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## Constitutional Law – 1958 Tennessee Survey

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# CONSTITUTIONAL LAW—1958 TENNESSEE SURVEY

ELVIN E. OVERTON\*

## INTRODUCTION

State constitutional law decisions, lacking the universality of application of many other fields of the law, are vital and of significance frequently only to the local bar and local public officials. There is another difference between state constitutional law decisions, and federal constitutional law decisions: state courts are inclined to deal with state constitutional issues with an emphasis on the pragmatic problem of deciding the case and getting it out of the way, rather than with an emphasis on completing the blue print—of seeking to establish the general principle which reflects the conflicting policies struggling for recognition. In most United States Supreme Court decisions, even when a unanimous opinion is forthcoming, the two beneficial and legitimate interests are likely to be clearly visible. The opinion is quite likely to make it apparent that judicial statesmanship is at work, and that broad fundamental policies, each of which have strong claims to recognition, are competing.

Eighteen cases have been selected for coverage by this review of constitutional law decisions for the year 1957-58. It is believed that these eighteen cases include the significant ones of the period. Of the eighteen, one is a federal district court decision, which is included in this analysis simply because it deals so particularly with a Tennessee problem.

## GENERAL PRINCIPLES UNDERLYING JUDICIAL REVIEW

*State v. Kivett*,<sup>1</sup> decided during the period under review, states the often-stated general rule that a constitutional question will be decided only when the case cannot otherwise be disposed of and when the decision becomes absolutely necessary. In this case, a county judge had been removed from office by quo warranto. He said that this was unconstitutional.<sup>2</sup> Pending his appeal the incumbent died. The court said that this made it a moot question, stated the general rule above referred to, and said that the exceptions are limited to cases which the court deems must be settled for the future, even if the lapse of time has made the immediate question moot.<sup>3</sup> Since the judge's estate ap-

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1. 308 S.W.2d 833 (Tenn. 1957).

2. The basis was that art. VI, § 6 provides the only method of removal. This section relates to removal of judges by the legislature. It is of course additional to the impeachment method provided for in art. V, § 4, and the indictment method under art. V, § 5.

3. *McCanless v. Klein*, 182 Tenn. 631, 188 S.W.2d 745 (1944); *State ex rel Scandlyn v. Trotter*, 153 Tenn. 30, 281 S.W. 925 (1925).

parently would have been entitled to salary if his removal were improper, the question would not seem entirely moot, but the court said that this was not sufficient to justify the decision on the validity of the removal, since the question of salary was not raised, and since the county was not a party. This last point seems dubious. If the ruling of the court were that he was improperly removed, it would seem to settle the issue as against everyone that he was not removed. Further, one would suspect that the county in such case is legally represented by the State of Tennessee, and that the county would be bound by principles of *res judicata* and representation.

One must agree with the court, that in all cases it is better to await an actual party rather than to decide an academic question. Otherwise the adversary quality of litigation disappears. The only question remaining would be whether there was an actual party.

An equally well established principle is that one may not attack the constitutionality of an act unless it affects him adversely. This doctrine was declared in *Davis v. Allen*<sup>4</sup> along with the corollary that the court will not pass upon the constitutionality of an act unless it is necessary to determine the right of a litigant. In that case, the plaintiff attacked the constitutionality of the act regulating the practice of public accountancy.<sup>5</sup> The court said that he could not attack the provisions relating to certified public accountants since he did not claim any rights as a certified public accountant. For the same reason he could not attack the provisions relating to certification as a public accountant since, after filing his bill, he obtained a certificate as a public accountant. The court held, however, that he could still attack the provisions governing his conduct as a public accountant, including the rule requiring him to pay an annual license fee. This rule that allows one to accept some of the benefits under a statute, and still attack some of the burdens, is thought to be better than the general principle set out in another case decided during the period.

In that case, *Roberts v. Brown*,<sup>6</sup> the court said that where certain officials had accepted office under a city charter that they could not thereafter take the position of challenging the recall election provisions of that charter. This was said to be similar to the doctrine of election, and to be well established.<sup>7</sup> Of course it is admitted that the

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4. 307 S.W.2d 800 (Tenn. App., M.S., 1957), *cert. denied* (1957).

5. As defined in TENN. CODE ANN. § 62-127 (1955).

6. 310 S.W.2d 197 (Tenn. App., W.S., 1957).

7. The court said this was established by *Saylor v. Trotter*, 148 Tenn. 359, 255 S.W. 590 (1923) which refused to permit a sheriff to attack the "Anti-Fee or Official Salary Act." This was apparently based upon a general doctrine of estoppel preventing an agent from questioning the title of his principal, as well as upon a particular doctrine that one acting under a statute is estopped from denying its constitutionality.

doctrine is not always true.<sup>8</sup> It is suggested that there is validity to the doctrine in so far as an official claiming to be an officer could not say that the act creating the office was unconstitutional.<sup>9</sup> The result of the two cases is that it is not clear to what extent one may claim a privilege under a statute, and still object to an unconstitutional restriction in the same statute.

One case, *Davis v. Allen*,<sup>10</sup> deals expressly with the question of when a case involving a constitutional question may properly go to the court of appeals rather than to the supreme court.<sup>11</sup> That case held that when the defendant raises the issue that the plaintiff has no standing to attack the constitutionality of the act, the doubt as to jurisdiction would be resolved in favor of the jurisdiction of the court of appeals. This appears a little amazing, at least at first impression, since it would seem that standing to raise a question of constitutionality is so closely related to the question of constitutionality itself, as to be controlled by whatever reasons determined the primary decision that such questions should go directly to the supreme court.<sup>12</sup>

#### CRIMINAL PROCEDURE AND CRIMINAL LAW

In *Conrad v. State*<sup>13</sup> the defendant claimed that the act<sup>14</sup> providing for increased punishment for subsequent offenses constituted an ex post facto law if the earlier offenses had been committed prior to the enactment of the law. The act was passed in 1953. The immediate offenses were committed in 1955. It was not shown whether the previous offenses were committed prior or subsequent to the enactment of the 1953 act. In accordance with the overwhelming majority, the court held that such a statute was not invalid as an ex post facto law.<sup>15</sup>

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8. In *Obion County v. Coulter*, 153 Tenn. 469, 284 S.W. 372 (1926), a property owner who had paid two or three assessments was allowed to attack the constitutionality of the law providing for the establishment of the drainage district.

9. *But see* *Kivett v. Mason*, 185 Tenn. 558, 206 S.W.2d 789 (1947).

10. 307 S.W.2d 800 (Tenn. App., M.S., 1957), *cert. denied* (1957).

11. The jurisdiction of the court of appeals does not extend to cases "involving the constitutionality of a statute or city ordinance which is the sole determinative question in the litigation . . ." TENN. CODE ANN. § 16-408 (1955).

12. *Findlay v. Davis*, 198 Tenn. 107, 278 S.W.2d 87 (1954) was cited as authority. The case involved a question of fact as to whether a man whose shotgun had been confiscated was hunting illegally. The Circuit Court held that he was not hunting. In *Davis v. Allen*, the only question seems to be one of law. The facts seem to have been admitted, or conceded.

13. 302 S.W.2d 60 (Tenn. 1957).

14. TENN. CODE ANN. § 59-1035 (1955).

15. The court cited 25 AM. JUR. 263 (1940), and 58 A.L.R. 21 (1929). The latter was an annotation prepared in 1921. Later annotations could have been cited including: 82 A.L.R. 345 (1933); 116 A.L.R. 209 (1938); 132 A.L.R. 91 (1941) and 139 A.L.R. 673 (1942). The last annotation cited and discussed

Another case involved a different problem under the habitual criminal law. It will be remembered that the original habitual criminal law<sup>16</sup> expressly provided that an indictment need not specifically include a charge of being a habitual criminal. The Tennessee Supreme Court had sustained the law as constitutional, though suggesting the desirability of giving such notice.<sup>17</sup> However, the United States Court of Appeals had held that it was unconstitutional in so far as it dispensed with notice.<sup>18</sup> This had been adhered to by the Supreme Court of Tennessee in an unreported case.<sup>19</sup>

A prisoner subsequently convicted under the Habitual Criminal Act, contends that these decisions held that the Habitual Criminal Act was unconstitutional. The court in *Bomar v. State ex rel Boyd*<sup>20</sup> held that in so far as the previous decisions did anything more than to rule the notice provision unconstitutional they were dictum. The court further held that in view of the severability clause, and in view of the finding that without the notice provision the act was a complete text and one that would have been passed by the legislature anyhow, the petitioner was properly convicted under the Habitual Criminal Act. As a matter of statutory interpretation, and as a matter of interpretation of the previous decisions, the decision seems desirable. The decision thus amounts to an adoption of the so-called doctrine of elision. The doctrine is normally used in passing upon constitutionality, and means that when the valid parts of a statute are "not so dependent upon the portion said to be void that [the] court cannot presume that [the] Legislature would not have enacted valid portion in absence of inclusion within enactment of that portion said to be void, and after elision of void portion there must be enough left of statute for a complete law capable of enforcement and fairly answering object of its passage . . ." <sup>21</sup> Of course the doctrine conflicts with the other generality that an unconstitutional statute is not law and imposes no obligations and confers no right of recovery.<sup>22</sup> It is consistent with the more cautious statement that the unconstitutional section is a nullity and cannot be used either as an offense or

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*McCummings v. State*, 175 Tenn. 309, 134 S.W.2d 151 (1939). The annotations make it clear that in general such statutes have survived attack under the doctrines of *ex post facto*, double jeopardy, cruel and unusual punishment, due process of law, and equal protection.

16. Tenn. Public Acts 1939, ch. 22, § 5. WILLIAMS TENN. CODE ANN. § 11863.5 (Supp. 1954) still carried the same provision.

17. *McCummings v. State*, 175 Tenn. 309, 134 S.W.2d 151 (1939).

18. *Edwards v. Rhea*, 238 F.2d 850 (6th Cir. 1956).

19. Cited in *Bailey v. State*, 312 S.W.2d 174, 177 (Tenn. 1958).

20. 312 S.W.2d 174 (Tenn. 1958).

21. *Davidson County v. Elrod*, 191 Tenn. 109, 231 S.W.2d 1 (1949). The quoted positions are from the headnote. The doctrine is usually not to be favored, and should be applied only in cases in which the conclusion is "fairly free from doubt" 191 Tenn. at 112.

22. *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S.W.2d 683 (1934).

defense.<sup>23</sup> Of course as drafted the statute was void on its face. It is worthy of note that the Tennessee Code Commission apparently anticipated the decision, though the court did not mention the new statement of the section in the Tennessee Code Annotated.<sup>24</sup>

*Atkins v. Harris*<sup>25</sup> raised a question of the validity of a search and seizure. The case is a constitutional law case in the sense that the state constitution contains a provision relating to illegal searches and seizures.<sup>26</sup> The question raised was the legality of a search of an automobile belonging to the arrested defendant when the automobile, while close to the defendant's house, was upon another's land. In so far as the case holds that there may be search incident to a lawful arrest under common law principles, the case adds nothing to the precedents.<sup>27</sup> In so far as it allows search of the immediate area around the arrested person it adds nothing.<sup>28</sup> However, to the extent that it justifies a search of premises not shown to have any connection with the defendant or his premises, the case poses some difficulty. True enough, it is not concern for the defendant that raises the difficulty, but concern for the security of neighbors. It seems clear that the court would not permit a search of an adjoining neighbor's house under the same circumstances. The difference is one of degree, though the difference in degree is substantial. In the case in question the officers searched a car of the defendant, but the risk in searching cars on neighboring property is really that another's car may be searched, and that trespasses will in fact be committed. The court cited cases in which searches of the defendant's cars some distance away were permitted. However, in several of those cases the car was apparently in a public place, and in fact on a public highway.<sup>29</sup> The court admits that a search of another's premises under a warrant describing the

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23. *Matill v. Chattanooga*, 175 Tenn. 65, 132 S.W.2d 201 (1939).

24. In the Tennessee Code Annotated as adopted in the Public Acts of 1955, ch. 6, the section specifically requires that in order to sustain a conviction as a habitual criminal the indictment or presentment shall charge that the defendant is a habitual criminal. TENN. CODE ANN. § 40-2803 (1955).

25. 304 S.W.2d 650 (Tenn. 1957).

26. TENN. CONST. art. I, § 7.

27. *Hughes v. State*, 145 Tenn. 544, 238 S.W. 588 (1921).

28. *Lawson v. State*, 176 Tenn. 457, 143 S.W.2d 716 (1940); *Cope v. State*, 157 Tenn. 199, 7 S.W.2d 805 (1928).

29. *Woods v. State*, 37 Okla. Crim. 377, 258 Pac. 816 (1927) involved a search of a wagon on a road a mile out of town. In *Gambill v. State*, 45 Okla. Crim. 291, 283 Pac. 262 (1929) the automobile was on a highway. In *State v. One Buick Automobile*, 120 Or. 640, 253 Pac. 366 (1927) the automobile was parked in the garage of the apartment house occupied by the defendant. In *People v. Garrett*, 232 Mich. 366, 205 N.W. 95 (1925) the car was parked in a "private parking place" or "private parking ground." In *State v. Cyr*, 40 Wash. 2d 840, 246 P.2d 480 (1952) the car was parked "outside" the restaurant in which the defendant was arrested. If the "private parking place" was a regular parking lot, and if the "outside" was either the street or a parking place for the use of the public, customers of the restaurant, the cases do not go as far as the Tennessee Supreme Court went.

defendant's premises would be unlawful. This might appear to give the officers more freedom if they neglect securing a search warrant. It is assumed, however, that such is not the case, and that securing the warrant would not deprive the officers of the privilege granted to officers without a warrant. As is the case in many constitutional protections, the community in general is the intended beneficiary, and not the defendant himself. In view of the natural hesitancy of innocent men to object to the method in which officers perform their functions, it is questionable whether too much significance should be attached to the reference in headnote 6, to the effect that the landowner "made no complaint about search," and the direct statement by the court that the adjoining owner has raised no complaint about the search being made on his property. *Beadle v. State*<sup>30</sup> raised the problem of how far due process of law required a criminal court to appoint a court reporter and to provide a record for a pauper unable to pay for his own bill of exceptions. The court felt that the United States Supreme Court case<sup>31</sup> upon which the argument was based itself answered the contention, since the narrative bill of exceptions used by the defendant's attorneys gave the reviewing court an adequate basis for reviewing the decision below.

#### CIVIL LIBERTIES

The only case involving a substantial question of civil liberties as that term is conceived in its narrower connotations is not a Tennessee decision, but is a decision of the United States District Court for the Middle District of Tennessee. In that case, *Kelly v. Board of Education*,<sup>32</sup> Judge Miller held that the Pupil Assignment Act<sup>33</sup> did not provide an adequate administrative remedy, and hence the plaintiffs did not have to exhaust their administrative remedy before resorting to the courts.<sup>34</sup> The court did not rule upon the constitutionality of the act, but held that the proposed plan of having integrated schools along with segregated schools, and permitting the parents to select which schools their children shall attend, did not eliminate racial discrimination. The decision accepts the view that color alone cannot constitutionally be made a basis of differentiation in public education. This seems to be quite firmly established. The decision, while recognizing that the right of the minority to attend a school cannot now

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30. 310 S.W.2d 157 (Tenn. 1958).

31. *Griffin v. Illinois*, 351 U.S. 12, (1956). The court there stated that "counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review."

32. 159 F. Supp. 272 (M.D. Tenn. 1958).

33. Tenn. Pub. Acts 1957, ch. 13.

34. The court said that it was clear that the Board was committed to a policy of segregation, and that the act did not forbid the Board from taking color into consideration in making the assignment.

be made to turn upon the consent of members of the majority race, recognized the difficulty facing school boards, and gave more time to the board to submit a new plan. This is consistent with the United States Supreme Court's own procedure. The judge, however, apparently is beginning to wonder how many years must elapse before a constitutional right should be implemented more fully.<sup>34a</sup>

*Barnes v. Kyle*<sup>35</sup> might be classified here simply because it does not particularly lend itself to inclusion in other categories. The immediate question was the right to intervene in a case between others. A claimant under a tax deed sought to remove a cloud on his title; the defendant city claimed fraud on the part of the claimant, and the participation in fraud by the state land agent. The state land agent sought to intervene claiming that the imputations of fraud have injured her reputation as an attorney and officer of the courts, and that to refuse her a right to be heard would deprive her of property without due process of law under the fourteenth amendment, and in violation of article I, section 17 of the Tennessee Constitution providing that courts shall be open, and that every man for an injury done him shall have a remedy.

The court passed only upon the contention under this last article and held that the provision covers only legal injury—that is, an injury amounting to a violation of a legal right. The court admitted that the right to practice a profession is a property right, but held that there was no legal remedy provided for such an injury resulting from a legal proceeding in which the injured person is not a necessary party. The case seems ultimately sound as a constitutional decision, once it is so conceded that there is no common law or statutory right to intervene.<sup>36</sup> Thus the constitutional provision creates no new right, but would apparently protect rights otherwise given.

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34a. This was written before the recent U.S. Supreme Court's decision, arising out of the Little Rock situation, which clarifies the solution. *Aaron v. Cooper*, 78 Sp. Ct. 1399 (1958).

35. 306 S.W.2d 1 (Tenn. 1957).

36. The opinion probably reflects a traditional Tennessee doctrine evidenced in other fields, adopting narrow rules permitting joinder, as in the case of joint tortfeasors. The desirability of developing broader doctrines permitting intervention has much support in certain fields. In the case in question, it is submitted that the state has a peculiar interest in permitting its agents to establish freedom from fraud in transactions conducted for the state. Since the agent, if guilty, concededly would be a joint tortfeasor, he would seem to be a proper party if not a necessary party. A rule permitting proper parties to intervene was not unknown at the common law. An early federal court case said: "Strangers to a cause cannot be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger . . ." *Anderson v. Jacksonville P. & M. R.R.*, 1 Fed. Cas. 842,843 (No. 358) (C.C.N.D. Fla. 1873). It has been stated that 40 states have broadened common law intervention, some by narrow statutes, some by broad statutes and some by rules of court. CLARK, CODE PLEADING 421 n. 283 (2d ed. 1947). It has also been pointed out that early statutes dating from 1285 and 1390—periods which normally are considered

## ECONOMIC REGULATION

The cases included herein have two features. In the first place, they define generally such terms as "due process of law" and "law of the land." Secondly, they hold that certain specific regulations or classifications are either valid or invalid.

"Law of the land" is defined in two of the cases. In *White Stores v. Atkins*<sup>37</sup> the court defined "law of the land" as meaning law

"[W]hich embraces all persons who are or may come into like situation and circumstances" . . . [I]t may be made to extend to all citizens, or be confined, under proper limitations to particular classes. If the class be a proper one, it matters not how few the persons are who may be included in it. Under the constitutional provisions here invoked the classification must be based on reason, be natural and not arbitrary.

It is clear under this definition that the phrase "law of the land" includes the idea of equal protection.

*Roberts v. Brown*<sup>38</sup> makes it clear that the phrase "law of the land" is synonymous with the phrase "due process of law." The court said that a statute which violated one violated the other.

This is not always true, since the state court may hold economic regulation unconstitutional which a federal court may hold constitutional. Clearly, there is more protection of economic activity in state courts under state constitutions than there is in federal courts under the due process clause. Tennessee, along with many other states, tends in this field to adhere to an older and more conservative view of the permissible legislative function in prohibiting certain means of conducting a business.

In *Logan's Supermarkets, Inc. v. Atkins*,<sup>39</sup> the court held invalid the Tennessee statute which, as construed, imposed additional taxes on those not redeeming their own stamps.<sup>40</sup> The court probably rested

part of the common law—had such provisions as to make a liberalization of the common law not so much a "modernization" as a "renovation." Rogers, *Intervention at Common Law*, 57 LAW Q. REV. 400 (1941).

37. 305 S.W.2d 720, 726 (Tenn. 1957). The case is noted in this year's annual survey since it was not covered in previous years. It was not reported until August 13, 1957. The court adopted in toto the chancellor's opinion, since "to rewrite the opinion would serve no useful purpose." The court did, however, add material on the definition of a discriminatory statute and of the "law of the land." Article 1, § 8, of the Tennessee Constitution provides: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property but by judgment of his peers or of the law of the land." The alternative wording suggests that if this is done by the judgment of his peers that it need not be done in accordance with the law of the land. The words of course have not been subjected to the suggested interpretation.

38. 310 S.W.2d 197 (Tenn. App., W.S., 1957). The court in addition set out more complete definitions which included the classification principle.

39. 304 S.W.2d 628 (Tenn. 1957).

40. It has been noted elsewhere that the court to some extent rewrote the Tennessee statute. Note, 25 TENN. L. REV. 397 (1958).

its decision upon the discriminatory feature, but was apparently of the opinion that any prohibitory statute would be unconstitutional.<sup>41</sup> As is well known, the United States Supreme Court has sustained prohibitory regulation in the form of destructive taxation.<sup>42</sup> There are sound economic reasons which might have been held to justify a different legislative treatment of merchants who redeemed their own stamps as compared to those who had arrangements with others to redeem the stamps.<sup>43</sup>

The court held in a brief statement that the discriminatory section could be elided while the non-discriminatory section increasing taxes could stand.

*White Stores, Inc. v. Atkins*<sup>44</sup> is largely a case of statutory construction, and rather simply held that the term "wholesale dealer" did not include a firm operating both as a wholesaler and a retailer, but only a firm operating exclusively as a wholesaler.<sup>45</sup> The act was further held not to be arbitrary in excluding those engaging in the wholesale and retail business from the privileges allowed those engaging exclusively in the wholesale business. The court adopted the opinion of the chancellor<sup>46</sup> since "to rewrite the opinion would serve no useful purpose." The court then added a few paragraphs defining "discrimination" and "law of the land."<sup>47</sup>

It is believed that there is an adequate basis for the classification. However, it is at least questionable whether the basis is any greater than the basis rejected in *Logan's Supermarkets, Inc. v. Atkins*.<sup>48</sup>

The difficulty of applying generalization in this field is particularly great. This is shown by a case dealing with the regulations of the accounting business. In *Davis v. Allen*<sup>49</sup> the court dealt with the validity of the regulations of the business of being a public accountant.<sup>50</sup> The court said that it could only look to see if the provisions were reasonable, that is, whether the act had "any real tendency to carry into effect the purposes designed—the protection of the public safety, health, or morals."<sup>51</sup>

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41. The court said: "However, the weight of authority and the later cases hold that such prohibition statutes are not valid, because violative of state constitutions." 304 S.W.2d at 632.

42. See, e.g., *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916).

43. See note 40 *supra*.

44. 303 S.W.2d 720 (Tenn. 1957).

45. TENN. CODE ANN. § 67-3101(f) (1955).

46. The chancellor felt that a previous decision, *Great Atlantic and Pacific Tea Co. v. McCanless*, 178 Tenn. 354, 157 S.W.2d 843 (1941), was controlling.

47. 303 S.W.2d at 726.

48. See note 39 *supra*.

49. 307 S.W.2d 800 (Tenn. App. M.S. 1957).

50. Since the complainant did not claim any rights as a certified public accountant, and since after filing his bill he obtained a certificate, the court held that he could not attack the act's provisions as to these matters.

51. 307 S.W.2d at 802.

The court said that it was passing upon the annual license fee and the standard of conduct authorized to be set up. There was no discussion of any particular provisions. The court said that a previous decision<sup>52</sup> striking down a previous act was not controlling, since that act required a license from anyone performing accounting work for more than one employer. The previous act was held to have no tendency to protect the public, and was unconstitutional as an unreasonable restriction upon the right to engage in private business.<sup>53</sup> One doubts that the previous act had no real tendency to protect the public, or that the court did not in fact broaden its definition of "safety, health and morals" over a previous day.

It is unfortunate to define "reasonable" only in terms of tendency to serve the purposes designed, and to neglect the requirement that the means must not achieve that purpose by methods that are unreasonably harsh, or to fail to include a rule that some ends cannot legitimately be sought. The decision is unquestionably in line with those cases involving the regulation of various aspects of the public accounting business.

*City of Chattanooga v. Veatch*<sup>54</sup> sustained the Chattanooga license fee for using the city streets as a valid regulation and not a revenue measure. The court followed an earlier case<sup>55</sup> in holding the license requirement within the power of the city.

*Phillips v. State*<sup>56</sup> sustained the validity of the act<sup>57</sup> requiring the observance of standard time only. The case defines the police power in very broad terms, as embracing all matters reasonably deemed necessary or expedient for the safety, health, morals, comfort, domestic peace, private happiness and welfare of the people.<sup>58</sup> Chief Justice Neil dissented. He thought that the statute was an attempt to regulate the time during which people could carry on their business. Of course it may have been so intended. But it did not prevent anyone

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52. *Campbell v. McIntyre*, 165 Tenn. 47, 52 S.W.2d 162 (1931). The court felt that the act was intended to protect certified and licensed accountants and not the public.

53. The current act would appear to retain a requirement of performing such work for more than one employer, but also to require the holding out to the public as a public accountant. TENN. CODE ANN. § 62-127 (1955).

54. 304 S.W.2d 326 (Tenn. 1957).

55. *DeLay v. Chattanooga*, 180 Tenn. 316, 174 S.W.2d 929 (1943). It was there upheld as being neither class legislation nor a burden on interstate commerce; nor was it repealed or superceded by the reciprocal agreement between the Commissioner of Finance and Taxation and officials of the State of Georgia made pursuant to ch. 242 of the Public Acts of 1937. The previous decision would seem to deny to the commissioner under this act the power to make any agreement with other states concerning use of any city street. This would seriously impair the effectiveness of any such reciprocal agreement. The statute is set out in TENN. CODE ANN. § 59-436 (1955).

56. 304 S.W.2d 614 (Tenn. 1957).

57. Tenn. Public Acts 1957, ch. 260.

58. 304 S.W.2d at 617.

from carrying on his business at any time he chose. The majority opinion admitted that the view sustaining such legislation has been criticized.<sup>59</sup> It is easier to agree with the court than it is to agree with the legislature.

The case also said that a classification would be upheld "if any possible reason can be conceived to justify such classification . . . [or] if the reasonableness . . . be 'fairly debatable.'"<sup>60</sup> This is obviously contradictory to the result in the trading stamp case.<sup>61</sup>

*Southern Bell Tel. & Tel. Co. v. Tennessee Pub. Serv. Comm'n.*<sup>62</sup> held that in regulating a public utility the rates must allow a fair return or violate the due process clause.

One case, *Bryan v. International Alliance*,<sup>63</sup> holding that a union member had to exhaust the union remedies before resorting to judicial action, and that he had not shown that such resort would be useless and futile, stated generally that the right to work and the right to contract in regard to such work was a property right protected by the fourteenth amendment of the federal constitution, and article I, section 8, of the state constitution. It also held that if a monopoly was created by the arrangement of the union, the plaintiff might have a remedy since such a monopoly would violate the fourteenth amendment, as well as the state constitution. A private monopoly may violate the Tennessee Constitution, but of course it cannot violate the fourteenth amendment. If the state court were to hold a monopoly valid this would be sufficient state action to raise the question of its constitutionality under the fourteenth amendment.

#### ADMINISTRATIVE LAW

In seeking review of administrative decisions, it is generally accepted that the administrative remedies must be exhausted before resort to the courts may be had. An exception is recognized when the administrative procedures provide an inadequate administrative remedy. Both doctrines were stated and the exception used in the case of the right of negroes seeking the aid of a court to declare that the proposed plan of having integrated schools, proposed by the Board of Education in Nashville, did not eliminate racial discrimination. Judge Miller of the Federal District Court for the Middle District of Tennessee, held in *Kelly v. Board of Education*<sup>64</sup> that the Pupil Assignment Act<sup>65</sup> did not provide an adequate administrative remedy.

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59. Annot., 37 A.L.R. 134 (1925).

60. 304 S.W.2d at 617.

61. See note 39 *supra*.

62. 304 S.W.2d 640 (Tenn. 1957). The decision is of more significance under the discussion in connection with administrative law, *infra* note 67.

63. 306 S.W.2d 64 (Tenn. App., E.S. 1957).

64. 159 F. Supp. 272 (M.D. Tenn. 1958).

65. Tenn. Public Acts 1957, ch. 13.

He found that the Board was committed to a policy of segregation and that the act did not forbid or preclude the Board from taking color into account in making the assignment. Hence he assumed jurisdiction to decide the merits of the proposed plan.

The cases that give the most difficulty in the field of administrative law are quite probably those dealing with the scope of judicial review, both as a matter of constitutional requirement and as a matter of state law. The problem is not without difficulty in Tennessee on both counts.<sup>66</sup> The current decisions do not add anything to clarify the situation.

In *Southern Bell Tel. & Tel. Co. v. Tennessee Pub. Serv. Comm'n*<sup>67</sup> the court stated a very broad rule that the issue of a fair return on the investment was a matter for the courts, and not the legislature. The complainant<sup>68</sup> was held to be entitled to an independent judgment of the court, since if the allegation were established, there would be a violation of due process. The rule was said to be applicable when a commission or a legislature fixes rates. The court said that the commission was an administrative body, and "may be to some extent quasi judicial," but that on the whole it is a legislative body, "because most of the things which it does . . . are things which the legislature would do through committees."

The case relied principally upon such cases as the *Ben Avon* case,<sup>69</sup> and *Smyth v. Ames*.<sup>70</sup> These cases are not very virile today,<sup>71</sup> except as they receive infusions of fresh blood from time to time by state courts.<sup>72</sup>

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66. See Lacey, *Judicial Review of Administrative Action in Tennessee—Scope of Review*, 23 TENN. L. REV. 349 (1954).

67. 304 S.W.2d 640 (Tenn. 1957).

68. The complaint was an original bill to attack the rates, and was not certiorari under TENN. CODE ANN. §§ 27-801 to -823 (1955).

69. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

70. 169 U.S. 466 (1898).

71. DAVIS, *ADMINISTRATIVE LAW* 868 (1951) states: "The long debate about de novo review versus restricted review is about ended; the Ben Avon and Crowell cases are of little interest except as history . . ." Another authority has said that "The doctrine that appellant is entitled to judicial re-determination of questions of constitutional fact (like the precept that one is entitled to judicial re-examination of questions of law) has been subject to considerable deterioration since the decision of the Ben Avon case in 1920." STASON and COOPER, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS* 533 (3d ed. 1957).

72. An interesting comment concerning the weakness of the Ben Avon case was made by the Justices of the Supreme Judicial Court of Massachusetts. They said: "Notwithstanding the criticism of these two Supreme Court decisions [Ben Avon and St. Joseph Stock Yards], and notwithstanding the assertions from various apparently competent sources that they are no longer law, we have not been able to discover when and where they have been overruled. One writer announces that the doctrine of these cases has 'gradually died' because of subsequent decisions inconsistent with it. Davis, *Administrative Law*, § 255 at page 919. Perhaps so, but we would prefer to see the death certificate." *Opinion of the Justices*, 328 Mass. 679, 106 N.E.2d 259 (1952).

Quite a different impression as to the scope of judicial review from administrative decisions and findings is gathered from *Real Estate Comm'n v. McLemore*.<sup>73</sup> In that case, the commission had revoked a license of a real estate broker. The broker sought certiorari before the circuit court. That court set aside the order of the commission and restored the license to the broker. The commission sought review by writ of error. The supreme court held that the petition for certiorari was insufficient both at common law and under the statutes.<sup>74</sup> The further language in the case was to the effect that an appeal from a judicial body is not a requirement of due process of law. Though everyone is entitled to his day in court—that is, to have a hearing after notice—he does not have a right to have his first hearing reviewed.<sup>75</sup>

Thus, the case is apparently decided as though it involved a right to a review of a judicial tribunal. There is no mention of a constitutional right to a review from an administrative tribunal. Of course the act states that the Commission is “declared to be a judicial body,”<sup>76</sup> but since this is followed immediately by “and the members or its employees thereof are granted immunity from civil liability when acting in good faith and in the performance of their duties as described in this chapter” it is questionable whether the act in addition to conferring this immunity meant to abolish the distinction between an administrative board exercising judicial functions, and court exercising judicial functions.

It will be remembered that the Tennessee Supreme Court once said that the judgments of boards of commissioners with quasi-judicial powers “cannot be made final and conclusive of the rights of litigants” and that upon review the case was to be retried upon the merits.<sup>77</sup> On the other hand, the Tennessee Supreme Court has held that to permit a trial de novo would violate the separation of powers concept and could not constitutionally be authorized.<sup>78</sup> It might be pointed out that it has been held that the separation of power concept prevented a retrial of the facts on a determination of value in a rate

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73. 306 S.W.2d 683 (Tenn. 1957).

74. The court said that where the petition does not show that the board acted illegally or in excess of its jurisdiction, the common law writ would not properly issue. As to the statutory writ, the court said that the petition was insufficient since, other than a statement that he was not guilty of any of the charges against him, the petition did not contain a statement of any facts or circumstances which at the very least would show a probability of innocence, upon which the circuit court might have exercised discretion in the issuance of the writ.

75. 306 S.W.2d at 686.

76. TENN. CODE ANN. § 62-1325 (1955).

77. *Staples v. Brown*, 113 Tenn. 639, 644-45 (1904).

78. *Hoover Motor Exp. Co. v. Railroad & Pub. Util. Comm'n*, 195 Tenn. 593, 261 S.W.2d 233 (1953). The court said that the Commission was not a court, that it performed administrative and legislative functions and that “the quasi-judicial power, is merely incidental thereto.” 195 Tenn. at 604.

case.<sup>79</sup> Of course Tennessee did not use the same technique in reviewing the valuation in the rate case discussed above.<sup>80</sup>

The current cases do not add any clarification to the constitutional issues of the right or power to review the fact determinations of an administrative tribunal. Though it may be conceded that there is a difference between rate making and revocation of a license, it is hard to see why an erroneous finding in one is more a deprivation of property than in the other. The arguments in favor of finality of an administrative tribunal's fact finding should not depend, in a revocation of a license, upon whether the legislature threw in a clause providing that a commission is a judicial body. The very idea of an administrative tribunal is that it sometimes exercises legislative functions, sometimes exercises executive functions, and sometimes exercises judicial functions. The function in setting value in a rate making case needs no greater supervision than the function of deciding violation of regulation in a license revocation proceeding.

#### GOVERNMENTAL LAW

A series of several cases involve various aspects of the power of the legislature to enact legislation for municipalities. They do not have any particular common ground except that they involve the validity of legislation concerning governmental units, or actions by governmental units.

*Roberts v. Brown*<sup>81</sup> involved the validity of a recall election provided for by a city charter. Though a general attack was made upon the law under the "due process" and "law of the land" provisions, the attack was primarily based upon the general and special law provision of article XI, section 8. The court held that the city charter provision was not invalid because there was a general ouster law. The court said that section 8 did not apply to municipal charters but only to private corporations. This is well established with respect to the provision relating particularly to "corporations," but it is clear that in the past the special class legislation provision of the section has been held to invalidate statutes applicable to particular cities.<sup>82</sup> The court further held that the 1953 amendment to article XI, section 9, relating to special acts for municipalities, did not act retroactively, and that a law previously adopted which was constitutional when adopted, was not made invalid by the subsequent adop-

79. *United Fuel Gas Co. v. Public Serv. Comm'n*, 73 W. Va. 571, 80 S.E. 931 (1914).

80. *Southern Bell Tel. & Tel. Co. v. Tennessee Pub. Serv. Comm'n*, 304 S.W.2d 640 (Tenn. 1957).

81. 310 S.W.2d 197 (Tenn. App. W.S. 1958).

82. For example, *State ex rel. Grantham v. Memphis*, 151 Tenn. 1, 266 S.W. 1038 (1924); *Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798 (1907).

tion of the constitutional amendment restricting the powers of the legislature.<sup>83</sup>

*Darnell v. County of Montgomery*,<sup>84</sup> held that an agreement by the county to build an industrial plant, and lease it to an industrial concern for 15 years, with an option to buy it during the last 10 years of the lease, was not invalid as an attempt to exempt private property from taxation,<sup>85</sup> nor as an attempt to spend money for private purposes,<sup>86</sup> within the meaning of article II, sections 28 and 29.<sup>87</sup>

The amendment to article XI, section 9 pertaining to the 1953 "home rule" amendment was construed in *State ex rel. Cheek v. Rollings*,<sup>88</sup> as not preventing the legislature from discontinuing all meetings of the circuit and chancery courts at Tracy City. The basic decision appears to be that since the legislature is given the power to establish courts, under article VI, section 1, that the power over courts was not limited by the "home rule" provision. Another basis of the decision was that since Altamont was originally made the seat of justice, discontinuing the courts at Tracy City and leaving them at Altamont was not a change in the seat of justice without the approval of the voters as required in article X, section 4. The decision that this was not an act "private or local in form or effect" is questionable, though governmentally it may be desirable for the legislature to have power to abolish court meetings at particular cities.<sup>89</sup>

The court said that since the legislature could validly establish the meeting of the court that it could abolish the meeting of the court. This is of doubtful validity since it amounts to saying that since the legislature had the power in 1913 to establish a court meeting by private act, it has the power in 1957, after special legislation has been seriously restricted, of removing the enactment of such special legislation, by "general" legislation dealing with particular courts in a particular city, in a particular county.

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83. *Duncan v. Rhea County*, 199 Tenn. 375, 287 S.W.2d 26 (1955) was held controlling. The court also said that the official was bound by a doctrine of election, since he had accepted office under the charter. See note 7 *supra*.

84. 308 S.W.2d 373 (Tenn. 1957).

85. Although the lease had a provision requiring the lessee to pay all taxes, it seems probable that the result of the agreement was to exempt the lessee from taxes, at least until the option to buy was exercised.

86. The court pointed out that this was held to be a public purpose on the part of a city. *Holly v. Elizabethton*, 193 Tenn. 46, 241 S.W.2d 1001 (1950).

87. Previously the expenditure of public funds for such purposes was held to be unconstitutional. *Azbill v. Lexington Mfg. Co.*, 188 Tenn. 477, 221 S.W.2d 522 (1949); *Ferrell v. Doak*, 152 Tenn. 88, 275 S.W. 29 (1924). The attempted reconciliations pose some difficulties.

88. 308 S.W.2d 393 (Tenn. 1957).

89. The court meetings were originally provided for by Private Act 1913, ch. 5. The act was incorporated into TENN. CODE ANN. § 16-232 and § 16-248 (1955). The law repealing the private act and amending the code sections is Public Acts 1957, ch. 2.

*Weakley County Municipal Elec. Sys. v. Vick*<sup>90</sup> holds that the Municipal Electric Plant Law<sup>91</sup> is constitutional and does not violate article XI, section 17, providing that no county office created by the legislature shall be filled otherwise than by the people or the county court, though the board is appointed by the municipal agencies. The question in the case involved the enjoining of picketing by the defendants of the municipal electric system. The decision was that the county could not enter into collective bargaining agreement, and hence the strike was illegal and properly enjoined.<sup>92</sup>

The result is not objectionable. The route was startling. The court said first that the commissioners were not county officers, but even if they were they were de facto officers. The decisions in Tennessee that there can be no de facto officer if there was not a de jure office do not prevent this, because there may be de jure commissioners of municipalities and towns. Even if this is not valid, said the court, the superintendent of the plant was a de jure or de facto employee. He was an employee of the county and not the commission, since the doctrine of respondeat superior does not apply.<sup>93</sup> It is dubious whether the applicability of respondeat superior has anything to do with who the superior is. The cases cited by the court would have required a holding that the governmental agency, whether the commissioners or the county, was not liable for the unauthorized and independent wrong of the employee. They seemed to give no support to the view that the employer was the county rather than the board or commissioners.

#### CONCLUSION

The cases reviewed have been decided in ways that could not often be attacked on an individual basis as reaching the wrong result. However, they have done little to clarify principles underlying the more significant cases coming before the court. It is respectfully submitted that this clarification of principles should be sought constantly by the courts. Of course the Tennessee Constitution is not an exemplary model of draftsmanship, and itself contributes to the difficulty that any court would face in applying its provisions to particular fact situations.

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90. 309 S.W.2d 792 (Tenn. App. W.S. 1957).

91. TENN. CODE ANN. §§ 6-1501 to -1534 (1955).

92. A citation of a United States Supreme Court decision involving the enjoining of picketing under the United States Constitution would have been preferable to citations from other state decisions that peaceful picketing for an unlawful purpose may be enjoined.

93. The court cited *Hale v. Johnston*, 140 Tenn. 182, 203 S.W. 949 (1918) and *Lunsford v. Johnston*, 132 Tenn. 615, 179 S.W. 151 (1915) which involved liability of county commissioners for their own neglect and that of employees in the operation of a county workhouse.