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Local Government Law

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LOCAL GOVERNMENT LAW

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This summary is limited to cases decided in the Court of Appeals and Supreme Court of Tennessee, reported during the last year, and dealing with some phase of that body of law which embraces Municipal Corporations, Counties, Officers, Elections and related topics fitting into the general classification of Local Government Law. No attempt has been made to consider Acts of the 1953 General Assembly which may have affected this field, as most of the legislation in this field is local in nature.

I. Municipal Corporations

A. *Nature of Municipal Corporation*

The nature of a municipal corporation was considered by the Supreme Court in the case of *Hamilton County v. Town of East Ridge.*[1] The case arose when Hamilton County sought to prevent the Town of East Ridge, located within the county, from collecting the beer tax which is permitted to incorporated municipalities under Chapter 37, Section 1, of the Public Acts of 1951.[2] The Town of East Ridge had origmally been chartered by Private Act of 1921, which created a governing body of the town and granted to it those powers generally employed for the promotion of the health, comfort and prosperity of the citizens as a whole, and also the power to levy certain taxes and hold property. In 1933 the charter was amended to withdraw from the town the right to maintain a fire department and the right to exercise certain police powers. The Court held that the amendments did not operate to destroy the existence of the municipal corporation.

The Tennessee Court, in the early case of *Nichol v. Nashville,*[3] discussed the power of the legislature to create municipal corporations and stated that such corporations could be created for "the good government of the town, and for the promotion of the health, comfort, and prosperity of its citizens. . . ."[4] The power of the legislature to amend the charter so as to limit or extend the powers of the municipality is well established.[5] Since some of the public powers were left

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1. 249 S.W.2d 895 (Tenn. 1952).
2. Tenn. Code Ann. § 1051.10 (Williams Supp. 1952).
3. 28 Tenn. 251 (1848).
4. 28 Tenn. at 264.
5. Smiddy v. Memphis, 140 Tenn. 97, 203 S.W. 512 (1918); Governor v. McEwen, 24 Tenn. 240 (1844).

to the corporation in the *East Ridge* case, it appears eminently reasonable that the act of the legislature in withdrawing from the town some of the powers previously delegated to it should not operate to destroy the corporation altogether.

B. *Tort Liability*

Two recent cases in the Supreme Court of Tennessee have dealt with the tort liability of municipal corporations. Both cases were decided on demurrer, and both raised the issues of (1) when is a municipal activity governmental as opposed to proprietary in character, and (2) what kind of activity on the part of a municipality is sufficient to constitute a nuisance.

Tennessee follows the well-established rule that a municipal corporation is immune from liability for negligent torts committed by its officers or agents while in the exercise of a governmental, as distinguished from a proprietary, function of the municipality.[6] Tennessee also recognizes the rule that this immunity does not attach, even with respect to governmental functions, if the acts of the municipality are such as to constitute a temporary or permanent nuisance.[7]

In the first of the two cases, *Johnson v. City of Jackson*,[8] a policeman, while riding upon a motorcycle in the process of checking city parking meters for violations, ran into and injured the plaintiff. The declaration alleged that the policeman had defective eyesight which had not been corrected by proper glasses and that the motorcycle had a defective windshield, both of which facts were known to the city authorities. The Court had no difficulty in finding that the checking of parking meters is a governmental function. It quoted with approval the phrase "mechanical policemen" in describing the function of the devices and reasoned that the checking of these meters by a policeman is a part of the function of regnlating and policing traffic on the streets and is clearly governmental in character.[9]

The second case, *Vaughn v. City of Alcoa*,[10] gave the Court more difficulty. Here the claim arose when a lifeguard at a city-owned-and-operated swimming pool negligently allowed a young child, who was using the pool as a paying customer, to drown. The city advertised its

6. Conelly v. Nashville, 100 Tenn. 262, 46 S.W. 565 (1898); Davis v. Knoxville, 90 Tenn. 599, 18 S.W. 254 (1891). For the rule generally, see 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.01 (3d ed. 1950); PROSSER, TORTS 1066 *et seq.* (1941); 38 AM. JUR., *Municipal Corporations* § 572 (1941).

7. Knoxville v. Lively, 141 Tenn. 22, 206 S.W. 180 (1918); Nashville v. Mason, 137 Tenn. 169, 192 S.W. 915, L.R.A.1917D 914 (1917); Knoxville v. Klasing, 111 Tenn. 134, 76 S.W. 814 (1903); Chattanooga v. Dowling, 101 Tenn. 342, 47 S.W. 700 (1898).

8. 250 S.W.2d 1 (Tenn. 1952).

9. 250 S.W.2d at 2.

10. 251 S.W.2d 304 (Tenn. 1952), 22 TENN. L. REV. 1068, 6 VAND L. REV. 944 (1953).

pool and invited nonresidents of the city as well as residents to use it; a fee was charged, and the city realized a profit from the operation. In ruling that the city was immune from liability because the pool was a governmental function, the Court recognized the confusion and contradictions of the various jurisdictions on the subject.[11] Although the Court quoted from its own cases and from those of several other jurisdictions, no very clear test or rule of determination as to character of a function is evident in the case. The effect of the decision seems to be to extend the classification of "governmental" to another fact situation and thus to broaden to this extent the immunity of a municipal corporation for its torts.

The Court had little difficulty in refusing to find a nuisance in either of the cases. In the *Johnson* case, the Court said that it had already held that it was nothing more than negligence for a city to employ a policeman known to be unsuited for his job,[12] and it rejected this ground without further comment. The Court then reasoned that, if it were mere negligence and not a nuisance for a city knowingly to employ a policeman who was unsuited for his particular task, then it logically followed that it was not a nuisance for a city knowingly to use a machine which was unsuitable.

In the *Vaughn* case, the Court applied the rule that the city must have done some affirmative act before it could have committed a nuisance. The mere construction of the pool, without hidden or apparent defects, would not be such an act. The Court disposed of a claim based upon the theory of attractive nuisance by stating that as no trespass was involved the doctrine could not apply. This ruling suggests the interesting possibility that a city might owe a higher duty to a trespasser than to a licensee.[13]

C. *Power to Grant Exclusive License or Franchise*

The City of Berry Hill, a suburb of Nashville with a population of 1246, adopted an ordinance providing that no more than one retail liquor license should be issued for each 5000 persons or fraction thereof residing within the city. One license was issued. Petitioner, in *Landman v. Kizer*,[14] sought to obtain the necessary certificate from city officials to enable him to obtain a license. When his request was refused because of the ordinance, petitioner challenged the validity of the ordinance on the ground that it created a monopoly in violation of Article I, Section 22, of the State Constitution.[15]

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11. 251 S.W.2d at 306.
12. Combs v. Elizabethtown, 161 Tenn. 363, 366, 31 S.W.2d 691 (1930).
13. This possibility is suggested in case note, 22 TENN. L. REV. 1068, 1070 (1953).
14. 255 S.W.2d 6 (Tenn. 1953).
15. "That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."

In denying the petition, the Court recognized the fact that in effect the licensing ordinance did tend to create a monopoly. It pointed out, however, that this effect was incidental to the real purpose of the ordinance, which was to protect the health, safety and morals of the people by stringent regulation of the liquor traffic, which traffic is not a matter of common right, but is illegal without the grant of a special privilege. The real purpose of the ordinance is a recognized, legitimate and highly desirable, or even necessary, exercise of the police power, and the anti-monopoly Article in the Constitution was not intended to deny a sovereign the right to exercise necessary police power for the protection of the people.

The *Landman* case is unusual only in that the ordinance in question resulted in the issuance of a single license. The Court had previously upheld an ordinance of the City of Dyersburg which limited retail licenses to five.[16] That decision, however, turned primarily upon the authority of the municipality under its charter, rather than upon the anti-monopoly issue. The *Landman* case followed the settled rule that the anti-monopoly clause will not invalidate a monopoly created incidental to legitimate exercise of public power for a public purpose.[17] The decision is also in accord with the principle that a grant of an exclusive license or franchise does not offend the anti-monopoly clause unless the right involved is a matter of common right.[18]

D. *Zoning Power*

The limitations upon the power of a municipal corporation to adopt zoning regulations were considered by the Supreme Court in *Henry v. White*.[19] In this case, the legislature had by private act empowered the Knoxville city council to enact zoning regulations, subject to the provision that all such regulations should be uniform for each class or kind of buildings throughout each district. The city council had then adopted an ordinance which prohibited the use of any building within a certain district for garage purposes. Later the ordinance was amended to permit garages to be operated on United States highways within said district. In holding that the amendment was invalid, the Court pointed out that zoning ordinances of a municipality must satisfy at least three conditions: (1) the legislature must have granted to the city the power to adopt zoning regulations; (2) the regulations, when

16. State *ex rel.* Veal v. Dyersburg, 184 Tenn. 1, 195 S.W.2d 11 (1946).
17. Checker Cab Co. v. Johnson City, 187 Tenn. 622, 216 S.W.2d 335 (1948); Noe v. Morristown, 128 Tenn. 350, 161 S.W. 485, Ann. Cas. 1915C, 241 (1913); Leeper v. State, 103 Tenn. 500, 53 S.W. 962, 48 L.R.A. 167 (1899). In the first two cases cited, the Court held that the particular exercise of power did not reasonably serve a proper public interest and struck down the action of the municipalities.
18. Frankfort Distillers Corp. v. Liberto, 190 Tenn. 478, 230 S.W.2d 971 (1950); Memphis v. Memphis Water Co., 52 Tenn. 495 (1871).
19. 250 S.W.2d 70 (Tenn. 1952).

enacted, must not be unreasonable or arbitrary, although mere discrimination between properties or detriment to individual property, if it is rested upon some reasonable basis, will not be fatal; and (3) the regulations must not conflict with the legislative act which grants the power. This third condition is really a corollary of the first; that is, power granted by the legislature to the city must be exercised in strict conformity with the enabling statute, else the city is actually operating without authority. It was this third requirement which the ordinance in question failed to meet, since to permit a garage on one street within a district but not upon other streets in the same district, no matter how reasonable the basis for distinction, does not make the regulation uniform throughout the district.

Essentially the same principles had already been enunciated and discussed in a very clear opinion in *State* ex rel. *Lightman v. Nashville.*[20] In the *Lightman* case, the zoning action of the city was struck down because the city failed to follow the procedures outlined in the grant of authority by the legislature. It would seem that the rule would apply with even greater force where a substantive deviation or conflict exists, as was true in the *Henry* case.

The *Henry* case suggests the need for extreme care in drafting legislation delegating zoning powers to a municipality, lest even the most reasonable ordinances or regulations fail to meet the test of conformity to the enabling act.

E. *Liability for Back Pay to Wrongfully Suspended Employee*

In a case of first impression in Tennessee, *Wise v. Knoxville,*[21] plaintiff, a policeman in the City of Knoxville, was wrongfully suspended by the city. Upon his reinstatement pursuant to court order, he sued the city for back salary. During the period of the suspension, plaintiff had earned substantial income at other employment.

The Court ruled that in the case of an employee of a municipal corporation, as distinguished from an officer of the corporation, the rule as to private employment applies; that is, a wrongfully discharged employee is required to minimize his damages, and the employer is entitled to credit outside earnings received by the employee against the amount of back pay owed. This appears to be the first adjudication in Tennessee on the point. Though the Court stated that the rule is well settled,[22] the decisions in other jurisdictions are conflicting, and many of them fail to consider the distinction between employee and officer.[23] The Tennessee Court did not rationalize its ruling on this point; however, the decisions relied upon seem to proceed upon the

20. 166 Tenn. 191, 60 S.W.2d 161 (1933).
21. 250 S.W.2d 29 (Tenn. 1952).
22. 250 S.W.2d at 31.
23. See cases collected in Note, 150 A.L.R. 100 (1944).

theory that the municipal employee is paid under a contractual arrangement and that the rule as to mitigation of damages for breach of private contract applies.

Having held that an employee cannot collect his full back pay without deduction for outside earned income, the Court then stated that the rule is different in the case of an officer of the municipality. In the light of the Court's determination that the policeman in question was an employee rather than an officer,[24] this statement appears to be dictum. However, it has already been adjudicated in Tennessee.[25]

II. COUNTIES

A. *Application of Laws by Population Classification*

In *Peterson v. Grissom*,[26] a private act of the legislature was attacked on the ground that it established an unreasonable population classification and, therefore, violated Article XI, Section 8, of the State Constitution.[27] The act applied to counties having a population of not less than 19,200 nor more than 19,300 according to the 1950 or any subsequent federal census. The population figures made the act applicable to Henderson County only. The act changed the system of road maintenance in the county and established a road commission and a position of road supervisor to be filled by the commissioners. The Supreme Court upheld the validity of the population classification, not because it was inherently reasonable, but because the act affected the county in its governmental capacity. The Court reasoned that, since the legislature could properly enact laws affecting a single county in its governmental capacity, the fact that the county to be affected was identified by an arbitrary population classification could not invalidate the act.

The proposition that the legislature may pass laws affecting single counties in their governmental capacities has long been settled in Tennessee.[28] That the act affected the county in its governmental capacity was conceded; therefore, the result reached is in accord with established principle.

The act was also attacked on the ground that it violated Article XI,

24. This issue is discussed in detail in a subsequent section of this summary, see text to note 53 *infra*.
25. Memphis v. Woodward, 59 Tenn. 499 (1873).
26. 250 S.W.2d 3 (Tenn. 1952).
27. "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of the law. . . ."
28. Loring v. McGinness, 163 Tenn. 543, 44 S.W.2d 314 (1931); Stokes v. Dobbins, 158 Tenn. 350, 13 S.W.2d 321 (1929).

Section 17, of the State Constitution. This issue is discussed in a later section of this summary.[29]

A different aspect of population classification was presented in the case of *Wilson v. Williams*.[30] By Chapter 475, Private Acts of 1951, the legislature made certain changes in the system of road maintenance in Morgan County. The act was made applicable to Morgan County by population classification, but it was based upon the 1940 census or any subsequent census. Here the contention was that the use of the 1940 census, rather than that of 1950, made the act arbitrary, vicious and capricious. The Court rejected this argument and held that the legislature may use any standard which will clearly indicate the county to which the act is to apply and makes such provision that other counties may come within its terms. The case is unusual in its facts in that, for some not apparent reason, an outdated census was used, but it is no departure in principle from existing law in Tennessee.[31]

B. *Taxation — Power of Legislature to Validate County Tax Unauthorized at Time of Enactment*

In 1949 Rhea County levied a total tax of $4.27 per $100.00 valuation of property. Of this sum, $3.42 was for special levies previously authorized by the legislature. A total of $0.57 was for special levies not authorized by the legislature, and $0.28 was for general county purposes. The general law[32] limits the counties to a maximum levy of $0.40 for general county purposes. Thus, even if $0.12 of the unauthorized special levy were treated as a part of the permissible general purpose levy, a remainder of $0.45 was unauthorized. By Chapter 276, Private Acts of 1951, the legislature purported to validate the 1949 tax for Rhea County. In *Cincinnati, N.O. & T.P. Ry. v. Rhea County*,[33] complainant railroad brought suit attacking the validating act on the grounds that it violated Article I, Section 20, of the State Constitution[34] and that the legislature had no power to validate an action of a county court which was void at the time the action was taken.

The Court admitted that $0.45 of the levy was void at the time the tax was adopted. It rejected the contention that the validating act violated the constitutional provision against retrospective laws on the ground that no one has a vested interest in freedom from taxation and that no contractual right was involved, so that the constitutional

29. See text to note 58 *infra*.
30. 250 S.W.2d 73 (Tenn. 1952).
31. Hall v. State, 124 Tenn. 235, 137 S.W. 500 (1911).
32. TENN. CODE ANN. § 1045.1 (Williams 1934).
33. 250 S.W.2d 60 (Tenn. 1952).
34. "That no retrospective law, or law impairing the obligations of contracts, shall be made."

inhibition did not apply.[35] Since the legislature could have authorized the county to levy such a tax in 1949, it was permissible for the legislature to validate the levy in 1951.

The rule that the legislature has the power to validate laws which it could have authorized in the first instance may well be sound as to tax matters. However, the decision in the case offers encouragement to county courts to exceed their taxing authority, with the prospect of obtaining legislative validation at a subsequent time. Retroactive taxation gives rise to much economic uncertainty, even when restricted to the federal level. When it is made available to counties, serious abuses may easily arise. It is submitted that here may be a proper field for future constitutional change.

C. *Eminent Domain — Liability of County for Additional Damages not Anticipated by Parties at Time of Settlement*

In *Carter County v. Street*,[36] the county had condemned land for highway purposes. A report of a jury of view was accepted by the parties, and a consent order was entered fixing the damages. Certain questions of construction and intent arose in the case, but the issue of significance to local government law concerned the liability of the county for additional damages, because the excavation and filling done in building the highway caused slides which rendered useless an additional acre and a half of the condemnee's land. The Court of Appeals held that the landowner was not concluded by the order in the condemnation suit but was entitled to recover additional damages for the additional acreage ruined.

The rule is established in Tennessee that all injuries necessarily incident to the taking of land in condemnation proceedings are presumed to have been included in the assessment and award of damages, and the landowner is precluded from making an additional recovery.[37] However, in the *Carter County* case, neither party had reason to anticipate the additional damages, and even if their possibility had been considered, it would have properly been rejected as speculative and conjectural. In such a case, the rule is that additional land rendered useless amounts to an additional taking; the proper remedy in such case is by further proceedings in condemnation, rather than by action of trespass, and the statute of limitations applicable to condemnation

35. Article I, Section 20, of the Constitution has been interpreted to mean that "No retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made." Hamilton County v. Gerlach, 176 Tenn. 288, 292, 140 S.W.2d 1084, 1086 (1940). The validity of retroactive taxes at the federal level is firmly established. Manhattan General Equipment Co. v. Commissioner, 76 F.2d 892 (2d Cir. 1935), *aff'd*, 297 U.S. 129, 56 Sup. Ct. 397, 80 L.Ed. 528, *rehearing denied*, 297 U.S. 728 (1936).

36. 252 S.W.2d 803 (Tenn. App. E.S. 1952).

37. Newberry v. Hamblen County, 157 Tenn. 491, 9 S.W.2d 700 (1928).

proceedings will control.[38]

D. *Constitutionality of County "Tort Claims Act"*

By Chapter 253, Private Acts of 1951, certain counties, particularly Davidson, are authorized to compensate persons damaged by torts of county employees committed while they are performing governmental functions of the county. The act in effect sets up the county court as a prototype of the State Board of Claims and gives it the right to appropriate county funds to compensate injured persons who would otherwise be barred by the rule of governmental immunity. The act does not purport to remove the cloak of immunity but simply permits the county court, if it sees fit, to compensate the victim of the tort. The action of the county court is final, there being no provision for appeal or review.

The act was challenged in *Griffin v. Davidson County*[39] as being invalid class legislation under Article XI, Section 8, of the State Constitution.[40] This contention was rejected for the reason that the act affects the county in its governmental capacity, and therefore the class doctrine does not apply.[41]

The act was also attacked in the same case on the ground that it provided for a gift or gratuity from public funds. The Court refused to rule on this argument, because the act does not actually direct payment, but simply authorizes it, and there was no showing that a payment would actually be made. Apparently, this ground of attack is premature and must be presented only after an actual award has been made or authorized by the county court. However, the Court indicated what the result of such a contest might be by stating that, if counties could pay liability insurance premiums from public funds to cover cases where the immunity doctrine would protect the county, then the counties could make direct compensation to liability claimants.

E. *County Trustee's Right to Charge Commission on Special Federal School Fund*

Since 1947, the Atomic Energy Commission had paid to Anderson County's board of education about $2,000,000.00 for use in operating and maintaining a school system at Oak Ridge. The school board turned this money over to the county trustee as it was received, and he held it in a special account to be disbursed for the Oak Ridge schools. Anderson County claimed that the trustee was entitled to collect a 1% commission[42] for handling this fund, and the board of education disputed the claim. This commission, amounting to about $117,000.00, would

38. Central Realty Co. v. Chattanooga, 169 Tenn. 525, 89 S.W.2d 346 (1936).
39. 250 S.W.2d 554 (Tenn. 1952).
40. See note 27 *supra*.
41. See note 28 *supra*.
42. Under TENN. CODE ANN. § 1621 (Williams 1934, Supp. 1952).

inure to the benefit of the county general fund, as the trustee had already received his maximum salary under the law. The trustee, in *Larue v. Anderson County*,[43] interpleaded the county and the board of education, and the Court held that the commission could not properly be charged by the trustee.

The Court had no difficulty in reaching the conclusion on both reason and authority. The funds paid by the United States to the board of education and by the board entrusted to the trustee are not within any of the classes of monies for which the statute provides that the trustee may charge a fee for handling, and the Tennessee Code further provides that no county officer may demand or receive a fee except as expressly provided by law.[44] The principle which the case confirms is that the commission of the county trustee is limited to county revenue which is received and disbursed by him. Money which some other governmental authority turns over to the county or one of its agencies to use in making payments which otherwise the county would have to make — that is, in a sense, intergovernmental gratuities — will not be permitted to find its way into the county general fund by way of the trustee's fee. The rule and the reasons therefor had already been clearly stated by the Court in *State v. Miner*.[45]

The county trustee filed the suit in good faith, and all parties conceded that he should not have to bear the expense personally. The board of education sought to have the county held liable for the attorney's fee incurred by the trustee. The Court ruled that, in the absence of authority, it could not hold a county liable for fees of opposing counsel, even if the case were prosecuted by consent. The particular application of the rule is new, but the principle is stated in an early Tennessee case cited by the Court.[46]

F. *Salaries of County Officials as Affected by Anti-Fee Law*[47]

In *Gregory v. Trousdale County*[48] the plaintiff sued the county to fix his compensation as clerk of the circuit and other courts of the county. As the case finally reached the Supreme Court, the issue was as to the constitutionality of certain resolutions of the Quarterly Court of Trousdale County which purported to fix the compensation of the clerk. The Court held, without elaboration, that the resolutions were in conflict with the anti-fee law of the State and were therefore void. If the legislature cannot suspend the general law for the benefit of a particular county, it seems too clear for argument that a county court may not do so.

43. 253 S.W.2d 736 (Tenn. 1952).
44. TENN. CODE ANN. § 10655 (Williams 1934).
45. 176 Tenn. 158, 138 S.W.2d 766 (1939).
46. Holtzclaw v. Hamilton County, 101 Tenn. 338, 47 S.W. 421 (1898).
47. TENN. CODE ANN. § 10725 *et seq.* (Williams 1934, Supp. 1952).
48. 254 S.W.2d 753 (Tenn. 1953).

A wholly different problem in the same field was presented in *State v. Hobbs.*[49] After enactment of the anti-fee bill in 1921, several private acts were passed affecting the pay of the Clerk and Master of Lawrence County. Pursuant to these acts, various incumbents of the office of county judge paid to the clerk and master sums different from the amounts which he would have received under the general law. Although the declaration alleged that the private acts were unconstitutional and that all concerned knew this to be true, no proceedings seem to have been brought to have this fact adjudicated. Instead this suit was brought to recover from the defendant the sums alleged to have been overpaid to him.

Several procedural difficulties and the statute of limitations affect the case in part; but the holding establishes the rule that, when money is paid out as salary by the proper county officials under an act which has not been declared invalid by competent authority, and where no facts to show collusion or bad faith are specified, no action will lie to recover the salary paid. This suggests that where a salary bill is thought to be unconstitutional, it is imperative that action to establish this fact be taken without delay, since county monies paid out pursuant to such bill may not be recoverable.

G. *Compensation of County Judge for Services other than as Judge*

By private act, the legislature fixed the salary of the County Judge of Scott County for his services as financial agent and chief accounting officer of the county. In *Chambers v. Marcum,*[50] the validity of the act was challenged on the ground that it suspended the general law for the benefit of an individual in violation of Article XI, Section 8, of the State Constitution. The general law referred to is section 771: "For his services as financial agent, the county judge or chairman shall receive such compensation as the county court may order. . . ."[51]

The Court ruled that this statutory provision does not fix any amount as compensation for the financial agent, but simply authorizes the county court to do so. It must be construed *in pari materia* with Code section 10679 which provides that a county judge "is entitled, when not otherwise stipulated, to receive five dollars per day during the sitting of the monthly or quarterly courts, and such additional compensation as the several quarterly courts may appropriate for his services. . . ."[52] The Court reasoned that the phrase "when not otherwise stipulated" means *by the legislature* and that, as thus interpreted, it shows that the legislature contemplated that it might act. Construing the two Code sections together, section 771 was thus held

49. 250 S.W.2d 549 (Tenn. 1952).
50. 255 S.W.2d 1. (Tenn. 1953).
51. TENN. CODE ANN. § 771 (Williams 1934).
52. TENN. CODE ANN. § 10679 (Williams 1934).

to mean that the county court may fix the compensation for the county judge when that official is serving as financial agent only in case the legislature has not already acted; that is, the legislature has surrendered none of its special legislation prerogatives under that statute.

III. Officers

A. *Distinction between Officer and Employee*

The problem of classifying an individual as an officer or as an employee of a local government has arisen in connection with two different legal principles in Tennessee recently. In *Wise v. Knoxville*,[53] plaintiff, a city policeman who had been wrongfully suspended, could recover his lost pay without reduction for outside earnings during the period of suspension, if he were classified as an officer of the City of Knoxville; if he were an employee of the city, he could only recover the difference between what he would have received as a policeman and what he actually received for other employment. The Court set out certain criteria to be used in determining the status of an individual who holds a position with a municipality: (1) Is he entitled to a salary for a definite term, with a right of tenure for a definite duration, with definite emoluments and definite duties which are fixed by statute? (2) Does he receive employee benefits, or is he ineligible for such? (3) Can he be retired by his superiors? (4) Does he work regular hours? (5) Does he do work assigned to him? It will be noted that the last four tests are special applications of some part of the first.

The Court decided that a policeman in the City of Knoxville is an employee and not an officer. In arriving at this result, the Court was confronted with its earlier decision in *Cornet v. Chattanooga*[54] wherein it had held that a policeman was an officer rather than an employee. The Court resolved this apparent conflict by stating that the *Cornet* case involved the Workmen's Compensation Law and the charter of the City of Chattanooga, neither of which was involved in the *Wise* case. The result of the *Cornet* decision was to deny workmen's compensation benefits to the widow of a policeman killed on duty. If any rule of construction peculiar to the Workmen's Compensation Law was involved, the Court failed to mention it at the time. Indeed, it would seem that the theory of workmen's compensation laws[55] would lead to a classification of the policeman as an employee if possible, so that the benefits of the Act might be conferred upon his

53. 250 S.W.2d 29 (Tenn. 1952). See text to note 21 *supra*.
54. 165 Tenn. 563, 56 S.W.2d 742 (1933).
55. The Workmen's Compensation Act is to be construed liberally in claimant's favor. Brown v. Birmingham Nurseries, 173 Tenn. 343, 117 S.W.2d 739 (1938); Maxwell v. Beck, 169 Tenn. 315, 87 S.W.2d 564 (1935).

surviving dependents. The charter of the City of Chattanooga was referred to in only one particular in the *Cornet* opinion — the charater used the term "employ" with reference to policemen. This hardly seems to be an adequate basis for suggesting that the city charter was a significant factor in classifying the policeman as an officer rather than as an employee. In the *Wise* case, the Knoxville charter refers to policemen as employees, and this fact was mentioned by the Court in support of its decision that the policeman was an employee and not an officer.

The effect of the two cases is to hold that a policeman is an employee when such classification is to his detriment, and an officer when he would benefit from being classed as an employee. True, as the Court pointed out, the *Cornet* case had already been limited in its application, but this limitation occurred in a case[56] which was clearly distinguishable in principle.[57] It is submitted that the *Wise* and *Cornet* cases are contrary in principle and that the Court should have expressly overruled the *Cornet* case instead of limiting its application to workmen's compensation cases involving persons working for the City of Chattanooga.

The problem as to when an individual is an officeholder as opposed to an employee of a county is involved in four recent Tennessee cases. The Tennessee Constitution contains two provisions relative to filling vacancies in county offices. Article XI, Section 17, provides: "No county office created by the Legislature shall be filled otherwise than by the people or the County Court." Article VII, Section 4, provides: "The election of all officers and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct." Taken together, these two clauses seem to require that, when the legislature creates any of numerous employment positions in a county, it must provide that the position be filled by popular election or by the county court if the position is an "office" of the county. However, if the holder of the position is merely an employee of the county, then the legislature may direct that he be selected in any manner it may choose.

In *Peterson v. Grissom*,[58] the position of road supervisor for Henderson County was created by the legislature, which directed that the supervisor be selected by the county road commission. In answer to the contention that this act was in violation of Article XI, Section 17, the Court held that the road supervisor was an employee, not an

56. Woods v. City of LaFollette, 185 Tenn. 655, 207 S.W.2d 572 (1947).
57. *Ibid.* In the *Woods* case, the insurance contract which covered city employees specifically mentioned policemen. Since the parties were free to contract as they pleased, the Court ruled that a policeman was covered by the Workmen's Compensation Act in the particular case.
58. 250 S.W.2d 3 (Tenn. 1952).

officer, so that the act was valid.[59] In *Wilson v. Williams*,[60] a similar act of the legislature created the position of county road supervisor and secretary of the county road commission, both to be filled by the county road commission. Without elaboration, the Court ruled that these two persons would be employees of the county. In *Helton v. State*,[61] a defendant convicted of a criminal offense challenged the validity of the Hamilton County jury commission act. This act set up a three-man jury commission in the county, the members to be appointed rather than elected. The Court held that these commissioners were not county officers, but rather arms of the judiciary, similar to a master in chancery, and might properly be selected as the legislature might direct.

None of these three rulings appears sufficiently questionable to require detailed explanation. The fourth is not so clear. By Chapter 156, Private Acts of 1941, a county council-manager form of government was established in Hamilton County. The county manager was chosen by the council. In *Ragon v. Thrasher*,[62] this act was attacked, and the Court ruled that the county manager was not an officer of the county, but was an employee. The powers, duties and prerogatives of the county manager are not set out in the opinion, so that no tests or standard can be derived from the case. However, if a county manager is not an officer, some difficulty is suggested in identifying any administrative position as an office. It is submitted that the Court could render a service to county governments by setting up the criteria by which it reaches its decisions in these cases.

B. *Proceedings to Enjoin Unqualified Individual from Taking Office*

The successful candidate for the office of General Sessions Judge of Bledsoe County was only 27 years old. Under the law, the minimum age for the officer was 30 years. Three suits were brought to enjoin the winning candidate from assuming office and were reported together as *Bickford v. Swafford*.[63] The first suit was brought by a number of residents and taxpayers of the county; it was dismissed on demurrer on the ground that the complainants had no justiciable interest in the controversy. The second suit was brought by the incumbent judge who, though not a cadidate in the election, sought to hold over by reason of the disqualification of the defendant; this suit too was dismissed. The third suit was instituted in the name of the State on relation of the district attorney general, and in this case the trial court granted a permanent injunction. The Supreme Court affirmed in all three cases.

59. See text to note 26 *supra*.
60. 250 S.W.2d 73 (Tenn. 1953). See text to note 30 *supra*.
61. 255 S.W.2d 694 (Tenn. 1953).
62. 253 S.W.2d 31 (Tenn. 1952).
63. 253 S.W.2d 557 (Tenn. 1952).

It is well established in Tennessee that a private citizen cannot maintain a suit to redress a public wrong where the complainant has suffered no injury which is not common to every citizen.[64] The incumbent judge did not seek to question the validity of the election itself; therefore, the suit was not an election contest, and the incumbent had no special standing to bring the suit.

Had the unqualified individual actually assumed the office, the proper remedy would have been a proceeding under section 9336(1) of the Tennessee Code. This and the immediately following section provide that such suits shall be brought in the name of the State, by the attorney general for the district by bill in equity. Such a proceeding is in the nature of the common law proceeding of *quo warranto*.[65] The *Bickford* case held that the same type of proceeding is appropriate where the individual in question has not yet assumed the office, the difference being in the relief sought. In proceedings under Code section 9336(1), the aim is to remove an individual from office; in the present proceeding, the aim was to enjoin him from taking the office. The individual citizen suffers no special injury in either instance; it naturally and logically follows that the proper complaint in either case should be the State upon relation of the district attorney general.

C. *Ouster Proceedings — Right to Jury Trial*

In *Edwards v. State* ex rel. *Kimbrough*,[66] ouster proceedings were instituted against the sheriff of Polk County on the ground that the sheriff knowingly and wilfully neglected to perform certain duties enjoined upon him as sheriff.[67] The sheriff demanded a jury, which was denied, and judgment of ouster was pronounced by the trial judge. On appeal, the Supreme Court affirmed.

The ouster law provides that proceedings shall be summary in character and shall be conducted in accordance with the procedure of courts of chancery.[68] The original ouster law did not provide for jury trial on issues of fact. In 1933 the law was amended to provide for a jury. In 1937 the 1933 amendment was repealed without more. In 1939 the 1937 repealing act was repealed without more. Thus a jury trial was provided and repealed, and then the repealing act was itself repealed. The defendant argued that this reinstated the original jury

64. Jared v. Fitzgerald, 183 Tenn. 682, 195 S.W.2d 1 (1946); Patton v. Chattanooga, 108 Tenn. 197, 65 S.W. 414 (1901).
65. Skelton v. Barnett, 190 Tenn. 70, 227 S.W.2d 774 (1950).
66. 250 S.W.2d 19 (Tenn. 1952).
67. "[T]o suppress all affrays, riots, routs, nnlawful assemblies, insurrections, or other breaches of the peace. . . ." TENN. CODE ANN. § 11418 (Williams 1934).
68. TENN. CODE ANN. §§ 1888 *et seq.* (Williams 1934).

provision.[69] The Court did not find it necessary to decide the point.

The Court ruled that, under the facts as shown, no reasonable person could have failed to reach the conclusion that the sheriff had knowingly and willfully failed to do his duty. In chancery courts, where a jury is empaneled on demand of one of the parties and the chancellor finds that there is no conflict of evidence on the issues, it is his right and duty to withdraw the case from the jury.[70] Accordingly, if the defendant had been granted a jury, it would have become the duty of the trial judge to withdraw the case from the jury and pronounce judgment of ouster; therefore, if error was committed, it was harmless. The trial court heard the evidence upon oral testimony without application from either party. In view of the summary nature of the proceedings, the Court held that this was proper for the reason that taking evidence by deposition under chancery rules would so delay matters as to frustrate the purpose of the act. The Court had made a similar ruling in *State* ex rel. *Timothy v. Howse.*[71]

Any uncertainty as to the effect of the series of repealing acts has been eliminated by the incorporation of the right to jury trial into the Code[72] after the trial of this case had been completed. However, this provision will not affect situations like the *Edwards* case. If an official is so clearly remiss in the performance of his duties as to offer no opportunity for reasonable difference of opinion, then he cannot rely upon his appeal to a jury to save him from ouster, as the matter may properly be withdrawn from the jury.

D. *Official Bonds — Liability of Sheriff for Acts of Deputy*

Several boys were riding in an automobile which was being pursued by sheriff's deputies in an official automobile, under claim that the boys had committed a misdemeanor in the presence of the deputies. In the chase, the deputies fired at the car, causing it to wreck and resulting in the death of one of the boys. In *Jones v. State for the Use of Coffey,*[73] the deceased's father brought suit against the sheriff and the surety on his official bond for the act of the deputies. The trial court overruled defendants' demurrer, a jury returned a verdict for plaintiff and the appellate courts affirmed. The decision is apparently based upon the theory that the deputies were acting by virtue of their office, although the Court indicates that liability might attach under

69. The defendant's position seems correct. If a repealing statute is itself repealed, the first statute is thereby revived, in the absence of a contrary intention expressly stated or necessarily to be implied. 50 AM. JUR., *Statutes* § 579 (1944).

70. Carpenter v. Wright, 158 Tenn. 289, 13 S.W.2d 51 (1929); Lincoln County Bank v. Maddox, 21 Tenn. App. 648, 114 S.W.2d 821 (M.S. 1937).

71. 134 Tenn. 67, 183 S.W. 510 (1916).

72. TENN. CODE SUPP. § 1889 (1950).

73. 253 S.W.2d 740 (Tenn. 1952).

a statute, even if the acts had been under color of their office.[74]

The distinction between "by virtue of" and "under color of" office is discussed in *State* ex rel. *Blanchard v. Fisher*.[75] "By virtue of" implies that the individual has lawful power to act. "Under color of" is a pretense of official right to do an act made by one who has no such right. In *Ivy v. Osborne*,[76] the Court stated that the liability of a sheriff for acts of his deputy is controlled by common law, not by statute, and that under the common law the sheriff and his surety would be liable only for torts of a deputy done by virtue of his office. The language of this case is approved in *Greene v. Leeper*.[77]

Under the Tennessee statute,[78] officers and their sureties on the official bond are liable to any person injured by the wrongful act of the officer done either by virtue of or under color of his office.[79] The Court in the *Jones* case stated that liability of the sheriff for the acts of his deputies done by virtue of their office is based upon doctrines of agency.[80] It then said that under Code section 1833 the sheriff is also liable where the deputy is acting under color of office "in certain cases." This latter phrase is not amplified. It would seem that the agency theory would fail in the "under color of" situations. Ratification by the sheriff of the deputy's wrongful act would apparently be one of the "certain cases" in which the sheriff and his surety would be liable for the deputy's act under Code section 1833.

E. *Official Bonds — Suits against Sureties for Benefit of State and County*

In *Smith v. State* ex rel. *Thomas*,[81] suit was brought by the County Judge of Weakley County against the sureties on the bond of the county court clerk to recover an alleged shortage. The suit was brought under Code section 1657 which provides that, if the auditors cannot collect a shortage without suit, they shall report to the county judge, who shall cause suit to be instituted within 90 days. If the judge fails to bring suit within that time, the comptroller of the state treasury is authorized to do so. A number of objections were made against the bill, and all were overruled. The case seems to stand for several specific rules governing such suits: (1) If the county judge fails to

74. "Liability of the Sheriff would always attach when and if the wrong of the Deputy was committed by virtue of an official act, the Sheriff being held responsible under the doctrine of agency. Whereas, the Sheriff and his surety would be liable in certain cases where the Deputy was acting 'Under color of office.' Code Section 1833." 253 S.W.2d at 742.

75. 193 Tenn. 147, 245 S.W.2d 179 (1951).

76. 152 Tenn. 470, 279 S.W. 384 (1926).

77. 193 Tenn. 153, 245 S.W.2d 181 (1951).

78. TENN. CODE ANN. § 1833 (Williams 1934).

79. Marable v. State *ex rel.* Wackernie, 32 Tenn. App. 238, 222 S.W.2d 238 (M.S. 1949).

80. See note 74 *supra*.

81. 250 S.W.2d 55 (Tenn. 1952).

bring suit within 90 days after receiving the auditor's report, his power to bring the suit is not thereby ended, but continues concurrently with that of the comptroller (dictum). (2) If a shortage covers more than one term, a bill may name the sureties for every term as defendants without being multifarious. (3) The bill need not show what amounts are due individually to the State and county. (4) The bill need not show how much of the shortage occurred in each of several terms. (5) The courts will not look with favor upon technical defenses to such a suit.

IV. Schools and School Districts

A. *Participation by Special School Districts in Proceeds of Bond Issue*

Under the authority of Chapter 60, Public Acts of 1911,[82] Williamson County issued bonds for school purposes. The law provided that distribution of the proceeds of county bond issues should be made to the county and to cities within the county. In *State* ex rel. *Barksdale v. Wilson,*[83] it was held that a hybrid special school district, comprised of territory partly within the town of Franklin and partly outside the town, could not participate in the proceeds of the county bond issue. The statute has since been amended to provide for special school districts.

The case offers nothing particularly new or unusual. It does point out a special danger which local government units may encounter where they are operating under general laws which did not anticipate the existence of the particular kind of local unit.

B. *Power of Local School Board — Scope of Judicial Review*

The Memphis city schools are placed by private act of the legislature under the exclusive management and control of the Memphis Board of Education, and the board is given power to employ and dismiss teachers. The law does not enumerate the causes for which a teacher may be dismissed. In *Hayslip v. Bondurant,*[84] complainant, a teacher in the Memphis schools, filed a bill in chancery to review the action of the board of education which rescinded her contract to teach and dismissed her. The Court held that, under the law establishing the board, the action of the board was final and not subject to review by the Court so long as the board acted within its jurisdiction, observed the statutory requirements and was not guilty of fraud.

In the absence of a standard in the act, the power of the board to dismiss one of its teachers would be limited only by the requirements

82. Tenn. Code Ann. §§ 2557 *et seq.* (Williams 1934).
83. 250 S.W.2d 49 (Tenn. 1952).
84. 250 S.W.2d 63 (Tenn. 1952).

that it be reasonably exercised. As a test of reasonableness, the Court adopted the test: ". . . any cause which bears a reasonable relation to the teacher's fitness or capacity to discharge the duties of his position" or "activities . . . which have a reasonable bearing on his ability, efficiency and influence in the class room."[85] In the light of all the evidence, the Court found that the board had not exceeded its jurisdiction, that it had observed the statutory requirements and that there was no showing of fraud, so that the action of the board should stand.

85. 250 S.W.2d at 65.