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Cliff Greenwood

Municipal Technical Advisory Service

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THE UNIVERSITY OF TENNESSEE
in cooperation with the
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A city is liable for negligent acts of its servants and agents when they are acting in a corporate proprietary or private capacity, and not liable when they are acting in a governmental or public capacity. This is the rule as generally stated and the rule that prevails in a majority of the states. There are two exceptions to the rule that a city is not liable when acting in a governmental capacity (1) when a nuisance is being committed and (2) when the city has insurance to cover the function to the extent of such coverage.

These rules concerning municipal liability for corporate or private duties and non-liability for governmental duties are elementary. The difficulty comes from the application. There are some duties that are clearly private, and others that are clearly governmental. It is the twilight zone that causes the confusion.

In each case the question whether the town acted in a governmental or proprietary capacity must be decided upon its own facts, and the purpose and character of the undertaking determine whether it is public or private.1

There is no sound basis on which to hold the city not liable where it is acting in a governmental capacity. No doubt this is largely responsible for the great confusion existing in the "twilight zone." This immunity dates back to an English case2 wherein there is supposed to be authority for the proposition that a governmental unit is immune from suit. This is a misunderstanding of the case. The basis of decision in this instance was that there was no fund from which a judgment could be paid. An early Tennessee case3 stated: "The reason is that the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate, not essential to the corporate existence largely subserves the public interest."

1 Williams v. Town of Morristown, 32 Tenn. app 274 (1949)
2 Russell v. Men of Devon County, 2 T. R. 667 (1788)
3 Foster v. Water Company, 71 Tenn. 42

PREFACE

In preparing this bulletin an examination has been made of all the published opinions of Tennessee. No attempt has been made to cite all opinions because there is considerable duplication, especially in the decisions dealing with street and sidewalk accidents. An attempt, however, has been made to cover all tort liability problems that have been presented to the appellate courts of Tennessee.

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"In respect to their streets and sidewalks, cities like counties, exercise a prerogative of sovereignty delegated by the State, and it was not originally considered that they were liable for injury resulting from the negligent condition of streets and sidewalks. Now the county as an arm or agency of the State is not liable for the negligent maintenance of highways... Now in all of the States, with the possible exception of South Carolina, municipal corporations are liable for injuries that result from the negligent maintenance of streets, sidewalks, and alleys. Their liability rests upon either an express statute or upon implied authority."

(It is submitted that the foregoing should be the correct view.) Without statutory authority cities and counties should be on the same footing. This, however, is not the situation. In the case of Wood v. Tipton County11 the court said:

"Within their prescribed spheres the counties legislate for the public good, in respect to ordering the laying out of roads, building bridges, and such other local improvements as are for the public benefit, and authorized by law. They are no more liable to be sued for neglect of the duty of its officers than is the State for similar neglect of duty by its officers. The common law gives no such action, and it is therefore not sustainable at all unless given by the statute."

The courts, however, were not consistent. In the case of Mayor of Memphis v. Lasser12 the city was being sued for injuries sustained by a fall into a cistern in the street. In finding liability the Court reasoned that: "All the powers conferred upon a corporation for the local government of a town or city are, in judgment of law, for the public benefit, and authorized by law. They are no more liable to be sued for neglect of the duty of its officers than is the State for similar neglect of duty by its officers. The common law gives no such action, and it is therefore not sustainable at all unless given by the statute."

All decisions prior to City of Knoxville v. Felding13 finding liability against municipalities for negligent construction and maintenance of streets and sidewalks could have been justified on the nuisance theory. A nuisance "...in legal parlance, extends to everything that endangers life or health, gives offense to the senses, etc."

That this is a false premise is illustrated by the fact that municipalities have continued to construct and maintain streets despite the fact that the courts have declared this to be a proprietary function.

Is there any test by which an harassed, frustrated city official can determine whether a proposed function is going to be proprietary or governmental? The case of Nashville Transit Company v. City of Nashville4 approves 38 Am. Jur. 2d which collects cases indicating the test to be whether the city has undertaken work of a commercial character from which it sought to derive profit. A casual examination of the authorities, however, will explode such theory. No one would say that the construction of city streets is "work of a commercial character" yet from the earliest cases5 it has been the corporate responsibility of the city to keep its streets in repair. Such theory is not consistent with the theory that operation of an electric plant for the sole purpose of lighting streets and municipal buildings is a private function.6 Such a ruling, however, could be based on the proposition that the function was in competition with private industry. It is not necessary that a profit actually be realized in order for the function to be proprietary.7 On the other hand, an incidental charge resulting in a profit to the municiplality does not render the service private or corporate.8 Despite the fact that an examination of the cases fails to disclose any hard and fast rules that may be applied in arriving at a conclusion as to what is proprietary and what is governmental, it is well to examine the cases for the conclusion reached in each.

Is the construction and maintenance of streets truly a proprietary function? There can be no question that such is the law in Tennessee at the present time. The manner of arriving at such results, however, is one of the most ambiguous and confusing chapters in the annals of common law. That the confusion still exists is manifest in the case of City of Knoxville v. Hargis9 when the court said: "Of course the Common Law duty of the city with respect to the maintenance of its streets and sidewalks is limited to them..." It would appear that the court here has examined the question that the duty to construct and maintain streets is a common law duty. This is contrary to the court's opinion in the case of City of Knoxville v. Felding10 wherein the court said:

4 182 Tenn. 545 (1944)
5 State v. Barkdale, 24 Tenn. 154 (1844), Mayor of Memphis v. Lasser, 28 Tenn. 556 (1849), State v. Mayor, 30 Tenn. 217 (1850)
6 Sainman v. City of Nashville, 131 Tenn. 477 (1922)
7 Williams v. Town of Morristown, 38 Tenn. App. 274 (1949)
8 Nashville Trust Co. v. City of Nashville, 180 Tenn. 545 (1944)
9 182 Tenn. 262 (1946)
10 153 Tenn. 586 (1925)
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11 66 Tenn. 112 See also Lee v. Davidson County, 158 Tenn. 313
12 28 Tenn. 556 (1849)
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cases prescribed by the statute. It, therefore, follows that
the Courts in order to be consistent would have found no lia-

bility in the Felding Case.

This inconsistency continues in other cases. In Shepherd
v. City of Chattanooga the court said:

"So in Conelly v. Nashville, 100 Tenn. 262, 46 S.W. 565,
the act of sprinkling a street was held to be a govern-
ment function by referring it to the charter power to preserve
the general health of the community rather than to the
power to open, alter and repair streets."

Under the reasoning in the Lasser Case there would not be
this distinction. This confusion continues with the examina-
tion of other cases. A city was held liable for injury caused
by a dead horse in the street, the theory of liability being
that cities hold their streets in a proprietary capacity. The
decision, however, could easily have gone the other way on the
basis that cleaning streets is a governmental function, or
that the regulation of the use of streets is a governmental
function. In this case, the court said:

"The manner in which the streets should be used, however,
calls for the exercise of municipal discretion, a govern-
mental power, and a municipality cannot be called to ac-
count respecting its employment of such a power."

Would a policeman directing the removal of an obstruction
from a street be acting in the capacity of policeman or super-
intendent of streets? In the case of Jackson v. City of Paris the
policeman discovered a long wire attached to a truck. He
stopped the truck and removed the wire, placing it in the gutter.
He called the street superintendent and found that he was out
of town. The policeman then called two city employees and directed
them to remove the wire. In the process one of these employees
received serious injuries. The court found no liability on the
ground that the policeman was acting in a governmental capacity
in ordering the wire removed from the street. Logically this
case is in conflict with the Shepherd Case because it could be
argued that the policeman was merely acting as an official or
the city in employing a person to remove an obstruction from
the street. In the Shepherd Case the court said:

10 McCreas v. Galey, 1 Tenn. 251; Hearn v. Pendleton, 43 Tenn. 399
11 169 Tenn. 153 (1934)
12 Memphis v. Lasser, 28 Tenn. 756
13 Nashville v. Fertilizer Co., 127 Tenn. 107 (1912)
14 Hale v. City of Knoxville, 189 Tenn. 491 (1949)
15 Town of Gainesboro v. Gore, 131 Tenn. 35 (1914)
16 33 Tenn. App. 55 (1949)
17 Shepherd v. City of Chattanooga, 168 Tenn. 153

violates the laws of decency, or obstructs the reason-
able and comfortable use of property. Anything which
renders a public highway unsafe for travelers thereon
is a nuisance. (citing cases)."

The Felding Case, however, presented a new situation. An em-
ployee of the city engaged in the construction of a street was
injured by a piece of steel flying from a hammer being wielded
by a fellow employee. In order to uphold a recovery in this
case the Court deemed it necessary to find statutory authority
for the proposition that construction of streets by a munici-
pality is a proprietary function. The court said:

"The rigid application of statutes that require
notice as a condition precedent to suit against
the city, and the precision exacted as to time,
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fied except upon the ground that originally the
law forbade a recovery..."

The statute referred to is Chapter 55, Public Acts 1913 which
reads as follows:

"No suit shall be brought against any municipal
corporation, on account of injuries received by
person or property on account of the negligent con-
dition of any street, alley, sidewalk, or highway of
such municipality unless within ninety days after such
injury to the person or property has been inflicted,
a written notice shall be served upon the mayor or
manager of said municipality, stating the time and
place where said injury was received and the general
nature of injury inflicted. The failure to give the
notice prescribed in this section, within the time
set out, shall be a valid defense against any liability
of the municipality which might otherwise exist on
account of the defective or negligent condition of
said street, alley, sidewalk, or highway; and provided,
that proof of registered letter by registry receipt and
addressed to the mayor or manager setting forth
the injury and place of injury complained of shall be
a complete compliance with this section."

Prior to the 1913 statute no action for negligence in the
construction and maintenance of streets had been brought against
a municipality that could not be prosecuted under the nuisance
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"So in Conelly v. Nashville, 100 Tenn. 262, 46 S.W. 565, the act of sprinkling a street was held to be a governmental task by referring it to the charter power to preserve the general health of the community rather than to the power to open, alter and repair streets."

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"...it seems to us to follow logically and necessarily that in the selection and use of the physical means and agencies by which this obligation is to be performed the municipality is likewise acting in its corporate capacity."

This case in turn is in direct conflict with another case. That case involved a waterworks, which function had previously been held to be a proprietary function. Nevertheless, the Court in the Smidy Case said:

"The operation of a water plant being a governmental function upon all of the authorities, we think it equally clear that the decision to employ persons to operate it, as well as the fixing of their salaries, is also a governmental duty."

One could assume that this quotation was a mistake and the court intended the words "water plant" to read "fire department" because the case involved employees of a fire department. In a subsequent case, however, the statement was referred to with approval.

A city is liable for patent defects in sidewalks and streets that result in injury unless the defect is the result of a plan adopted by the city which is not dangerous as a matter of law. Ordinarily the city is not liable for a dangerous condition of the streets or sidewalks resulting from natural causes such as snow and ice even though the city in attempting to clear away snow contributes to the condition. There may be liability, however, if the snow and ice is allowed to accumulate to the extent of creating a nuisance and there is an affirmative duty to inspect. The court in this case said:

"The duty of the municipality to use ordinary care in keeping its streets in a safe condition for public travel involves the inspection of defects that are the natural and ordinary result of climatic influence."

This does not mean that a city warrants its sidewalks to be safe, but is liable for any damage caused by defective walks, which it knew or might have known by exercise of reasonable care, to be defective. The condition creating the defect may have been created by the abutting property owner. Nevertheless the city is jointly liable where it has actual or constructive notice of the dangerous condition and does nothing to abate it. The city has the duty to inspect and actual notice is not necessary.

The obligation to keep sidewalks and streets in repair is a primary one. By statute property owners may be made jointly liable by cities authorized so to do, or by notice to the property owner at least five days before the accident the liability may be passed to the property owners. An ordinance, however, requiring abutting property owners to keep walks in repair does not impose liability on owner for injuries. The primary liability of the city is not shifted by statute or ordinance. In other words an injured party may elect whether to sue the city or the property owner.

We have been discussing liability for injury to persons caused by defective construction and maintenance of walks and streets. Municipalities are also liable for injuries to property. A city cannot lawfully cut ditches and canals so as to empty the water from ponds in such a manner as to flood private property without being liable. By statute a city is liable for damages caused by a change in the grade of a street. The change in grade need not be on the same side of the street as the property. Liability holds even though the grading is done by a third person without the regular or formal consent of the city.

By statute a person bringing suit for injuries received on account of negligent condition of any street, alley, sidewalk or highway must give written notice to the mayor or manager stating place of injury and describing extent of injury. The location of

23 Smidy v. City of Memphis 140 Tenn. 97
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27 City of Nashville v. Brown, 25 Tenn. App. 34
28 Swain v. City of Nashville, 170 Tenn. 90
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30 City of Nashville v. Nevin, 12 Tenn. App. 336
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32 Osborn et al v. City of Nashville, 182 Tenn. 197 (1944)
33 City of Clarksville v. Deason, 9 Tenn. App. 274 (1920)
34 Williams Tennessee Code, annotated Section 3402
35 Id. Section 3403
36 Vinson v. Fentress, 3 Tenn. App. 359 (1950)
37 Harbin v. Smith, 168 Tenn. 112, City of Knoxville v. Ferguson
38 W. 2d 612 (1951)
40 Williams, Code annotated, Section 3404
41 Chattanooga v. Geier, 81 Tenn. 611, Gray v. Knoxville, 85 Tenn. 99
42 City of Knoxville v. Phillips, 162 Tenn. 328 (1930)
43 Williams Code, annotated, Sec. 8596
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42 City of Knoxville v. Phillips, 162 Tenn. 328 (1930)
43 City of Knoxville v. Hunt, 156 Tenn. 7 (1927)
44 Williams Code, annotated, Sec. 8996
operating a swimming pool. This pool is patronized by many people not residents of the city and actually operates at a small profit, or, at least, does not require the expenditure of any public funds. Yet this operation was held to be a governmental function and the city would not be liable for the negligent operation thereof. A nuisance, however, may be created in connection with the operation thereof. A nuisance, however, may be created in connection with the operation of a swimming pool by permitting the drainage from the pool and the showers to gather in pools that serve as a breeding place for mosquitoes and which give off objectionable odors. The city becomes liable for such nuisance.

By statute, the operation of airports is made a governmental function. The constitutionality of this act has been sustained. In this case it was found that a wire placed to protect a grass plot did not constitute a nuisance. Enforcing punitive ordinances is a governmental function.

The operation of the jail and the working of prisoners to pay fines is a governmental function. The operation of a park is a governmental function, however, the city is liable for a nuisance, created in connection therewith.

Building a sewer is a governmental function. The construction however is not to be done in a negligent manner. Leaving dynamite cap lying around constitutes an attractive nuisance. Discharge of sewerage near private property may constitute a nuisance.

A sewer overflowing onto private property constitutes a nuisance and renders the city liable to damages. Close ally allied with sewage disposal is the collection of garbage, which is also a governmental function, and the city is not liable for negligence unless a nuisance is created. An affirmative act of the city is required to create a nuisance.

The place must be definite. Such notice, however, is not required if the city committed the act which caused the injury, or if a contractor failed to guard or give warning of an excavation. The notice must be explicit, and must be served on the proper official, and must be given prior to instituting suit.

Other Activities Which Have Been Considered Proprietary or Private in Nature

There are many other activities of municipalities which are considered proprietary and for which cities have been held liable for negligence in the performance of such functions. In an early case, a steamboat coming into a city operated wharf hit a cylinder which had been on the dock for several months, but which was submerged at the time. The operation of the wharf was held to be a proprietary function.

The operation of a water works system for "profit" means the system is being conducted on a commercial basis for revenue and not as a governmental enterprise even though no profit is realized in the operation thereof. The operation of a market house is a proprietary function and the city is liable for injury caused by a defect in the floor. The operation of a power plant is a private function. Licensing ordinarily would be a public operation. The city, however, was held accountable for licensing a luna tic as a druggist.

City functions which have been considered governmental in nature, and for which city is not liable even though negligence is involved.

In the case of Vaughan v. City of Alcoa the city was engaged in...
operating a swimming pool. This pool is patronized by many people not residents of the city and actually operates at a small profit, yet this operation was held to be a governmental function and the city would not be liable for the negligent operation thereof. A nuisance, however, may be created in connection with the operation thereof. A nuisance, however, may be created in connection with the operation of a swimming pool by permitting the drainage from the pool and the showers to gather in pools that serve as a breeding place for mosquitoes and which give off offensive odors. The city becomes liable for such nuisance.

By statute the operation of airports is made a governmental function. The constitutionality of this act has been sustained.

Discharge of sewerage near private property may constitute a nuisance. A nuisance, however, may be created in connection with the operation of a swimming pool by permitting the drainage from the pool and the showers to gather in pools that serve as a breeding place for mosquitoes and which give off offensive odors. The city becomes liable for such nuisance.

The operation of the jail and the working of prisoners to pay off fines is a governmental function. The operation of a park is a governmental function, however, the city is liable for a nuisance, created in connection therewith.

Building a sewer is a governmental function. The construction however is not to be done in a negligent manner. Leaving dynamite cap lying around constitutes an attractive nuisance. It is a question for the jury as to whether a catch basin is a nuisance. Discharge of sewerage near private property may constitute a nuisance. A sewer overflowing onto private property constitutes a nuisance and renders the city liable to damages. Closey allied with sewage disposal is the collection of garbage, which is also a governmental function, and a city is not liable for negligence unless a nuisance is created. An affirmative act of the city is required to create a nuisance.

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the place must be definite. Such notice, however, is not required if the city committed the act which caused the injury, or if a contractor failed to guard or give warning of an excavation. The notice must be explicit, and must be served on the proper official, and must be given prior to instituting suit.

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June 7, 1932, not yet reported
Governmental immunity extends to the operation of a hospital and generally speaking a city is not liable for the negligence of officers and employees of such institutions.60

The operation of a cemetery is a governmental function.81

Should a city carry liability insurance to cover governmental functions?

In order to answer this question several things must be taken into consideration.

(1) Would the city officials be authorized to spend money for this purpose? We have found no case directly in point in Tennessee or any other state. There is, however, in one state82 dicta to the effect that such expenditure would not be legal. In that case the court made this observation:

"It is the settled law of this state that a municipal corporation is not liable for negligence in the performance of a governmental function. Under any ordinary circumstances, for it to compensate one injured by such negligence might well be to use public funds and impose a burden upon its taxpayers for an unlawful purpose which it has no right to do. (citing cases)...It was stated in oral argument that the city was insured against liability of this nature, but, if so, that would almost of necessity mean the use of money of the city to pay premiums for such insurance, which would be open to the suggestion we have stated..."

The question has not been raised in Tennessee. Consistent reasoning, however, would necessitate this conclusion. In Nashville v. Sutherland Co,83 the city attempted to contract for the construction of a sewer line. Subsequently water backed up and injured the company’s property. The city was not liable for negligent construction of the sewer line. This case, the case of Blank84 v. City of Columbia, and the case of Van Horn v. Des Moines85 are quoted with approval in the case of Nashville Trust Co. v.

Adopting, installing, equipping and operating a fire department is a governmental function.70 Extinguishing fires is a public and not a corporate one and the city is not liable for negligence of the fire department in responding to a call.71 The installation and operation of a fire alarm system is a governmental function.72 Supplying water to a sprinkler system is a governmental function, and in this regard the city acts in a dual capacity.73

It is not a nuisance to operate a fire truck at a speed where it was the custom to throw signal lights and to sound a siren, and negligence in the operation of the signal system does not render the city liable.74

Police activities come within the category of governmental functions.75 In commenting on this matter the court in the case of Davis v. Knoxville76 said:

"However difficult it may be in some instances to determine whether a particular act or duty falls within the general governmental or public powers of the corporation, or pertains to its purely local and special side, yet in the case under consideration there can be no doubt but that the acts complained of fall within the general or public functions of the city of Knoxville. The preservation of order, the maintenance of sobriety, the arrest and detention of violators...is not for the local and private benefit of the corporation."

This non liability for the wrongful acts of a policeman in making an arrest77 continues even though it is known to the officials of the city that a policeman is insane and dangerous.78 A city may become liable for the personal tort of a policeman if the act was sanctioned by the city officials.79

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80 Smiddy v. Memphis, 140 Tenn. 97 (1918), Irvine v. Chattanooga 101 Tenn. 291
81 Irvine v. Chattanooga, 101 Tenn. 291 (1908)
82 Gorman v. Mayor and Aldermen, 2 Civ. App. 551 (1910)
83 Nashville Trust Co. v. City of Nashville, 182 Tenn. 545 (1944)
84 Burnett v. Rudd, 165 Tenn. 238 (1932)
85 Festerfield v. Vickers, 43 Tenn. 205, Chavin v. Mayor and City Council, 1 Civ. App. 317
86 Bobo v. City of Kenton, 186 Tenn. 515 (1948)
87 Johnson City v. Wolfe, 103 Tenn. 277
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This non liability for the wrongful acts of a policeman in making an arrest continues even though it is known to the officials of the city that a policeman is insane and dangerous. A city may become liable for the personal tort of a policeman if the act was sanctioned by the city officials.
In the absence of charter authority it seems advisable for municipalities to refrain from spending money to purchase liability insurance to cover governmental activities. The uncertainties surrounding this phase of municipal law point up the need for general legislation that will permit a city that so desires to spend money for this purpose and to limit liability to the amount of coverage, and legalize the contractual agreements of insurance companies not to plead governmental immunity.

City of Nashville\textsuperscript{86} where the court said:

"Under these authorities a city cannot assume liability for negligence in cases where the law relieves it of liability. In other words, a city is without power to enter into a contract rendering it liable for the negligence of its servants in the exercise of a governmental function."

It logically follows that if a city has no authority to waive governmental immunity\textsuperscript{87} it would have no authority to spend money for liability insurance covering governmental activities.

There have been instances in Tennessee where such policies have been enforced against the insurance company. In the case of Rogers et al v. Butler\textsuperscript{88} it was held that a county generally cannot be held liable for negligence of its agents and employees. The court found, however, that the carrying of liability insurance to cover accidents to children riding the bus was authorized by statute.

In the case of City of Kingsport v. Lane\textsuperscript{89} it was held that the operation of a park is a governmental function. By the purchase of insurance the city waived its immunity to the extent of such insurance. The question, however, of the authority to purchase insurance was not raised and not discussed. An examination of the Kingsport charter discloses that there, perhaps, is authority for such expenditure.

(2) If there is no authority for liability insurance, do the officials become personally liable for the expenditure of funds therefor?

In Tennessee there seem to be no cases in point. There is ample authority in other states to holding officials liable for the illegal disbursement of funds.

Municipalities are specifically authorized by statute\textsuperscript{91} to carry workmen's compensation on its employees.

\textsuperscript{86} 182 Tenn. 545 (1944)
\textsuperscript{87} Stephenson v. City of Raleigh, 232 N.C. 42, 55 S.E. 2d 195
\textsuperscript{88} 170 Tenn 125 (1936)
\textsuperscript{89} 243 S.W. 2d 289
\textsuperscript{90} McQuillin, Municipal Corporation, 3rd Edition, Vo. 4, Sec. 12.217 lists the United States, Arkansas, Florida, Illinois, Kansas, Kentucky, Michigan, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Texas and Wisconsin.
\textsuperscript{91} Williams Code, Annotated, Sec. 6856 (e)
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MTAS CONSULTING SERVICE

As a part of its program to provide technical assistance to city officials, the Municipal Technical Advisory Service at the University of Tennessee furnishes technical, consultative, and field services to municipalities in problems relating to fiscal administration improvements and public works and in any and all matters relating to municipal government.

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In cooperation with the Tennessee Municipal League.