. 799 (1927); Cole Mfg. Co. v. Falls, 92 Tenn. 607, 22 S.W. 856 (1893); Terrell v. State, 86 Tenn. 523, 8 S.W.

as a pardon of offenses committed prior to repeal unless there is an appropriate savings clause in the repealing legislation or an applicable separate statute.[111] This particular repealing legislation contained no such savings clause and the only applicable savings clause is the general one in Tennessee which provides that repeal of a statute does not affect any right accrued, penalty incurred or proceeding pending.[112] Since the original conviction of the defendant on the 1954 indictment had been held to be void,[113] no penalty had been incurred by defendant within the meaning of the general savings statute. Since the original indictment had been quashed, there was no pending proceeding within the meaning of the statute. Thus, the defendant had been pardoned by this combination of circumstances for the offense under the pre-1955 law and could not be prosecuted under the previous robbery statute.

The final question was then whether the defendant could be prosecuted under the robbery law as re-enacted and amended in 1955. This would be a trial for an offense occurring prior to the effective date of the applicable criminal statute. Even if the 1955 legislation is viewed as only changing punishment, the ex post facto prohibition applies not only to statutes creating new substantive criminal offenses but also to those which change the standard of punishment previously prescribed for a crime.[114] This principle has even been applied to invalidate laws allowing a warden to fix and keep secret the time of excution[115] or requiring solitary confinement of criminals sentenced to death,[116] where applied to offenses committed prior to enactment. The conclusion was inescapable that application of the 1955 robbery law to 1954 offenses would make it an unconstitutional ex post facto law. The conviction was therefore reversed and the defendant became a free man.

---

212 (1888); Poe v. State, 85 Tenn. 495, 3 S.W. 658 (1887); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1932 (3d ed. 1943).

111. Yeaton v. United States, 9 U.S. (5 Cranch) 281 (1809); Wharton v. State, 45 Tenn. 1 (1867).

112. TENN. CODE ANN. § 1-1301 (1956).

113. The judgment in the habeas corpus proceeding was not appealed by the state and the court in the instant case refused to entertain a collateral attack by the state that the court there lacked jurisdiction to void the conviction under the first indictment.

114. Lindsey v. Washington, 301 U.S. 397 (1937); Holden v. Minnesota, 137 U.S. 483 (1890); Kring v. Missouri, 107 U.S. 221 (1882).

115. *Ex parte* Medley, 134 U.S. 160 (1890). But laws have been sustained providing heavier penalties for new crimes committed thereafter by habitual criminals. Gryger v. Burke, 334 U.S. 728 (1948); McDonald v. Massachusetts, 180 U.S. 311 (1901). Or changing the punishment from hanging to electrocution. Malloy v. South Carolina, 237 U.S. 180 (1915). Or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail, prior to execution and substituting the warden for the sheriff or hangman. Rooney v. North Dakota, 196 U.S. 319 (1905).

116. Holden v. Minnesota, 137 U.S. 483, 491 (1890).