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# Local Government Law -- 1957 Tennessee Survey

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# LOCAL GOVERNMENT LAW—1957 TENNESSEE SURVEY

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The substantial amount of litigation involving local governmental units, their officers and agents, continued during the period covered by this survey and if volume alone were any indication of significant growth and development in a given area of law this survey article would be of considerable importance. But, in general, the cases decided in this period draw on fairly well established legal rules and principles or upon legislation which has been designed to clarify existing problems. In view of this fact it does not appear justifiable to do much more than to present a summary of these decisions with brief observations as to those that depart from the established pattern.

The activity of the Eightieth General Assembly should also be noted at this point. During this session of the legislature some 411 Public Acts were passed and a large percentage of this number had some effect upon local governments in Tennessee. The number and range of these many acts are so great that no attempt will be made to comment on them separately. One can only fully appreciate the scope of the local governmental problems facing the legislative body by reading this flood of legislation. This is made understandable by the fact that governmental activity on all levels continues to increase and to touch each inhabitant of the state more and more often and in more and more places, coupled with the fact that local governments are creatures of the legislature[1] and the parent is faced not just with the problem of adjusting relationships between the local units and the people but with the more complex and difficult problem of settling the increasing number of disputes between their offsprings. Some of the most significant legislation in this area was devoted to the general problem of adjusting relationships between local governmental units.[2]

*Private Act v. General Act:* In *Algee v. State*[3] the Supreme Court of Tennessee affirmed a judgment of ouster entered by the Chancery Court of Lake County in a quo warranto action against certain members of the County Board of Education of that county. The question presented was whether or not a general statute providing for the

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1. 2 McQUILLIN, MUNICIPAL CORPORATIONS, § 4.04 (3d ed. 1949).
2. See, *e.g.*, Tenn. Pub. Acts 1957, c. 120 §§ 1-22; TENN. CODE ANN. §§ 6-3701 to -3723 (Supp. 1957). This legislation's stated purpose is to authorize and provide for the creation and functioning of metropolitan governments in counties with population in excess of 200,000 or more according to the Federal Census of 1950.
3. 290 S.W.2d 869 (Tenn. 1956).

qualifications of members of boards of education[4] should be applied in this case in view of the fact that a private act passed in 1929, applicable to Lake County alone, was still in existence, and under its provisions the defendants would have been qualified for office. The Supreme Court logically concluded that this private act violated article 11, section 8 of the Tennessee Constitution and under the general act defendants were ineligible to hold the office.

There were three other decisions during the survey period wherein the inquiry concerned the validity of private acts of the legislature when challenged by those who contended that a general law was applicable. In *Freshour v. McCanless*[5] the Supreme Court affirmed the judgment of the Cocke County Court sustaining a private act fixing the salary of the clerk of the general sessions court in that county. The court reiterated the oft cited proposition that nothing prohibits the legislature from enacting special legislation affecting a particular county or municipality in its political or governmental capacity so long as such act is not contrary to the provisions of a general law. Since there was no general law governing salaries of general session court clerks, it was proper for the legislature to provide for such by special act.

In *Memphis v. Yellow Cab, Inc.*[6] the Supreme Court found that a private act and an ordinance enacted by the city of Memphis pursuant thereto placing a $60 per year tax on taxi cabs for use of the street were unconstitutional and void. The primary defect again was that these acts operated to suspend a general law declaring that the licensing of motor vehicles belong exclusively to the state.

In *Shelby County v. Hale*[7] the Supreme Court climaxed a number of persuasive and enlightened opinions in this area when it held that a private act changing the salary of the commissioners of Shelby County was unconstitutional and void because it conflicted with article 11, section 9 of the Tennessee Constitution. The specific portion of this section violated was the second paragraph which is the sixth amendment, popularly known as the "Home Rule" amendment. The opinion in this case is a vital blow in support of the principle of home rule and gives the sixth amendment a scope and vitality in keeping with the spirit and intent of those who drafted and supported it.[8]

In reaching a conclusion that avoided the denuding effect of the interpretation given the amendment by the chancellors of Shelby

4. TENN. CODE ANN. § 49-209 (1956). This statute precluded members of the quarterly county court and other county officials from membership on county boards of education. It was stipulated in the case that defendants were members of the County Court of Lake County.
5. 292 S.W.2d 705 (Tenn. 1956).
6. 296 S.W.2d 864 (Tenn. 1956).
7. 292 S.W.2d 745 (Tenn. 1956).
8. *Id.* at 748.

County sitting in banc the Supreme Court relied upon two well established and logical rules of legislative construction. The first of these is that a statute should be construed so as to give effect to all of its provisions and the second is that where legislative intent is in doubt the history of the act or constitution should be examined to find the intent of the framers. This intent, when found, should be given effect. An application of these principles resulted in an interpretation of the sixth amendment which deprives the legislature completely of power to pass a special, local or private act having the effect of removing an incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected. This may well be a landmark decision and spells the end of "ripper bills" in this jurisdiction.

*Elections:* A decision based on a rather technical point in pleading was made by the Supreme Court in a case brought by the defeated candidate for the office of sheriff in the 1954 Jackson County election.[9] The successful candidate and the election commissioners, all defendants, filed demurrers to the petition for contest and the Supreme Court held that these demurrers should have been sustained. The petition was fatally defective in that it contained no allegation to the effect that the election was a valid one. Citing a prior opinion, the court stated that in order to maintain an election contest, the contestant must allege facts which show that the election was valid and that he received a majority of ballots cast by qualified voters.[10] As an alternative basis for the decision reversing the judgment below for contestant, the court pointed out that it is error to declare an election void where after hearing all the evidence it appears that there has been a valid expression of the people's will and one of the candidates has been elected. This result follows even though there have been irregularities.

In *Bohr v. Abercrombie*[11] the Supreme Court affirmed the Chancellor of the Chancery Court of Hamilton County who had sustained defendant's demurrer to a bill challenging the validity of an election wherein voters of a municipality had adopted a city manager-commission form of government. The court felt that all voters had been given an opportunity to vote; that, even though there was nothing in the record to establish compliance with Code section 6-1804 requiring election petitions to be signed by twenty per cent of legal voters, this evidenced at most an informality insufficient to invalidate the election;[12] and that, as the permanent registration of voters law[13] was in effect, the statute requiring special registration in the city-

9. Mathis v. Young, 291 S.W.2d 592 (Tenn. 1956).
10. Nelson v. Sneed, 112 Tenn. 36, 83 S.W. 786 (1903).
11. 292 S.W.2d 38 (Tenn. 1956).
12. TENN. CODE ANN. § 6-2008 (1956).
13. *Id.* § 2-301 (1956).

manager commission elections[14] had no substantial bearing on the outcome of the election and failure to follow it was not error. It was implied that this section is no longer a valid requirement of law.

In *State v. Town of Greenville*[15] petitioners were owners of property just outside the city limits of the town of Greenville. They brought their action to prevent annexation of their property to the town as a suit in the nature of quo warranto provided for by statute.[16] The decision involves primarily the construction of the annexation statute and the court felt that the legislature obviously did not have in mind applying all the provisions of the quo warranto statute to this annexation statute providing for an action "in the nature of quo warranto." Where the two statutes differ, the annexation statute can still be given effect and aggrieved property owners can file this suit even though quo warranto can only be brought by the Attorney General.

*Reapportionment:* In *Kidd v. McCanless*[17] the Supreme Court faced the very difficult and perplexing question of what to do when it appears that the General Assembly has failed to comply with the constitutional requirement that it reapportion the state every ten years. In this suit for a judgment declaring the 1901 apportionment statute unconstitutional the court reversed the chancellor's holding that the act was unconstitutional, stating that this must be the rule in the absence of a showing that there is a prior act to fall back on. Nowhere, of course, does the court indicate any sympathy or approval of the failure to act on the part of the legislature. The decision rather indicates a refusal by the court to enter an area so fraught with difficulty and so highly charged with politics. Relief from this situation can be obtained only through political processes and they are rendered less workable by the very failure of the legislature to discharge its responsibility.

The case presents an interesting discussion of the *de facto* officer doctrine pointing out that it cannot be relied on to maintain the present General Assembly because after it is once determined that the present body is not a *de jure* government, the members would have no color of authority and therefore could not serve as *de facto* officers.

In *Davidson County v. Harmon*[18] the Supreme Court affirmed the decree of Chancellor Steele of Davidson County sustaining a demurrer to a suit by Davidson County to enjoin construction of a five story building adjacent to the Nashville Municipal Airport. It was contended that this building would exceed the height permitted by the

14. *Id.* § 6-1805 (1956).
15. 297 S.W.2d 68 (Tenn. 1956).
16. TENN. CODE ANN. § 6-310 (Supp. 1957).
17. 292 S.W.2d 40 (Tenn. 1956).
18. 292 S.W.2d 777 (Tenn. 1956).

zoning code of Davidson County. In this case the state was engaged in erecting the building at the Central State Hospital to be used in the treatment of patients at that institution. The court considered afresh this question which has over the years stirred much controversy and supported by ample authority recommitted itself to the rule that a municipal or local zoning ordinance does not bind the state unless the state legislature has expressly so provided. The principle of sovereign immunity is well established in this area.[19]

*Distribution of Taxes:* A controversy between counties and cities over the right to part of the gasoline tax collected on the storage of aviation gas sold to the United States for use by the Air Force was decided in favor of the counties by Chancellor Steele of Davidson County and the Supreme Court affirmed his decree.[20] The case involved a construction of several sections of the Tennessee Code and general rules for construing statutes were followed.

CITIES

In *Witt v. McCanless*[21] certain taxpayers in Hamilton County challenged the validity of Chapter 113 of the Public Acts of 1955[22] on the ground that it violated article II section 17 of the Tennessee Constitution in that the act embraced more than one subject, the subject was not expressed in the title, and it purported to repeal, revive or amend former laws without proper reference to them and further violated article II, section 1 in that it attempted to delegate legislative authority to the courts. The Supreme Court affirmed the decree below sustaining the act holding that the statute had but one general object or purpose which was adequately expressed in the title and that the statute in conferring on the court authority to determine reasonableness of an annexation ordinance was not delegating legislative authority but merely recognizing a power that was necessarily committed to the courts.

The case of *Callahan v. Town of Middleton*[23] is discussed elsewhere in this issue.[24] In that case it was pointed out that a municipality cannot escape liability for the taking of private property within the corporate limits for a public purpose when it constructs or permits others to construct a public highway. It is no defense to show that the county and state were constructing a highway out of their own funds or in conjunction with the federal government. The fact that the city

19. 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.15 (3d ed. 1957).
20. Nashville v. Gibson County, 298 S.W.2d 540 (Tenn. 1956).
21. 292 S.W.2d 392 (Tenn. 1956).
22. TENN. CODE ANN. §§ 6-309 to -311 (Supp. 1957).
23. 292 S.W.2d 501 (Tenn. App. W.S. 1954).
24. Roady, *Real Property—1957 Tennessee Survey,* 10 VAND. L. REV. 1188, 1193-94 (1957).

is not contributing to the cost is immaterial. The city does not thereby lose its right in the streets nor can it escape liability for the taking of the private property for a public use. A number of cases are cited in support of this proposition.

A municipal ordinance of the City of Pulaski prohibiting the construction of underground gasoline storage tanks with a capacity in excess of 1,100 gallons was challenged successfully by an independent gasoline dealer. Reversing the decree below for the city, the Supreme Court said the ordinance was discriminatory and violated article I, section 8 of the Tennessee Constitution.[25] The defect arose from the fact that the ordinance permitted persons already using such tanks to continue doing so while prohibiting all others.

This is a most interesting decision. The court observed that the subject matter of this ordinance was well within the police power and apparently it was conceded that the ordinance would be valid as an initial proposition. But conceding all this, if the municipality decides to regulate in the interest of public safety, it cannot exclude some persons from engaging in business while allowing others to do so. There is considerable authority for this proposition but one must be careful to recognize, as the court did, that zoning regulations may be approached differently. The continuance of existing uses may be permitted in zoning ordinances, but if the reasonableness of a police regulation depends upon the prohibited use being dangerous to the community, where the danger is as real with respect to existing as it is to future uses it is not reasonable to permit one and prohibit the other.

The case is one of first impression on the point involved. The court cited authority from other jurisdictions[26] in support of the distinction made between zoning and other police regulations. But basically the test to be applied to all police ordinances is the same and where there is classification or different treatment awarded individuals there must be a reasonable basis for the classification.

Another example of an inquiry into the reasonableness of an exercise by a legislative authority of the police power is the case of *Starr v. Nashville Housing Authority*[27] wherein the court held that the Nashville Housing Authority had not acted arbitrarily and unreasonably in requiring the eliminations of petitioner's theater and office buildings as part of a slum clearance project. This result followed even though the buildings were structurally sound and not unsightly or unsanitary.

25. Consumers Gasoline Stations v. City of Pulaski, 292 S.W.2d 735 (Tenn. 1956).
26. *Id.* at 737.
27. 145 F. Supp. 498 (M.D. Tenn. 1956).

*Contract Liability:* An interesting opinion during the survey period supports the general proposition that a city is liable for breach of its valid contractual obligations as it well should be.[28] The City of Springfield, proceeding under the authority granted in the Industrial Building Revenue Bond Act of 1951,[29] contracted with plaintiff for the purchase of certain real estate conditioned upon bonds being voted and the city being able to enter into lease agreement with a manufacturer at rental sufficient to pay the bonds. This condition was satisfied but the manufacturer later backed out on his agreement to lease. This did not excuse the city from performance of its obligation to plaintiff. While industrial development is desirable and beneficial, city officials are well advised to proceed with caution in committing the city by contract in the business of attracting industry. Sometimes the price is too high.

*Tort Liability:* There were a number of decisions during the survey period wherein the tort liability of municipalities was in issue. These decisions are discussed elsewhere in this survey[30] and no attempt to analyze them will be made here. In *Murray v. Nashville*[31] the court of appeals held that a plaintiff who crossed a street at a point other than a crosswalk in violation of a city ordinance was guilty of negligence per se and could not recover for injuries sustained when he slipped and fell in a shallow, unmarked depression in the street. In *Chattanooga v. Rogers*,[32] the Supreme Court affirmed a judgment in favor of the administrator of a deceased workman who was electrocuted when a crane came in contact with city's uninsulated power line. The court held that the question of the city's negligence was for the jury.

For years now the number of decisions holding cities liable in tort for the so-called "sidewalk injuries" has been increasing.[33] Some jurisdictions have reached the point of imposing almost absolute liability on the city for such injuries.[34] *City of Winchester v. Finchum*[35] portrays this general tendency to impose liability. In this case a judgment for plaintiff who had been injured when the bicycle she was riding on the sidewalk struck a broken slab of concrete causing her to be thrown to the sidewalk. The Supreme Court held that the question of defendant's negligence in failing to repair the defective sidewalk was for the jury. The city holds its public ways and side-

28. Springfield Tobacco Redryers Corp. v. City of Springfield, 293 S.W.2d 189 (Tenn. App. M.S. 1956).
29. TENN. CODE ANN. §§ 6-1701 to -1716 (1956).
30. See Wade, *Torts—1957 Tennessee Survey*, 10 VAND. L. REV. 1218 (1957).
31. 299 S.W.2d 859 (Tenn. App. M.S. 1956).
32. 299 S.W.2d 660 (Tenn. 1956).
33. 19 McQUILLIN, MUNICIPAL CORPORATIONS §§ 54.01-.04 (3d ed. 1950).
34. See Swenson v. City of Rockford, 136 N.E.2d 777 (Ill. 1956).
35. 301 S.W.2d 341 (Tenn. 1957).

walks in a proprietary or corporate capacity and cannot divest itself of its duty to keep such walks reasonably safe by an ordinance imposing upon each property owner the duty to construct and maintain them. The case is indicative of the strong tendency to find liability. For, while plaintiff was riding on the sidewalk in violation of an ordinance prohibiting such use and was, therefore, guilty of negligence per se, the court said this did not prevent a recovery in the absence of a showing that her negligence was the proximate cause of the injury. In this age city officials would do well to insure against such liability.

SCHOOLS

*Teacher Tenure:* While under the teacher tenure law a Board of Education retains the right and authority to transfer teachers within the system for the "good of the schools" and can effect such transfer by a majority vote without approval of the Superintendent, this authority to transfer is not unlimited. If on the facts, a Board has abused its authority and acted in an arbitrary and unreasonable manner, its action is subject to judicial review and the court will not allow the purpose of the tenure statute to be defeated by the arbitrary action of a Board of Education. In *State v. Yoakum*[36] the injunction restraining the Claiborne County Board of Education from transferring approximately eighty teachers who had acquired tenure status to remote places in some instances eighty miles from their homes contrary to the recommendation of the Superintendent was affirmed.

*Teacher Salaries:* The invalidation of the General Education Bill of 1951 was a blow to the financial expectations of many teachers and this was particularly true if they had in some way been deprived of the benefits of the act of 1949. Certain teachers in the public schools of McMinn County sued to recover the same amount of salaries for employment during 1949-51 as they received during 1948-49. Their contention was that the attempted repeal of the 1949 education bill was ineffective due to the invalidation of the 1951 act and that according to the 1949 act current salaries should not be less than the amount received during 1948-49 plus the difference between the state salary schedule for the prior year and the schedule set by the Board of Education for the next biennium, notwithstanding the fact that a contract for the minimum salary provided by the law had been signed by each of the teachers. The court held that the prior valid act of 1949 was in full force and was not effected by the specific provision for repeal in the invalidated act of 1951. Since the contract signed by the teachers incorporates general law, the act of 1949 gov-

36. 297 S.W.2d 635 (Tenn. 1956).

erns the minimum amount of salaries notwithstanding a contract provision to the contrary.[37]

MISCELLANEOUS

*Boards and Commissions:* In *Chanaberry v. Gordy*[38] the court held that the action of the Knox County Beer Board in revoking a beer permit at a meeting not attended by the holder, and after the holder had been advised no action would be taken at the meeting was clearly arbitrary. It further appeared that one member of the board voted for the revocation even though he had not heard the evidence. In view of a stipulation by the parties, the court said that the matter should have been referred back to the Board for final action.

In *Jones v. Sullivan County Beer Board*[39] the court affirmed the revocation of a wholesale beer permit because the holder sold beer at retail on premises within 2,000 feet of a church in Sullivan County in violation of a statute and because it found this created a private and public nuisance. The action of the Beer Committee was challenged on the basis that one of the committeemen was not properly elected. The court held that on the facts the Beer Committee of Sullivan County was at least a *de facto* committee and the election of its member could be challenged only in the quarterly court directly, not collaterally as in this proceeding.

*Compensation of Attorneys:* In a somewhat novel opinion the court decided that a county was not liable for the attorney fees claimed by those who represented a temporarily appointed county judge in quo warranto proceedings instituted against him by the district Attorney General. The court admitted that they would like very much to see the attorneys compensated but since there was no statute imposing liability in such a case on the county, the county did not owe the money and had no power to pay the claim.

The question of just when and under what conditions a municipal corporation is liable and can pay for attorney fees incurred by officials who are forced to defend their acts or their right to office is a knotty one and it is difficult to rationalize all of the cases. The test often is in terms of a question as to the exact nature of the interest of the municipality in the outcome of the suit. Where the suit is against the individual officer in his official capacity or arises out of the performance by him of some official power, right, duty, or obligation attaching to the office, it is generally held that the municipality may compensate his attorneys. But where the suit is viewed as directed against

37. McMinn County Board of Education v. Anderson, 292 S.W.2d 198 (Tenn. 1956).
38. 292 S.W.2d 18 (Tenn. 1956).
39. 292 S.W.2d 185 (Tenn. 1956).

the officer as an individual, then it is generally held that the municipality has no obligation to pay his attorneys and, in fact, a payment would likely be held to involve the expenditure of funds for other than a "public purpose." In this case the court views a quo warranto action as essentially one against defendant officer as an individual and even though the county may receive some benefit from the services of attorneys defending, the county is not liable for such services.

Attorneys who had performed services for local governmental officers also came off second best on their claim for compensation in another case decided during the survey period.[40] In this decision the Supreme Court construed chapter 183 of the Private Acts of 1937 as conferring on the County Commission of Knox County authority to control the issuance and revocation of beer permits in Knox County. In this action for declaratory judgment the court gave added emphasis to its holding in Troutman v. Crippen[41] where it had pointed out the broad power of the legislature over the reorganization of county government by stating in effect that the 1937 Private Act was effective in transferring all power formerly held by the quarterly court "except with reference to schools and the constitutional matters provided for in the Quarterly Court."[42] But while the decision affirmed the exercise of this power by the Knox County Board of Commissioners, it denied that the Board had authority to employ special counsel at the expense of Knox County to represent it in the declaratory judgment action. This result was dictated by a statute which provided the method to be used by boards and commissions in Knox County in employing counsel. Since this method was not followed, the employment was beyond the authority of the Board and Knox County is not liable for their services.

*Pensions*: As a general rule, laws creating the right to pensions are liberally construed so as to carry out the intent and policy of legislative bodies in adopting them. During the survey period the Supreme Court had occasion to construe the comprehensive pension and retirement ordinance of the city of Memphis and in a decision affirming the Chancery Court of Shelby County the above rule was applied, and a retiring member of the city police force was found to be entitled under the ordinance to credit for service in the armed forces during World War II even though he had accepted employment as a deputy sheriff for a twenty-nine day period between his resignation to enter the service and the actual date of his commission.[43] One cannot quarrel

40. Bayless v. Maynard, 292 S.W.2d 774 (Tenn. 1956).
41. 186 Tenn. 459, 212 S.W.2d 33 (1937).
42. Bayless v. Maynard, 292 S.W.2d 774, 776 (Tenn. 1956).
43. Raney v. Board of Administration of the Retirement System of Memphis, 298 S.W.2d 729 (Tenn. 1957).

with the rules applied nor with what appears to be a just and equitable result but, in this case, the Board of Administration of the Retirement System had excluded the period in computing applicants length of service, and as a general proposition courts are inviting trouble when they substitute their judgment for that of an administrative agency on such matters.