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ADMINISTRATIVE LAW—1954 TENNESSEE SURVEY

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Administrative Law consists of those legal principles, whether of constitutional, statutory or common law derivation, which are generally concerned with the organization, relationships, powers and procedures of administrative agencies.[1] These are the agencies of government, other than the regular courts and legislatures, which can determine private rights through adjudication or affect these rights through the making of rules having the status of law. It will be noted that the definition excludes the substantive rules of law applied and developed through such agencies.[2] Procedural in nature, it is an area of law in which the institution of judicial review of administrative action continues to be of central, though diminished, importance.[3]

Through extensive studies[4] and the passage of the Federal Administrative Procedure Act,[5] the systematizing of this area of law at the federal level has been greatly advanced in recent years. Few states have made similar strides, although administrative agencies at the state and local level may be even more numerous.[6] Tennessee has not

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1. See DAVIS, ADMINISTRATIVE LAW 1-4 (1951).

2. The activities of these agencies cut across almost all fields of substantive law and in many instances the work of the agency may be regarded as the most important single factor in the development of a particular area of law within the state. This is true, for example, of the work of the Railroad and Public Utilities Commission in the field of substantive Transportation Law and Public Utility Law. In an Appendix to this article there is included a summary of some of the more important decisions of this agency during the survey year.

In another area, see Note, *Claims against the State of Tennessee—The Board of Claims*, 4 VAND. L. REV. 875-904 (1951).

3. See DAVIS, ADMINISTRATIVE LAW 4 (1951).

4. See REPORT WITH SPECIAL STUDIES OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937); Att'y Gen. Comm. Ad. Proc., SEN. Doc. No. 10, 77th Cong., 1st Sess. (1941).

5. 60 STAT. 237 (1946), 5 U.S.C.A. § § 1001 *et seq.* (Supp. 1950).

6. For an indication of the number in Tennessee, see Boone, *An Examination of the Tennessee Law of Administrative Procedure*, 1 VAND. L. REV. 339, 340-41 (1948).

attempted any comprehensive statutory regulation such as the Model State Administrative Procedure Act.[7] What might have been a legislative attempt at detailed coverage of the topic of judicial review, in conjunction with the adoption of the 1932 Code, has been treated as accomplishing little change in the pre-existing law.[8] In its decision of major importance in this field of law during the current survey year, the Tennessee Supreme Court invoked the Constitution to prevent from becoming effective what could have been a far-reaching statutory change in the scope of judicial review.[9] Apart from this decision there was little development of more than routine significance during the period.

Statutory Basis of Power

Two decisions of the Tennessee Supreme Court serve to stress the basic importance of the particular statutory framework in determining the powers of an administrative agency. General regulatory statutes or the constitution may impose additional restraints; but an administrative agency cannot exercise authority in the first place except such as is provided within the four walls of the legislation creating it and setting forth its functions.[10] This is a matter of administrative conformity to the standards provided by the law-making authority. A basis of common or generalized law being lacking, determining the existence of power of an administrative agency to take certain action or to follow a certain procedure becomes first of all then an exercise in statutory construction.[11]

In *Young v. Warren County Beer Board*,[12] a permit to sell beer outside the corporate limits of McMinnville was revoked by the Beer Board on the basis of misrepresentation in the application. On a petition attached to the application only three of the nine signatures of alleged property owners in the vicinity were such in fact. The circuit court, after petition for certiorari was filed with it, affirmed the board's action. On appeal the Supreme Court, in an opinion written by Chief Justice Neil, reversed. In granting or revoking permits the beer board has no authority to prescribe restrictions beyond those set forth in the statute. The action of the board in requesting the applicant to secure the approval of property owners in the vicinity, "while commendable,"

7. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1944) 329; *id.* (1946) 191, 202.
8. Anderson v. Memphis, 167 Tenn. 642, 72 S.W.2d 1059 (1934).
9. Hoover Motor Express Co. v. Railroad and Public Utilities Comm'n, 195 Tenn. 593, 261 S.W.2d 233 (1953).
10. Social Security Bd. v. Nierotko, 327 U.S. 358, 66 Sup. Ct. 637, 90 L. Ed. 718 (1946).
11. This is not meant to suggest that the administrative agency does not play an important role in the development of the meaning of the statute under which it operates. See Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470-92 (1950).
12. 195 Tenn. 211, 258 S.W.2d 763 (1953).

was not required by law and the paper with signatures was not a part of the application. The issue of fraud was related to a collateral matter. Thus the statutory power of the board to revoke for false statements in the application could not be invoked.[13]

A logical difficulty here may be noted. The beer board apparently was not acting beyond its authority in asking the applicant to furnish the signatures of property owners. It undoubtedly had the discretion to reject an application for a permit fully complying with the requirements of the statute, because of the absence of such signatures.[14] Nevertheless, the case holds, even if fraud exists as to such signatures, it is of no legal significance if the board seeks to revoke the permit. The discretion which the statute affords the beer board in the granting of permits is found by a process of strict interpretation to be drastically reduced in the matter of revocation.

On the merits, the decision appears to be at odds with language in earlier Tennessee decisions indicating considerable discretion in beer boards in the matter of revocation as well as in the granting of permits.[15] An additional basis for the revocation here, the board's finding that granting beer permits outside city limits was detrimental to the community's peace, health and general welfare, was dismissed as mere opinion unsupported by testimony and not responsive to any issue in the case. That the legislature had made specific statutory provision for the granting of such permits would seem to have been a complete answer to this asserted reason.[16]

In *Range Pontiac Sales Co. v. Dickinson,*[17] a case involving the confiscation of an automobile used in the transportation of unstamped liquor, the Supreme Court was similarly strict in requiring adherence to statutory conditions as a basis for the exercise of administrative authority. Justice Tomlinson's opinion states that the Commissioner of Finance and Taxation was not empowered to sell an automobile claimed by a conditional vendor even if it were assumed that the purchaser had a reputation for liquor law violation and inquiry of proper officials had not been made. The lack of authority in the commissioner, the opinion states, stemmed from a failure to follow precisely and within defined time limits the steps set forth in the con-

13. TENN. CODE ANN. § 1191.14 (Williams 1943, and Supp. 1952).

14. State *ex rel.* Camper v. Pollard, 189 Tenn. 86, 222 S.W.2d 374 (1949); State *ex rel.* Simmons v. Latimer, 186 Tenn. 577, 212 S.W.2d 386 (1948); *cf.* Gatlinburg Beer Regulation Committee v. Ogle, 185 Tenn. 482, 206 S.W.2d 891 (1947).

15. Putnam County Beer Bd. v. Speck, 184 Tenn. 623, 201 S.W.2d 991 (1947); Sowell v. Red, 192 Tenn. 681, 241 S.W.2d 775 (1951); *but cf.* Perry v. Sevier County Beer Comm'n, 181 Tenn. 696, 184 S.W.2d 32 (1944).

16. TENN. CODE ANN. § 1191.14 (Williams 1934); see Perry v. Sevier County Beer Comm'n, 181 Tenn. 696, 184 S.W.2d 32 (1944).

17. 195 Tenn. 228, 258 S.W.2d 770 (1953).

fiscation statute.[18] The sheriff seizing the car had turned it over to representatives of the Federal Alcohol Tax Unit. Absolute compliance with statutory provisions is treated as a condition for the legal accomplishment of confiscation, under the rule of strict construction applicable to forfeitures. In adhering to its decision on the petition to rehear the court rejected an argument phrased in terms of equity: "The Court did not consider equities. Its decision was rested solely upon the absence of authority in the Commissioner under the facts of this case."[19]

In another confiscation case during the survey period, *Dickinson v. Ross*,[20] the court sustained the commissioner's order for the sale of a confiscated automobile even though there had been an unlawful search in securing evidence that the car was being used in the transportation of contraband liquor. Under the statute[21] the commissioner was authorized, in the hearing before him for the return of the car, to place the initial burden of proving title and lack of guilty knowledge upon the petitioner. Since in meeting this burden petitioner had testified to his own law violation instead of claiming his immunity and since he had not objected to testimony of others with regard to the results of the unlawful search he was taken to have waived any objection he might have had on a constitutional ground. While petitioner was not prevented from asserting his constitutional rights in the hearing before the commissioner it is not clear that he could have asserted and protected them and, at the same time, succeeded in securing the return of his automobile.

Fair Hearing

The confiscation case last discussed throws some light on the widely-discussed topic of "fair hearing" in administrative proceedings. It illustrates that drastic departures from conventional procedures, when authorized by statute, may still meet basic constitutional requirements. The generalization of Justice Roberts of the United States Supreme Court is equally applicable in the states: "[Due Process] guarantees no particular form of procedure; it protects substantial rights."[22] Nevertheless the normal attributes of a judicial hearing must be accorded if one's rights are being adjudicated. Statutes will normally

18. TENN. CODE SUPP. § 6648.24 (1950).

19. 258 S.W.2d 773. See also Wells v. McCanless, 184 Tenn. 293, 198 S.W.2d 641, 643 (1947).

20. 264 S.W.2d 800 (Tenn. 1954).

21. TENN. CODE SUPP. § 6648.25 (1950).

22. National Labor Relations Bd. v. Mackay Radio, 304 U.S. 333, 351, 58 Sup. Ct. 904, 82 L. Ed. 1381 (1938).

be interpreted as requiring such attributes whether expressly set forth or not because they rest upon a constitutional basis.[23]

There was only oblique treatment of fair hearing elements in the Tennessee Administrative Law Cases during the survey period. In the *Young* case discussed above,[24] the petition to have Young's beer permit revoked had asserted lack of notice to surrounding property owners prior to the granting of the permit. The board had not relied on this as a reason for its revocation and in the supreme court opinion it is asserted that this contention with respect to notice is wholly irrelevant, since the statute imposed no requirement of notice to surrounding property owners either by the applicant or the beer board.[25] Implicit in such a statement is the assumption that no legal rights of surrounding property owners are being determined when the beer board passes upon an application for a permit. The relationship between notice and opportunity to be heard (as phases of procedural due process) is indicated by the Tennessee Supreme Court's decision in *McCord v. Alabama Great Southern R. Co.*,[26] where an assessment by the Railroad and Public Utilities Commission was overturned because the carrier had not been given adequate notice of, and opportunity to present evidence under, the theory of assessment adopted in the case by the commission. This case was again before the court during the survey period under the style of *Browning v. Alabama Great Southern R. Co.*[27] The opinion indicates that this phase of the case had been corrected, the carrier being "fully advised" of the theory of the assessing authorities and being allowed to introduce testimony to meet this theory.[28] *Roberts v. Knoxville Transit Lines*,[28a] indicates that notice in administrative proceedings is not controlled by the technicalities of pleading.

An impartial tribunal is usually regarded as one of the essentials of a fair hearing when rights are determined. "Bias" is a term with many shades of meaning, however, even as applied to normal judicial activity, and it is clear that many of these can exist in the particular tribunal without invalidating the proceedings.[29] It can hardly be contended that a hearing to adjudicate rights is fair when conducted

23. See Morgan v. United States, 298 U.S. 468, 478, 56 Sup. Ct. 906, 80 L. Ed. 1288 (1936).

24. *Supra* p. 734

25. TENN. CODE ANN. § 1191.14 (Williams 1934). See also State *ex rel.* Camper v. Pollard, 189 Tenn. 86, 222 S.W.2d 374 (1949).

26. 187 Tenn. 302, 213 S.W.2d 207 (1948). On the general subject, see Boone, *An Examination of the Tennessee Law of Administrative Procedure*, 1 VAND. L. REV. 339, 357-69 (1948).

27. 195 Tenn. 252, 259 S.W.2d 154 (1953).

28. *Id.* at 155.

28a. 259 S.W.2d 883, 888 (Tenn. App. 1952).

29. DAVIS, ADMINISTRATIVE LAW c. 9 (1951).

before those whose minds are firmly closed against further inquiry upon the issues or persons involved in the case or those personally interested in a direct, tangible way in the outcome.[30] Judges and members of administrative agencies inevitably will possess and develop points of view, and basic policy judgments concerning matters coming before them. If this type of "bias" prevents a tribunal from being impartial in an invalidating sense, it would be impossible for cases to be determined.[31] The Supreme Court of the United States has recognized that those who decide "may have an underlying philosophy in approaching a specific case."[32]

The principle last discussed was applied by the Supreme Court of Tennessee in the case of *State ex rel. Caylor v. Miller*.[33] Justice Gailor's opinion finds no merit in the contention of one whose beer permit had been revoked that the members of the Beer Commission of Sevier County were prejudiced. The permit holder had filed a plea in abatement to its jurisdiction before the commission on the basis of prejudice. At the commission's hearing on this plea no evidence was introduced except that it was proved and admitted that the chairman of the commission "disapproved of beer and the sale of beer." The chairman and all the other members of the commission stated they would pass on the petition "according to law and the evidence, and without regard to their own personal appetites and convictions."[34] The court examined the full proceedings before the commission and concluded that they were conducted without prejudice to the permit holder.

Bias was the turning point of the decision in *Roberts v. Knoxville Transit Lines*[35] decided by the Court of Appeals, Eastern Section, although the particulars are not clear from the opinion. The case involved the issuance of a certificate of convenience and necessity by the Knoxville Public Utilities Commission for a closed-door bus service from downtown Knoxville to an outlying Sears store. Knoxville Transit Lines opposed the application and secured a reversal of the commission's action in the circuit court on the basis of lack of sufficient supporting evidence. The Court of Appeals, in an opinion by Judge McAmis, reversed and remanded the case to the circuit court

30. Tumey v. Ohio, 273 U.S. 510, 47 Sup. Ct. 437, 71 L. Ed. 749 (1927); see DAVIS, ADMINISTRATIVE LAW 385 (1951).

31. DAVIS, ADMINISTRATIVE LAW 370 (1951). This is to be distinguished from the so-called "rule of necessity" under which even a biased official may be the only one legally capable of taking action. State *ex rel.* Bradshaw v. Hedrick, 294 Mo. 21, 241 S.W. 402 (1922); but cf. State *ex rel.* Miller v. Aldridge, 212 Ala. 660, 103 So. 835 (1925). See Note, 39 A.L.R. 1476 (1925), and DAVIS, ADMINISTRATIVE LAW 382-83 (1951).

32. United States v. Morgan, 313 U.S. 409, 421, 61 Sup. Ct. 999, 85 L. Ed. 1429 (1941).

33. 263 S.W.2d 500 (Tenn. 1953).

34. *Id* at 502.

35. 259 S.W.2d 883 (Tenn. App. E.S. 1952).

for further trial. The court concluded that the evidence before the commission supported its granting of the certificate and that such action was not capricious or arbitrary. The remand was made necessary because: "The petition for certiorari as shown charges, however, that the members of the commission prejudged the application and we think petitioner is entitled to a trial on that question."[36] We are given no further facts nor comment except that the opinion points out that the burden of proof was upon the petitioner to sustain this charge.

Judicial Review

The importance of judicial review as an institution in a discussion of Administrative Law might be assumed to rest upon the fact that the very existence of law in this area depends upon it. This would be erroneous since constitutional, statutory and common law controls over the organization, powers and procedure of administrative agencies are routinely considered and applied by the agencies themselves. This is not to say that there would not be profound differences in the character of the whole field of Administrative Law if the institution were drastically curtailed. A considerable part of Administrative Law is concerned with questions as to the mechanics of judicial review—when, by what method, and to what extent will the courts exercise controlling restraints over the activity of administrative agencies.[37]

There were no Tennessee decisions during the survey period dealing with the timing of judicial review. The litigation involved in *Young v. Warren County Beer Board*[38] had come before the supreme court in 1952, after the entry of an order by the board revoking a beer permit upon condition of payment of $700 to the permit holder by those petitioning for the revocation. The Supreme Court held[39] that the circuit court on certiorari could review such an order, determine its illegality and correct the illegality of the proceedings by remanding the case to the beer board for the entry of a final and proper order. This sensible result was reached without detailed discussion of the intricacies which have surrounded the questions of a "final order" and ripeness for review in some jurisdictions.[40] However, some of the language in the decision indicating a rather complete freedom of review at an intermediate stage may be misleading.

Tennessee is fortunate in having achieved a comparative simplicity

36. *Id.* at 890.
37. DAVIS, ADMINISTRATIVE LAW cc. 15-17, 19, 20 (1951); 1 VAND. L. REV. 339, 369-74 (1948); and see the comprehensive treatment of one phase of this topic in Lacey, *Judicial Review of Administrative Action in Tennessee—Scope of Review*, 23 TENN. L. REV. 349-69 (1954).
38. *Supra* note 12.
39. Bragg v. Boyd, 246 S.W.2d 575 (Tenn. 1952).
40. See DAVIS, ADMINISTRATIVE LAW 620 (1951).

as to the method of securing judicial review of administrative agencies —an area of law that is truly chaotic in some states.[41] Code Sections 9008-9018[42] set forth what appears to be a comprehensive plan for obtaining judicial review by petition of certiorari in the chancery or circuit court "where not otherwise specifically provided." However, some of the apparent simplicity vanishes when it is noted that these code sections have been held not to destroy the distinction between the "common law" or "constitutional" certiorari provided by Code § 8989 and the statutory writ in lieu of appeal under Code § 8990.[43] The common law writ as a method of review would seem to be always available, if desired, perhaps as a matter of constitutional right.[44] The statute might limit review to this method[45] or achieve the same result by according "finality" to certain administrative determinations.[46] As will be seen later, only common law certiorari can be used if the matter reviewed involves the performance of a legislative or administrative as opposed to a judicial function.[47] Major uncertainty continues to surround the availability to review administrative agency action of the statutory writ with its trial *de novo*.[48]

When the statute prescribes review of beer board action by the common law writ of certiorari in the circuit court, that method is exclusive, the Supreme Court held in *Crowe v. Carter County*.[49] The court, in an opinion by Chief Justice Neil, affirmed the action of the chancellor in sustaining a demurrer to a bill for an injunction to restrain the beer board from revoking a permit. The injunction was sought upon the basis that the action of the quarterly court in creating the beer board was illegal. Such a fact would be "wholly immaterial" the court says, "The fact that the rights of the permit holder is [sic] adversely affected by the action of such regulatory agencies is sufficient to confer jurisdiction solely upon circuit courts [as provided in Code § 1191.47]."[50]

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41. See *id.* at c. 17.

42. TENN. CODE ANN. §§ 9008-9018 (Williams 1934).

43. Anderson v. Memphis, 167 Tenn. 648, 72 S.W.2d 1059 (1934); Hoover Motor Express Co. v. Railroad and Public Utilities Comm'n, 261 S.W.2d 233 (1953).

44. TENN. CONST. Art. VI, § 10.

45. TENN. CODE ANN. § 1191.14 (Williams Supp. 1952); Putnam County Beer Bd. v. Speck, 184 Tenn. 616, 201 S.W.2d 991 (1947).

46. See TENN. CODE ANN. § 1535 (Williams 1934); McCord v. Southern Ry., 187 Tenn. 247, 213 S.W.2d 184 (1948); Browning v. Alabama Great Southern R.R., 259 S.W.2d 154 (1953); and see TENN. CODE ANN. § 6901.30 (Williams Supp. 1952); Clinton v. Hake, 185 Tenn. 476, 206 S.W.2d 889 (1947).

47. Hoover Motor Express Co. v. Railroad and Public Utilities Comm'n, 261 S.W.2d 233 (1953).

48. See Lacey, *supra* note 37; *cf.* Boone, *supra* note 6.

49. 263 S.W.2d 509 (Tenn. 1953).

50. *Id.* at 510. *Cf.* DAVIS, ADMINISTRATIVE LAW 748-50 (1951), as to general availability of injunctions and declaratory judgments as a means of reviewing administrative action in state courts.

Scope of judicial review raises troublesome questions as to the extent to which reviewing courts will substitute their judgment for that of the agency with regard to the facts or the law in a particular case. The normal pattern in Administrative Law makes use of the "substantial evidence" test in judicial review of administrative findings of fact.[51] Under this test the reviewing court will not itself determine the facts or weigh the evidence before the agency but ascertain whether or not the record before the agency contains substantial or material evidence to support its findings of fact. This is the test usually applied in Tennessee by reason of the provisions of the particular statute or because it is the required approach when reviewing under the common law writ of certiorari.[52] During the survey period this test was expressly applied in the following decisions: *Roberts v. Knoxville Transit Lines*,[53] *State* ex rel. *Caylor v. Miller*,[54] and *Hoover Motor Express Co. v. Railroad and Public Utilities Commission*.[55] The case of *Browning v. Alabama Great Southern Ry.*[56] seems to permit fact determinations of an assessing authority to be "final" in a more or less absolute sense. However, this instance instead of being a case of true non-reviewable administrative action, is simply one where the area of discretion accorded the agency is more extensive. It is still reviewable to see if those limits have been exceeded under the power of the court to determine if the State Board of Equalization has acted "illegally, fraudulently or in excess of jurisdiction."

The *Hoover* case is illustrative of the difference between the operation of a "substantial evidence" rule for judicial review of administrative fact findings and one that involves judicial weighing of evidence or more extensively redetermining the facts. The Tennessee Supreme Court has resisted suggestions that the statutes should be construed to require the reviewing court to determine independently the facts underlying all types of exercise of administrative authority. The literal language of § 9014, even prior to its 1951 amendment, might reasonably suggest the contrary.[57] In *Anderson v. Memphis* the court said:

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51. DAVIS, ADMINISTRATIVE LAW c. 20, especially pp. 914-17 (1951); see Stason, *"Substantial Evidence" in Administrative Law*, 89 U. OF PA. L. REV. 1026 (1941).

52. Tennessee Cartage Co. v. Pharr, 184 Tenn. 414, 199 S.W.2d 1119 (1947).

53. 259 S.W.2d 883 (Tenn. App. E.S. 1952).

54. 263 S.W.2d 500 (Tenn. 1953).

55. 195 Tenn. 593, 261 S.W.2d 233 (1953).

56. 195 Tenn. 252, 259 S.W.2d 154 (Tenn. 1953).

57. " . . . The hearing [in the reviewing court] shall be on the proof introduced before the board or commission . . . and upon such other evidence as either party may desire to introduce . . . . The chancellor shall reduce his findings of fact . . . to writing and make them parts of the record." TENN. CODE ANN. § 9014 (Williams 1934).

> "There is, however, no support for the contention that this language of the statutes has the effect of overthrowing the established practice by subjecting the merits of every action of statutory commissions and boards to judicial review, substituting the discretion of the . . . . courts for that of administrative bodies. To so construe the statute would be to broadly extend the judicial power into a field heretofore considered the proper domain of the executive or administrative. . . . Such an extension of judicial power is one which the courts have been and are properly loath to assume, and may not be accomplished by judicial construction of even a doubtful statute."[58]

In 1951 § 9014 had added to it the following sentence:

> "In making such findings of fact the Chancellor shall weigh the evidence and determine the facts by the preponderance of the proof."[59]

The decision in the *Hoover* case construing the effect of this amendment and rendering it largely ineffective in terms of changing the pre-existing law is, of course, of momentous importance in the Administrative Law of this jurisdiction.

The *Hoover* case arose out of the petition of one Robinson before the Railroad and Public Utilities Commission to secure certificates of convenience and necessity for eight freight haulage routes. Certain other truck carriers (referred to as the "Hoover Group") opposed the petition and filed certiorari in the Chancery Court of Davidson County after the commission, subsequent to full hearing, acted favorably upon it. The chancellor did not apply the 1951 amendment to § 9014 since it became effective after the hearing before the commission. Proceeding as usual under the common law writ of certiorari he found substantial evidence to support the granting of operating rights over three of the eight routes but no evidence to support the other five. Appeal was perfected only from the affirmance of the three certificates and the Court of Appeals held that the 1951 amendment should have guided the chancellor in his disposition. It agreed that the three certificates were supported by "material substantial evidence" but that the evidence preponderated against the commission's finding. Accordingly, it cancelled in its entirety the commission's order. The Supreme Court, first refused to hear, then granted certiorari after finding a constitutional question involved. A divided court, with Justice Gailor writing the opinion, reversed the judgment of the Court of Appeals and affirmed the decree of the chancellor. Justice Tomlinson wrote a dissenting opinion.

The construction given the 1951 Amendment by the court of appeals

58. 167 Tenn. 648, 652-53, 72 S.W.2d 1059 (1934).
59. Tenn. Pub. Acts 1951, c. 261, § 1. General reference should be had to Lacey, *supra* note 37, for additional discussion of the question raised by this amendment.

was unconstitutional under the separation of powers provision,[60] the Supreme Court majority opinion declares. If the statute is construed so as to require the reviewing court to weigh the evidence in order to perform a legislative or administrative function, such as deciding upon the issuance of certificates of convenience and necessity, it would be imposing a non-judicial function upon the court, which the Constitution forbids. Justice Gailor's opinion relies heavily upon the opinion in *In re Cumberland Power Co.*[61] and points out further that, under the common law writ of certiorari applicable in this instance, only questions of law will be reviewed by the courts. "An order of the Commission which is not supported by any evidence is arbitrary and void, and therefore within judicial power to quash under the common law writ of certiorari .... The question whether there is any material evidence to support the finding and order of the Commission is, therefore, a matter of law for the Court upon review, and to ascertain that, whether there is any material evidence, is the limited purpose for which the evidence introduced before the Commission is admissable in the Court granting the common law writ of certiorari."[61a] To avoid the unconstitutional construction given the 1951 amendment to § 9014 by the Court of Appeals, the following is stated as the proper construction:

> "The effect of the amendatory Act was, therefore, only to require the Chancellor to review the evidence which had been introduced before the Commission, and to determine by a preponderance of the evidence, whether the Commission had acted beyond its jurisdiction, arbitrarily, fraudulently or illegally. Since this was the long established limit of appropriate judicial review under the common law writ, the amendatory Act of 1951 could have no further or greater effect on procedure under the common law writ, whatever may be the effect of the amendment on a proceeding under the statutory writ, Code sec. 8990."[62]

Justice Tomlinson's dissent deals with this last suggested construction in this manner:

> "... according to the majority opinion, the 1951 Act requires the Court, in reviewing a fact conclusion of the Public Utilities Commission, to determine by a preponderance of the evidence whether such fact con-

60. TENN. CONST. Art. II, §§ 1-2.
61. 147 Tenn. 504, 249 S.W. 818 (1923). This case had held unconstitutional Chapter 107 of the 1921 Public Acts of Tennessee, by which the legislature had attempted to give a right of appeal to the Supreme Court from decisions of the Railroad and Public Utilities Commission. For a similar holding under the Federal Constitution see Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731 (1923). *Compare* Federal Radio Comm'n v. General Electric Co., 281 U.S. 464, 50 Sup. Ct. 389, 74 L. Ed. 969 (1930) *with* Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276, 53 Sup. Ct. 627, 77 L. Ed. 1166 (1933).
61a. 261 S.W.2d 233, 238-239.
62. *Id.* at 238.

> clusion is supported by any substantial evidence. Such a construction, as I see it, of the 1951 Act is to reduce it to an absurdity in that it proposes to require the Court to do that which is impossible."[63]

This dissenting opinion goes on to state that the proper meaning of the 1951 change is to require the reviewing court to determine whether the fact conclusion of an administrative board to commission is supported by a preponderance of the evidence. "I think that is what the Legislature intended." Justice Tomlinson sees nothing "non-judicial" in determining matters on the basis of the preponderance of the evidence and he feels that the constitution permits the legislature to enlarge as well as diminish the sphere of action of the courts.

There would seem to be little doubt that Justice Tomlinson is correct as to the intent of those responsible for the language in the 1951 amendment to § 9014. He is undoubtedly correct also in pointing out the substantially meaningless result as applied to the review of evidence that the construction the majority opinion gives the amendment to avoid what is considered an unconstitutional interpretation. On the other hand, the majority decision is thoroughly consistent in its general approach with the language of *Anderson v. Memphis*[64] quoted above as well as the factors underlying the result in *In re Cumberland Power Co.*[65] There is a recognition in it of the basic unworkability of a system of judicial review where the courts independently determine the facts underlying the exercise of a judgment or discretion that is best left to the legislature or the executive (and therefore "non-judicial"). As a matter of sound governmental organization it does not make much sense to establish and spend large sums for agencies to exercise specialized knowledge and judgment in finding certain facts and then let that judgment be subject to a completely *de novo* determination on the same or additional evidence in a reviewing court. If the particular agency does not justify such confidence it is doubtful if its continued existence is desirable.

The *Hoover* decision leaves many questions unanswered, particularly as to the categories of administrative action where a "judicial" as opposed to a "non-judicial" function is being exercised, permitting a complete re-examination of the facts by the reviewing court.[66] By

63. *Id.* at 239-40.
64. 167 Tenn. 648, 72 S.W.2d 1059 (1934).
65. 147 Tenn. 504, 249 S.W. 818 (1923).
66. If the administrative determination of fact being reviewed can be phrased as involving a question of law or as involving the facts underlying an asserted constitutional right then there is no reason to expect that the courts will feel precluded from independently determining such facts. They can be expected to regard such a determination as "judicial," even though rate-making, for example, is widely regarded as a "legislative" function. See DAVIS, ADMINISTRATIVE LAW 918-22 (1951). The Supreme Court of the United States has held that the Fourteenth Amendment is violated if a state withholds from its courts the opportunity of passing independently upon the facts in deciding

placing its decision, in effect, upon a constitutional basis, the supreme court has made it impossible for the legislature to impose upon the courts the exercise of a discretion that they frequently are ill-equipped to perform and which in our scheme of government is normally looked upon as "non-judicial." In taking this position, the court puts Tennessee in line with the weight of authority prevailing throughout the country in judicial review of legislative-type fact determinations.[67]

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the constitutionality of public utility rates set by a commission. Ohio Water Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908 (1920). And see St. Joseph's Stock Yards Co. v. United States, 298 U.S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033 (1936). While there is considerable question as to continued validity of these decisions in terms of federal Constitutional law, the doctrine has been applied recently under state constitutions in New York and Massachusetts. Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947); Lowell Gas Co. v. Department of Public Utilities, 324 Mass. 80, 84 N.E.2d 811 (1949); and see Atlantic Coast Line R.R. v. Public Service Comm'n, 77 F. Supp. 675 (E.D.S.C. 1948).

There is also the matter of the court feeling equally competent to exercise the particular judgment indulged in by the agency and, acting accordingly, particularly where not hindered by statutory provisions giving "finality" to the administrative fact determination. See Staples v. Brown, 113 Tenn. 639, 85 S.W. 254 (1905); Tomlinson v. Board of Equalization, 88 Tenn. 1, 12 S.W. 414 (1889); Binford v. Carline, 9 Tenn. App. 364 (W.S. 1928). DAVIS, ADMINISTRATIVE LAW 893-97 (1951); and Lacey, *supra* note 37 at 363.

67. See DAVIS, ADMINISTRATIVE LAW 893-95 (1951); Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217-26 (1952); *cf.* Davis, *Judicial Review of Administrative Findings in West Virginia—A Study in Separation of Powers*, 44 W. VA. L. Q. 270-376 (1938); and Wade, *Recent Mississippi Oil and Gas Cases*, 18 MISS. L. J. 243, 261-66 (1947).

APPENDIX*

*(The assistance of Harold Seligman, Assistant General Counsel of the Tennessee Railroad and Public Utilities Commission, in the selection and preparation of the material in this Appendix is gratefully acknowledged.)

The Tennessee and Public Utilities Commission's jurisdiction (apart from tax assessment functions) includes the granting of certificates of convenience and necessity and contract haulers' permits to motor carriers; the regulation of schedules, rates, discontinuance and abandonment of railroads; and control of service areas, corporate financing, sale or merger, and rates of utilities, which include gas, telephone, water and various other types of public utilities. The Commission sits as a quasi-judicial body, composed of three commissioners who hear cases under the rules of evidence and procedure of chancery proceedings. During the course of the year ending June 30, 1954, the Commission had formal hearings in more than 200 cases and issued more than 1500 orders in matters presented to it. This appendix will summarize a few cases selected to illustrate the differing types of questions coming before the commission.

The case of Central Bus Lines, Inc. (Approval of Schedule 5-A) originated with the filing of a schedule between Nashville and Knoxville by Central Trailways, now Continental Trailways. A question arose as to the authority of Central to serve this route. The certificates of convenience and necessity held by Central Bus Lines were limited to four round trips daily between Nashville and Knoxville. Certificate No. 9-F, held by Central between Sparta and Crossville, was attempted to be used under Code § 5501.5a by tacking as authority for this schedule. The Commission by its order disallowed the use of Certificate No. 9-F, stating that said certificate had been abandoned because of non-use during the previous five year period. The Commission stated that Code Section 5501.10 of Williams Code of Tennessee set forth the provisions for the abandonment or discontinuance of service, and that it was incumbent upon the carrier to serve all certificates unless otherwise suspended by order of the Commission. Central Bus Lines was allowed a rehearing and argued that Section 5501.10 made it mandatory upon the Commission to have a hearing and written order before the Commission could revoke a certificate. The Commission upheld its original order in the rehearing and the case has been appealed to the chancery court.

An example of an application for a certificate of public convenience and necessity is that of J. W. Smith, doing business as Smith Freight Lines of Chattanooga, Tennessee, in Docket No. MC 3622. Application was made for service between Jamestown, Livingston, Cookeville and Sparta, Tennessee. Testimony was presented to the Commission at an open hearing at which carriers presently holding authority over the same route appeared in protest. The applicant in this case did not make a sufficient showing to the Commission for the necessity of additional service to be rendered over these highways, and further the effect of the proposed transportation service on existing carriers was regarded to be highly detrimental. Proof on behalf of the carrier serving the Jamestown to Sparta area was sufficient to convince the Commission that the application should be denied.

Under its rule-making power the Commission, undertaking to extend and make definite the commercial zones and terminal areas for Tennessee motor carriers serving in intrastate traffic, issued the proposed order in Special MC 177, suggesting the extended service areas. The purpose of this general order was to make specific the areas which a carrier may serve beyond the

actual existing city limit of all cities and unincorporated towns. A carrier having authority to serve Memphis, Murfreesboro or Tyner, Tennessee, presently does not know how far beyond the existing city limit or incorporated area it may lawfully serve. Most cities have various reasons for failing to extend corporate limits at an equal pace to both the industrial and residential growth of cities and towns in Tennessee. The Commission is endeavoring by a general order to make a specific area within which certified carriers may serve, under its Docket No. MC-177.

Exemplary of cases in the Railroad Division, the Railway Express Agency, Inc., filed tariffs with the Commission requesting a 15% general increase on intrastate traffic and a 20% increase on certain classifications of commodities. After hearing, before a hearing examiner appointed by the Commission, it was recommended that the proposed increase be totally denied. The basis for this recommendation was the fact that Railway Express Agency shipments have continued to decrease during recent years, following rate increases allowed by the Commission, and it was the belief of the examiner that an additional increase would cause further diversion of traffic, which would result in a decrease of revenue. Exceptions were filed to the Examiner's Report, but the Commission ratified the report and issued its order, following the Examiner's recommendation. Railway Express Agency, Inc., then instituted a proceeding before the Interstate Commerce Commission where the matter is now pending, seeking to have the Federal Commission establish in Tennessee non-discriminatory intrastate rates and charges.

Commission Docket No. R-3448 was an application of the Clinchfield Railroad for the discontinuance of passenger service in Tennessee under Code Section 5398.1. This Section of the Code is the only mandatory section imposed by the legislature upon the Commission and provides that in passenger operations by a railroad, if the direct operating expenses exceed the aggregate gross revenue by more than 30% for a twelve months' period, the railroad shall be allowed to discontinue its operation. In the case of the Clinchfield Railroad, the direct operating expenses exceeded the aggregate gross revenue by more than 60%, leaving the Commission no alternative but to grant the discontinuance. Discontinuance under this provision is dependent upon the definition of direct operating costs, which the Commission defined in its Docket No. R-3308 involving the Louisville and Nashville Railroad. The Louisville and Nashville Railroad discontinuance case was appealed to the Supreme Court, which upheld the Commission's decision of direct operating costs in the case of *Louisville & Nashville R.R. v. Fowler,* to be reported in volume 196 of the Tennessee Reports.

The Commission has jurisdiction of some eighty independent telephone companies in Tennessee, and of Southern Bell Telephone and Telegraph Company, the largest company in Tennessee. In Docket No. U-3314, the Commission disallowed a rate increase designed to produce an additional revenue to this company of five million dollars. During the course of the hearing, an amendment was requested changing the test year which would have the effect of advancing the company's request to seven million dollars. The Commission disallowed the entire request and the matter was subsequently appealed to chancery court, which court upheld the Commission's order.

In contrast to both the requests and the Commission's decision is the case of the Mt. Juliet Telephone Company, Docket No. U-3417. The applicant in this cause presented a case in which 285 of his 288 subscribers supported the company's request for an increase, and the three persons not included as sup-

porters were unable to be contacted at the time of the hearing. The Commission granted the request for increase from the bench, a rare occurrence.

In Docket No. U-3423, the Arkansas Power and Light Company requested permission to serve electric power to certain islands on the Mississippi River, considered a part of the State of Tennessee. The Commission had to undertake a determination of whether these islands were actually a part of the State of Tennessee, and further whether or not the Tennessee Commission had jurisdiction over this matter. The Commission accepted the jurisdiction and granted the application.

As an illustration of the regulation of various corporate financing, the Commission approved in Docket No. U-3556, the application of the Arkansas Power and Light Company for authority to issue and sell $750,000,000 worth of first mortgage bonds. In recent years, numerous utilities, particularly telephone and gas companies, have sought extremely heavy financing through the Rural Electrification Administration, and private lenders (Stromberg Carlson Credit Corporation, for example) in order to build inter-toll dial systems and natural gas distributing systems throughout the state. Careful consideration must be given by the Commission in these financial programs to insure that the present rate payer does not bear the burden of long range financing.