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MUNICIPAL CORPORATIONS

by

Charles W. Webster* and John L. FitzGerald**

I. Legislative Control

In Avery v. Midland County' the supreme court held that the Texas and United States Constitutions were violated by a reapportionment and redistricting order of the Midland county commissioners which gave one of the four precincts ninety-five per cent of the population and grossly disparate land area and taxable values. The court held that equality of population is not the sole criteria and that other factors may be considered by the commissioner's courts in drawing precinct lines. The court said:

[T]he convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners' precincts upon the basis of additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which it ordered a redistricting to achieve substantial equality of population.

The supreme court emphasized that developments during recent years have placed urban responsibilities on cities and rural responsibilities on counties, and the population balance must take these things into account. Thus the growth of population must be reflected in precinct population distribution in order to comply with article 5, section 18, of the Texas Constitution, but certain rural concerns can also be taken into consideration such as roads, bridges, and taxable values of large land areas, which disproportionately concern the rural areas. The court held that the requirements of the Texas constitutional provision must be construed and enforced in consistency with the equal protection clause. It also observed that it has not been settled whether the “one man, one vote” holdings of the United States Supreme Court apply to subordinate governmental units. These holdings concerned only legislative and congressional reapportionment. The county, though, is a unit exercising chiefly administrative powers. Its legislative functions are negligible, and county government is not

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1 406 S.W.2d 422 (Tex. 1966), 20 Sw. L.J. 691.
2 TEX. CONST. art. 5, § 18.
otherwise comparable to the legislature of a state or to the federal congress. Therefore, the court believed that the "equal protection under the law" requirements of the United States Constitution does not make population the sole basis for division of counties into precincts. The court recognized that there are recent state and federal cases which hold that the "one man, one vote" rule applies to subordinate governmental units, the basis for such a holding, however, varying from case to case.\(^2\)

**Home-Rule Cities.** A quo warranto action challenged the constitutionality of a home-rule charter as part of an attack upon the validity of the annexation ordinances in *State ex rel. Rose v. City of LaPorte.*\(^4\) The supreme court held that the city's finding, in 1949, that it had a population of more than 5,000 enabled it to adopt a home-rule charter pursuant to article 11, section 5 of the Texas Constitution and article 1165 of the civil statutes. This finding was conclusive, absent allegations and proof of fraud, bad faith, or abuse of discretion. Under the constitutional home-rule grant of power, a city is not restricted to census reports available only once in ten years. Since the statute prescribed no special method for determining population, the municipal governing body had implied authority to determine the facts. However, the annexation was declared invalid because the description of the annexed property could not be closed with respect to boundary lines.\(^5\)

A collateral attack was made by taxpayers on certain municipal annexation ordinances in *Deacon v. City of Euless.*\(^6\) The ordinances were pending before the city on March 15, 1963, and were adopted on June 25, 1963.

\(^2\)In some states there is a constitutional or statutory requirement that apportionment of subordinate governmental units be on the basis of population. Seaman v. Fedourich, 209 N.E.2d 778 (N.Y. Ct. App. 1965) (constitutional provision); Miller v. Board of Supervisors, 405 P.2d 857 (Cal. 1965) (statute requires districts to be "as nearly equal in population as may be"). Some cases stress the similarity which exists between the selection of state and subordinate legislative bodies. Ellis v. Mayor, 352 F.2d 123 (4th Cir. 1965) (city wards); Bianchi v. Griffing, 238 F. Supp. 997 (E.D.N.Y. 1965) (county districting); Goldstein v. Rockefeller, 257 N.Y. Sup. 994 (Sup. Ct. 1961) (county districting). Where the subordinate unit has a legislative, rather than an administrative function, the "one man, one vote" rule has been said to apply. Mauk v. Hoffman, 209 A.2d 150 (N.J. Super. Ct. 1965) (multi-county government); State v. Sylvester, 132 N.W.2d 249 (Wis. 1965) (county districting); Bailey v. Jones, 139 N.W.2d 385 (S.D. 1966) (county districting). In one case redistricting was denied because the plaintiff lacked standing, but in dictum it was announced that the "one man, one vote" rule does apply to subordinate governmental units. Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).


\(^4\)See also on the latter point, Slattery v. Caldwell Township, 199 A.2d 670 (N.J. Super. Ct. 1964) voiding a rezoning due to vagueness of a boundary description which referred only to "Proposed Federal Highway 180."

\(^5\)405 S.W.2d 59 (Tex. 1966).
The plaintiffs, taxpayers, contended that the city was without power to enact them due to section 7 of article 970a, which states that a city may annex only territory equivalent to ten per cent of its area in any one calendar year. It was contended that the area annexed by the challenged ordinances, together with other land annexed during 1963, totaled more than ten per cent of the area of Euless on January 1, 1963. Section 7(d) provides that the limitations of the statute as to size and extent of areas to be annexed shall be binding on cities as of March 15, 1963. The city’s position was that article 970a was enacted by the legislature on May 14, 1963, and did not become effective until August 23, 1963; that, even though the annexations violated the statutory limitations, the limitations did not then apply since the statute could not be given retroactive effect.

The court held the city’s position incorrect, stating that although statutes are generally given prospective effect, the controlling question is the intention of the legislature. Here, there was an expressed intention to have the statute take effect as of March 15, 1963. Since the statute applied to this ordinance, the ordinance was found void. The court gave a traditional answer to the argument that the statute violated article 1, section 7 of the constitution which says that no retroactive law shall be made. The court said that this section prohibits retroactive laws which destroy or impair vested rights. Since municipal corporations do not acquire vested rights against the state, the constitutional provision was not violated.

The city also contended that the statute was in violation of the home-rule amendment of the constitution in that it interfered with the right of home-rule cities to annex territory. The court pointed out that the home-rule amendment preserved the priority of the general laws of the state over inconsistent ordinances passed by home-rule cities, and thus nothing in the constitution limited the power of the legislature to curb annexation powers of home-rule cities. The court further held that if the territory sought to be annexed by the city exceeds the limits prescribed by the legislature, the ordinances are in direct violation of article 970a and are void.

A taxpayer may maintain a suit to challenge the validity of ordinances which are utterly void because not authorized by law or color of law, and the remedy in such a case would not be limited to quo warranto proceedings.

Interstate Circuit, Inc. v. City of Dallas emphasized again that home-rule cities in Texas “have full authority to do anything the legislature could have authorized them to do prior to adoption of the Home-Rule Amendment, the result being that it is not necessary to look to the acts of the

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7 Tex. Const. art. 11, § 5.
8 402 S.W.2d 770 (Tex. Civ. App. 1966) error ref. n.r.e.
legislature for grants of power to such cities, but only for limitations on their powers.\textsuperscript{10}

\section*{II. General Powers}

The court of criminal appeals upheld a speeding ordinance in part and voided it in part, but affirmed the conviction. The state statutes prohibit driving on the highways at a speed greater than is reasonable and prudent under the circumstances, or at any speed in excess of limits prescribed by the statutes, the State Highway Commission or municipalities (within their limits). In \textit{Ex parte Devereaux}\textsuperscript{10} an ordinance provided a speed limit; punishment for violation of the ordinance was established as a fine not to exceed two hundred dollars. However, the statutes provided that punishment for speeding shall be a fine of not less than one dollar, or more than two hundred dollars. Though this variance was slight, the court held that the variation from the statutory penalty invalidated that part of the ordinance because the statute could be implemented but not altered. The speed limit established in the ordinance was upheld, with the violation punishable under the statutory penalty provision. The court cited the Texas home-rule constitutional provision,\textsuperscript{11} which forbids ordinances or charters of home-rule cities from containing provisions inconsistent with the general laws.\textsuperscript{13}

\section*{III. Police Power}

A Texas court of civil appeals, following a de novo trial in the district court, held that a Dallas movie classification ordinance, directed chiefly to the prevention of exhibition of pictures "not suitable for young persons" (under sixteen years of age) was lawfully applied to bar the exhibition of the film \textit{Viva Maria} to such persons.\textsuperscript{13} In a proceeding brought by Interstate Circuit, Inc. in a federal district court for a declaratory judgment and an injunction against enforcement of the ordinance, the ordinance was sustained with the exception of one provision. The exception related

\textsuperscript{9} \textit{Id. at 777.}
\textsuperscript{10} \textit{389 S.W.2d} 672 (Tex. Crim. App. 1965).
\textsuperscript{11} Tex. Const. art. 11, § 5.
\textsuperscript{12} For an informative article, see Ruud, \textit{Legislative Jurisdiction of Home Rule Cities}, 37 Texas L. Rev. 682 (1959). See also Port Arthur Independent School Dist. v. City of Groves, \textit{376 S.W.2d} 330 (Tex. 1964), holding that enforcement of city building code as applied to new building undertaken by independent school district under the state school laws was not inconsistent with the general laws which were silent upon the subject. See also Anderson v. Grossenbacher, \textit{381 S.W.2d} 72 (Tex. Civ. App. 1964) \textit{error ref. n.r.e.}, holding mandamus not available to charter drafting commission against county commissioners to compel them to call an election on a proposed county home rule charter; failure to have a statutory quorum present at one of the five public hearings required by statute invalidates the preliminary procedure required by the Home Rule Statute, the quorum requirement being more than a parliamentary rule.
\textsuperscript{13} Interstate Circuit, Inc. v. City of Dallas, \textit{402 S.W.2d} 770 (Tex. Civ. App. 1965) \textit{error ref. n.r.e.}
to the provision for revocation or suspension of the exhibitor’s license (a provision reserved by the court of civil appeals for future decision when involved in a case before it) if the exhibitor showed for a period of up to one year pictures classified as “not suitable,” such provision being deemed a denial of the right to exhibit films not obscene to an adult audience.¹⁴ Stress is laid in both opinions upon (1) a distinction between the police power exercisable over children’s activities as compared with that permissible over adults’, (2) the expedited timetable for administrative hearing and judicial review,¹⁵ (3) the full administrative hearing accorded, (4) the reasonableness of the ordinance in the light of the legislative objective and the connection of the latter with available data related to “societal evil,” (5) the home-rule authority of the city of Dallas and the non-preemptive nature of existing general law, and (6) identification of the contemporary community standard established with contemporary national community standards.

Though there is much in common between the views taken by the state court decision and the Fifth Circuit decision, there are also important differences, the chief of which is their approach to the validity of the legislative standards contained in the ordinance. In general, the term “not suitable for young persons” forms the operative term of the ordinance.¹⁶ This term is the subject of a lengthy definition which, in paraphrase, forms the basis for regulation of films which portray (1) sexual relations in a manner likely, in the judgment of the Board, to encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest, or (2) brutality, criminal violence or depravity in a manner likely to encourage crime or delinquency on the part of young persons. The federal court upheld the ordinance only as to (1) above, interpreting the sense of (1) to reach only to obscenity (although this word was not used in the ordinance), though considering that a broader concept of obscenity would be permissible insofar as the effect on young persons would be the guide.¹⁷ The state court upheld the ordinance as to both (1) and (2). Since “obscenity” has had more United States Supreme Court approval as a standard than has “violence” or other factors in (2), the state

¹⁵ As a matter of interest upon the factor of expedited process, the motion picture Viva Maria was classified “unsuitable for young persons” by the Board on February 7, 1966; the suit was filed by the city February 14, 1966; the hearing on the temporary injunctions was begun on February 17; the temporary injunction was granted by the local district court on February 18, 1966; and the decision on appeal was rendered by the Texas Court of Civil Appeals April 5, 1966. In the Fifth Circuit proceeding the court noted that the city of Dallas cannot by ordinance compel state courts to afford speedy relief. Cf., Freedman v. Maryland, 380 U.S. 51, 56-61 (1965). The Fifth Circuit decision observed, however, that if the courts are willing to cooperate, Freedman’s requirement for speedy judicial action on the merits and on review is satisfied.
¹⁶ 249 F. Supp. at 26 (exhibit).
¹⁷ Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966).
court perforce gave more attention to the question of vague standards. It emphasized the fact that a de novo trial and independent judicial determination were had in the trial court, and further emphasized that a film deemed not suitable was not barred for exhibition to adults but only to children of the defined ages. There is a question whether de novo review is adequate to supply legislative standards, but there have been occasions when the United States Supreme Court has so indicated.

Touching upon the non-employment in the ordinance of the words "obscene" or "obscenity," the concurring opinion in the state court said in part:

Conveying to young persons the idea that to be able to enjoy the pleasures of sexual gratification without being burdened with any accompanying responsibility or commitment, and with no retributive consequence, or the slightest remorse, is acceptable behavior according to accepted standards of the American community, would in my opinion have a much more pernicious effect on the morals of the community than mere obscenities. To say that a community is powerless to protect itself and its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable.

Both parties have petitioned the United States Supreme Court for a writ of certiorari in the federal case, and Interstate has also petitioned the United States Supreme Court in the state case. The Supreme Court has not acted upon these petitions as of this date.

IV. STATUTORY DEVELOPMENTS

As of November 1, 1966, the Department of Housing and Urban Development reported it had made a $50,496 grant to the North Central Texas Regional Planning Commission, to aid the Dallas-Fort Worth metropolitan area in its program of comprehensive planning for growth and development. Article 1011m strengthens the ability of local governmental units to cooperate and coordinate their planning efforts with emphasis upon their common needs in broad respects defined by the statute. It de-

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18 402 S.W.2d at 774-45. There is no statute providing for judicial review. The ordinance (No. 10961) in § 46A-7 provides in part:
(a) ... the Board shall have the burden to present evidence sufficient to convince the court of the reasonableness of its classification.
(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order [of classification], but such order shall be suspended at the end of fifteen days after the filing of such notice unless an injunction is issued within such period. ...

247 F. Supp. at 916 (exhibit).

19 This has found expression in cases upholding broad standards because the statute in question provided for judicial review of administrative action under the standards, protecting against arbitrary action. Mulford v. Smith, 307 U.S. 38 (1939); Yakus v. United States, 321 U.S. 414 (1944).

20 402 S.W.2d at 778.

21 See also Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966).
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prives no local governmental unit of existing power or authority. Rather, it extends the previously narrower applicability of the planning statute to counties or parts thereof. In 1965 the Texas legislature adopted a law permitting municipalities in counties having a population of more than one million inhabitants, if the municipality does not have a zoning ordinance, to enjoin violations of restrictions contained or incorporated by reference in recorded plats or other instruments affecting subdivisions within the municipalities. The term "restrictions" is defined by the act. Two exceptions are made: (1) violations of restrictions placed on the land prior to the effective date of the act are not enjoinable so long as "the nature of the violation remains unchanged," and (2) the municipality may not enforce a restriction (as it obviously could not in any event) "that violates the Constitution of the United States or of this State."

V. MUNICIPAL FUNDS AND OTHER PROPERTY

In City of Port Arthur v. Tillman, the supreme court considered and rejected the argument that article 5544 applies the two-year statute of limitations to cities, since such article was a part of title 91 which expressly provides that rights of incorporated cities shall not be barred by any of the provisions of the title. The court also rejected the contention of the respondents—that the city of Port Arthur was taking over Water District No. 11 for the purpose of engaging in a proprietary enterprise, hence article 5517 of title 91 should not be construed to immunize the city from the statutes of limitations, as it would be unconstitutional as an unreasonable classification and would be in conflict with the equal protection of the law clauses of the Texas and Federal Constitutions—holding that the classification was not unreasonable.

It has been said in a number of cases that a property owner has the right

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26 Ibid.
27 9 Tex. Sup. Ct. J. 199 (Jan. 19, 1966) (city, upon annexing a water district, alleged it succeeded to powers, assets, and liabilities of the district including alleged cause of action against directors of the district).
of access to any street abutting his property. But some cases restricted this right by balancing police power traffic considerations against the question of whether the remaining access to an owner is reasonable. In a case decided last year, a Texas city closed a portion of the street on which the plaintiff's property abutted in order to make way for a viaduct exit from a nearby highway. This left the plaintiff with only an indirect access and exit to a cross street by use of his alley. The supreme court, in Du Puy v. City of Waco carefully considered the plaintiff's situation and found there was a taking by the city which entitled the plaintiff to damages. The court held an abutter has a property right consisting of an easement of access, though this does not prevent the city from destroying some of his access rights so long as adequate access is preserved. For example, in an earlier case the Texas court permitted the city, subject to trial of the facts, to deprive a garage owner of access to a heavily traveled street from one side of his property, since he had access remaining to another street from the other side of his property. It is to be noted also that the Texas Constitution provides for recovery for "damage" as well as for "taking." In a companion case to Du Puy, no recovery was allowed, since the plaintiff had other direct access to the street.

A civil appeals decision involved a declaratory judgment action to determine whether or not a general law city had the authority to construct and maintain a sewage disposal plant within the limits of a home-rule city in the absence of the consent of the latter. The city of Allen, a general law city, selected a site for a new sewage disposal plant and instituted plans to acquire the property by negotiation and eminent domain. When the city of Plano learned of this, it annexed the situs. For purposes of the case the annexation was assumed to be valid. The issue then arose as to whether Allen had the right to acquire property within Plano for the purpose of constructing a sewage disposal plant without first obtaining the consent of the governing body of Plano. It was held that the operation of a sewage system is a governmental, not a proprietary function, and that Texas statutes do not expressly grant to any municipal corporation the right to own and operate a sewage disposal plant within the

22 Archenhold Auto. Supply Co. v. City of Waco, 396 S.W.2d 111 (Tex. 1965).
23 City of Plano v. City of Allen, 395 S.W.2d 927 (Tex Civ. App. 1965) error ref. n.r.e.
city limits of another city. Therefore, such authority to be exercised must be implied. Militating against implication of such an authority, in the view of the court, were these considerations: (1) If the matter is doubtful as to whether one municipal corporation has the right to enter upon the boundaries of another in the pursuance of a public undertaking, that doubt should be resolved adversely to any ex parte exercise of power; (2) home-rule cities have statutory control and jurisdiction over streets and alleys to widen, alter and lengthen them. Since the land in question was undeveloped, the construction proposed by Allen would limit the right of Plano to control the location of streets and alleys in its future development and to appropriately carry out its powers under the zoning statutes.

A civil appeals case discussed a situation where a statute provided that a water district could construct a dam that would result in the inundation of a county road. The statute provided further that, in such event, the commissioners’ court should “change” the road so that it could be used, and the expense of making this change would be borne by the water district. In this case the change made by the commissioners’ court was to elevate the old road, rather than to reroute it around the body of water created by the new dam. The court determined as a matter of law that the term “change” in the statute was not restricted to a horizontal change, as contended by the water district. The court held that the commissioners’ court action under the statute was an exercise of discretion which the appellate court on review could examine for caprice. It could not substitute judicial judgment for the judgment of the county. The county was not bound to consider only elements of cost to the district, but it could take into consideration the facts of convenience to the public, causing the substitute road to serve substantially the same purpose as its predecessor. The cause was reversed and remanded for a new trial.

VI. MUNICIPAL TORT LIABILITY

While the concept of governmental immunity seems to be so completely a part of Texas jurisprudence that it probably will be necessary for the legislature to change our traditional form of approaching this problem, it is interesting to note that the supreme court may destroy the doctrine of charitable immunity, a doctrine which was judicially created, as was the doctrine of sovereign immunity.

26 Watkins v. Southeast Baptist Church, 399 S.W.2d 530 (Tex. 1966), 20 Sw. L.J. 163. But see, Milner v. Huntsville Memorial Hosp., 398 S.W.2d 647 (Tex. Civ. App. 1966) error ref. n.r.e. As the doctrine of charitable immunities is a matter of judge-made law and therefore the courts have the power to abrogate it, it is unlikely the courts will take the same approach when it comes to municipal corporations. See generally Note, Charitable Immunity in Texas Reconsidered, 20 Sw. L.J. 163 (1966).
Texas continues to determine liability for tort on the basis of the function in which the municipal corporation is engaged. But it is also important to determine whether a particular arm of the government is a municipal corporation or a political subdivision of the state. In a civil appeals case the court held that a navigational district was not a municipal corporation but rather a political subdivision of the state and, as such, had governmental immunity. The issue was also raised in another civil appeals decision concerning a hospital district. In that case the court considered whether this was really a political subdivision or not but determined that regardless of how it was classified, the function performed was governmental in nature and therefore was entitled to immunity.

Governmental Functions. While the supreme court was not called on to deal with the issue of what is a governmental function during the period covered by this Survey, there were several interesting cases in the courts of civil appeals. Probably the most interesting situation was where the plaintiff, a prisoner, brought a negligence action because he was blinded by a tear gas gun fired by an officer attempting to quell a riot in a jail. The facts showed that the officer was definitely engaged in a governmental function and therefore the case would not have warranted discussion. However, the court was faced with the novel argument that the supreme court in three cases had abrogated the doctrine of municipal immunity from tort liability in Texas. The court gave its analysis of the above cited cases and determined that in all of them the city was engaged either in a proprietary function or in a mixed function and that none of the cases dealt with a function which was purely governmental. It pointed out that since Dancer v. City of Houston, the court has twice refused to consider cases in which the function was governmental.

One case dealt with the question of an intentional tort as contrasted to negligence. The court here again applied the concept of governmental immunity where an independent school district was involved. However, the proceeding was a case in which the court was dealing with a political subdivision of the state rather than a municipal corporation.

37 Jones v. Texas Gulf Sulphur, 397 S.W.2d 304 (Tex. Civ. App. 1965) error ref. n.r.e.
38 Arsenau v. Tarrant County Hosp. Dist., 408 S.W.2d 802 (Tex. Civ. App. 1966). This case is of value to attorneys in that the court collected the cases in which the Texas Supreme Court and courts of civil appeals have determined what activities are political subdivisions of the state.
40 The appellant had cited Crow v. City of San Antonio, 357 Tex. 250, 301 S.W.2d 628 (1957); City of Austin v. Daniels, 160 Tex. 628, 335 S.W.2d 753 (1960); and Dancer v. City of Houston, 384 S.W.2d 340 (Tex. 1964). The Dancer case will be discussed again in this section.
41 384 S.W.2d 340 (Tex. 1964).
44 See note 2 supra and accompanying text.
Proprietary Functions. Texas has always recognized that where a municipal corporation is engaged in a proprietary function, it is liable for its negligence. During the period under question the appellate courts were called on to review several cases dealing with what is a proprietary function. A civil appeals case concerned a six-year-old child who was with his family at a public picnic area. The youth wandered away from his parents and onto an adjacent public golf course. The city had left barrels of liquid fertilizer on the course. One barrel had a spigot, which was easily accessible. Leaving the barrel in such a position violated orders of the city manager. The child drank from the spigot and died. The city attempted to avoid liability on grounds that a green fee was charged for use of the course and that while it might be liable to persons who had paid for the privilege of playing golf, it was not liable in the situation where the child was a trespasser, or at most a licensee and therefore took the premises as he found them. As to this argument, the court took the position that the child was the equivalent of an invitee, that the fee was for the privilege of playing, that it was common knowledge that golfers were often followed by members of the family or other onlookers and that the city should have anticipated that there would be persons other than golfers on the course. The city was negligent; the function was proprietary and liability was sustained. This case was one in which liability also could have been based on the doctrine of attractive nuisance.

In another case the owner of a boat house brought an action based upon the negligence of city employees in removing boats from Lake Waco. The court was faced with the problem of deciding the lake's function. The court reasoned that although the lake was used to supply city water, it was also used for pleasure boats; therefore the mixed governmental and proprietary function made the city liable.

The final case of significance was one in which the city was held liable for negligence resulting in an accident caused by failure to make proper inspection of garbage trucks. The court held that the collection of garbage (a governmental function) did not include the question of repair and inspection of the trucks and therefore was a function for which the city was liable.

Contributory Negligence. In a case of first instance the court of civil appeals held that the defense of contributory negligence was available to

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46 City of Lampasas v. Roberts, 398 S.W.2d 612 (Tex. Civ. App. 1966) error ref. n.r.e.
47 City of Waco v. Busby, 396 S.W.2d 469 (Tex. Civ. App. 1965) error ref. n.r.e.
47 City of Houston v. Celaya, 390 S.W.2d 542 (Tex. Civ. App. 1965) error ref. n.r.e. This case appears to be an extension of Houston v. Shilling, 150 Tex. 387, 240 S.W.2d 1010 (1951).
an individual defendant in an action in which the city was the plaintiff. The facts involved an accident between a police car and a citizen. The court reasoned that when a city sues an individual for negligence, the defendant is entitled to assert all defenses because there is no liability sought against the city, only an extinguishment of the entire cause of action.

**Nuisance.** The appellate courts have had no difficulty in sustaining a complaint which is grounded in nuisance. Two cases came before the courts during the last term, but in only one of them did the court determine that the city was liable. In one civil appeals case the court restated the concept of nuisance and set out the elements to be considered in determining the amount of damages. It was held that the property owners were entitled to accrued interest on permanent damages in addition to the market value of the property. In a second civil appeals case the court dismissed an action in nuisance, holding that the provision of civil statutes article 758a did not apply to a situation in which the city of Dallas had widened a creek, thereby causing an overflow on plaintiff's property, as this was not a diversion within the terms of the statute. The court did recognize, however, that the statute was applicable to municipal corporations.

**Notice of Claims.** Most city charters require a set period of time and a procedure under which claimants must file any claim against the municipality. The supreme court discussed the issue of the manner in which this must be accomplished in *Dancer v. City of Houston* and held that mere substantial compliance with the charter provisions is sufficient. Despite this, the courts of civil appeals have seemingly overlooked the *Dancer* ruling. In one case, where an affidavit which was required by the charter was not supplied, the court held that strict compliance was necessary. Two other cases indicated that something less than the *Dancer* standard need be met where there are special circumstances. In one instance, where the plaintiff was only seven years old, the court remanded the case because it felt that it was a question of fact as to whether a minor of that age should be held to literal compliance with the charter provisions. The second case held that in view of the fact that the city itself was performing the work with its own employees, and the plaintiff was an employee, the city had actual notice and literal compliance with the charter provisions was not required.

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45 City of Abilene v. Downs, 386 S.W.2d 877 (Tex. Civ. App. 1965) error ref. n.r.e.
46 Stoner v. City of Dallas, 392 S.W.2d 910 (Tex. Civ. App. 1965) error ref. n.r.e.
47 Supra note 41.
In City of Big Spring v. Board of Control, it was held that a water contract entered into by the city of Big Spring in 1937 to sell water to a hospital at a stipulated rate so long as the hospital was operated at the present site was valid. The supreme court upheld this contract against the objection that it lacked definite terms and that it abdicated the legislative functions of the city. The court concluded that the termination date was supplied by the condition of continued occupation of the site; hence it was not subject to the rule that where no term is specified, the contract may be ended after a reasonable time. As to the second contention, the court declared that the express power of the city to contract would authorize entering into this contract. A dissenting opinion took the view that a city should not be permitted to enter into indefinite-length contracts impairing their financial capacities in the future.

In Big Spring the court pointed to the broad contracting power conferred upon cities under article 1108, section 3, namely to sell water from its waterworks under such terms and conditions as "may appear to be for the best interest of such town or city." The court, disposing of the argument that the contract abdicated the city’s legislative power insofar as it agreed to supply water to the hospital for so long as the hospital was maintained by the state at the site, emphasized the breadth of the discretion conferred by the statute and stated that courts should not intervene except in instances of clear abuse. This abuse does not take place "unless the contracts made by them are unreasonable, inequitable and unfair or tainted with fraud or illegality." The decision of the court in this case was sound. The contract was not indefinite, since the asserted indefinite provision was clarified by other terms of the contract. The issue of whether the contract was too unreasonable to be entered into by a municipal corporation was resolved by applied judgment to all the facts and circumstances of its making, in particular the tangible and intangible quid pro quo of construction of a new state hospital at a site provided by the city.

Another case involving a contract was where a motel association brought a declaratory judgment action to prevent the operation of a Howard Johnson motel on land leased from the Texas Turnpike Authority to the de-
fendant for that purpose." The contention, in the civil appeals court, was that under the statutes the Authority had power to condemn land only as necessary for road and right-of-way purposes, that it had obtained this tract by deed through threat of condemnation proceedings, and that the motel was not reasonably necessary to the operation of a turnpike project. The court of civil appeals pointed out that another section of the statute authorized the Authority to contract with any person for use of the right-of-way adjoining the paved road for the use of hotels, that the present use was in accordance with the power conferred, and that it was a governmental function. The court further said that, except for due process rights under the Constitution, there is no inherent right of appeal from the action of an administrative agency and that Arlington here had no justiciable interest. The court refused to equate the asserted economic harm to the plaintiffs, resulting from a less favorable competitive position for the patronage of Turnpike users, with a property interest. This view is consistent with past decisions, provided expenditure of tax funds or misuse of public funds is not in issue and a statute does not liberalize doctrines of standing to sue.

VIII. Municipal Indebtedness

It is somewhat unusual for a public authority in Texas to issue bonds as a means of purchasing the land, facilities and all capital stock of a private corporation, as occurred in Brazos River Authority v. Carr, rather than enter upon a developmental project of its own. Texas long has been strict in its interpretation of the constitutional prohibition of subscription by public bodies in stock of private corporations. Here, however, the supreme court denied the applicability of article 3, sections 50-53 and article 2, section 3 of the Texas Constitution and held that since all the stock of the private corporation was acquired by the Authority, the dissolution of the private corporations would result. The court distinguished its strict rule applied to municipal purchase of mutual insurance by stating that: "The Authority is not entering into a joint venture with private enterprise or becoming a participating stockholder."

As a practical matter, the view taken by the court on the constitutional question is significant, since it settles the question for this state that purchase by a public body of stock in a private corporation is not illegal when immediate dissolution of the private corporation effectively prevents the

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60 405 S.W.2d 689 (Tex. 1966).
Authority from becoming a stockholder in a private corporation. Thus, the public body may purchase stock rather than things, provided a sufficiency of stock is purchased.

A "hold harmless" agreement in behalf of the United States, made by a Texas county in relation to a bridge project, was upheld by the supreme court in Brown v. Jefferson County. The court held the agreement of the county to save the United States free from damages that could result from construction did not violate article 11, section 7, of the Texas Constitution. That article prohibits a debt unless provision is made for levying and collecting a tax sufficient to meet the interest and establish the prescribed sinking fund. It was held that since the resolution of the county provided for annual collection of taxes to establish a sinking fund, the unpredictability of the amount needed to meet such a contingent liability as the hold harmless clause created did not bar the exercise of the discretion of the commissioners' court to fix the rate. It was noted further that since the county would own the bridge upon completion, any damages would be determined in a comparatively short period of time. Dissenting justices would have declared the resolution void since, under such a clause, the extent of debt that could arise could not be known. A previous Texas decision held an indemnity agreement to be a "debt" within the Texas Constitution; the majority distinguished the decision as involving circumstances under which no provision was made for meeting such debt, and the dissenters found a parallel in the decision. The holding of the court in the present case appears basically pragmatic, recognizing that the federal government requires, as a matter of policy, that it be held harmless in such project undertakings.

IX. SPECIAL ASSESSMENTS

In City of Houston v. Blackbird, the court of civil appeals held that a city council was guilty of arbitrary action in (1) determining that the property owners abutting on the north side of a new street would be benefited six dollars per foot, whereas those abutting on the south side received no benefits and (2) permitting the abutters on the south side to agree that they would not use the street for access while refusing to make such an

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63 713 S.W.2d 713 (Tex. Comm'n App. 1943).
64 Special assessments, though commonly sustained under the exercise of the power of taxation, differ from general taxes, since they are special and local impositions upon the property in the immediate vicinity of municipal improvements, which are necessary to pay for the improvements, and are laid with reference to the special benefit which the property is supposed to have derived from the improvement.
64 384 S.W.2d 929 (Tex. Civ. App. 1964). For further discussion see FitzGerald, Administrative Law, this Survey at footnote 96.
agreement with the abutters on the north side. The supreme court affirmed, holding that the city council's finding was arbitrary because the property to the north actually decreased in value as a result of the improvements, and was thus based on an unreasonable determination of special benefits which by statute must be shown at least to equal the special assessment made against the property.

In another special assessment case, the court of civil appeals looked at the facts and applied the special benefits requirements constitutionally underlying imposition of special assessments against owners of properties abutting public improvements. The court reversed and rendered the trial court's affirmance of a street assessment, of which one-half the cost was to be paid by abutting owners. Two of the properties involved, though within the city, were in farm use, and the testimony indicated that it was speculative whether they would have value for more urban type use for eight or ten years. For farm use the assessments would have exceeded the value of the special benefits. Moreover, it appeared to the court that the street improvements were related to a new high school nearby, raising a question of whether the primary benefit was for the public generally rather than for the abutting lands.

X. Public Officials and Employees

The courts have been asked to consider several questions concerning public officials, personnel and their dependents during the last term.

Justiciable Issue. In a civil appeals case a former chief of police was denied an action for declaratory judgment. The former policeman sued to stop payment of his successor's salary on grounds that this was an illegal expenditure of funds. His claim of standing to sue was on the basis of being a tax-paying citizen. The court denied this claim because the plaintiff did not have sufficient interest in the alleged issue of illegal expenditure of funds.

In Board of Fireman's Relief & Retirement Funds v. Hamilton the court held that, while a disabled fireman’s avenue of review was to the Fireman’s Pension Commissioner, in the event of his death his widow's recourse from the action of the board of trustees was directly to the district court. This was so even though the statute itself gave no right of appeal; otherwise there would be a denial of due process.

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66 394 S.W.2d 119 (Tex. 1965).
69 The court did indicate that the appropriate remedy might be quo warranto although, even here, the courts had not considered in such an action the question of the expenditure of illegal funds. See also Willis v. City of Lubbock, 381 S.W.2d 617 (Tex. Civ. App. 1964) error ref. n.r.e., wherein the city's voluntary computation of accrued vacation leave was not subject to judicial review.
70 386 S.W.2d 754 (Tex. 1961).