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TENNESSEE EDUCATION ANNOTATED 2003 EDITION SELECT LEGISLATIVE SUMMARIES — 2002 GENERAL ASSEMBLY

(Compiled by Publisher's Staff from Legislative Reports)

**Commissioner of Education — Distribution of Public Acts
49-1-201 (Amended)**

Provides for electronic dissemination of public chapters on education to local boards of education. (Act Chapter 88)

**Enrollment — Power of Attorney
49-6-3001 (Amended)**

Under this provision, the caregiver would have the right to enroll the minor child in the LEA serving the area where the caregiver resides. The LEA must allow such caregiver to enroll the minor child but would be allowed to require proof of residence or hardship. Any caregiver who fraudulently enrolls a student in a school system by falsifying residence information would be required to provide restitution to the school system for any expenditure incurred on behalf of such student. This amendment specifies that if the parent or legal guardian disagrees with the decisions of the caregiver or chooses to make any healthcare or educational decisions for the minor child, the parent must revoke the power of attorney and provide such information to the health care provider or LEA. (Act Chapter 71)

**Enrollment — Restitution Action Where Fraudulent
49-6-3003 (Amended)**

Authorizes LEA to bring action for restitution against parent, guardian or other legal custodian who enrolls out-of-district or out-of-state student in school system and fraudulently misrepresents address for domicile of student. (Act Chapter 221)

**Funding — Use of State Monies
49-3-306, 49-3-352 (Amended)**

This amendment removes the present law prohibition on an LEA increasing salaries using state funds appropriated for public education that have been allocated for new or additional personnel and specifies that in any fiscal year in which state-shared revenues distributed to counties are reduced below the levels distributed to counties in the 2002-2003 fiscal year, any or all of the accumulated fund balance may be used for education purposes without restrictions. (Act Chapter 355)

— **Inner City Educational Enhancement — Pilot Project
49-1-602 (Amended)** —

Authorizes certain units of local government to establish inner city educational enhancement pilot project; authorizes participation of certain school systems. (Act Chapter 404)

**Kindergarten — Program Status
49-6-101 (Amended)**

Provides that kindergarten may be considered mandatory program (Act Chapter 285)

**Military Service - Compensation for Pay Differential
49-5-702 (Amended)**

Allows local boards of education to compensate teachers the difference between their regular pay and military pay while such teachers are engaged in military service. (Act Chapter 268)

Pre-School and Early Learning Programs — Determination of At-Risk Children

49-6-101 (Amended)

Revises criteria for determining at-risk children for pre-school and early learning programs (Act Chapter 298)

Principals — Notice of Enrollment**37-1-131, 49-6-3051 (Amended)**

Strengthens procedures for notifying school principals of enrollment of students who have been convicted of serious criminal offenses. (Act Chapter 238)

Reduction in School Term — Federal Disaster Areas**49-6-3004 (Amended)**

Allows school term to be reduced by up to five days in 2002-2003 school year due to severe weather conditions in LEAs in declared federal disaster area. (Act Chapter 4)

Retired Teachers — Benefits Upon Resumption of Employment**8-36-822 (Added)**

Subject to funding, allows teachers who have been retired for at least two years to accept full-time employment as elected city officials without loss or suspension of retirement benefits; such retired teacher may not receive additional benefits for employment as city official. (Act Chapter 223)

State Board of Education — Membership**49-1-301 (Amended)**

Requires one member of State Board of Education to be K-12 public school teacher. (Act Chapter 91)

State Board of Education — Suspension Authority**49-5-5607 (Amended)**

Authorizes state board to place institution on temporary probation if institution has 30 percent or more of its students fail state teachers' examination in two consecutive years when less than 10 students take such exam. (Act Chapter 315)

Student Records — Release**10-7-504 (Amended)**

Permits institutions of higher education to release certain student records and student information if related to criminal activity or drug or alcohol possession or use by such student. (Act Chapter 105)

Textbooks — Weight Study**49-6-2210 (Added)**

Requires state board of education to study and make recommendations concerning weight of elementary and secondary school textbooks and to submit findings to general assembly on annual basis (Act Chapter 369)

TENNESSEE EDUCATION LAWS ANNOTATED

CONSTITUTION OF THE STATE OF TENNESSEE

ADOPTED IN CONVENTION AT NASHVILLE,
FEBRUARY 23, 1870.
PROCLAIMED AND IN EFFECT, MAY 5, 1870,
AS AMENDED.

ARTICLE VII

STATE AND COUNTY OFFICERS

SECTION.

2. Vacancies.
5. Civil officers — Election — Vacancies.

Sec. 2. Vacancies. — Vacancies in county offices shall be filled by the county legislative body, and any person so appointed shall serve until a successor is elected at the next election occurring after the vacancy and is qualified. [As amended; Adopted in Convention December 6, 1977; approved at election March 7, 1978; Proclaimed by Governor, March 31, 1978.]

Compiler's Notes. Prior to the 1978 amendment this section read: "Should a vacancy occur, subsequent to an election, in the office of Sheriff, Trustee or Register, it shall be filled by the Justices; if in that of the clerks to be elected by the people, it shall be filled by the Courts; and the person so appointed shall continue in office until his successor shall be elected and qualified; and such office shall be filled by the qualified voters at the first election for any of the County Officers." This amendment was adopted by a vote of 195,183 in favor and 166,728 against.

Cross-References. Procedure for filling vacancies in county offices, § 5-5-113.

Vacancies in county legislative bodies, § 5-5-102.

Cited: *Waters v. State ex rel. Schmutzer*, 583 S.W.2d 756 (Tenn. 1979); *Shelby County Election Comm'n v. Turner*, 755 S.W.2d 774 (Tenn. 1988).

NOTES TO DECISIONS

ANALYSIS

1. Meaning of terms.
2. Construction.
3. Temporary judges.
4. County officers.
5. —General sessions judge.
6. —Juvenile court judge.
7. —Probate judges.
8. —State officers distinguished.
9. Constitutionality of statutes.
10. Special elections.

1. Meaning of Terms.

Until such time as the general assembly speaks affirmatively and with specificity upon the subject, the phrase "next election," when considered in the context of Tenn. Const., art. VII, § 5, voicing the

constitutional imperative that elections of judicial and civil officers be elected on the first Thursday in August "forever thereafter" and when considered in the light of almost two centuries of custom, tradition, habit and practice, must be held to mean the regular August general election. *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980).

The phrase, "next election occurring after the vacancy" does not include any primary election. *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980).

2. Construction.

This section is not self-executing and is dependent upon the adoption of legislation and as to Knox County is effective on and after September 1, 1980, when the county legislative body is inducted into office but until that time the appointive power resides in the quarterly court. *State ex rel. Maner v. Leech*, 588 S.W.2d 534 (Tenn. 1979).

The county legislative body may fill a vacancy pending the August election. This is the clear mandate of Tenn. Const., art. VII, § 2. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

This provision is somewhat ambiguous and is not self-executing. *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980).

3. Temporary Judges.

Section 17-2-116(a)(1) does not violate this section or Tenn. Const., art. XI, § 17 since neither constitutional provision applies to the designation of temporary special general sessions court judges who substitute for but do not replace the incumbent judge. *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567 (Tenn. Ct. App. 1994).

4. County Officers.

There are many county offices other than those enumerated in Tenn. Const., art. VII, § 1, and since general words rather than restrictive ones were chosen in this section, the appointing power set out in this section extends to all county offices including, but not limited to, those county offices specified in Tenn. Const., art. VII, § 1. *State ex rel. Winstead v. Moody*, 596 S.W.2d 811 (Tenn. 1980).

The overall duties of the clerk of the circuit court and general sessions court of Knox County are applicable to the people of Knox County alone; therefore the office is a county office. *State ex rel. Webster v. LaBonte*, 597 S.W.2d 893 (Tenn. 1980).

When acting in a law enforcement capacity, a sheriff acts as a county official under Tennessee law. *Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001).

5. —General Sessions Judge.

Since the court found that in creating the office of judge of the general sessions court there was no legislative intent apparent to create a court with jurisdiction beyond the borders of the county, that the county bore the expenses of the court, paid the judge's salary, and was entitled to the fees collected by the court and that the overall duties are applicable to the people of the county alone, it was held that the general sessions court was a county rather than a state office. *State ex rel. Winstead v. Moody*, 596 S.W.2d 811 (Tenn. 1980).

6. —Juvenile Court Judge.

A juvenile court judge is a county officer, and Tenn. Const., art. VII, § 2, authorizes the county legislative body to fill vacancies. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

7. —Probate Judges.

The statutes make it clear that the county court is the probate court. The 1978 constitutional amendments superseded this court. Viewed realistically the probate court is just as much a part of our judicial system as the juvenile court. Probate judges are county officers. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

8. —State Officers Distinguished.

The primary badge of a state officer is that the general assembly

provides that the state pay the salary of the office. *State ex rel. Winstead v. Moody*, 596 S.W.2d 811 (Tenn. 1980).

9. Constitutionality of Statutes.

When properly construed there is no conflict between § 5-5-102 and Tenn. Const., art. VII, § 2. Both the constitutional provision and the statute provide for the vacancy to be filled by the legislative body. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

Section 49-2-202 is constitutional to the extent of the temporary appointment to a vacancy. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

There is no constitutional infirmity in § 5-6-103 (obsolete), providing that should a vacancy occur in the office of county judge, in these counties wherein the judge is temporarily serving as county executive: (1) If a vacancy occurs prior to the qualifying date for the election of a county executive, the county legislative body shall appoint a county executive to serve until a county executive is elected in the regular August election; and (2) if a vacancy occurs after the qualifying date for the election of a county executive, the county legislative body shall appoint a county executive to serve until a county executive is elected in the next succeeding general election or other county-wide election in such county. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

Irrespective of the language used, action of the general assembly, acting in order to avoid having duplicating offices, and purely as a transitional measure, giving a county judge authority and charging him with the duties attendant upon the office of county executive is a constitutional orderly transition. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980).

10. Special Elections.

A special election would not be conducted pursuant to Tenn. Const., art. VII, § 2, but by virtue of the implied recognition that such elections are proper under Tenn. Const., art. VII, § 5 and art. IV, relating to elections. *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980).

DECISIONS UNDER PRIOR LAW

ANALYSIS

1. Meaning of terms.
2. Quarterly county court impliedly recognized as constitutional court.
3. Vacancies filled by county court.
4. Terms of persons appointed.
5. Holdovers.

1. Meaning of Terms.

The word "justices" used in this section of the constitution means the justices of the peace of the county assembled in the quarterly county court, for it is in such collective capacity that they must make the elections required of them. *Pope v. Phifer*, 50 Tenn. 682 (1871), overruled on other grounds, 126 Tenn. 106, 148 S.W. 229 (1912); *Prescott v. Duncan*, 126 Tenn. 106, 148 S.W. 229 (1912).

2. Quarterly County Court Impliedly Recognized as Constitutional Court.

The quarterly county court is impliedly recognized and continued by the provision in the preceding section authorizing the justices of the peace to elect a coroner and ranger; and by the provision in this section authorizing the justices to fill the vacancies occurring in the offices of sheriff, trustee, and register; and by the provision (Tenn. Const., art. XI, § 17) that the county court may be authorized to fill county offices created by the general assembly; for these powers can be performed by the justices only when assembled in the body known as the quarterly county court. *Prescott v. Duncan*, 126 Tenn. 106, 148 S.W. 229 (1912).

3. Vacancies Filled By County Court.

The right and power to fill a vacancy in the office of clerk of the county court is vested in the quarterly county court, composed of the justices of the peace of the county, and not to the county judge or chairman of the county court. *State ex rel. Johnson v. Campbell*, 76 Tenn. 74 (1881).

It is competent for the general assembly to provide by statute that this power of filling a vacancy in the office of clerk, conferred by the constitution upon the "court," when the filling of the vacancy in the office of the clerk of the county court is involved, may be exercised by

the quarterly county court composed of any prescribed number of the justices or by the county judge or chairman of the county court. In accordance with statutes enacted in pursuance of this power, when properly construed, the quarterly county court composed of the justices of the county, or three-fifths thereof as a quorum, is empowered to fill the vacancy in the office of the clerk of the county court. *State ex rel. Johnson v. Campbell*, 76 Tenn. 74 (1881). See §§ 5-512 — 5-516 (now §§ 5-5-111 — 5-5-114).

4. Terms of Persons Appointed.

Under the Constitution of 1834, a vacancy in the office of sheriff, trustee, or register, and clerks elective by the people, occurring subsequent to an election, was to be filled temporarily by appointment until the next election for any of the county officers, when the office was to be filled by the qualified voters, and the person so elected to fill the office held for the full constitutional term of office, and not merely to the end of the term in which the vacancy occurred, and such term could not be shortened by statute. *Powers v. Hurst*, 21 Tenn. 24 (1840); *Brewer v. Davis*, 28 Tenn. 208 (1848); *Keys v. Mason*, 35 Tenn. 6 (1855); *State ex rel. Burns v. Clark*, 38 Tenn. 369 (1858); *Ex parte Cross & Mercer*, 84 Tenn. 486 (1886), overruled on other grounds, 111 Tenn. 234, 80 S.W. 750 (1903); *State ex rel. Rambo v. Maloney*, 92 Tenn. 62, 20 S.W. 419 (1892); *McCulley v. State*, 102 Tenn. 509, 53 S.W. 134 (1899); *Redistricting Cases*, 111 Tenn. 234, 80 S.W. 750 (1903); *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S.W. 257 (1915).

The person appointed or elected by the quarterly county court to fill a vacancy in the register's office holds only until the next regular election for county officers, and the qualification of the person elected by the voters. *Tatum v. Rivers*, 66 Tenn. 295 (1874).

But under the Constitution of 1870 (Art. 7, § 5), no appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. *Ex parte Cross & Mercer*, 84 Tenn. 486 (1886), overruled on other grounds, 111 Tenn. 234, 80 S.W. 750 (1903); *State ex rel. Rambo v. Maloney*, 92 Tenn. 62, 20 S.W. 419 (1892); *McCulley v. State*, 102 Tenn. 509, 53 S.W. 134 (1899); *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S.W. 257 (1915).

Under §§ 1, 2, 5 of this article, where an appointment is made to fill an unexpired term, there is a vacancy at the end of such term, since the appointment was only for that time, though the appointee must continue to perform the duties of the office as an officer holding over, if another is not elected and qualified, and he does not hold as under a prolonged term, that is, for another full term, as in the case of an officer elected for a definite term and until his successor is elected and qualified. *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S.W. 257 (1915).

Where the length of term of an office only is fixed, with no set date for its beginning or ending, and no reference to an unexpired term, or to a vacancy in the term of office, as distinguished from a vacancy in the office itself, an incumbent appointed to fill a vacancy holds for a full term, and not merely for the unexpired portion of his predecessor's term. *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S.W. 257 (1915).

5. Holdovers.

Under § 1 of this article, providing for the election of the sheriff for the term of two years; under this section, providing that if a vacancy occurs in the office of sheriff, subsequent to an election, it shall be filled by the justices; and under § 5 of this article, providing that the term of the officer shall be computed from the first day of September next succeeding the election; that no appointment to fill a vacancy shall be made for a period extending beyond the unexpired term, and that every officer shall hold office until his successor is elected and appointed and qualified, the justices in the quarterly court cannot appoint a successor to one who was elected sheriff, but died before qualification, since there can be no appointment unless there is a vacancy, and there can be no vacancy so long as the former elected sheriff holds over or is prolonged until the qualification of his successor; for the word "vacancy" is used in its ordinary sense as meaning empty of an incumbent, or without an incumbent. *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S.W. 257 (1915).

Sec. 5. Civil officers — Election — Vacancies. — Elections for Judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of

each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of the Governor and of other executive officers shall be computed from the fifteenth of January next after the election of the Governor. No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs.

Cross-References. Filling vacancies in judicial offices, title 17, ch. 1, part 3.

Time of elections, §§ 2-1-104(24) and (25), 2-3-202.

Law Reviews. The Tennessee Court System — Circuit Court (Frederic S. LeClercq), 8 Mem. St. U.L. Rev. 241.

Attorney General Opinions. “City election” under city charter construed as November elections, OAG 98-0103 (6/8/98).

Constitutionality of municipal charter amendment that extends term of elected officials, OAG 00-017 (2/8/00).

Cited: Hanover v. Boyd, 173 Tenn. 426, 121 S.W.2d 120 (1938); Swaim v. Smith, 174 Tenn. 688, 130 S.W.2d 116 (1939); In re Appointment of Clerk & Master, 670 S.W.2d 215 (Tenn. 1984); Shelby County Election Comm’n v. Turner, 755 S.W.2d 774 (Tenn. 1988); DeLaney v. Thompson, 982 S.W.2d 857 (Tenn. 1998).

NOTES TO DECISIONS

ANALYSIS

1. Construction.
2. “Vacancy” defined.
3. Filling vacancy.
4. Time of election.
5. Election beyond unexpired term.
6. Statutory failure to specify.
7. Terms of judges and district attorneys.
8. Extension of terms of county officers.
9. Election of county judge.
10. —Justices of the peace.
11. —Constables.
12. Incumbent holding over.
13. —Displacing holdover.
14. —Temporary appointee.
15. —Failure to qualify.
16. Common law powers.
17. Effect of vacancy.

1. Construction.

The provision in this section of the constitution as to the times from which the terms of office shall be computed originated with this constitution. The Constitution of 1834 simply prescribed the duration of the terms of office, and left the time and manner of qualification to be regulated by statute. State ex rel. Nolin v. Parchmen, 40 Tenn. 609 (1859).

By the provisions of this section of the constitution, a new era in the political history of the state is established. A certain day is named from which all official life thereafter shall be reckoned. Absolute uniformity in the time for the commencement and termination of every official term of officer of the same grade throughout the state is positively ordained. Though such uniformity had been of but small moment under the Constitution of 1834, it is now made paramount. State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892).

The words “the unexpired term,” as used in the constitutional prohibition against the “appointment or election to fill a vacancy . . . for a period extending beyond the unexpired term,” as applied to judicial offices, signify the future portion of any particular recurring period of eight years, computed from the first day of September, 1870, for which an appointment or election is to be made, whether the office to be filled

is a new one to be occupied for the first time, or a preexisting one which has been occupied before, and is made vacant by death, resignation, or removal. State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892).

The principle of this rule will apply to all constitutional offices whose terms are fixed, and are to be computed from a fixed date, so as to end at a recurring fixed date. The rule is to be applied according to the length of term of the particular office involved. But see Prescott v. Duncan, 126 Tenn. 106, 148 S.W. 229 (1912). (Note in Shannon’s constitution.)

The general assembly may provide for special elections to fill vacancies in county offices. These provisions are not self-executing, but require affirmative legislative action. McPherson v. Everett, 594 S.W.2d 677 (Tenn. 1980).

A special election would not be conducted pursuant to Tenn. Const., art. VII, § 2, but by virtue of the implied recognition that such elections are proper under Tenn. Const., art. VII, § 5 and art. IV, relating to elections. McPherson v. Everett, 594 S.W.2d 677 (Tenn. 1980).

2. “Vacancy” Defined.

The word “vacancy” in the constitutional provision that “No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term” applies where the appointment or election may be made to fill an office for the first time, and where it may be made to fill a preexisting office whose incumbent has died, resigned, or has been removed. The word “vacancy” covers both cases. A “vacancy” as applied to offices means an unoccupied office, an office not filled. There is a vacancy in every instance in which there is an office without an incumbent. Every office without an officer is vacant. Therefore, every newly created office must, of necessity, be vacant from the time of its creation until it is filled by appointment or election. McLean v. State, 1 Shannon’s Cases 478 (1875); State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892); Condon v. Maloney, 108 Tenn. 82, 65 S.W. 871 (1901), overruled on other grounds, 189 U.S. 64, 23 S. Ct. 579, 47 L. Ed. 709 (1903); State v. Akin, 112 Tenn. 603, 79 S.W. 805 (1903); State ex rel. Cummings v. Trewwhitt, 113 Tenn. 561, 82 S.W. 480 (1904); Richardson v. Young, 122 Tenn. 471, 125 S.W. 664 (1909); Prescott v. Duncan, 126 Tenn. 106, 148 S.W. 229 (1912). But see headnote 12 in last case.

The word “vacant” is to be given its ordinary meaning, “without an incumbent,” regardless of when or how the vacancy arises. State ex rel. Gann v. Malone, 131 Tenn. 149, 174 S.W. 257 (1915); Conger v. Ray, 151 Tenn. 30, 267 S.W. 122 (1924), overruled on other grounds, 532 S.W.2d 929 (Tenn. 1976).

3. Filling Vacancy.

The election of a judge or of a district attorney general to fill a vacancy can be held at no other time than at a special election held at the same time as an August general election. State ex rel. Shriver ex rel. Higgins v. Dunn, 496 S.W.2d 480 (1973).

Section 49-2-202 is constitutional to the extent of the temporary appointment to a vacancy. Marion County Bd. of Comm’rs v. Marion County Election Comm’n, 594 S.W.2d 681 (Tenn. 1980).

4. Time of Election.

Provision of this section for time of election of judicial and civil officers is violated by act fixing different time for election by popular vote of county superintendent of education, he being a “civil officer.” State ex rel. Thomas v. Davis, 159 Tenn. 693, 21 S.W.2d 623 (1929).

Private Acts 1941, ch. 220 established a county road commission but failed to specify the time of election of the commissioners. Construing the act with this section it was held that they were to be elected at the general August election in 1942. Farmer v. Wiseman, 177 Tenn. 578, 151 S.W.2d 1085, 135 A.L.R. 1169 (1941).

The provision of this section for the time of election of judicial and civil officers was violated by a charter provision that elections for municipal officers were to be held on a specified date in October of even years. State ex rel. Bryant v. Maxwell, 189 Tenn. 187, 224 S.W.2d 833 (1949).

It is the constitutionally declared public policy of this state that elections wherein the people speak with finality in the selection of county officials be “forever” held on the first Thursday in August of even-numbered years. McPherson v. Everett, 594 S.W.2d 677 (Tenn. 1980).

The general assembly, acting pursuant to Tenn. Const., art. VII, § 5, and art. IV, is privileged to provide for “a special election on May 6, 1980, conducted simultaneously, but independently of the primaries.” Marion County Bd. of Comm’rs v. Marion County Election Comm’n, 594 S.W.2d 681 (Tenn. 1980).

5. Election Beyond Unexpired Term.

The provision in this section of the constitution that "No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term" originated with this constitution, and was intended to obviate and remedy the judicial construction, given to the previous constitution, that an officer elected to fill a vacancy held the office for the full constitutional term, and not merely to the end of the term in which the vacancy occurred (as shown in the cases of Powers v. Hurst, 21 Tenn. 24 (1840); Brewer v. Davis, 28 Tenn. 208 (1848); Keys v. Mason, 35 Tenn. 6 (1855); State ex rel. Burns v. Clark, 38 Tenn. 369 (1858); Ex parte Cross & Mercer, 84 Tenn. 486 (1886), overruled on other grounds, 111 Tenn. 234, 80 S.W. 750 (1904); State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892); McCulley v. State, 102 Tenn. 509, 53 S.W. 134 (1899); Grainger County v. State ex rel. Mynatt, 111 Tenn. 234, 80 S.W. 750 (1903)); and to obviate the decision and holding that a statute providing that the officer elected to fill a vacancy should hold only for the unexpired term was unconstitutional (as was specifically held in the cases of Brewer v. Davis, 28 Tenn. 208 (1848); Keys v. Mason, 35 Tenn. 6 (1855)).

But under the new provision in this constitution, a vacancy in office is filled for the unexpired term only. Ex parte Cross & Mercer, 84 Tenn. 486 (1886), overruled on other grounds, 111 Tenn. 234, 80 S.W. 750 (1903); State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892); McCulley v. State, 102 Tenn. 509, 53 S.W. 134 (1899).

6. Statutory Failure to Specify.

When the length of term, merely, is fixed, with no set time for its beginning or no date for its ending, and no reference to an unexpired term, or to a vacancy in the term of office as distinguished from a vacancy in the office itself upon happening of a vacancy, the office reverts to the people or sovereign, and, when it is again vested, it is not for an unexpired term but for the full term. State ex rel. Gann v. Malone, 131 Tenn. 149, 174 S.W. 257 (1915).

Private Acts 1941, ch. 220, setting up a new road law for Sequatchie County is unconstitutional because it fails to specify the term of office of the county road commissioners. Farmer v. Wiseman, 177 Tenn. 578, 151 S.W.2d 1085, 135 A.L.R. 1169 (1941).

The act also failed to specify when the term of the commissioners should begin. It was held that this section should be read into the act so that the term begin on Sept. 1, 1942. Farmer v. Wiseman, 177 Tenn. 578, 151 S.W.2d 1085, 135 A.L.R. 1169 (1941).

7. Terms of Judges and District Attorneys.

This constitution abolished special elections to fill vacancies in the offices of judges or district attorneys, except at the regular recurring biennial election for civil officers. Where an appointment to fill such a vacancy is made, the appointee is to hold until the next recurring biennial election for civil officers. State ex rel. Smiley v. Glenn, 54 Tenn. 472 (1872); Gold v. Fite, 61 Tenn. 237 (1872); McLean v. State, 1 Shannon's Cases 478 (1875).

Where a new court is created and established to be held by a new judge, there can be no election until the regular recurring biennial election in August, and the judge shall be appointed by the governor to fill the vacancy until such next biennial election. McLean v. State, 1 Shannon's Cases 478 (1875). If such a vacancy occurs within thirty days of the next biennial election on the first Thursday in August, the appointee is to hold until the first day of September after the second biennial election, and until his successor elected at such election is qualified. The constitutional provision that such vacancy shall be filled at the next biennial election recurring more than thirty days after the vacancy occurs clearly means that if the vacancy occurs within thirty days of such recurring biennial election, the vacancy cannot be filled at the next recurring biennial election, but at the one next after that, for the reason that the vacancy must be filled at the recurring biennial election to be held more than thirty days after the vacancy occurs, and not at the one recurring within thirty days thereafter. (Note in Shannon's constitution.)

The terms of office of judges and district attorneys elected on the fourth Thursday in May, 1870, under Acts 1853-1854, ch. 32, and Acts 1869-1870, ch. 28, § 7, enacted in accordance with the amendment to the constitution ratified on the first Thursday in August, 1853, commenced from their election and commission, and their commencement was not postponed by the provision in this section of the Constitution of 1870 to the first day of September, 1870, for the reason that this provision is confined to the officers elected on the first Thursday in August. The terms of judges and district attorneys elected on the fourth Thursday in May, 1870, were computed from the first day of September, 1870, and continued for eight years from that date; and until their

successors were elected and qualified. This results from the provisions of this section and the first section of the schedule to this constitution. Brinkley v. Bedford, 56 Tenn. 799 (1872).

All judicial terms are for the period of eight years; and each successive term begins on the first day of September, every recurring eighth year from the first day of September, 1870, and terminates eight years thereafter, and on the first day of September, every recurring eighth year from the first day of September, 1870. State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892).

Where district attorney general died in the forenoon of July 4 and the next biennial election recurred August 4, more than thirty days elapsed before the next biennial election and a vacancy existed in such office to be filled at such election. A successor appointed by the governor to fill the vacancy was not entitled to continue to hold the office as against a successor elected at the next biennial election. Hanover v. Boyd, 173 Tenn. 426, 121 S.W.2d 120 (1938).

Where district attorney general was elected United States Senator in November but did not take oath as senator and resign as district attorney general until the following January 16, no vacancy occurred in the office until January 16. Successor appointed by newly inaugurated governor was entitled to hold office as against appointed of outgoing governor made on January 13. Kelly v. Woodlee, 175 Tenn. 181, 133 S.W.2d 473 (1939).

Constitutional and statutory provisions that every officer shall hold office until his successor is elected or appointed and qualified did not have effect of continuing justices of the peace in office for the purpose of determining a quorum of quarterly county court where certain of such justices had removed from the district where elected, others had been disqualified by holding other offices and one had resigned. Bailey v. Greer, 63 Tenn. App. 13, 468 S.W.2d 327 (1971).

One appointed to fill an unexpired term continuing to perform the duties of office after the expiration of other term would not hold as under a prolongation of his term, but only as a temporary holder of the office until an ascertained vacancy could be filled by designated authority. State ex rel. Barnes v. Smith, 199 Tenn. 459, 287 S.W.2d 63 (1956).

8. Extension of Terms of County Officers.

The terms of office of sheriffs and other county officers elected on the fourth Saturday (the 26th) of March, 1870, under Acts 1869-1870, ch. 62, were extended for the constitutional period thereof, computing from the first day of September, 1870, in accordance with this section and the first section of the schedule to this constitution. State ex rel. v. Wright, 57 Tenn. 237 (1872); Tatum v. Rivers, 66 Tenn. 295 (1874).

9. Election of County Judge.

The election of a county judge on the same day with other county officers, under a statute (Acts 1857-1858, ch. 38, § 2; § 824 of the Code of 1858) so directing, was not void under the amendment to the constitution in 1853, for the reason that the county judge was then held to be a county officer, and not a regular judge, in the sense of such amendment. Moore v. State, 37 Tenn. 510 (1858); Saffrons v. Ericson, 43 Tenn. 1 (1866); State ex rel. Smiley v. Glenn, 54 Tenn. 472 (1872).

It has been since held that a county judge is not a county officer, but is a judge of an inferior court. State ex rel. Smiley v. Glenn, 54 Tenn. 472 (1872); State ex rel. Puckett v. McKee, 76 Tenn. 24 (1881); State ex rel. Orr v. Leonard, 86 Tenn. 485, 7 S.W. 453 (1888); State ex rel. Rambo v. Maloney, 92 Tenn. 62, 20 S.W. 419 (1892); Johnson v. Brice, 112 Tenn. 59, 83 S.W. 791 (1903); Ledgerwood v. Pitts, 122 Tenn. 570, 125 S.W. 1036 (1910).

Under the provision of this constitution, it is immaterial whether a county judge is a county officer or a judicial officer, insofar as the date of his election is concerned, since the election of judicial and other civil officers is to be held on the same day, namely, the first Thursday in August preceding the expiration of their terms of office on the first day of September. (Note in Shannon's constitution.)

10. —Justices of the Peace.

Where federal court issued writ of mandamus requiring justices of Lauderdale County to make a levy to pay relator's judgment, but 21 out of the 26 justices resigned for various and sundry reasons and sheriff failed to call for an election, the justices were in contempt of court, as they did not have an unrestricted right of resignation, since under this section of the constitution they held office until a successor was elected or appointed and qualified. United States ex rel. Watts v. Justices of Lauderdale County, 10 F. 460 (W.D. Tenn. 1882).

Governor's commission to one as justice of the peace cannot be presumed to have been issued for a full term or to him generally as a justice, when the election pursuant to which the commission was

issued was only to fill vacancies and for an unexpired term. State ex rel. Attorney Gen. v. Allen, 57 S.W. 182 (Tenn. Ch. App. 1900).

Where a statute (Acts 1903, ch. 424), redistricting a county provided that it should take effect on the first day of September, 1906, at which time the terms of the then incumbents of the offices of the justices of the peace expired, it was proper to hold elections to fill the offices of the justices of the peace in the newly created districts on the first Thursday in August, 1906, as provided by the constitution and statutes. Maxey v. Powers, 117 Tenn. 381, 101 S.W. 181 (1906); Heiskell v. Lowe, 126 Tenn. 475, 153 S.W. 284 (1912). But see Clemmens v. Cato, 36 Tenn. 291 (1856); State ex rel. Burns v. Clark, 38 Tenn. 369 (1858); Beasley v. Ferriss, 69 Tenn. 461 (1878).

Where Private Acts 1939, ch. 281 redistricted McNairy County and designated the persons who were to serve as justices of the peace in the new districts, such act was not rendered invalid by the failure to designate the term for which such persons were to serve since under the provision of Tenn. Const., art. VI, § 15 (repealed) providing for the election of such officials by the qualified voters of their district the officials would only serve until the next general election as fixed by this section. Swain v. Smith, 174 Tenn. 688, 130 S.W.2d 116 (1939).

Where county election commission omitted office of justice of peace for municipality in general election due to practice of voting for office in October instead of August as provided by this section of the constitution there was no election hence chancery court was entitled to declare that person who was issued a certificate of election on basis of six write in votes at general election was holding office without authority, as proceeding was not an election contest but a proceeding to determine right of defendant to hold office, since chancery court was not required to look behind election returns to determine proceeding. State ex rel. Bryant v. Maxwell, 189 Tenn. 187, 224 S.W.2d 833 (1949).

11. —Constables.

A vacancy in the office of constable may be filled, under § 8-1005 (now § 8-10-105; subsequently repealed), by an election by the people, held on the same day and at the same time with any other election, as, when the election for governor of the state, and members of the general assembly is held. Beasley v. Ferriss, 69 Tenn. 461 (1878).

Constable, who was elected in 1948 and furnished bond, and who was reelected in 1950 and continued to pay premiums on bond was covered by the bond since he continued to hold office until a successor was elected and qualified. Garner v. State ex rel. Askins, 37 Tenn. App. 510, 266 S.W.2d 358 (1953).

12. Incumbent Holding Over.

The provision in this section that "Every officer shall hold his office until his successor is elected or appointed, and qualified" prevents the termination of office of the incumbent until a successor is elected or appointed, and qualified, but the continuance in office is only to operate until the appointive or elective power acts, and appoints or elects another. The incumbent's holding over under this provision does not give him any indefeasible right to the office. In re Baldwin, 54 Tenn. 414 (1872). But see State ex rel. Gann v. Malone, 131 Tenn. 149, 174 S.W. 257 (1915).

The constitutional provision that "Every officer shall hold his office until his successor is elected or appointed, and qualified" was probably intended to meet a case, where for any reason there is a failure to elect or appoint any officer at the proper time, thus continuing the former officer in office and lengthening his term. In that view, the implication is clear that an "election or appointment," after the regular time is necessarily contemplated and recognized by the constitution. State ex rel. v. Anderson, 84 Tenn. 320 (1886).

The constitutional provision that "Every officer shall hold his office until his successor is elected or appointed, and qualified" applies to official terms that end by their own limitation. The purpose of this provision is to prevent a hiatus in the office and a suspension of the performance of the duties thereof, and to designate some one to perform the public duties, for which the offices were created. This provision does not apply so as to authorize the general assembly, by statute, directly or by implication or inference, to extend the term of office of an incumbent in the office of county attorney created by statute for a certain county. State ex rel. Cummings v. Trewwhitt, 113 Tenn. 561, 82 S.W. 480 (1904).

The clerk of a county board of road commissioners, being the de jure officer by virtue of his right to hold over under the constitution where the election of his intended successor is void, is entitled to serve in the office and to take all of its emoluments. Hogan v. Hamilton County, 132 Tenn. 554, 179 S.W. 128 (1915).

Code provision that when an election is null it shall be declared void

and so certified to those authorized to fill vacancy or order new election is inapplicable where incumbent holds over until his successor is elected and qualified, there being no vacancy. Conger v. Ray, 151 Tenn. 30, 267 S.W. 122 (1924).

County superintendent who held over after expiration of his term, under void law attempting to extend his term from two to four years, held under provision of this section for continuation in office until successor is chosen. State ex rel. Tidwell v. Morrison, 152 Tenn. 58, 274 S.W. 551 (1925).

Under this section, county judge may hold over beyond his term until election and qualification of his successor as the de jure incumbent, and, as such, may sue in his own name to enjoin interference from an illegally appointed claimant. Morrison v. Gower, 154 Tenn. 624, 288 S.W. 731 (1926).

Where an election of juvenile court judge was void, the incumbent was entitled to hold office until the position was filled by the county courts election of an interim judge. Stambaugh v. Price, 532 S.W.2d 929 (Tenn. 1976).

With respect to public offices that cannot be identified with a particular incumbent, there is no holding over beyond the end of the term. State ex rel. Wyrick v. Wright, 678 S.W.2d 61 (Tenn. 1984) (at-large positions).

Ordinarily, where the incumbent holds a specific and identifiable office, the death of an elected officer before qualifying for office does not create a vacancy in the office that can be filled by appointment or otherwise, but the incumbent continues in office until his successor is elected and qualified. State ex rel. Wyrick v. Wright, 678 S.W.2d 61 (Tenn. 1984).

13. —Displacing Holdover.

The holdover provision in this section, being for the benefit of the public and to prevent interruption in the public service, is not violated by an act providing for appointment of a temporary judge during contest in election for that office, it never having been intended by this section to deny the general assembly power to prevent a judge from prolonging his tenure of office by his own act of bringing any ill-advised election contest. After appointment of temporary judge following expiration of term, incumbent, candidate for reelection, could not remain in office during contest or draw a salary. Graham v. England, 154 Tenn. 435, 288 S.W. 728 (1926). See also State ex rel. Barham v. Graham, 161 Tenn. 557, 30 S.W.2d 274 (1930).

But see Morrison v. Gower, 154 Tenn. 624, 288 S.W. 731 (1926), holding that the reasons referred to in Graham v. England, supra, as disqualifying a circuit judge engaged in a contest over the office, do not apply to county judges, and that, by looking to the object clearly intended and by reference to the context, the act involved in that case appears not to have been intended to include county judges.

Where township school commissioners hold over after expiration of the term for which they were appointed, they have no such vested right in such office as will deprive the general assembly of the power to legislate them out of office (Private Acts 1929, ch. 897; Private Acts 1931, ch. 104; Private Acts 1935, chs. 128, 188). Kimsey v. Hyatt, 169 Tenn. 599, 89 S.W.2d 887 (1936).

14. —Temporary Appointee.

Where sheriff was appointed by county court to fill vacancy, his right to the office terminated at the end of the unexpired term for which he was appointed, and the sheriff elected for the succeeding term having died before taking office, the office could be filled by another appointee of the county court. State ex rel. Kenner v. Spears, 53 S.W. 247 (Tenn. Ch. App. 1899).

When an appointment is to fill an unexpired term, there is necessarily, under this section, a vacancy at the end of the term, because the appointment extends only that long; but the appointee must, under the constitution, continue to discharge the duties of the office until someone is chosen to fill the vacancy as an officer holding over, but not as one holding under a prolonged term, as where an officer is elected for a definite term and until his successor has qualified. State ex rel. Gann v. Malone, 131 Tenn. 149, 174 S.W. 257 (1915).

Where general assembly's election of one of its own members to fill vacancy in board of election was void as violative of Tenn. Const., art. II, § 10, a member of the board appointed by the other two members, before the general assembly convened, held over thereafter under this section and statute providing for continuation in office until election and qualification of successor. State ex rel. Carey v. Bratton, 148 Tenn. 174, 253 S.W. 705 (1923).

Where two of three trustees on school board for special school district resigned and defendants were appointed by remaining member to serve

out the unexpired term and where two persons elected to the board at next regular election were declared ineligible, persons appointed by the newly elected remaining member were entitled to membership rather than defendants. *State ex rel. Barnes v. Smith*, 199 Tenn. 459, 287 S.W.2d 63 (1956).

15. —Failure to Qualify.

The sheriff elected died between the date of his election and the date when he should have qualified. There was no vacancy in the office of sheriff, and the old sheriff was empowered to holdover, though the quarterly county court undertook to fill the supposed vacancy by election of a sheriff. *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S.W. 257 (1915).

Where the statute requires the taking of an oath of office, the elected officer does not qualify and the term of office does not commence until the prescribed oath is taken. *State ex rel. Wyrick v. Wright*, 678 S.W.2d 61 (Tenn. 1984) (elected official dies before taking oath).

16. Common Law Powers.

This provision of the constitution and the provisions in Tenn. Const., art. VII, §§ 4, 5, and art. XI, § 17 as to the manner in which officers shall be elected are not violated by a statute (Acts 1905, ch. 150) requiring the separation of the white and colored races on streetcars, because it authorizes the conductors in charge of the cars to change the line of division in cars, and to assign seats to passengers in accordance with such change, for this is not an unlawful delegation of the police power to the agents of streetcar companies in violation of such constitutional provisions, but is a requirement of the exercise of a power already existing by the common law in streetcar companies. *Morrison v. State*, 116 Tenn. 534, 95 S.W. 494 (1905). As to police power, see *Rhinehart v. State*, 121 Tenn. 420, 117 S.W. 508 (1908); *Motlow v. State*, 125 Tenn. 547, 145 S.W. 177 (1912), cert. dismissed, 239 U.S. 653, 36 S. Ct. 161, 60 L. Ed. 487 (1915).

17. Effect of Vacancy.

Where justice of the peace resigned and his resignation was accepted by county judge prior to date of meeting of quarterly county court and justice made no effort to participate in meeting in any way, office of justice was vacant at time of meeting and he should not have been counted in determining whether a quorum was present. *Bailey v. Greer*, 63 Tenn. App. 13, 468 S.W.2d 327 (1971).

ARTICLE XI

MISCELLANEOUS PROVISIONS

SECTION.

12. Education's inherent value — Public schools — Support of higher education.

Sec. 12. Education's inherent value — Public schools — Support of higher education. — The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines. [As amended; Adopted in Convention October 11, 1977; approved at election March 7, 1978; Proclaimed by Governor, March 31, 1978.]

Compiler's Notes. Prior to the 1978 amendment this section read: "Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government, to cherish literature and science. And the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appro-

prised by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by Legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools. The State taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the Colleges, Universities or Academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time." This amendment was adopted by a vote of 237,912 in favor and 127,788 against.

Cross-References. Education, title 49.

Health and educational facility corporations, title 48, ch. 3, part 3. Public education system established, § 49-1-101.

State university and community college system established, § 49-8-101.

Tennessee student assistance program, § 49-4-301.

Tennessee student loan program, § 49-4-501.

University of Tennessee at Chattanooga established, § 49-9-901.

University of Tennessee at Martin established, § 49-9-1001.

University of Tennessee board of trustees, §§ 49-9-201, 49-9-202.

University of Tennessee college of veterinary medicine established, § 49-9-801.

University of Tennessee medical school established, § 49-9-701.

University of Tennessee Space Institute established, § 49-9-601.

Section to Section References. This section is referred to in § 49-7-803.

Law Reviews. Comment, A Review of the Struggle for Tennessee Tax Reform, 60 Tenn. L. Rev. 431 (1993).

Leaving Equality Behind: New Directions in School Finance Reform (Peter Enrich), 48 Vand. L. Rev. 101 (1995).

School Finance Litigation: A Rural Perspective: The Magna Carta of Public Education in Tennessee (Lewis R. Donelson), 61 Tenn. L. Rev. 445 (1994).

School Finance Litigation: An Urban Perspective (Ernest G. Kelly Jr.), 61 Tenn. L. Rev. 471 (1994).

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The Great Tax Debate: Start at the Beginning (Allan F. Ramsaur), 35 No. 9 Tenn. B.J. 19 (1999).

The Wages of Taking Bakke Seriously: The Untenable Denial of the Primacy of the Individual, 67 Tenn. L. Rev. 949 (2000).

Attorney General Opinions. Municipality must offer new grade levels to all eligible children, OAG 98-090 (4/15/98); OAG 98-0132 (7/28/98).

If the failure to disburse basic education program funding adversely affects the delivery of program to K through 12 students, then the failure to distribute could lead to a violation of the constitution, OAG 01-112 (7/12/01).

Cited: *City of Nashville v. State Bd. of Equalization*, 210 Tenn. 587, 360 S.W.2d 458 (1962); *Goss v. Board of Educ.*, 301 F.2d 164 (6th Cir. 1962); modified, *Northcross v. Board of Educ.*, 302 F.2d 818 (6th Cir. 1962); *George Peabody College for Teachers v. State Bd. of Equalization*, 219 Tenn. 123, 407 S.W.2d 443 (1966); *County of Johnson v. United States Gypsum Co.*, 664 F. Supp. 1127 (E.D. Tenn. 1985); *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217 (Tenn. 1988); *Rollins v. Wilson County Gov't*, 967 F. Supp. 990 (M.D. Tenn. 1997); *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706 (Tenn. 2001); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002).

NOTES TO DECISIONS

ANALYSIS

1. Failure of challenge to 1978 amendment.
2. Municipal and county schools.
3. —Transportation.
4. Federal courts.
5. Equal educational opportunities.

6. Education funding system.

1. Failure of Challenge to 1978 Amendment.

Citizens and taxpayers who were voters in the referendum calling the 1977 limited constitutional convention lacked standing to challenge amendment to this section on ground that the amendment exceeds the limits of the convention call of Acts 1976, ch. 848 and therefore is ineffective under Tenn. Const., art. XI, § 3. *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980), cert. denied, 451 U.S. 939, 101 S. Ct. 1889, 68 L. Ed. 2d 396 (1981).

Lawsuit challenging amendment to this section did not present a justiciable controversy under the Declaratory Judgments Act where amendment was not self-executing but required legislative action to affect any rights of the plaintiffs, thereby rendering the controversy theoretical and contingent. *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980), cert. denied, 451 U.S. 939, 101 S. Ct. 1889, 68 L. Ed. 2d 396 (1981).

2. Municipal and County Schools.

Under Tennessee law, the county school systems are separate from county governments, the two entities having separate functions, origins and management, and thus where an employee worked for each entity for less than a year, she was not able to combine the two periods to become an eligible employee under the federal Family and Medical Leave Act (29 U.S.C. § 2612). *Rollins v. Wilson County Gov't*, 154 F.3d 626, 1998 Fed. App. 280 (6th Cir. 1998).

3. —Transportation.

Transportation of certain pupils to a particular school rather than to a closer school did not violate this section in absence of arbitrary or unreasonable abuse of discretion by school board. *Davis v. Fentress County Bd. of Educ.*, 218 Tenn. 280, 402 S.W.2d 873 (1966).

4. Federal Courts.

The mere fact that the state general assembly may go farther than it has in controlling and paying for public schools does not mean that the federal courts, in the exercise of their equitable powers, ought to tell the general assembly what it must do in this respect. *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986 (6th Cir. 1987), cert. denied, 487 U.S. 1206, 108 S. Ct. 2848, 101 L. Ed. 2d 885 (1988).

5. Equal Educational Opportunities.

The constitution imposes upon the general assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

6. Education Funding System.

The constitutionality of the state's education funding system presents a justiciable issue. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

DECISIONS UNDER PRIOR LAW

ANALYSIS

1. Scope of section.
2. Common school fund and educational fund.
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1. Scope of Section.

The constitutional provision making it "the duty of the general assembly, in all future periods of this government, to cherish literature and science" is, to be sure, merely a direction to the general assembly, but it nevertheless indicates the popular feeling and the public policy upon this great question. *Green v. Allen*, 24 Tenn. 170 (1844) (in dissenting opinion).

The language of this section treating of the common school fund is not confined to such fund, but is declaratory of the sense of the constitutional convention (and of the people who adopted it) upon the

subject of education, and the duty of the general assembly at all times to "cherish" education. *State v. Fisk Univ.*, 87 Tenn. 233, 10 S.W. 284 (1889); *Ward Sem. for Young Ladies v. Mayor of Nashville*, 129 Tenn. 412, 167 S.W. 113 (1913).

The school fund established under the constitution, and lost by the misfortunes of war and the subsequent events, was again spoken into existence by legislative fiat (Acts 1873, ch. 24, § 6) creating and appropriating for a permanent school fund the sum of two million five hundred and twelve thousand and five hundred dollars (\$2,512,500), and the faith of the state was pledged for the payment of the interest upon that fund for the equal benefit of all the people of the state. This school fund, thus spoken into existence by legislative fiat, became a permanent common school fund under this provision of the constitution. *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899).

This section of the constitution makes it the express duty of every general assembly at all times to encourage, foster, and cherish literature and science. As one of the chief means of accomplishing this most important purpose, the constitution contemplated the establishment of a common school system, and provided the common school fund. *State v. Mayor of Knoxville*, 115 Tenn. 175, 90 S.W. 289 (1905).

Constitution manifests the intention of the people that the education of the children through a system of common schools should be a state purpose. *Board of Educ. v. Shelby County*, 155 Tenn. 212, 292 S.W. 462 (1927).

2. Common School Fund and Educational Fund.

The common school fund defined in this section is one thing and the educational fund to be raised from polls is quite another. The common school fund is for the support of the common schools by the use of the interest thereon. The educational fund to be derived from polls may be more comprehensively appropriated to educational purposes, including not only common schools, but colleges, academies, public and private schools, libraries, in fact every enterprise that may in its nature be "educational" or an "educational purpose." The perpetual existence and continuance of this educational fund is guaranteed by making the elective franchise depend upon contribution to it, as shown by the constitution (art. II, § 28; art. IV, § 1). Therefore, the statute (Acts 1881, ch. 173) for the compromise and settlement of the bonded indebtedness of the state, which provided for the issuance of the state's refunding bonds whose coupons (as provided by the third section thereof) should be receivable in payment for all taxes and debts, except taxes for the support of the common schools, and for the payment of the interest on the common school fund, and not excepting the taxes on polls devoted to educational purposes, and which bonds and coupons, according to the form prescribed by the ninth section, omits the entire exception made in the third section, is unconstitutional and void, for the reason that, under such act, the common school fund and also the educational fund are both attempted to be diverted from their constitutional purpose of education to that of paying the state's indebtedness. *Lynn v. Polk*, 76 Tenn. 121 (1881); *Ballentine v. Mayor of Pulaski*, 83 Tenn. 633 (1885). But see Tenn. Const. art. IV, § 1, as amended in 1953.

3. Legislative Power Over School Fund.

The general assembly has the power to change the direction of a donation to a county before it has been appropriated, or rights have been acquired under it. Thus, that portion of the internal improvement fund created by Acts 1829, ch. 75, to which any particular county (Smith) was entitled by apportionment may be diverted therefrom and converted (as was done by Acts 1831, ch. 43, § 8) into a part of the school fund of such county to be disposed of and appropriated according to law (Acts 1829, ch. 107, § 10). The statute (Acts 1837-1838, ch. 83), authorizing the county court of Smith County to make such disposition of the internal improvement fund belonging to such county as to the court might seem proper, and to prosecute actions against any person who might fail to pay over any of such funds in his hands, did not include or apply to the internal improvement fund so previously converted into the school fund of such county, because such fund was not then any part of the internal improvement fund of such county. *Cage v. Hogg*, 20 Tenn. 49 (1839).

Previous to the Constitution of 1834, the school fund belonged to the state, and it was subject to the absolute control of the general assembly. But under the Constitution of 1834, as well as that of 1870, as shown by the provision of the above sections of the two constitutions, the general assembly was and is prohibited from passing any law diverting either the principal or interest of the fund to any purpose other than the use and support of the common schools. For the purpose of producing profits or interest on the fund for the use of the common schools, the general assembly had the power to loan or invest the fund,

and even to loan it to the state. *Governor v. McEwen*, 24 Tenn. 241 (1844); *State v. Bank of Tenn.*, 64 Tenn. 18 (1875); *Ballentine v. Mayor of Pulaski*, 83 Tenn. 633 (1885). See Acts 1873, ch. 24, § 6.

4. —To Compromise Suits.

Under this provision of the Constitution of 1834, and the statute (Acts 1835-1836, ch. 23) enacted to enforce it and put it in operation, the general assembly had the power, directly or by and through commissioners appointed for that purpose, under its resolutions (resolutions 49 and 53 in Acts 1843-1844, pp. 316 and 318), to settle, arrange, and compromise any suit or demand for the school fund, even after a decree had been rendered in the supreme court against the superintendent of public instruction (the treasurer of the fund) and his official sureties declaring and adjudging their liability and ordering a reference for an accounting and to ascertain the amount of their liability upon the basis fixed by the decree. *Governor v. McEwen*, 24 Tenn. 241 (1844); *State v. Fleming*, 26 Tenn. 152 (1846); *Johnson v. Hacker*, 55 Tenn. 389 (1874); *State v. Bank of Tenn.*, 64 Tenn. 18 (1875).

5. “The Bank of Tennessee.”

The moneys and debts due to “The Bank of the State of Tennessee” (incorporated by Acts 1820, ch. 7), and appropriated by statute (Acts 1827, ch. 64, amended by Acts 1829, ch. 107) to the use of common schools, were, by the Constitution of 1834, art. XI, § 10, converted into a perpetual, inviolable, and inalienable fund for the support and encouragement of common schools throughout the state. *Ingraham v. Terry*, 30 Tenn. 572 (1851).

In 1837, “The Bank of Tennessee” was created by Acts 1837-1838, chs. 107 and 108, partly for the purpose of aiding in the cause of education, which had been made a prominent object of the constitutional convention in 1834, as appears in this section of the constitution of that year. *Louisville & N.R.R. v. County Court*, 33 Tenn. 636 (1854); *Furman, Green & Co. v. Nichol*, 43 Tenn. 432 (1866), *rev’d on other grounds*, 75 U.S. 44, 19 L. Ed. 370 (1868).

When the school fund was, by Acts 1837-1838, ch. 107, §§ 1, 2, made a part of the capital stock of “The Bank of Tennessee,” it became a part of the assets of the bank, subject to the claims of creditors. When the school funds derived from the sales of the school lands were deposited in “The Bank of Tennessee,” to be invested in state bonds in accordance with Acts 1843-1844, ch. 104, §§ 3, 10, such funds became assets of the bank, and the districts depositing the same became simple creditors of the bank, except only as to such bonds on hand as were identified as those in which such investment was made, of which there were none. Therefore, the statute (Acts 1865-1866, ch. 28) appropriating the assets of “The Bank of Tennessee,” which was insolvent, as a preference for such school funds, attempted, in this way, to deprive the holders of the notes of the bank and its other creditors of their rights by impairing the obligation of the contracts of such bank, and for such reason, it was unconstitutional and void to that extent. *State v. Bank of Tenn.*, 64 Tenn. 1 (1875); *State ex rel. Bloomstein v. Sneed*, 68 Tenn. 472 (1876), *aff’d*, 96 U.S. 69, 24 L. Ed. 610 (1877); *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899). See *United States Fid. & Guar. Co. v. Rainey*, 120 Tenn. 357, 113 S.W. 397 (1907).

6. Escheated Property to School Fund.

All escheated property of every description whatever is appropriated to the use of common schools, and the proceeds thereof become a part of the common school fund, under, by, and in accordance with, the provisions of this section of the constitution, and the statutes (Acts 1827, ch. 64, § 1, and Acts 1835-1836, ch. 23, § 6, compiled in § 31-801 (repealed)). *Hinkle’s Lessee v. Shadden*, 32 Tenn. 46 (1852); *Puckett v. State*, 33 Tenn. 355 (1853). See *State v. Lancaster*, 119 Tenn. 638, 105 S.W. 858 (1907).

The constitution provides that all property of every description whatever appropriated by law (enacted before or after its adoption) to the common school fund shall become a part of a perpetual fund for the use of the common schools throughout the state. By Acts 1827, ch. 64, § 1, enacted before the adoption of this provision in the Constitution of 1834, all escheated property was appropriated to the use of common schools, and being so appropriated by law, the same came within the constitutional provision, and became a part of the perpetual school fund. By Acts 1835-1836, ch. 23, § 6, enacted after the adoption of the Constitution of 1834, and before the adoption of the Constitution of 1870, all escheated property was appropriated to the use of the common schools, and being so appropriated by law, the same came within the constitutional provision, and became a part of the perpetual school fund. This provision is identical in both constitutions. (Note in Shannon’s constitution.)

Under the constitutional provision permitting the general assembly

to authorize heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time, a statute (Acts 1849-1850, ch. 54, § 1), casting the land of an intestate husband upon his widow, where he left no heirs capable of inheriting his lands, and directing (in the fourth section thereof) that the attorney-generals shall dismiss all suits brought to recover lands as escheated under the previously existing laws, where the intestate husband left a widow, is valid and constitutional, and the dismissal of a suit brought to recover the lands of an intestate husband, or of a husband from whose will his widow dissented, and who was an unnaturalized foreigner, residing here, as land escheated to the state for want of heirs, operated to vest the same in his widow, though he died previous to the enactment of such statute. *Puckett v. State*, 33 Tenn. 355 (1853); *Garretson v. Brien*, 50 Tenn. 534 (1870).

7. Delegation of Taxing Power.

The general assembly cannot delegate the power of taxation to agencies other than counties and incorporated towns, and cannot delegate it to school districts or civil districts, though they be denominated incorporated towns. Such districts cannot become incorporated towns in the sense of the constitution (art. II, § 29). The power of taxation cannot be delegated to such districts, not even for school purposes, under the provisions of this section of the constitution. *Keesee v. Board of Educ.*, 46 Tenn. 127 (1868); *Waterhouse v. Board of President & Dirs.*, 55 Tenn. 858 (1874); *Lipscomb v. Dean*, 69 Tenn. 546 (1878); *Luehrman v. Taxing Dist.*, 70 Tenn. 425 (1879); *Ballentine v. Mayor of Pulaski*, 83 Tenn. 633 (1885); *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 36 S.W. 1041 (1896); *Redistricting Cases*, 111 Tenn. 234, 80 S.W. 750 (1903); *Maxey v. Powers*, 117 Tenn. 381, 101 S.W. 181 (1906); *State ex rel. Bigham v. Powers*, 124 Tenn. 553, 137 S.W. 1110 (1911).

8. Municipal and County Schools.

A special law authorizing a certain municipal corporation or county to establish and provide, by local taxation, for a system of free schools, is constitutional and valid. *Ballentine v. Mayor of Pulaski*, 83 Tenn. 633 (1885); *Burnett v. Maloney*, 97 Tenn. 697, 37 S.W. 689 (1896); *Redistricting Cases*, 111 Tenn. 234, 80 S.W. 750 (1903). See *Maxey v. Powers*, 117 Tenn. 381, 101 S.W. 181 (1906); *Prescott v. Duncan*, 126 Tenn. 106, 148 S.W. 229 (1912).

A statute (Acts 1899, ch. 59), authorizing children living outside, but within one-half mile of the city limits of Memphis as recently extended (by Acts 1899, ch. 134) to attend, for the period of five years thereafter, the public schools of the city, free of tuition, tended to encourage “knowledge, learning, and virtue” as essentials “to the preservation of republican institutions,” and was, in giving to the children beyond, as well as those within, the municipal borders, the opportunities and advantages of the education afforded by these municipal schools, conducive to good order and public morals in the community of Memphis. The education of the children living so near the city might well be considered a corporate purpose calculated to promote the interest of the city. *Edmondson v. Board of Educ.*, 108 Tenn. 557, 69 S.W. 274 (1902); *Ransom v. Rutherford County*, 123 Tenn. 1, 130 S.W. 1057 (1909).

It has long been firmly established in the jurisprudence of Tennessee that the establishment of a system of public schools and the exercise of the taxing power for their maintenance is at the same time a state, county, and municipal purpose, and is fully authorized by the Constitution of Tennessee. *Ransom v. Rutherford County*, 123 Tenn. 1, 130 S.W. 1057 (1909).

While it is true that the state normal school to be established under the provisions of the statute contained in Acts 1909, ch. 580, is a state institution, still it combines features providing for educational advantages which are peculiarly accessible to the scholastic population of the city and county in which it is established, thus combining with the state purpose also a municipal and county purpose, and there is no constitutional obstacle in the way of the state, county, and city combining for the establishment and maintenance of such an institution. *Ransom v. Rutherford County*, 123 Tenn. 1, 130 S.W. 1057 (1909).

9. Exemptions of University.

The charter exemption of the land of a certain university from taxation so long as such land belongs to the university, as shown in its legislative charter (Private Acts 1857-1858, ch. 29, § 10), granted under the Constitution of 1834, is not affected, lost, or forfeited, by the fact that the university leased such lands for terms extending from one to 33 years, with renewal options in some cases, to divers persons, where the annual rents are used and devoted exclusively to the purposes of the university. The exemption is not made to depend upon