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Local Government

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PART III: PUBLIC LAW

LOCAL GOVERNMENT

by

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I. OPEN MEETING LAW

IN 1967 the Texas Legislature adopted the "Open Meeting Law," which was designed to assure the public an opportunity to be informed of the transaction of public business.[1] This act, with certain exceptions, requires that every regular, special, or called meeting or session of every governmental body shall be open to the public. The legal effect of a meeting held in violation of this statute reached the appellate courts during this survey period.

In *Toyah Independent School District v. Pecos-Barstow Independent School District*[2] suit was brought to enjoin the enforcement of an order adopted by the Board of Trustees of Reeves County, annexing Toyah Independent School District. It was contended that the annexation order was subject to judicial invalidation because it was adopted at a "closed" meeting of the Reeves board in violation of the Open Meeting Law. The court stated that the Reeves School Board was a political subdivision of the State of Texas, and that the members could perform no valid act except as a body at meetings properly convened and conducted. Concluding that the Open Meeting Law imposed a mandatory obligation on the school board, the court held that the order adopted at the illegal meeting was ineffectual.

II. ANNEXATION

During this survey period there have been a number of cases involving the interpretation of the Municipal Annexation Act,[3] which was adopted in 1963. The limitations imposed by the Act continue to be the source of much litigation. A significant case in this area is *Fox Development Co. v. City of San Antonio*.[4] In *Fox* the land in question was located outside the corporate limits of San Antonio, but the city contended that it was within five miles of its corporate limits as extended by ordinance, thus making the property subject to the provisions of the Municipal Annexation Act. The appellant contended that the land in question was not within five miles of the corporate limits of San Antonio, since the annexation ordinance relied upon was void because the city had by subterfuge extended the city limits along various roads exiting from San Antonio in an attempt to evade the five-mile limitation of the Act. The ordinance in question was one of a group of similar ordinances of the city extending its city limits five miles in length co-extensive with various highway rights-of-way, and these were generally described as "spoke" ordinances. The

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[1] Ch. 271, § 1, [1967] Tex. Laws 597 (codified at TEX. REV. CIV. STAT. ANN. art. 6252-17 (1970)).

[2] 466 S.W.2d 377 (Tex. Civ. App.—San Antonio 1971).

[3] TEX. REV. CIV. STAT. ANN. art. 970a (1963).

[4] 468 S.W.2d 338 (Tex. 1971).

particular ordinance annexed the highway right-of-way of United States Highway 281 South, and embraced an area of .11 square miles. The area was contiguous to the existing city limits at its width, which was calculated to be 116.16 feet. The area was not within and did not touch the city limits of any other municipality. It did not include any privately owned or occupied land area. It was contended that the ordinance was void under the authority of *City of Pasadena v. State ex rel. City of Houston*[5] and *City of Irving v. Dallas County Flood Control District*.[6] In those cases it had been held that similar annexations were void because the area sought to be annexed was not adjacent to the annexing city. However, in *Fox* the supreme court relied on *State ex rel. Pan American Production Co. v. Texas City*,[7] wherein it was held that the only limitations on the power of a city to annex additional territory is that it must be adjacent to the city and not included within the boundaries of any other municipality. In *Texas City* the court had also stated that "the Legislature used the term adjacent in the sense of being 'contiguous' and 'in the neighborhood of or in the vicinity of,' without reference to the character of the land or the use to which it is put."[8] The court in *Fox* then distinguished *City of Pasadena* and *City of Irving* on the basis that those cases involved areas that were adjacent to the contesting cities and not adjacent to the annexing cities. The court reasoned that since the area in question was within five miles of the corporate limits of San Antonio, it was within the extraterritorial jurisdiction of San Antonio and subject to annexation by it.

State ex rel. Ratcliff v. City of Hurst[9] presented the question of the validity of an attempt by the city of Hurst to annex territory that was adjacent to its corporate limits at the end of a fifty-foot strip. The fifty-foot strip was adjacent to the corporate limits of the cities of Bedford and Colleyville. The court held that under the principles of law considered in *City of Pasadena*, the area in question was not adjacent to Hurst by virtue of the fifty-foot strip, but that the area was adjacent to the municipalities of Colleyville and Bedford, and the attempted annexation of the fifty-foot strip was void.

Another case involving the construction of the Municipal Annexation Act is *Spencer v. City of Brownsville*.[10] It was contended that the attempted annexation of the area in question was void because the city failed to comply with the notice requirements of section 6 of the Act.[11] Specifically, it was asserted that the city was required to have another public hearing after the city commission deleted a part of the proposed area following the public hearing. A public hearing was held as required by the Act, and notice of the hearing was published, together with a full description of the area proposed to be annexed. After the public hearing and on first reading the city commission passed an annexation ordinance that included a full description of the area. This ordinance deleted 389 acres from the area as described in the notice of the public

[5] 442 S.W.2d 325 (Tex. 1969).
[6] 383 S.W.2d 571 (Tex. 1964).
[7] 157 Tex. 450, 303 S.W.2d 780 (1957).
[8] *Id.* at 457, 303 S.W.2d at 784.
[9] 458 S.W.2d 696 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*
[10] 458 S.W.2d 504 (Tex. Civ. App.—San Antonio 1970).
[11] TEX. REV. CIV. STAT. ANN. art. 970a, § 6 (1963).

hearing. Public notice of the passage of the ordinance on first reading on April 2, 1970, was given on April 10, 1970, together with a description of the area to be annexed at final reading on May 14, 1970. It was undisputed that the annexed area was included within the original description as published before the public hearing, and that the appellants' land, being located within the area described in the annexation ordinance, was also within the area described in the notice published before the public hearing. The question presented was whether the city's action in not having another public hearing after the commission decided to delete 389 acres from the proposed annexation made the annexation ordinance wholly void so as to enable the appellants to challenge its validity. The court pointed out that section 6 of the Act neither specifically requires that the notice contain a description of the territory to be annexed nor that the notice be in the same form as the annexation ordinance. It merely requires that notice be given of a public hearing at which interested persons are to have an opportunity to be heard. The court concluded that notice of the public hearing was duly given and that the public was advised of the area proposed to be annexed. The annexation was, therefore, held to be valid.

State ex rel. Howard v. City of Wichita Falls[12] involved a question of whether the possession by the city of an easement for pipeline purposes entitled it to annex territory outside its territorial jurisdiction. The Municipal Annexation Act provides: "A city may annex territory only within the confines of its extraterritorial jurisdiction; provided, however, that such limitations shall not apply to the annexation of property owned by the city annexing the same."[13] The city desired to annex Lake Arrowhead, which was located approximately nine miles from the city limits. The lake was owned in fee simple by the city as a water supply facility. Some portions of the land lying along the pipeline conduit connecting the lake to the city were owned in fee simple, but the title to the surface was not continuous and connecting, and the greater portion of the conduit lay under land surface to which individuals held title. The court recognized the right of the city to annex Lake Arrowhead, which it owned, but also recognized that the lake area would not be contiguous unless the city could lawfully annex the intervening property to which its easement rights pertained. The court held that the easements of the city were not such as would permit the court to accord "ownership" thereof to it within the contemplation of section 7 of the Municipal Annexation Act.[14] Since one or more of the parcels of land lying outside the territorial jurisdiction of the city, in and under which the city held easement rights, were "owned" by individuals who held fee title to the surface, the area in question was not subject to annexation by the city.

Sitton v. City of Lindale[15] was an interesting case involving the power of a general-law city to annex territory. The city of Lindale, which was incorporated as a general-law city, annexed territory without the consent of the inhabitants of the area. Since 1875 the annexation of land by general-law cities has been

[12] 465 S.W.2d 459 (Tex. Civ. App.—Fort Worth 1971), *error ref. n.r.e.*
[13] TEX. REV. CIV. STAT. ANN. art. 970a, § 7 (1963).
[14] *Id.*
[15] 455 S.W.2d 939 (Tex. 1970).

governed by the provisions of article 974.[16] The statute requires that a majority of the inhabitants within an area vote in favor of becoming a part of the annexing city before the area may be annexed. The city contended that consent is not necessary when a city annexes within its extraterritorial jurisdiction under the Municipal Annexation Act. The court held that the Act did not change the power of annexation of general-law cities. The annexation by Lindale was, therefore, void.

III. INCORPORATION

In *City of West Lake Hills v. State ex rel. City of Austin*[17] the Texas Supreme Court considered the validity of the original incorporation of West Lake Hills. The original incorporation included within the proposed boundaries of the city area that was already within the corporate limits of the city of Austin. The court also considered the validity of an annexation ordinance by which West Lake Hills annexed a strip of land fifty varas[18] wide and several miles in length. The trial court found that this annexation was for the purpose of cutting off an area of several thousand acres that would otherwise be within the immediate normal growth pattern of Austin. The court held that the incorporation of West Lake Hills could not be upheld in its original form. The court then considered whether the original incorporation should be invalidated or whether a part of the territory originally described could be invalidated. The court recognized that municipal line-drawing is a legislative, not a judicial function.[19] The court held that the area within the limits of Austin would be excluded from the incorporated area of West Lake Hills, but upheld the incorporation of the remaining part of the city.

The court stated that the validity of the annexation of the fifty-varas strip by West Lake Hills depended upon whether the city had complied with the requirements of article 974g,[20] which limits city annexation to territory "contiguous and adjacent" to the city and to that no more than one-half mile in width. The fifty-varas strip was almost six miles long, and part of it was beyond the one-half mile distance from the boundaries of West Lake Hills. For the most part the strip was closer to the city limits of Austin than to the body of West Lake Hills. The mayor of West Lake Hills testified that the annexation was solely for the purpose of preventing it from being annexed and served by Austin. The court held that the annexation ordinance was invalid for the reason that the land was not adjacent to West Lake Hills at the time the ordinance was passed. The court also considered whether the annexation ordinance had been validated by various validating acts[21] adopted by the Texas Legislature since the passage of the ordinance. In holding that the various validating acts had not validated the annexation ordinance, the court said that although the

[16] TEX. REV. CIV. STAT. ANN. art. 974 (1963).
[17] 466 S.W.2d 722 (Tex. 1971).
[18] "Yard, a measure of three feet . . . ." A NEW PRONOUNCING DICTIONARY OF THE SPANISH & ENGLISH LANGUAGE 646 (M. Valazquez & E. Gray eds. 1955).
[19] 466 S.W.2d at 728, citing City of Irving v. Dallas County Flood Control Dist., 383 S.W.2d 571 (Tex. 1964).
[20] TEX. REV. CIV. STAT. ANN. art. 974g (1963).
[21] *Id.* arts. 966e, 966f, 966h, 974d-5, 974d-6, 974d-11 (Supp. 1972).

legislature could validate the annexation or incorporation of noncontiguous and nonadjacent territory, it had not expressly done so. Thus, the court concluded that it was not the intention of the legislature to validate annexation of nonadjacent and noncontiguous territory.

Harang v. State ex rel. City of West Columbia[22] was a quo warranto proceeding in which the court considered the validity of the incorporation of the village of Wild Peach. The area proposed to be incorporated was adjacent to, but did not include (except for a few connecting strips) about fifteen miles of county roads. There were about 100 homes and 374 inhabitants in the entire area. The court pointed out that there should be some degree of unity and proximity between the inhabitations so assembled to constitute a town or village. To be entitled to incorporate, the area of the town or village should be susceptible of receiving some municipal services.[23] The court then stated that as a matter of law the area sought to be incorporated did not constitute a town or village. The court also said that under the statute authorizing the town to be incorporated,[24] the area to be incorporated is limited to that which is intended to be used for strictly town purposes. This is to prevent the town or village from embracing land for tax purposes only when there is no reasonable expectation that it will become a residential part of the town.[25] The court held that the limitation on the area to be included also prohibited the inclusion of territory simply to make up the required population without any reasonable expectation of furnishing to it any of the usual services afforded by a municipality.

In two cases the courts considered the provisions of the Municipal Annexation Act that prohibit a city from being incorporated within the extraterritorial jurisdiction of another city without the written consent of the governing body of that city.[26] In *State ex rel. City of Azle v. City of Sanctuary*[27] the court stated that the written-consent requirement of the Act was inapplicable since the city of Azle, not being an incorporated municipality, had no extraterritorial jurisdiction under the act or common law. In *Parks v. Elliot*[28] the plaintiff sought a writ of mandamus against the County Judge of Harris County to require him to order an election for the incorporation of the proposed town of Waterloo. The proposed town was within the extraterritorial limits of Houston, an incorporated municipality, and Houston had not given its written consent. The court held that the failure of the applicants to obtain the written consent of the governing body of Houston for incorporation of the area lying within Houston's extraterritorial jurisdiction was fatal to their petition for mandamus. The applicants also contended that the written-consent requirement was unconstitutional. In overruling this argument, the court cited cases in which the Texas Supreme Court had specifically upheld its validity.[29]

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[22] 466 S.W.2d 8 (Tex. Civ. App.—Houston [14th Dist.] 1971).

[23] State *ex rel.* Taylor v. Eidson, 76 Tex. 302, 13 S.W. 263 (1890). *See also* Mandelker, *Standards for Municipal Incorporations on the Urban Fringe*, 36 TEXAS L. REV. 272 (1957).

[24] TEX. REV. CIV. STAT. ANN. art. 1134 (1963).

[25] State *ex rel.* Perrin v. Hoard, 94 Tex. 527, 62 S.W. 1054 (1901).

[26] TEX. REV. CIV. STAT. ANN. art. 970a, § 8 (1963).

[27] 467 S.W.2d 211 (Tex. Civ. App.—Fort Worth 1971).

[28] 465 S.W.2d 434 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error ref. n.r.e.*

[29] *Id.* at 437, citing Deacon v. City of Euless, 405 S.W.2d 59 (Tex. 1966); Red Bird

IV. ASSESSMENTS AND TAXATION

The Texas Court of Civil Appeals at Dallas in *City of Garland v. Garland Independent School District*[30] considered whether a school district may be subjected, without its consent, to liability for special assessments levied by a city for paving streets abutting the school property. The city contended that even though school property is exempt from forced sale and from taxation under the Texas Constitution,[31] the special benefit from street improvements makes the assessments not "taxation" within the constitutional exemption. The city further contended that the school was liable for the assessment under the provisions of article 1105b,[32] which authorizes cities to levy such assessments. The school district argued that it was not liable in the absence of approval by its board of trustees, because its expenditures are limited to purposes authorized by its board under the Texas Education Code.[33] The school district conceded that its board of trustees had the power to expend school funds for improving abutting streets, but contended that the statute forbids such expenditures without the board's approval. The court held that in the absence of approval of the school board for this expenditure, which was not a mere irregularity but a matter affecting the city's *power* to make the assessment, the assessment was void. The court also held that because the assessment was void, the school district's failure to file suit within the time required by section 9 of article 1105b[34] does not bar it from asserting that the assessment was void in the instant proceeding.

In *Maverick County Water Control & Improvement District No. 1 v. State*[35] the Veterans' Land Board sought a determination of whether certain land owned by the Board was free of all liens, claims for taxes, and other charges made, levied, or assessed by the water control district, the independent school district, and the county. The land in question had been purchased by the Veterans' Land Board and sold to a returning veteran, but the Board subsequently repossessed the land when the veteran defaulted. In addition to ad valorem taxes the other charges attempted to be asserted against the land consisted of assessments and water delivery charges made by the water district. The court said that under provisions of section 4 of article 7150,[36] property belonging to the state or to any political subdivision thereof is exempt from taxation. After the forfeiture of the veteran's rights under the contract of sale the entire interest in the land was owned by the State of Texas and was not subject to ad valorem taxation while the full legal title was held by the state. The defendant water district contended that even if the land was exempt from ad valorem taxation, it was subject to special assessments levied by the district. Without passing on the question of whether the special assessment constituted a "tax," the court held that a political subdivision of a state has no power to levy a special assessment against state property.

Village v. State *ex rel.* City of Duncanville, 385 S.W.2d 548 (Tex. Civ. App.—Dallas 1964), *error ref.*

[30] 468 S.W.2d 110 (Tex. Civ. App.—Dallas 1971), *error ref. n.r.e.*

[31] TEX. CONST. art. XI, § 9.

[32] TEX. REV. CIV. STAT. ANN. art. 1105b (1963).

[33] TEX. EDUC. CODE ANN. § 20.48 (1969).

[34] TEX. REV. CIV. STAT. ANN. art. 1105b, § 9 (1963).

[35] 456 S.W.2d 204 (Tex. Civ. App.—San Antonio 1970), *error ref.*

[36] TEX. REV. CIV. STAT. ANN. art. 7150, § 4 (1960).

In *Harding Bros. Oil & Gas Co. v. Jim Ned Independent School District*[37] the taxpayer sought to enjoin the collection of school taxes on the basis of excessive assessments. The property owner had rendered its property for taxation, but the valuation had been increased by the board of equalization, and it was contended that the increased assessments were illegal and, thus, null and void. The property owner, although not contending that its property was not subject to *any* taxation, did not tender to the school district any amount of taxes whatever. The school district contended that since the property owner was seeking equitable relief without offering to do equity, his prayer for a declaratory judgment and injunction should be denied. Agreeing with this contention, the court held that a taxpayer is not entitled to injunctive relief against collection of school taxes on alleged grounds of excessive assessments unless he has offered to do equity by tendering in dollars and cents the amount of taxes owed under his own theory of valuation.

The Supreme Court of Texas considered the right to exemption from ad valorem taxes in *City of Waco v. Texas Retired Teacher Residence Corp.*[38] A nonprofit corporation operated a residence of eighty-eight living units for retired school teachers. Different fees were charged depending upon the size of the accommodations, and, in addition to a furnished apartment, the residents received board, utilities, maid service, and other benefits. Medical aid was not provided, and it did not admit or retain residents who were ill. The court recognized that charitable exemption from ad valorem taxes is provided for a type of institution defined as "one which dispenses its aid to its members and others in sickness or distress, or at death, without regard to poverty or riches of a recipient . . . ."[39] The court concluded that in the instant case aid was not dispensed to those in sickness or distress without regard to the poverty or riches of the recipient. No person was accepted during the years in question without regard to poverty or riches, and no one was accepted in the residence who could not pay a minimum fee of $115 per month, and then only if the payment was supplemented by twenty-five dollars. The court held that the residence was not operated as a purely public charity during the years in question and was not exempt from taxation.

V. ZONING

In *Hunt v. City of San Antonio*[40] the city had changed the zoning classification on two lots from single-family zoning to apartment zoning classification. Suit was brought by an owner of property in the immediate vicinity to have the zoning ordinance declared null and void. The trial court entered judgment holding the ordinance void. The court of civil appeals reversed and rendered judgment for the city.[41] The supreme court reversed and rendered, holding the ordinance void. The lots in question were two vacant lots located at an intersection with a major thoroughfare in the city of San Antonio. The city relied

[37] 457 S.W.2d 102 (Tex. Civ. App.—Eastland 1970).
[38] 464 S.W.2d 346 (Tex. 1971).
[39] TEX. CONST. art. VIII, § 1; TEX. REV. CIV. STAT. ANN. art. 7150, § 7 (1971).
[40] 462 S.W.2d 536 (Tex. 1971).
[41] 458 S.W.2d 952 (Tex. Civ. App.—San Antonio 1970), *error granted.*

upon the following changes in the area surrounding the two lots: (1) a parking lot had been built on the northwest corner of San Pedro Avenue and Summit Street catercorner to the lots; (2) a theater parking lot had been built one block south of the lots; (3) enrollment had increased at the junior high school across San Pedro Avenue and to the south of the lots; (4) San Pedro Avenue had been widened to accommodate four lanes of traffic; (5) traffic had increased on San Pedro Avenue in the vicinity of the lots. The court pointed out that the parking lot, the theater parking lot, and the school were each located in a zone in which the use of each had been authorized by an earlier comprehensive zoning ordinance. This left only two changes to be considered by the court: the widening of San Pedro Avenue and the increased traffic on it. The court then concluded that these last two changes standing alone, were insufficient to justify the rezoning of the two lots in question, and that the rezoning constituted "spot" zoning. The court recognized that a city ordinance is presumed to be valid and that the presumption applies to amendatory zoning ordinances. Further, if reasonable minds may differ on the issue of whether a particular zoning ordinance has a substantial relationship to public health, safety, morals, or general welfare, no clear abuse of discretion is shown, and the ordinance must stand as a valid exercise of the city's police power. An "extraordinary burden" rests on one attacking the ordinance to show that no conclusive or even controversial issuable facts or conditions exist which would authorize the governing board of a municipality to exercise the discretion confided to it. This clearly presents a question of law, not fact. This presumption that an amendatory ordinance is valid, however, disappears if it is shown that the city acted arbitrarily and unreasonably, rather than on a basis of changed conditions. The court held that the mere fact that there had been a changed condition outside of the residence area in question would not justify the change of zoning on the lots in question simply because they were on the edge of the residential district. It said that "if the zoned area may be encroached upon from the edge, the effect thereof is to cause the comprehensive plan to collapse like the fall of a row of dominoes when the first in the row is knocked over."[42]

In *City of Lubbock v. Stewart*[43] the trial court granted a summary judgment invalidating an amendment to the zoning ordinance based on opinion evidence offered in affidavits of real estate experts. The court of civil appeals said that a summary judgment cannot be supported by opinion evidence found in affidavits or depositions attached to the motion for summary judgment, even though the witness is an expert in his field. Because there was a presumption of validity of the zoning ordinance when it was attacked by the appellees, the opinion evidence offered by the affidavit supporting the motion for summary judgment did not establish as a matter of law that the ordinance was invalid.

The courts again recognized the principle of law that all property is held subject to the lawful exercise of police power by a city in *Town of Renner v. Wiley*.[44] A property owner sought to enjoin the city from interfering with his use of the property and also sought to enjoin the city from interfering with the

[42] 462 S.W.2d at 540.
[43] 462 S.W.2d 48 (Tex. Civ. App.—Beaumont 1970).
[44] 458 S.W.2d 516 (Tex. Civ. App.—Dallas 1970).

furnishing of utility service by the Texas Power & Light Company. The applicant operated a trailer court in the town of Renner, having commenced the construction of the trailer court in April 1967. In 1968 he sought to enlarge the trailer court and attempted to obtain additional electrical service from the power company. He had failed to make application for a building permit or obtain a certificate of occupancy, although the town of Renner had in November 1966 adopted an ordinance prohibiting the furnishing of utilities to any building until the owner had obtained a building permit and a certificate of occupancy. On March 18, 1968, the town adopted a new comprehensive zoning ordinance and an ordinance pertaining to the subdivision of land. The applicant contended that since he had started construction of the trailer court prior to March 18, 1968, when the current comprehensive zoning ordinance was adopted, that it was not applicable to him and that he should be permitted to enlarge the trailer park. The court held that a zoning ordinance adopted under statutory authority is presumed to be valid. Courts cannot interfere unless the challenged ordinance appears to represent a clear abuse of municipal discretion, or unless there is evidence that a zoning ordinance is arbitrary or unreasonable—either generally or as to particular property. The court stated that regulation of the construction, maintenance, or repair of buildings falls within the scope of police power, and that authority to exercise such regulation has been delegated to municipalities by the state.[45] Absence of knowledge of a zoning ordinance does not constitute a defense to the enforcement of the ordinance.[46] In holding that the applicant was not entitled to injunctive relief, the court reasoned that all property is held subject to the lawful exercise of police power. No vested rights can be acquired to avoid the valid exercise of a municipality's police power. The rule is applicable though an application for a building permit may have been made and suit filed prior to passage of a valid ordinance. Since the applicant had not made application to the city for a building permit and certificate of occupancy, as required by its ordinances, the application for the injunction was denied.

VI. TORT LIABILITY

During this survey period two cases dealing with the notice provisions contained in charters of home-rule cities with regard to minors were decided, the courts of civil appeals arriving at different conclusions. In *McCrary v. Shows*[47] the court considered the obligation of a minor involved in an accident with a city vehicle to give notice to the mayor or city council in writing within sixty days after the accident had occurred, as required by the home-rule charter. The eighteen-year-old minor was involved in a collision with a city vehicle operated by the assistant fire chief of Odessa. It was contended that the plaintiff was under the disability of minority and that compliance with the notice provision of the charter was not required. No issue with regard to actual physical or mental incapacity was raised. The court sustained the city's motion for summary judg-

[45] TEX. REV. CIV. STAT. ANN. art. 1011a (1963).
[46] City of Fort Worth v. Johnson, 388 S.W.2d 400 (Tex. 1964).
[47] 466 S.W.2d 803 (Tex. Civ. App.—El Paso 1971).

ment, stating that minority alone does not excuse compliance with the notice-of-claim charter provision of a municipality.[48]

City of *Houston v. Bergstrom*[49] was an action brought in behalf of a girl who was fifteen years and ten months old at the time of a collision with a vehicle owned and operated by the city of Houston. It was argued that the plaintiff was not physically or mentally capable of giving such notice as was required by the charter because of her minority. The court held that the minor should be excused from compliance with the notice requirements of the city's charter as a condition to the city's liability to her for personal injuries caused by its negligence. Referring to article I, section 13, of the Texas Constitution,[50] the court said that if the Houston charter notice requirement were construed as working a forfeiture of the common-law causes of action of one under the disability of minority for personal injuries suffered by him as the result of the actual negligence of the city, it would violate the constitutional guaranty. The court then stated that the plaintiff was as a matter of law excused from complying with the notice requirement of the charter because of her minority. It is interesting to note that the court referred to the case of *Wones v. City of Houston*,[51] an earlier decision by the same court, and specifically stated that they disagreed with the views expressed by the court in *Wones*.

In *Sarmiento v. City of Corpus Christi*[52] the court considered whether a school crossing guard is engaged in the performance of a governmental function. After discussing the various activities of a city, whether the activity was governmental or proprietary, the court said that the use of control traffic lights by a city in the regulation and control of traffic on a street is a governmental function as a reasonable exercise of police power. It further held that the activity of an employee of a city in directing traffic at a street intersection is analogous to the activity of a traffic signal light, and concluded that the school crossing guard was performing a governmental function and that the city was not liable for the negligence of such an employee while performing these duties.

An interesting case in which error has been granted is *George v. City of Houston*.[53] In *George* an eleven-year-old boy trespassed upon property operated by the city as a sanitary land fill. The court recognized that the city could not be held liable on a theory based on ordinary negligence because the activities were deemed governmental in nature. The court noted that there is only one Texas case in which recovery against a municipality has been allowed for personal injury or death sustained by reason of a nuisance established or maintained by a municipality in the performance of a governmental function. A cause of action exists in such a case in which a right of an injured party has been violated. The court, in reviewing the evidence in the light most favorable to the appellants, said that it appeared that the pond in question was inherently

[48] 466 S.W.2d at 805, citing Wones v. City of Houston, 281 S.W.2d 133 (Tex. Civ. App.—Galveston 1955).
[49] 468 S.W.2d 588 (Tex. Civ. App.—Houston [14th Dist.] 1971).
[50] TEX. CONST. art. I, § 13: "All courts shall be open, and every person for an injury done him, in his lands, goods, persons or reputation, shall have remedy by due course of law."
[51] 281 S.W.2d 133 (Tex. Civ. App.—Galveston 1955).
[52] 465 S.W.2d 813 (Tex. Civ. App.—Corpus Christi 1971).
[53] 465 S.W.2d 387 (Tex. Civ. App.—Houston [1st Dist.] 1971), *error granted.*

dangerous and constituted a nuisance. The case was then reversed and remanded for the jury to make a determination of whether the inherently dangerous condition was a proximate cause of the death of the boy. Since a writ of error has been granted in *George*, the rule of law to be followed in this will apparently be soon determined.

VII. POLICE POWER

The application of the Texas Motor Bus Act[54] was considered by the supreme court in *State v. Houston Tour & Charter Service, Inc.*[55] The tour and charter service held a permit from the city of Houston authorizing the performance of a charter bus service with the city. The distinguishing characteristic of a charter bus service is that routes, points of service, and times of departure, arriving, and return are determined by the chartering passengers. The controversy concerned the fact that the company had extended its charter bus service to points and places beyond the city of Houston and its suburbs. This necessitated the transportation of persons for compensation or hire over the public highways. The company had not filed for and had not obtained an authorizing certificate of public convenience and necessity from the Railroad Commission of Texas, and insisted upon its rights to so operate without compliance with the Act. The Act defined "motor bus company" as one engaged in the business of transporting persons for compensation or hire over the public highways within the state, whether operating over fixed routes or schedules, or otherwise.[56] Motor bus companies are required to obtain a certificate or permit from the Railroad Commission. The Act provides that its regulatory power does not include the operation of motor-propelled passenger vehicles wholly within the limits of any incorporated town or city and its suburbs. The court held that the company operated its charter bus services so as to come within the terms of the Act's definition of "motor bus company." The company's operation was enjoined until it complied with the requirements of the Act.

In *Sundaco, Inc. v. State*[57] the court considered the efforts of a company to get around the provisions of the Texas "Sunday Closing Law."[58] Clarks entered into a contract with Sundaco providing that Sundaco would lease from Clarks a certain premise in Abilene for the period of time beginning on Saturday night at 11:59 P.M. and ending at midnight of the following Sunday. At the beginning of such period Sundaco would buy from Clarks all the goods, wares, and merchandise owned by Clarks at such location with the option to return the same to Clarks at the end of the period. The law in question provides: "Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell [certain named items] shall be guilty of a misdemeanor."[59] The court found that the lease or contract was a subterfuge; that Sundaco served as a conduit for Clarks; that Sundaco was the alter ego of Clarks; and that for the purpose of

[54] TEX. REV. CIV. STAT. ANN. art. 911a (1964).
[55] 460 S.W.2d 113 (Tex. 1970).
[56] TEX. REV. CIV. STAT. ANN. art. 911a (1964).
[57] 463 S.W.2d 528 (Tex. Civ. App.—Eastland 1971), *error ref. n.r.e.*
[58] TEX. PEN. CODE ANN. art. 286a (1971).
[59] *Id.* § 1.

Sunday sales Sundaco was an agent of Clarks and that Sundaco and Clarks had entered into collusion for the purpose of evading the law. Affirming the judgment of the trial court, the court of civil appeals stated that a mere device or subterfuge to evade the law is looked upon with disfavor by the courts. Further, it held that courts will look through the form to the substance of the relation between corporations and will disregard the fiction of corporate identity if it is used to circumvent the statute or as a mere tool or business conduit.

Two cases involving the jurisdiction of a civil district court to enjoin the enforcement of a penal ordinance were decided during this survey period. In the first case, *Parker Brothers & Co. v. City of Hunter's Creek Village*,[60] an effort was made to enjoin enforcement of a penal ordinance regulating truck traffic on certain roads within the city of Hunter's Creek Village. The court stated the general rule to be that equity will not enjoin the enforcement of criminal law. However, it recognized an exception. When the criminal statute is unconstitutional, or otherwise void, and enforcement thereunder involves an invasion of property rights which will result in an irreparable injury, equity will intervene to protect those property rights by enjoining enforcement of the statute. The appellant company contended that the ordinance in question prevented it from delivering certain ready-mixed concrete products, and forced it to use a circuitous route in delivering its products. The company further argued that it would not be economically feasible for it to continue to deliver its products to certain areas, and that other plants operated by the company were inadequate to supply the material needed to fill outstanding contracts. The court found that the appellant had failed to establish that the enforcement of the ordinance in question would cause irreparable injury to its business. The fact that the appellant's contract to sell and deliver building materials might be affected if the ordinance were upheld did not entitle the appellant to injunctive relief. The court reasoned that the contracts which relate to the use of highways must be deemed to have been made in contemplation of the regulatory authority of the state. Having failed to show that as a matter of law access to their property was impaired by the ordinance so as to adversely affect the value of the properties, the appellant was not entitled to injunctive relief.

In the second case, *City of Corpus Christi v. Gilley*,[61] the trial court declared a taxicab licensing ordinance unconstitutional and enjoined its enforcement. The provisions of the Corpus Christi ordinance complained of required the payment of a fee as a prerequisite to the issuance of a city chauffeur's license for taxicab drivers. The plaintiff contended that the provisions of the ordinance requiring the payment of such a fee to the city was void, unconstitutional, and unenforceable as being in conflict with the provisions of articles 6687b[62] and 6698.[63] The court of civil appeals pointed out that article 6687b, which deals with the licensing of operators of motor vehicles, prescribes the requirements of such applicants and provides for the payment of fees to the state of Texas for the issuance of such state licenses. Article 6698 gives to municipal corpo-

[60] 459 S.W.2d 915 (Tex. Civ. App.—Houston [1s Dist.] 1970).
[61] 458 S.W.2d 124 (Tex. Civ. App.—Corpus Christi 1970), *error ref. n.r.e.*
[62] TEX. REV. CIV. STAT. ANN. art. 6687b (1971).
[63] *Id.* art. 6698 (1969).

rations the right to license and regulate the use of motor vehicles for hire, but prohibits the cities from levying or collecting any occupation tax or license fee on such motor vehicles. The court held that since the appellee has the right to drive a commercial motor vehicle by virtue of the license granted by the State of Texas for which a fee is paid to the state, the city had no right to impose an additional fee for a city chauffeur's license. The city contended that since the subject ordinance was a penal ordinance, the trial court erred in enjoining the enforcement of it. The court recognized that when the criminal law is unconstitutional and the enforcement thereof involves an invasion of property rights which will result in irreparable injury, equity may intervene to enjoin the enforcement. Having found that the ordinance was unconstitutional, the granting of the injunction was proper.