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Constitutional Law--1960 Tennessee Survey

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CONSTITUTIONAL LAW—1960 TENNESSEE SURVEY

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I. DUE PROCESS

Eminent Domain—Just Compensation.—Landowners sued the Tennessee Commissioner of Highways and Public Works for compensation for a taking of property for the state's superhighway program in *Brooksbank v. Leech.*[1] The trial court sustained a demurrer on the ground that the suit was barred by sovereign immunity.[2] In order to dispose of this question on appeal the supreme court first de-

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1. 332 S.W.2d 210 (Tenn. 1959).

2. TENN. CONST. art. I, § 17 provides that "suits may be brought against the state in such manner and in such courts as the Legislature may by law direct." TENN. CODE ANN. § 20-1702 (1956) provides that "no court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state . . . with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state." This statute codifies the rule that actions brought against public officers in their own name are treated as suits against the state if the rights of the state would be directly and adversely affected by the judgment or decree sought, Automobile Sales Co. v. Johnson, 174 Tenn. 38, 122 S.W.2d 453 (1938); General Oil Co. v. Crain, 117 Tenn. 82, 95 S.W. 824 (1906), *aff'd*, 209 U.S. 211 (1908). In an action for the recovery of money from state funds, the state is the real party in interest and may invoke its sovereign immunity even though individual officers are the nominal defendants. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945). The court in the instant case thus summarily overruled the landowner's argument that his action was against the Commissioner individually and not against the state. 332 S.W.2d at 214-15.

termined whether the legislature had provided an adequate statutory method for just compensation, the absence of which would have rendered the taking unconstitutional under both article I, section 21, of the Constitution of Tennessee[3] and the due process clause of the United States Constitution.[4] The court held that the landowners' remedy was by suit against the county where the taking occurred.[5]

Until 1959, condemnation awards for state highway projects were directed by statute to be paid from the general funds of the county where the expenses were incurred.[6] The state was made liable for payment between itself and the county,[7] but was held not to be liable at the suit of the landowner.[8] The landowner's sole remedy was to obtain a judgment against the county, and if it lacked funds for payment, he could obtain mandamus to compel the county to levy a tax to satisfy the judgment.[9] A general eminent domain statute enacted in 1959[10] now directs that awards be paid from the general funds of the municipality, county or state, whichever is the condemner.[11] However, the legislature did not specifically authorize suit against the state to collect judgments when it is the condemner.[12] In the instant case, the court construed the 1959 laws strictly[13] and in *pari materia* with the other eminent domain statutes and held that the legislature intended that landowners continue to collect damages and compensation by suit against the county. This was held to be an adequate method for just compensation, thus precluding suit against the state.[14]

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3. Which provides "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

4. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

5. Roane County was made a defendant in the trial court after the demurrer was sustained. However, a nonsuit was then taken as to the county when the court denied a discretionary appeal pending disposition of the county's liability.

6. TENN. CODE ANN. § 54-506 (1956).

7. TENN. CODE ANN. § 54-511 (1956).

8. Phillips v. Marion County, 166 Tenn. 83, 59 S.W.2d 507 (1933); State Dep't of Highways and Pub. Works v. Roseborough, 17 Tenn. App. 403, 68 S.W.2d 132 (M.S. 1933).

9. TENN. CODE ANN. §§ 5-921, -922 (1956); State Highway Dep't v. Mitchell's Heirs, 142 Tenn. 58, 71, 216 S.W. 336 (1919).

10. TENN. CODE ANN. §§ 23-1530, -1531 (Supp. 1960).

11. TENN. CODE ANN. § 23-1540 (Supp. 1960).

12. TENN. CODE ANN. § 54-2004 (Supp. 1960), likewise enacted in 1959, deals with acquisition of controlled access facilities and merely authorizes "condemnation . . . in the same manner as now or hereafter may be authorized by law."

13. Statutory authorization of suits against the state are strictly construed and must specify the manner of bringing such action and designate the court in which it may be brought in order to satisfy the provisions of article I, section 17, of the Tennessee Constitution, quoted *supra* note 2. State *ex rel.* Allen v. Cook, 171 Tenn. 605, 106 S.W.2d 858 (1937).

14. It is not necessary that the provision for compensation be contained in the statute authorizing the taking so long as there is adequate provision in the

Any other interpretation of the eminent domain statutes would have left the court with a difficult question in the *Brooksbank* case. The legislature clearly had not authorized a suit against the state.[15] If suit against the county had not been held to be available for a taking by state highway agencies, the statutes authorizing such taking would presumably have been held unconstitutional. The next question would then be the liability of a public officer who takes private property under such a statute. No case has been discovered where a public officer was held personally liable in damages for taking property under an unconstitutional law. However, the statement is generally made in decisions involving public utilities that purported statutory authority to take private property without paying just compensation is void and offers protection to no one.[16]

II. Equal Protection

1. Public School Segregation.—In 1956 the Supreme Court of Tennessee followed *Brown v. Board of Education*[17] and held unconstitutional Tennessee's laws providing for compulsory segregation in public schools.[18] In 1957 the Tennessee legislature enacted several laws concerning public school administration, one of which authorized local school boards to provide separate schools for Negro and white children whose parents or guardians voluntarily elect that they attend segregated schools.[19] In *Kelley v. Board of Education of the City of Nashville,*[20] this statute was held unconstitutional by the United States Court of Appeals for the Sixth Circuit. Despite its element of free choice between integrated and segregated schools, the statute provides for the maintenance of separate Negro and white schools from which children of the opposite race are excluded. It therefore denies equal protection under *Brown v. Board of Education.*

Probably more important, however, is the affirmance of the district court's approval of the so-called "Nashville Plan" for desegregation of schools by commencing with the first grade and adding one additional grade each year. The plaintiffs' appeal had challenged the extension of desegregation over a twelve year period as being unreasonably long and violating the "all deliberate speed" mandate of the United

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general laws. Louisville & N. R.R. v. City of Louisville, 131 Ky. 108, 114 S.W. 743 (1908).

15. See notes 12, 13 *supra.*

16. Payne v. Kansas City St. J. & C.B.R.R., 112 Mo. 6, 20 S.W. 322 (1892); 18 Am. Jur. *Eminent Domain,* § 130 (1938).

17. 347 U.S. 483 (1954), 349 U.S. 294 (1955).

18. Roy v. Brittain, 201 Tenn. 140, 297 S.W.2d 72 (1956).

19. Tenn. Pub. Acts 1957, ch. 11, § 1. By implication the separate schools would be in addition to desegregated schools required by the above decisions.

20. 270 F.2d 209 (6th Cir. 1959), *cert. denied,* 361 U.S. 924 (1960).

States Supreme Court.[21] The district court had found that the local school board had adopted the grade-a-year plan in good faith for valid administrative and educational reasons. The record was such that the court of appeals could not say that the district court's judgment approving the plan was clearly erroneous.[22] However, the court noted with approval that the district court had retained jurisdiction of the case and indicated that future events might demonstrate that more time was being taken than necessary and the district court could then order acceleration of the plan.

The *Kelley* decision also approved the provision of the Nashville plan which allows the voluntary transfer of both white and Negro students who are assigned either to a school previously attended solely by members of the opposite race or to a school in which the opposite race is in the majority. Since the transfer provisions are equally available to students of both races and do not exclude any child from a school solely because of his race, they were upheld. The court noted that *Brown v. Board of Education* does not compel integration but only forbids compulsory segregation. If parents voluntarily choose segregated schools for their children when nonsegregated schools are available, no constitutional rights of the child are violated.[23]

2. Racial Exclusion From Licensing Board.—An alleged scheme to exclude Negro funeral directors and embalmers from membership on a state licensing board was involved in *Tennessee Negro Funeral Directors Ass'n v. Board of Funeral Directors and Embalmers.*[24] Sections 62-501 through 62-507 of the Code of Tennessee establish a board for the licensing of funeral directors and embalmers, the members of which are appointed by the Governor. As originally enacted,[25] the statute provided that vacancies occurring on the board

21. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

22. The opinion of the court of appeals details the evidence at length and reaches the following conclusion:

"The findings of the district court were sustained by the evidence. There is no claim that the Board of Education did not act in good faith. The plan is supported by practically all of the teachers in the schools. The reasons for the support of the plan were clearly given by the Superintendent of Schools, the former Superintendent of Schools, by the Acting Chairman of the Board of Education, and by one of the most experienced principals and teachers where the desegregation plan was operating. Among those reasons, including difficulties arising from the recruitment of teachers, was the most persuasive one—that children in the first grade had no sense of discrimination; that as the classes of Negro and white children progressed year by year up through high school, they would know no feelings of racial discrimination, until the entire school system had been harmoniously integrated. One may disagree with the gradual process, but we cannot say that such a plan is so unreasonable that the judgment of the district court approving the plan, in the light of the evidence before it, should be reversed as clearly erroneous." 270 F.2d at 228.

23. Cooper v. Aaron, 358 U.S. 1 (1958).

24. 332 S.W.2d 195 (Tenn. 1960).

25. Tenn. Pub. Acts 1951, ch. 13.

should be filled by the Governor from a list approved and certified to him by the State Association of Funeral Directors, whose membership is limited to the white race. Negro funeral directors sought an adjudication that this provision was unconstitutional, alleging that its effect would be to deny Negroes membership on the board. While the action was pending, this provision was amended by the legislature[26] to provide that vacancies were to be filled by appointment of any person who met certain qualifications established by the act and that the Governor was authorized to consider as qualified those persons whose name appeared on a list certified by the same association.[27] The supreme court held that the amendment rendered the challenge of the original provision moot. The court then viewed the new provision as not being unconstitutional on its face and refused to assume the truth of the plaintiffs' allegation that it would be administered so as to systematically exclude Negroes from membership on the board. It could not be assumed either that the lists certified by the association of white persons would not include the names of any Negroes or that the Governor would limit his appointments to those on the list since the amended act does not *require,* but merely *authorizes,* appointment from the list.

Even though the court's expression of faith in the executive branch's adherence to constitutional principles may turn out to be unwarranted,[28] the holding of the *Funeral Directors* case is in accord with established principles of statutory construction. In considering constitutional questions, it is presumed that public officers will obey the constitution,[29] and a court will not base a decision of unconstitutionality upon contingencies which may not arise.[30] The holding in the instant case is similar to the recent decisions upholding state pupil placement acts against attacks which anticipate that they will be administered so as to perpetuate school segregation.[31]

3. Legislative Classification.—State legislation favoring pinball machines over other gaming devices led to the invalidation of a city

26. TENN. CODE ANN. § 62-502 (Supp. 1960).
27. Did the amendment materially affect the constitutional issue? The original act required appointment from the list certified by the all-white association. As amended, it made inclusion on its list conclusive as to qualification for appointment. In both instances the segregated association was delegated a portion of the state's legislative power to determine the membership of the board.
28. It would require proof of uniform and long-continued systematic exclusion of Negroes before the statute would become unconstitutional in its application. *Cf.* Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958).
29. State *ex rel.* Gallaher v. Hickman, 190 Tenn. 310, 229 S.W.2d 495 (1950).
30. Donathan v. McMinn County, 187 Tenn. 220, 213 S.W.2d 173 (1948).
31. Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.), *aff'd,* 358 U.S. 101 (1958); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910 (1957).

ordinance in *Smith Amusement Co. v. Mayor and Board of Commissioners of City of Chattanooga.*[32] The general gambling statutes of Tennessee exempt pinball machines and their operation by express exclusion from the definitions of "gambling device" and "gambling,"[33] but the City of Chattanooga passed an ordinance prohibiting the possession and maintenance of pinball machines and then confiscated and destroyed all such items. The trial court sustained a demurrer to an action challenging the ordinance. On appeal, the supreme court reversed and held the ordinance unconstitutional as being in conflict with the general laws of the state. The state statutes were held to make the possession and operation of pinball machines lawful.[34] The court rejected the city's argument that the exemption of pinball machines from the state statute was discriminatory and unconstitutional, stating that "this was a matter for the legislature to determine" and noting that such machines may be used for innocent purposes. While a municipality may create offenses which are not offenses against the state, it may not pass ordinances which violate the general laws of the state or outlaw conduct expressly permitted by state law.[35] The result then followed that the ordinance was ultra vires the city's legislative authority.

III. HOME RULE

The 1954 amendments to the Tennessee Constitution providing a degree of home rule for cities and counties[36] were considered in two cases. Opposite results were reached for legislation affecting general sessions courts and special school districts.

Durham v. Dismukes,[37] concerned the validity of special legislation affecting the General Sessions Court for Sumner County. Chapter 203 of the Private Acts of 1957 increased the judge's salary and expanded the court's jurisdiction to include probate and juvenile jurisdiction. In accordance with the Home Rule Amendment[38] the statute

32. 330 S.W.2d 320 (Tenn. 1959).
33. TENN. CODE ANN. § 39-2033 (Supp. 1960).
34. This holding was made prior to the legislation excluding pinball machines as gambling devices. Heartley v. State, 178 Tenn. 254, 157 S.W.2d 1 (1941).
35. O'Haver v. Montgomery, 120 Tenn. 448, 111 S.W. 449 (1908).
36. The general purpose of these amendments was to require local approval, by popular referendum or vote of the city or county legislative body, of essentially local matters previously included in private acts of the state legislature. For a general discussion of these amendments and their background, see Hunt, *Constitutional Law—1954 Tennessee Survey,* 7 VAND. L. REV. 763 (1954).
37. 333 S.W.2d 935 (Tenn. 1960).
38. "[A]ny act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an

was made dependent upon approval by the voters of Sumner County. It was subsequently defeated in a special election. The judge of the sessions court sought a declaratory judgment that the act nevertheless was effective, contending that its subject matter was not within the purview of the Home Rule Amendment and that it became law without the necessity of approval by the voters.[39] A decree that the act was nullified by its defeat in the election was affirmed by the supreme court.

The supreme court had previously held that circuit and chancery courts are state courts and that legislation discontinuing their meetings at a city was not subject to home rule provisions,[40] the principal reasoning being that the salaries for the judges of such courts are paid from state funds. General sessions courts, however, have generally been treated by judicial decisions as being local courts subject to special or private legislation.[41] Although the jurisdiction of general sessions courts overlaps the jurisdiction of state courts and goes far beyond that of the old justices of the peace which they displaced, their judges' salaries are still paid from county funds and such courts are regarded as essentially local in nature. In the *Durham* case, the supreme court thus treated them as county courts subject to the Home Rule Amendments, feeling that the need for creating them or expanding their jurisdiction should properly be left to a vote of the people in the local county.

School districts were not accorded treatment as local institutions for home rule purposes. In *Perritt v. Carter*,[42] a declaratory judgment was sought that a private act[43] expanding a special school district in Carroll County was void because it required approval of the voters in the affected area rather than those of the entire county.[44] The supreme court held that the Home Rule Amendments did not apply to special school districts, voided the election provision, and upheld the validity of the act.[45]

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election by a majority of those voting in said election in the municipality or county affected." TENN. CONST. art. XI, § 9.

39. Had this contention been accepted, the success of his action would have then depended upon whether the statute would have been upheld after voiding the election provision. This question is discussed *infra* at page 1032.

40. State *ex rel.* Cheek v. Rollings, 202 Tenn. 608, 308 S.W.2d 393 (1957).

41. Freshour v. McCanless, 200 Tenn. 409, 292 S.W.2d 705 (1956)); Hancock v. Davidson County, 171 Tenn. 420, 104 S.W.2d 824 (1937). Juvenile courts have been placed in the same category. State *ex rel.* Webb v. Brown, 132 Tenn. 685, 179 S.W. 321 (1915).

42. 325 S.W.2d 233 (Tenn. 1959).

43. Tenn. Priv. Acts 1957, ch. 286.

44. Had the Home Rule Amendments been held applicable, the election provisions evidently would have invalidated the statute. TENN. CONST. art. XI, § 9 makes legislation "void" unless approved by "a majority of those voting in . . . said election in . . . the county affected."

45. The effect of elision of the election provision is discussed *infra* at page 1032.

At first blush, the *Perritt* decision may appear to be an undesirable limitation of the scope of the Home Rule Amendments by removing from their operation something so seemingly local in nature as a special school district. However, for the amendment to apply to a particular legislative act it must not only be "private or local in form or effect," but must also be "applicable to a particular county or municipality, either in its governmental or its proprietary capacity."[46] Regardless of its essentially local impact, if the statute does not affect a *county* or *city* as such, it is not subject to home rule.

The court relied principally in *Perritt* upon the recent holding that sanitary utility districts are not subject to home rule[47] and prior decisions that school districts do not have the legal status of municipal corporations but are instrumentalities of the state subject to unlimited control of the legislature.[48] It seems evident that legislation which concerns only an existing school district does not have the effect upon a county or municipality contemplated by the Home Rule Amendment. But the private act excluded from home rule by *Perritt* resulted in the expansion of a school district, which apparently brought within it areas whose schools were previously administered by the county or other governmental agencies. Legislation concerning the administration of city or county educational systems has generally been held to affect the county or city in its governmental capacity,[49] and therefore, to be permissible as special legislation unless violative of the general law of the state.[50] Furthermore, a county in which a school district is expanded may find that the school district becomes the owner of the county's school properties without assuming any bonded indebtedness arising from such properties.[51] It would thus appear that expansion of a school district might well affect

46. *Supra* note 38.

47. Fountain City Sanitary Dist. v. Knox County Election Comm'n, 203 Tenn. 26, 308 S.W.2d 482 (1957).

48. Kee v. Parks, 153 Tenn. 306, 283 S.W. 751 (1926); Quinn v. Hester, 135 Tenn. 373, 186 S.W. 459 (1916). However, it was held that a school district is "in the same class with counties and occupies the same legal status" for purposes of immunity from suit in Barrett v. City of Memphis, 196 Tenn. 590, 269 S.W.2d 906 (1954).

49. Baker v. Milam, 191 Tenn. 54, 231 S.W.2d 381 (1950); Davidson County v. City of Nashville, 190 Tenn. 136, 228 S.W.2d 89 (1950); State *ex rel.* Bales v. Hamilton County, 170 Tenn. 371, 95 S.W.2d 618 (1935); Knox County v. State *ex rel.* Nighbert, 177 Tenn. 171, 147 S.W.2d 100 (1940); Hamilton County v. Bryant, 175 Tenn. 123, 132 S.W.2d 639 (1939). *But see* State *ex rel.* Scandlyn v. Trotter, 153 Tenn. 30, 281 S.W. 925 (1926).

50. State *ex rel.* Smith v. City of Chattanooga, 176 Tenn. 642, 144 S.W.2d 1096 (1940).

51. See Prescott v. Town of Lenox, 100 Tenn. 591, 47 S.W. 181 (1898); Robertson v. Town of Englewood, 174 Tenn. 92, 123 S.W.2d 1090 (1939). Apparently for this reason, the statute authorizing municipal annexation without the vote of the area to be annexed provides for compulsory arbitration to settle the rights of affected governmental units, school districts and utility districts in the allocation or conveyance of their assets and liabilities. TENN. CODE ANN. § 6-318 (Supp. 1960).

the county in which it is located in both the county's governmental and proprietary capacities and therefore be properly subject to home rule proceedings. This question was not considered in *Perritt* and apparently was not raised. If it arises in the future, the instant case should not be considered as a controlling precedent.

IV. Legislative Apportionment

The urban voters of Tennessee entered the final phase of their struggle to secure judicial relief from the unconstitutional apportionment of representation in the state's legislature. Despite the express command of the state constitution that reapportionment be accomplished according to enumeration of voters every ten years,[52] apportionment of the Tennessee Legislature has not changed since 1901.[53] In 1956, the Supreme Court of Tennessee held that the rights of proportional representation guaranteed by the state constitution were denied to urban voters but the court declined to grant any relief under state law.[54] The court applied the traditional rule of judicial self-limitation and held that the enforcement of such constitutional provisions is left to the conscience of the legislative branch.[55] In *Baker v. Carr*,[56] the plaintiffs sought a declaration that the Reapportionment Act of 1901 and subsequent inaction of the Tennessee Legislature violate the equal protection and due process clauses of the fourteenth amendment of the United States Constitution. They alleged debasement of voting rights and denial of equal representation with resulting discriminatory and inequitable allocation of state taxes and expenditures. The remedy sought was either an injunction requiring state election officials to elect the next legislature from the state at large, or an injunction directing an election under an up-to-date apportionment formula. A special three judge federal district court followed the traditional view of judicial nonintervention and dismissed the suit. The court held first, that an election at large would be equally violative of the Constitution of Tennessee, which specifically requires that such elections be based upon counties and districts, and second, that the court could not practically direct and supervise statewide elections based upon newly

52. Tenn. Const. art. II, §§ 4-6.
53. The 1901 act is now Tenn. Code Ann. §§ 3-101 to -107 (1956).
54. Kidd v. McCanless, 200 Tenn. 282, 292 S.W.2d 40 (1956), *appeal dismissed*, 352 U.S. 920 (1956). Discussed in Sanders, *Constitutional Law—1957 Tennessee Survey*, 10 Vand. L. Rev. 1002 (1957).
55. Colegrove v. Green, 328 U.S. 549 (1956); People *ex rel.* Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930); Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1929); Latting v. Cordell, 197 Okla. 369, 172 P.2d 397 (1946).
56. 179 F. Supp. 824 (M.D. Tenn. 1959). The decision of Judge Miller upholding the court's jurisdiction and convening the three-judge court is reported at 175 F. Supp. 649 (M.D. Tenn. 1959).

apportioned election districts.

As this article is written, an appeal is pending in the United States Supreme Court[57] and the final chapter in this frustrating struggle for constitutional rights may be written during the next survey period. As yet, no workable judicial remedy has been advanced by which the courts can grant relief in this area, which is of course the primary reason for the courts' inaction.[58]

The court, in *Baker v. Carr,* was most impressed by the view of the Supreme Court of Tennessee that judicial relief could not be granted without completely disrupting, if not destroying, the government of the state.[59] It may be logically urged that the courts should merely adjudge the unconstitutionality of present apportionment and trust the legislature to then perform its duty and carry out reapportionment. In view of the long standing refusal of a majority of the legislature to follow their clearly defined constitutional duty, it can be understood why the court would hesitate to render a bare declaration of unconstitutionality with no clear remedy to be applied if the legislature ignores the court as it has ignored the constitution. However, this course has been followed successfully in some instances.[60] On the other hand, it now seems clear in Tennessee and many other states[61] that unlawful deprivation of proportional representation to urban citizens will continue indefinitely unless the courts can fashion a judicial remedy. If convinced of this, the Supreme Court of the United States may employ the same initiative and flexibility in its equity powers as has been used in the school segregation cases and thus fill this vacuum in our system of constitutional government.

V. DELEGATION OF LEGISLATIVE POWER

1. Administrative Delegation—Public Health.—Broad delegations of legislative power to a County Board of Health were challenged in

57. 28 U.S. L. WEEK 3358 (U.S. May 26, 1960).

58. Although usually characterized by such terms as "political question," "judicial self-limitation," or "non-intervention," one writer has candidly labeled the basis of these holdings as "judicial incompetence." Frank, *Political Questions,* in SUPREME COURT AND SUPREME LAW 36 (Cahn ed. 1954).

59. Kidd v. McCanless, *supra* note 54.

60. This procedure resulted in legislative reapportionment in Minnesota. Magrew v. Donovan, 159 F. Supp. 901 (D. Minn. 1958), 163 F. Supp. 184 (1958), 177 F. Supp. 803 (1959). It has also been undertaken by the New Jersey Supreme Court in Asbury Park Press, Inc. v. Woolley, 161 A.2d 705, 712 (N.J. 1960), in which the court stated: "A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a co-equal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature."

61. See Lewis, *Legislative Apportionment and the Federal Courts,* 71 HARV. L. REV. 1057, 1062 (1958).

Gamble v. State,[62] a criminal prosecution of a parent for violating a regulation of the board requiring polio immunization of school children. The enabling statute authorized the board to institute such regulations as it deemed necessary "for the protection of the public health."[63] In affirming the conviction of the defendant, the Supreme Court of Tennessee upheld this delegation over the argument that it lacked requisite standards to guide and limit the exercise of the delegated power. Many cases have similarly upheld broad delegations in matters pertaining to the public health and safety.[64] At least one court has candidly admitted that such delegations are "an exception to the general doctrine of constitutional legislation."[65]

The *Gamble* case also raised the question of delegation of power to impose criminal penalties. Section 14 of the enabling statute made violation of a rule of the County Board of Health punishable as a misdemeanor and set minimum and maximum penalties to be assessed upon conviction. Administrative creation of crimes or impositions of criminal penalties are generally forbidden,[66] but the legislature may authorize an agency to issue regulations, the violation of which the legislature declares to be criminal and for which it prescribes penalties to be assessed by a court.[67]

2. Referendum.—The validity of a private act which depended upon a favorable election by the voters of the affected municipality was involved in *Halmontaller v. City of Nashville*.[68] This was an action brought by firemen and policemen of the City of Nashville seeking back pay for a period during which the city had failed to put them on a five day work week along with other city employees. A 1949 private act[69] had directed that the City of Nashville hold a referendum to determine if its voters wished city employees placed on a five day week, in which event the Mayor and City Council were directed to carry out the voters' mandate. The election results were affirmative

62. 333 S.W.2d 816 (Tenn. 1960). The Home Rule Amendments to the Tennessee Constitution, article XI, section 9, now authorize precisely this type legislation, *supra* at 1026, but the private act involved here was enacted prior to these amendments.

63. Tenn. Priv. Acts 1909, ch. 339, § 7.

64. State v. Martin & Lipe, 134 Ark. 420, 204 S.W. 622 (1918); State *ex rel.* Anderson v. Fadely, 180 Kan. 652, 308 P.2d 537 (1957); Brodbine v. Inhabitants of Revere, 182 Mass. 598, 66 N.E. 607 (1903).

65. Board of Health of Weekhawken Township v. New York Cent. R.R., 4 N.J. 293, 72 A.2d 511 (1950).

66. Helvering v. Mitchell, 303 U.S. 391 (1938); People v. Grant, 242 App. Div. 310, 275 N.Y.S. 74 (1934); Board of Harbor Comm'rs v. Excelsior Redwood Co., 88 Cal. 491, 26 Pac. 375 (1891); Tite v. State Tax Comm'n, 89 Utah 404, 57 P.2d 734 (1936). See Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943).

67. United States v. Grimaud, 220 U.S. 506 (1911); People v. Blanchard, 288 N.Y. 145, 42 N.E.2d 7 (1942).

68. 332 S.W.2d 163 (Tenn. 1960).

69. Tenn. Priv. Acts 1949, ch. 705.

but firemen and policemen were not put on a five day week until almost two years after other city employees. The Supreme Court of Tennessee sustained the city's demurrer to the action, holding the act invalid as an unconstitutional delegation of legislative power to the will of the people.

The court replied principally on *Wright v. Cunningham*,[70] in which an amendment to an act prohibiting open grazing in a class of counties made the act applicable only to counties which "adopted" it by majority vote at a special popular election. This referendum provision was held unconstitutional. The *Wright* opinion had rejected holdings of other jurisdictions that the legislature may make approval by popular vote a contingency upon which legislation becomes effective and made the further sweeping declaration that "no legislative act can be so framed as that it must derive its efficacy from a popular vote."[71] The *Wright* case was subsequently distinguished and limited by *Clark v. State ex rel. Bobo*,[72] which upheld local liquor options. *Clark* limited the *Wright* holding to invalidating a referendum which decides whether or not a proposed statute will become law and held that *Wright's* prohibition does not apply to legislation which is so drawn as to be complete in itself and which is operative through the entire state with only its local effect left to popular vote in particular counties. Although it was not discussed, the *Halmontaller* holding is in accord with the distinction drawn by the *Clark* case since the enabling act was not self-executing but depended upon the municipal referendum to bring it into operation.

VI. MISCELLANEOUS

1. Effect of Partial Unconstitutionality of Statutes.—In *Perritt v. Carter*,[73] which is also discussed herein under "Home Rule," the Supreme Court of Tennessee upheld a private act authorizing the expansion of a school district after eliding a provision of the act making its effectiveness dependent upon the result of a referendum.[74] The court relied upon *Fountain City Sanitary Dist. v. Knox County Election Comm'n*,[75] where it had reached the same result for a private act expanding a utility district. The *Perritt* opinion does not discuss the fact that the statute upheld in *Fountain City* contained a separability clause while that in *Perritt* contained none. Prior cases have

70. 115 Tenn. 445, 91 S.W. 293 (1905).
71. 115 Tenn. at 468, 91 S.W. at 298.
72. 172 Tenn. 429, 113 S.W.2d 374 (1938).
73. 325 S.W.2d 233 (Tenn. 1959).
74. The doctrine of elision allows the upholding of a statute despite the invalidity of a portion thereof where a complete legislative 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).
75. 203 Tenn. 26, 308 S.W.2d 482 (1957).

held that the absence of a separability clause creates a presumption that the legislature did not intend the enactment to become effective without all its provisions,[76] and that in any case the doctrine of elision is to be applied with "hesitation."[77] Also, there was evidence in *Fountain City* that the election provision was inserted only in the event that it was held that sanitary districts were subject to the Home Rule Amendments, a fact not shown to have been in the record in *Perritt*. Apparently much school district legislation, such as bond issues, has been made dependent upon popular approval.[78] It may therefore be questioned whether the legislature intended the statute involved in *Perritt* to take effect without the prescribed approval by referendum.

2. *Formal Requirements for Repealing Acts.*—A series of private acts concerning the salary of the General Sessions Judge for Bedford County was before the Supreme Court of Tennessee in *English v. Farrar*.[79] The most recent act was construed as repealing by implication all prior enactments on the subject. However, this act did not refer expressly, in either its caption or body, to the prior enactments which were repealed by it. The court then sustained the act over the objection that it violated the provisions of article II, section 17, of the Tennessee Constitution concerning repealing acts.[80] It was established by prior cases that an act which merely repeals prior legislation by necessary implication from its provisions need not expressly refer to the title or substance of such prior enactments.[81] This constitutional provision applies only to an act which expressly purports to be a repealing act, which must then recite the title or substance of the prior acts which are repealed. This requirement is strictly applied once it is determined to be applicable.[82] The result is that repeals by implication, which are not favored in other contexts, are much more free of formal constitutional restrictions than are express repealing acts.[83]

76. Life & Cas. Ins. Co. v. McCormack, 174 Tenn. 327, 125 S.W.2d 151 (1939).
77. Mensi v. Walker, 160 Tenn. 468, 475, 26 S.W.2d 132, 135 (1930).
78. Kee v. Parks, 153 Tenn. 306, 315, 283 S.W. 751 (1926).
79. 332 S.W.2d 215 (Tenn. 1960).
80. "All acts which repeal, revive or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended."
81. Clark v. State *ex rel.* Bobo, 172 Tenn. 429, 113 S.W.2d 374 (1938); Brown v. Knox County, 187 Tenn. 8, 212 S.W.2d 673 (1948).
82. In Melvin v. Bradford Special School Dist., 186 Tenn. 694, 212 S.W.2d 668 (1948), an act captioned "To Abolish all Special School Districts in Gibson County" was held to be unconstitutional because it failed to expressly recite the title or substance of the prior acts creating the school districts.
83. The preceding provision of article II, section 17, requiring that all bills contain only one subject which shall be expressed in its title has been liberally construed, lest useful legislation be unnecessarily embarrassed. Goetz v. Smith, 152 Tenn. 451, 278 S.W. 417 (1925). See Note, *Constitutional Provisions Regulating The Mechanics Of Enactment In Tennessee*, 5 VAND. L. REV. 614 (1952).