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Constitutional Law -- 1954 Tennessee Survey

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CONSTITUTIONAL LAW—1954 TENNESSEE SURVEY

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I CONSTITUTIONAL AMENDMENTS

During the period under consideration the most important developments for Tennessee in the field of Constitutional Law were amendments to the State Constitution. This Constitution, adopted in 1870, was the oldest unamended constitution in the United States until eight proposed amendments were ratified by the voters on November 3, 1953. That the Tennessee Constitution had been unchanged for so many years was the result of several factors, most obvious of which was the fact that such constitution was especially difficult to amend.

Under the amending provision[1] amendments required approval of a majority of the entire membership of both Houses of one Legislature, approval of two-thirds of the members of both Houses of the next Legislature, followed by ratification at an election at which such proposals are approved "by a majority of all the citizens of the State, voting for Representatives, voting in their favor. . . ." Hence, an amendment finally proposed for ratification at an election was not necessarily adopted when approval was given by a majority, or even an overwhelming majority, of those voting with respect to it. Those who stayed away from the polls or refrained from voting were, in practical effect, casting a negative vote. It is obvious why both lawyers[2] and political scientists[3] have stressed the extreme difficulty of adopting specific amendments by this method.

The amending provision also permits of a constitutional convention[4] and the Tennessee Constitution was finally amended by resorting to the device of a limited constitutional convention. The advantage of this method, the "Constitutional Convention Route," over the method previously attempted, the "Amendment Route," lies in the fact that the proposal or proposals of the Convention may be ratified and adopted at an election by approval of a mere majority of those voting on the proposal or proposals. To be effective, such election does not require the participation of any specified proportion of the electorate.

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1. TENN. CONST. Art. XI, § 3.

2. Sims, *Limited Constitutional Convention in Tennessee*, 21 TENN. L. REV. 1 (1949).

3. Williams, *The Calling of a Limited Constitutional Convention*, 21 TENN. L. REV. 249 (1950).

4. TENN. CONST. Art. XI, § 3, includes this sentence: "The Legislature shall have the right, at anytime, by law, to submit to the people the question of calling a Convention to alter, reform or abolish this Constitution, and when, upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed."

The practical disadvantage of the "Constitutional Convention Route" had been the apprehension, supported by an opinion of the Attorney General, that a constitutional convention, once assembled, could propose amendments or alterations other than those to which the enabling act sought to limit it.

A constitutional convention with its power limited to proposing amendments to specified provisions of the Constitution was made practicable by a decision of the Supreme Court of Tennessee that a legislative act is valid which submits to the voters the question whether a constitutional convention shall be held with limited power to propose amendments to specified sections of the Constitution and that a convention called pursuant to such law would be legally restricted as provided by the act.[5] The first such limited constitutional convention[6] was defeated by vote of the people, apparently because one of the subject matters for consideration was amendment of the taxing clause[7] so as to permit classification of property. A second attempt[8] was successful, the holding of a limited constitutional convention being approved by the voters in August, 1952. Delegates to such convention were elected in November, 1952; the convention assembled in April, 1953; and eight proposed amendments were adopted by ratification at the polls in November, 1953. Although such amendments were ratified by receiving a majority of the votes cast at the special election, the vote in favor of such proposals was not sufficiently large to have resulted in ratification by the "Amendment Route."

A summary of the eight amendments which were adopted is as follows:

(1) The amending clause[9] was itself amended, both as to the Amendment Route and the Constitutional Convention Route.

As to the Amendment Route, the Constitution of 1870 authorized the legislature to propose amendments not oftener than once in six years. By one of the changes of 1953 this limitation is deleted, but there remains a limitation upon such proposals of not oftener than once in four years. Such limitation results from the fact that proposals for amendments are to be voted upon by the people "at the next general election in which a Governor is to be chosen." Amendments also require for ratification "a majority of all the citizens of the State voting for Governor, voting in their favor. . . ." The reason for changing the requirement from a majority of those voting for Representatives to a majority of those voting for Governor is that the former provides a complex and difficult standard, while the latter provides a simple standard or measure. The difficulty of determining how many

5. Cummings v. Beeler, 189 Tenn. 151, 223 S.W. 2d 913 (1949).
6. Proposed by Tenn. Pub. Acts 1949, c. 49.
7. TENN. CONST. Art. II, § 28.
8. Proposed by Tenn. Pub. Acts 1951, c. 130.
9. TENN. CONST. Art. XI, § 3.

persons voted for representatives results from the fact that certain legislative districts elect more than one representative. Davidson County, for example, elects six representatives.[10] Here every voter may have voted for six representatives, but many voters may have voted for a lesser number of representatives,—a situation which makes it well-nigh impossible to determine exactly how many persons voted in the legislative races.

As to the Constitutional Convention Route, the validity of a limited constitutional convention, previously established by judicial decision[11] was expressly written into the amending provision,[12] but there was added a limitation that "no such convention shall be held oftener than once in six years."

(2) The provision relating to compensation of members of the General Assembly was also amended.[13] Since 1870 this section had provided for compensation of four dollars per day for legislators. By the amendment there was provided fifteen dollars per day in lieu of four dollars per day, *i.e.*, "$10.00 per day compensation and $5.00 per day for expenses." The amended section also provides a method for increasing or reducing the specified compensation and allowance for expenses. A reduction may be effected by law enacted in regular session, but an increase requires "law enacted in two consecutive regular sessions."

(3) The term of office of the Governor was changed.[14] Heretofore

10. TENN. CODE ANN. § 143 (Williams 1934).
11. Cummings v. Beeler, 189 Tenn. 151, 223 C.W.2d 913 (1949).
12. TENN. CONST. Art. XI, § 3, as amended, includes a provision that "no change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention."
13. TENN. CONST. Art. II, § 23, which, as amended, reads as follows:
"Each member of the General Assembly shall be allowed $10.00 per day compensation and $5.00 per day for expenses, and $4.00 for every twenty-five miles traveling to and from the seat of government. No member shall be paid for more than seventy-five days of a regular session, nor for more than twenty days of an extra or called session, nor for any day when absent from his seat in the Legislature unless physically unable to attend. The Senators, when sitting as a Court of Impeachment, shall each receive $10.00 per day compensation and $5.00 per day for expenses for each day of actual attendance. The compensation and allowance for expenses of the members of the General Assembly may from time to time be reduced by any General Assembly by law enacted in regular session, and may be increased from time to time by law enacted in two consecutive regular sessions of the General Assembly. No increase or reduction shall take effect until the next regular session after such law shall have been finally enacted."
14. By revision of Art. III, § 4, TENN. CONST., which, as amended, reads:
"The Governor hereafter elected shall hold office for four years, and until his successor shall be elected and qualified. One succeeding to the vacated office during the first eighteen calendar months of such term shall hold office until his successor to such vacated office is elected at the following election for members of the General Assembly and qualified for the remainder of the term, as provided in Section 2 of this Article and Section 8 of Article II; and one succeeding to said

the Governor has been elected for a term of two years, with eligibility limited to six years in any term of eight. Hereafter, by reason of the amendment the Governor will be elected for a term of four years, with ineligibility for the succeeding term. One who becomes Governor as the result of a vacancy during the term, and thus serves less than a full four year term, is not ineligible for the succeeding term.

Where a vacancy in the office of Governor occurs during the first 18 months of the term, there is an election at the regular November election to fill such vacated office for the remainder of the term,[15] but where such vacancy occurs subsequent to the first 18 months, there is no such election and the person temporarily filling the vacancy serves for the remainder of the term.

(4) The provision relating to the governor's veto power[16] was changed in two important respects. The original provision included the following: "If the Governor shall fail to return any bill, with his objections, within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the General Assembly, by its adjournment[17] prevents its return, in which case it shall not become a law." Under similar constitutional provisions in other states there is a division of authority as to whether a bill may become a law by signature of the Governor after final adjournment of the legislature.[18] No decision in Tennessee has dealt with the question, but for many years the assumption has been that all bills not signed by the Governor prior to final adjournment of the legislature were killed and no instance is known where a Governor of Tennessee has signed a bill after such adjournment.

The practice in Tennessee has been for both legislative houses to "stop the clock" when the hour for *sine die* adjournment approaches and for the two speakers not to declare such adjournment until advice has been received from the Governor that he has completed consideration of all bills sent to him. This practice required the Governor, the speakers and legislative and executive employees to work far into the night.[19] Because a large number of bills are enacted in the closing

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vacated office subsequent to the first eighteen months of the term shall continue to hold office for the remainder of the full term. No Governor elected and qualified for a four year term shall be eligible for the succeeding term."

15. The vacated office would be temporarily filled by the speaker of the Senate, those next in line being the speaker of the House, the secretary of state and the state comptroller. TENN. CONST. Art. III, § 12, and TENN. CODE SUPP. § 187.1 (1950).

16. TENN. CONST. Art. III, § 18. As revised, this provision is lengthy and its full quotation is not essential to an explanation of the changes made.

17. Such adjournment means final adjournment. Johnson City v. Tenn. Eastern Electric Co., 133 Tenn. 632, 182 S.W. 587 (1915).

18. 50 AM. JUR., *Statutes* § 120 (1944); 82 C.J.S., *Statutes* § 50 (1953); Note, 64 A.L.R. 1468 (1930).

19. The practice under the Federal Constitution was similar prior to 1932 when Edwards v. United States, 286 U.S. 482, 52 Sup. Ct. 627, 76 L. Ed. 1239

days of a legislative session, such practice required the Governor to make hurried decision as to his action on many bills.[20]

The amended veto provision now includes the following:

> "The Governor may approve, sign, and file in the office of the Secretary of State within ten days after the adjournment of the General Assembly any bill presented to him for signature during the last five days of the session, and when thus approved the same shall become a law. If the General Assembly, by its adjournment, prevents the return of any bill within said five-day period it shall become a law, unless disapproved by the Governor and filed by him with his objections, in the office of the Secretary of State, within ten days after such adjournment."

Thus, the Governor may still "pocket veto" a bill presented to him during the last five days of the session in the sense that he need not return it disapproved to the legislature and afford opportunity for passage over the veto, but the Governor cannot "pocket veto" in the sence of disapproval by inaction alone. He must specifically disapprove or else a pending bill will automatically become law.

The second major change in the veto provision gives the Governor power to "reduce or disapprove the sum of money appropriated by any one or more items or parts of items" in an appropriation bill. Like the traditional veto, such partial or item veto must be exercised within five days (Sundays excepted) after presentation of the bill to the Governor and may be overridden by repassage in the legislature.

Article III, section 18, as amended, also prescribes conditions for the exercise of such partial or item veto during the closing days of a legislative session, the most significant being with respect to bills presented to the Governor during the five days before final adjournment, in which case the partial veto must be exercised not later than the day following presentation of the bill to him, unless this be prevented by final adjournment.

(5) For many years, subject to limitations as to age and exemptions, payment of a poll tax was a prerequisite to voting in Tennessee, either in general elections or in state-wide primaries.[21] The legislature attempted to repeal the poll tax[22] imposed by legislative act enacted pursuant to a constitutional mandate, but the Tennessee Supreme Court, with two of the five Justices dissenting, held the repealing Act to be unconstitutional.[23] In 1949, the legislature greatly diminished the

(1932), determined that a bill passed by Congress may be signed by the President within ten days after it is presented to him, though signed after final adjournment.

20. In 1953 of 269 general laws enacted, 144 were signed by the Governor on the final day. See Tenn. Pub. Acts 1953, pp. 460-950.

21. TENN. CONST. Art. II, § 28 and Art. IV, § 1; TENN. CODE ANN. §§ 1082, 1558, 1559, 2027 (Williams 1934); Tenn. Pub. Acts 1937 (2d Ex. Session), c. 2.

22. Tenn. Pub. Acts 1943, c. 37.

23. Biggs v. Beeler, 180 Tenn. 198, 173 S.W.2d 144 (1943).

practical importance of the poll tax as a qualification upon the right of suffrage by a series of laws which abolished the poll tax requirement for state-wide primary elections,[24] exempted women from the payment of poll tax,[25] made the poll tax collectible only for one year following delinquency,[26] and exempted from the poll tax all ex-servicemen who were honorably discharged.[27] In 1951 an Act was enacted providing that the only poll tax, payment of which was a prerequisite to voting, was that "for the year 1871" if lawfully assessed.[28]

That which had been accomplished by various, and perhaps devious, legislature acts—the destruction of the poll tax as a prerequisite to voting—was confirmed and expressly included in the Constitution by amendment of Article IV, section 1. As amended, this section provides that a voter shall be twenty-one years of age,[29] a citizen of the United States, a resident of the State for twelve months and of the county for three months, and "there shall be no other qualification attached to the right of suffrage."

(6-7) Probably the most important constitutional amendments adopted were two relating to home rule for cities and counties.[30] To indicate the extent and significance of these changes requires statement of the practices previously followed. For many years it had been established by decisions of the Tennessee Supreme Court that an act affecting a county or municipality in its governmental or political capacity was not unconstitutional merely because it was restricted in operation to one county or municipality.[31] Taking full advantage of this principle, the Tennessee legislature at each biennial session has enacted a mass of local or private acts, which have legislated locally in the most minute detail and often by the most drastic alterations of existing law.[32] Because of the prevalence of the custom known as "legislative courtesy," such local or private laws are the decision or judgment of the entire legislature only in name and form. This legislative practice, so closely adhered to as to be almost without exception, is that the Senate will pass any local bill having the support of the

24. TENN. CODE SUPP. § 2227.15 (1950); Tenn. Pub. Acts 1949, c. 57.

25. TENN. CODE SUPP. § 1082 (1950); Tenn. Pub. Acts 1949, c. 62.

26. TENN. CODE SUPP. § 1494.1 (1950); Tenn. Pub. Acts 1949, c. 236.

27. TENN. CODE SUPP. § 2043.2 (1950); Tenn. Pub. Acts 1949, c. 111.

28. Tenn. Pub. Acts 1951, c. 63.

29. Efforts to lower the age for voting to eighteen years were defeated in the constitutional convention.

30. These were numbers 6 and 7, which added new provisions to TENN. CONST. Art. XI, § 9.

31. State v. Wilson, 80 Tenn. 246 (1883); Redistricting Cases, 111 Tenn. 234 (1903).

32. Tenn. Priv. Acts 1953, which are 592 in number, fill 1970 printed pages. Tenn. Priv. Acts 1947, which are 878 in number, fill 3487 printed pages.

local senator (or senators) and the House will pass any local bill having the support of the local representative (or representatives).[33] Conversely, the Senate will pass no local bill opposed by the local senator and the House will pass no local bill opposed by the local representative.

Hence, in fact as distinguished from constitutional theory, the power to enact or to defeat local legislation has not been exercised by the entire assembly, but it has been delegated to the local representatives. In many instances the local delegation is one member of the House and one member of the Senate. Where one county is represented in the Senate by a senator residing in another county, such senator often accepts the wishes of the member of the House who resides in the former county as decisive of its local legislation.

Many conscientious and politically-wise legislators have never sponsored local legislation without consulting the city council, the quarterly county court or other public officials of the governmental subdivision to be affected thereby. Also some local legislation is the final decision of an issue raised and resolved by the political campaign as a result of which the legislator was chosen. But every legislative session has produced some, perhaps numerous, private acts which have been claimed to be contrary to the recommendations of the public officers of the city or county affected and which were not publicly advocated nor even mentioned in the election campaign. Many of these claims appear to have been well-founded, and instances of local acts which were spite legislation or ripper bills have been too frequent. Thus, the legislative machinery has been diverted and used to give the form of legislation to that which represented at best a few persons' sound judgment or at worst one individual's harmful caprice. Amendments to the Constitution, designed to change substantially the prior practice and to destroy the evils of local legislation, were adopted.

(a) A provision designed to secure a substantial amount of home rule for both cities and counties was added to Article XI, section 9.[34] Under this provision, the legislature may not pass any private act (1) which removes an incumbent from any municipal or county office, or

33. Where the local senators (or representatives) are in disagreement, the usual, but not invariable, result has been legislative inaction.

34. The Amendment reads as follows:

> "The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected."

(2) which alters the salary prior to the end of the term. These prohibitions are applicable even though the local act has the approval of the local legislative body. Changes in salaries and terms of office of local officers, if made by private act of the General Assembly, must not take effect sooner than the expiration of the incumbent's term. When local officers have long terms, proposed changes may be delayed for several years.[35]

Under such provision also, the legislature has no power to pass *any* local act unless it requires approval (a) of two-thirds vote of the local legislative body, or (b) by popular approval in a referendum election.

(b) Another amendment to Article XI, section 9, provides optional home rule for cities.[36] Under this provision any municipality may become a home rule city as the result of a local election in which a majority of the qualified voters approve the proposal. Until the voters of such home rule city decide otherwise by a similar election, such city is "a home rule municipality" and the General Assembly cannot legislate for it by local act, but can legislate as to it only by general law. Such home rule city may retain its existing charter, or it may amend it, or it may adopt another one.

The general method for amending the charter of a home rule city is by proposal by the local legislative body (i. e. "by ordinance") or by proposal by a charter commission,[37] followed by publication of the proposal and approval thereof in a municipal election at the same time as the first general state election held at least 60 days after such publication. Such proposal becomes effective 60 days after approval.

A most important and far-reaching feature of this provision is the following: "The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered." Heretofore, cities could be created by the method prescribed by general law[38] or by special act. Very few Tennessee cities have been incorporated under the general law, and the overwhelming majority of cities possess special act charters. The legislature has also possessed the power, without the consent of the inhabitants affected, to annex adjacent territory to an existing city by special

35. For example, under the charter of the City of Nashville, Tenn. Priv. Acts 1947, c. 246, members of the board of park commissioners and of the electric power board have staggered terms of five years each.

36. This amendment is quite lengthy and its full quotation is not deemed essential here.

37. Either a charter commission provided for by general law or, in the absence of such general law, a charter commission chosen as prescribed by this constitutional provision.

38. TENN. CODE ANN. § 3292 *et seq.* (Williams 1934).

act.[39] In actual practice this has been the customary method of corporate extension,[40] despite the existence of a general act under which annexation may be accomplished.[41]

Hereafter, the General Assembly will no longer possess the power to create municipalities by private act, nor will it be able to alter municipal boundaries by such act. As a practical matter, it will be most difficult, if not impossible, for a city to extend its boundaries so that corporate growth may keep pace with economic growth, unless a carefully planned and comprehensive general act is enacted. Sections 3320 and 3321 of the Code of Tennessee, providing for annexation after petition and referendum election confined to the voters of the area to be annexed, have not led to extension of municipal boundaries and are not likely to do so.

(8) The final amendment adopted in 1953, also to Article XI, section 9,[42] makes possible the consolidation of governmental or corporate functions of a county and of a municipality therein. Such consolidation requires approval by a majority of the voters of the city voting in an election and also approval by a majority of those voting in the county outside of the city.

II Judicial Decisions

During the period under consideration only a small number of cases decided by the appellate courts of Tennessee involved constitutional questions. There was no express departure from any constitutional doctrine previously established and no prior decision of a constitutional question was specifically overruled, disapproved or limited. The published opinions dealing with constitutional questions were usually concise, if not disappointingly brief and meager. Cases involving constitutional questions not discussed in other articles of this Survey[43] were as follows:

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39. Williams v. Nashville, 89 Tenn. 487, 15 S.W. 364 (1891); Town of Oneida v. Hardwood Flooring Co., 169 Tenn. 449, 88 S.W.2d 998 (1935).

40. Tenn. Priv. Acts of 1953 changed city limits in no fewer than 45 instances.

41. Tenn. Code Ann., §§ 3320-3321 (Williams 1934).

42. This amendment adds the following:

> "The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided, such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting within the municipal corporation and by a majority of those voting in the county outside the municipal corporation."

43. Constitutional Law questions chiefly concerned with an independent field of law are left for discussion in the pertinent articles of this Survey.

A. *Conditions under which validity determined*

The caution, or even reluctance, with which courts approach constitutional questions was demonstrated in two cases. In one of these[44] the Supreme Court of Tennessee avoided the constitutional question sought to be raised by application of the established principle that courts will not pass upon the constitutionality of a statute upon complaint of one who fails to show that he is injured by its operation. In the other[45] the same court relied upon the equally well settled rule that courts will pass upon the constitutionality of an ordinance or statute only when such action is necessary to a disposition of the case.

State ex rel. *Turner v. Wilson*[46] was an action of mandamus by municipal officers designated in a statute providing a new charter for Middleton, to compel the incumbents to surrender their offices to the new officials. The terms of office of the defendants had expired and they were "hold-over" officials. By demurrer to the bill defendants challenged the constitutionality of the statute providing the new charter. The Chancellor held that defendants had no right to assail the constitutionality of the Act and also held that it was constitutional. The Tennessee Supreme Court affirmed and held on the authority of its earlier decision[47] that the officers holding beyond the expiration of their term had no special interest in their offices which entitled them to attack the constitutionality of the new city charter of incorporation designating new officials to serve. So holding, the Supreme Court did not reach the question of constitutionality.

City of Greenfield v. Callins[48] involved a municipal ordinance which provided that "every person a non-resident who comes regularly within the city in pursuit of some business or occupation, and who operates regularly an automobile . . . shall . . . register his motor vehicle with the city clerk . . . and shall pay an annual fee of $3." Mrs. Callins, living outside Greenfield, drove daily to her job in that city in an automobile which was owned by and licensed in the name of her husband. She was fined in city court for violation of the ordinance and appealed to the Circuit Court, which remitted the fine and construed the ordinance as not applicable because Mrs. Callins was not the owner of the automobile.

On appeal to the Tennessee Supreme Court by the City, defendant attacked the constitutionality of the ordinance. The Court in an opinion by Justice Gailor did not reach the question of constitution-

44. State ex rel Turner v. Wilson, 264 S.W.2d 796 (Tenn. 1954).
45. City of Greenfield v. Callins, 195 Tenn. 285, 259 S.W.2d 525 (1953).
46. 264 S.W.2d 796 (Tenn. 1954).
47. Kimsey v. Hyatt, 169 Tenn. 599, 89 S.W.2d 887 (1936).
48. 195 Tenn. 285, 259 S.W.2d 525 (1953).

ality. The Court applied the rule of interpretation that a law imposing a tax or license is to be construed strictly against the taxing authorities and in favor of the taxpayer, and construed the ordinance as imposing a duty of registration only on owners of motor vehicles.

B. Legal Effect of Unconstitutionality.

Different aspects of the troublesome question as to the legal effect of unconstitutionality were presented in two cases.[49]

State v. Superintendent, Davidson County Workhouse,[50] opinion by Chief Justice Neil, held unconstitutional the provision of a special act constituting the charter of the City of Nashville,[51] pursuant to which had been established a Juvenile and Domestic Relations Court of the City of Nashville, and thereby determined that such court had no legal existence. The challenged provision of the special act authorized the Mayor and City Council to provide by ordinance for a Juvenile Court with a judge to be appointed by the Mayor for a term of office the same as that of the Mayor, such judge to have been a member of the bar of Tennessee for not less than seven years and a resident of Davidson County for not less than two years. Such charter provision was held violative of the sections of the Tennessee Constitution providing for inferior courts to be established by the legislature[52] and providing for the election of the judges of such courts by the people, the term of office of such judge to be eight years and his qualifications to be the age of thirty, residence in the State for five years and residence in the circuit or district for one year.[53]

The conflict between the Constitution and the statute is manifest, despite the fact that such court had functioned without challenge for a decade.[54] Not only was the Juvenile Court created by municipal ordinance rather than by the legislature as provided in the Constitution, but also the method of selecting the judge, his term of office and his qualifications as fixed by the ordinance differed from the constitutional requirements as to these matters.

This decision is, however, distinctly unsettling as to a legal principle previously declared in Tennessee. The unconstitutionality of the Juvenile Court of Nashville was adjudicated upon a petition for writ of *habeas corpus* filed by a relator who was in custody under sentence imposed by that court. In holding that a petitioner in *habeas corpus* may be discharged where the court by which he was sentenced and committed had no legal existence, the Tennessee Supreme Court

49. State v. Superintendent, Davidson County Workhouse, 195 Tenn. 265, 259 S.W.2d 159 (1953); Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953).
50. 195 Tenn. 265, 259 S.W.2d 159 (1953).
51. Tenn. Priv. Acts 1947, c. 246, article 51.
52. TENN. CONST. Art. VI, § 1.
53. TENN. CONST. Art. VI, § 4.
54. The challenged provision of the charter of Nashville enacted in 1947 was contained in the previous charter, *i.e.*, Tenn. Priv. Acts 1943, c. 47.

applied "a well-settled general rule,"[55] but in so holding the court ignored and disregarded its earlier decision of *Beaver v. Hall*[56] reaching a contrary result by application of the principle that there may be a *de facto* court as well as a *de facto* judge.[57]

Beaver v. Hall, supra, involved petitions for *habeas corpus* by Hall and others who had been sentenced to the county workhouse by the Criminal Court for Tipton County. Subsequently in a different proceeding the act creating such court had been held unconstitutional. Thereafter, Hall and other relators sought their release by *habeas corpus*, insisting that the act creating said court was void *ab initio* and relying upon the sweeping rule: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[58]

The decision of the Tennessee Court in *Beaver v. Hall* took a position directly opposed to *Norton v. Shelby County*[59] that there can be no *de facto* office under an invalid statute and declared: "We believe that the same consideration of public policy that led the courts to adopt the *de facto* doctrine as a means of protecting the rights of the public who deal with officers acting under color of authority should be invoked in this case to protect the acts of a tribunal organized under an act of the legislature, apparently valid, until there has been a judicial determination of the invalidity of such a court."[60]

Beaver v. Hall[61] has not heretofore been overruled or disapproved in Tennessee. It has not been criticized nor its holding questioned or limited. On the contrary, it has been cited approvingly in numerous subsequent cases.[62] Now the authority of *Beaver v. Hall*, has been seriously weakened by *State v. Superintendent, Davidson County Workhouse*, whether intentionally or not being for future opinions to clarify. The confusion is increased by the fact that *Beaver v. Hall*

55. 25 AM. JUR., *Habeas Corpus*, § 31 (1940); 158 A.L.R. 529 (1945).

56. 142 Tenn. 416, 217 S.W. 649 (1919).

57. See Note, *De jure office as condition of a de facto officer*, 99 A.L.R. 294 (1935).

58. Norton v. Shelby County, 118 U.S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886).

59. *Ibid.*

60. 142 Tenn. at 425. In Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940), the Supreme Court of the United States abandoned the extreme position of *Norton v. Shelby County*, and declared that "the actual existence of a statute is an operative fact and may have consequences which cannot justly be ignored."

61. 142 Tenn. 416, 217 S.W. 649 (1919).

62. Such cases include, but are not limited to, Roberts v. Roane County, 160 Tenn. 109, 23 S.W.2d 239 (1929); Ridout v. State, 161 Tenn. 248, 30 S.W.2d 255 (1930); Shoup V. M. Corp. v. Hamilton County, 178 Tenn. 14, 152 S.W.2d 1029 (1941); State *ex rel.* v. Wert, 178 Tenn. 21, 152 S.W.2d 1032 (1941); and State v. Hobbs, 194 Tenn. 323, 250 S.W.2d 549 (1952).

was cited approvingly in an opinion also by the Chief Justice on the same day that its legal principle was denied application.[63]

In *Bricker v. Sims*[64] another phase of the problem as to the effect of unconstitutionality was considered. The City of Martin had enacted an ordinance forbidding any person from being on any public street or the property of any other person without permission of the owner after eleven o'clock at night. Bricker, charged with violation of such ordinance, was arrested by the sheriff and a deputy sheriff, and was fined in city court. On appeal to the circuit court the case was dismissed, apparently because of the invalidity of the ordinance. Thereupon Bricker sued the City of Martin, the mayor and board of aldermen and the arresting officers for false arrest and false imprisonment. Demurrers of all defendants were sustained and plaintiff Bricker appealed. The Tennessee Supreme Court assumed without deciding that the ordinance was "void,"[65] but it affirmed the judgment of the trial court in sustaining the demurrers as to all defendants.

As to the mayor and board of aldermen sued individually, the general rule[66] was applied that in a civil action for damages the members of a legislative body cannot be held liable for their votes for or against particular legislation, in the absence of corruption. Another defendant, the City of Martin, was held immune for liability by reason of the principle that the doctrine of *respondeat superior* does not apply to municipal corporations with respect to the acts of its officers in the exercise of governmental powers.

The arresting officers were also held not to be liable. The court said that such officers were obligated to act upon the assumption that public laws and municipal ordinances are constitutional until there is a proper adjudication of unconstitutionality, and quoted approvingly from an earlier case, as follows: "An unconstitutional act is not void but voidable only and ministerial officers are therefore authorized to treat every act of the Legislature as *prima facie* valid and they are not liable for any acts committed under an unconstitutional statute on account of its unconstitutionality."[67]

Bricker v. Sims is one of the cases which demonstrate that for various purposes, other than that of enforcement in its invalid form, regard will be paid by the courts to an unconstitutional statute. The fact that

63. Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953).

64. 259 S.W.2d 661. (Tenn. 1953).

65. Curfew ordinances of municipal corporations were held illegal in Mayor etc. of Memphis v. Winfield, 27 Tenn. 707 (1848); and *Ex parte* McCarver, 39 Tex. Cr. R. 448, 46 S.W. 936, 42 L.R.A. 587 (1898). *Cf.* curfew under the war power, Hirabayashi v. United States, 320 U.S. 81, 63 Sup. Ct. 1375, 87 L. Ed. 1774 (1943).

66. McGuire v. Carlyle, 6 Higgins 51 (Tenn. Civ. App. 1917); 49 AM. JUR., *States, Territories and Dependencies* § 45 (1943); 22 A.L.R. 125 (1923).

67. Roberts v. Roane County, 160 Tenn. 109, 23 S.W.2d 239 (1929).

there was an ordinance was the basis of the defense of the arresting officers and without such ordinance, although it was assumed to be "void" by reason of unconstitutionality, there was no defense. In several opinions in the past twenty-five years[68] the Tennessee Supreme Court has continued to quote the sweeping generalization of *Norton v. Shelby County,*[69] hereinabove quoted, that an unconstitutional law is in legal contemplation as inoperative as though it had never been passed. Actually, such court adandoned that extreme doctrine in 1919 in *Beaver v. Hall*[70] and recognized at that time, as did the Supreme Court of the United States in 1940,[71] that the existence of a statute prior to determination of its invalidity is a fact, with consequences which cannot always be ignored. So long as the sweeping generalization of *Norton v. Shelby County* is to be quoted but not adhered to, there will continue to be confusion in those decisions which ultimately turn, not upon the determination of unconstitutionality, but, rather upon the retroactive consequences, if any, of unconstitutionality.

C. *Taxation*

During the Survey period only two decisions[72] of appellate courts of Tennessee involved taxing statutes attacked as unconstitutional, and in one of these the constitutional question was described as "of minor importance."[73]

In *Aday v. McMinn County Board of Education,*[74] the provisions of the State Constitution requiring equality and uniformity of taxation throughout the State[75] were invoked to challenge the constitutionality of a provision in the General Education Act of 1949[76] requiring all counties and cities to increase the salaries of teachers, principals, supervisors and superintendents. The challenged provision contained a formula to determine the amount of the required increase in salary for the current year as compared with the preceding scholastic year. The contention apparently was that, because various cities and counties are unequal in wealth and population, the requirement that all of them increase the compensation of teachers would impose unequal burdens on the taxpayers by varying effects upon local tax rates.

68. State v. Hobbs, 194 Tenn. 333, 250 S.W.2d 549 (1952); Henry County v. Standard Oil Co., 167 Tenn. 485, 71 S.W.2d 684 (1934); Roberts v. Roane County, 160 Tenn. 123, 23 S.W.2d 243 (1929).
69. 118 U.S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886).
70. 142 Tenn. 416, 217 S.W. 649 (1919).
71. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940).
72. Aday v. McMinn Co. Board of Education, 257 S.W.2d 698 (Tenn. App. E.S. 1952); Nashville Trust Co. v. Evans, 258 S.W.2d 761 (Tenn. 1953).
73. Aday v. McMinn Co. Board of Education, 257 S.W.2d 698, 702 (Tenn. App. E.S. 1952).
74. *Ibid.*
75. TENN. CONST. Art. II, §§ 28-29.
76. Tenn. Pub. Acts 1949, c. 9, § 9.

The opinion of the Court of Appeals, Eastern Section, by Judge Winfield Hale, treated the constitutional question as one of minor importance and sustained the validity of the Act.

Prior to 1951, the Court of Appeals would not have had jurisdiction in this case, such jurisdiction not extending to cases "involving constitutional questions."[77] A statute enacted in 1951 so amended the prior law as to exclude jurisdiction of the Court of Appeals by reason of a question of constitutional law only when the case involved "the constitutionality of a statute or ordinance which is the sole determinative question in the litigation."[78]

In *Nashville Trust Co. v. Evans*,[79] the Tennessee Supreme Court was asked to review and overrule one of its earlier decisions, and thereby to sustain an immunity from taxation claimed under the Federal Constitution[80] and also under federal statute.[81] The soundness of the earlier decision, which determined a federal question, allegedly had been impaired by a recent decision of the Supreme Court of the United States. The controversy arose out of these facts:

The Tennessee excise tax[82] and the Tennessee franchise tax[83] are taxes levied on corporations for the privilege of doing business in Tennessee. The excise tax is measured by net earnings within the state and the franchise tax is based on that proportionate part of the corporate capital stock, surplus and undivided profits employed in doing business in Tennessee.[84] The tax commissioner required the complaining corporations to pay excise tax measured by net earnings without deducting therefrom interest received on United States bonds, and to pay franchise tax measured by capital stock, surplus and undivided profits without deducting the value of United States bonds. Such taxpayers insisted that the excise and franchise taxes, so computed, violated the provision of the Federal Constitution authorizing the United States to borrow money[85] and also the federal law forbidding state taxation of United States bonds.[86]

Nearly two decades ago in *National Life & Accident Insurance Co. v. Dempster*,[87] the Tennessee Supreme Court had rejected the same

77. TENN. CODE ANN. § 10618 (Williams 1934).
78. Tenn. Pub. Acts 1951, c. 9.
79. 195 Tenn. 205, 258 S.W.2d 761 (1953).
80. U. S. CONST. Art. I, § 8, cl. 2, authorizing the United States to borrow money.
81. 31 U.S.C.A. § 742 (1954), forbidding state or local taxation of bonds and other obligations of the United States.
82. TENN. CODE ANN. § 1316 *et seq.* (Williams 1934) and TENN. CODE SUPP. § 1316 *et seq.* (1950).
83. TENN. CODE SUPP. § 1248.21 *et seq.* (1950).
84. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157, 162, 213 S.W.2d 45, 47 (1948).
85. U. S. CONST. Art. I, § 8, cl. 2.
86. 31 U.S.C.A. § 742 (1954).
87. 168 Tenn. 446, 79 S.W.2d 564 (1935).

contention as to the excise tax and had held upon the authority of decisions[88] of the United States Supreme Court that a corporate privilege tax measured by net earnings may properly include interest from United States bonds as a part of such earnings. The Tennessee franchise tax law was enacted subsequent to the opinion in the *Dempster* case, but the decision of that case relating to the excise tax had been followed by the tax officers in the administration of the franchise tax. If there was no constitutional necessity for excluding interest from United States bonds from net earnings by which the corporate privilege tax for doing business is measured, then none was perceived for deducting the value of United States bonds when such a privilege tax is measured by capital stock, surplus and undivided profits.

In *Nashville Trust Co. v. Evans*[89] the taxpayers asked the Court to overrule the *Dempster* case upon the authority of a recent decision of the United States Supreme Court, *New Jersey Realty Title Ins. Co. v. Division of Tax Appeal.*[90] The Tennessee Court reaffirmed the holding of *National Life & Accident Ins. Co. v. Dempster,*[91] and distinguished the later federal decision relied upon[92] as a tax on net worth and not upon the privilege of exercising the corporate franchise. Further, the Tennessee Court emphasized that the New Jersey case did not expressly overrule previous decisions of the United States Supreme Court which support the holding of the *Dempster* case.[93]

D. Due Process of Law

During the Survey period, no statute of Tennessee was held unconstitutional, nor even challenged in a reported opinion, as a denial of due process of law. In three cases the law of the land clause[94] was invoked unsuccessfully in attacks upon the validity of municipal

88. Flint v. Stone Tracy Co., 220 U.S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389 (1911); Educational Films Corp. v. Ward, 282 U.S. 379, 51 Sup. Ct. 170, 75 L. Ed. 400 (1931).

89. 195 Tenn. 205, 258 S.W.2d 761 (1953).

90. 338 U.S. 665, 70 Sup. Ct. 413, 94 L. Ed. 439 (1950).

91. 168 Tenn. 446, 79 S.W.2d 564 (1935).

92. New Jersey Realty Title Co. v. Division of Tax Appeal, 338 U.S. 665, 70 Sup. Ct. 413, 94 L. Ed. 439 (1950).

93. Educational Film Corp. of America v. Ward, 282 U.S. 379, 51 Sup. Ct. 170, 75 L. Ed. 400 (1931); Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission, 309 U.S. 560, 60 Sup. Ct. 688, 84 L. Ed. 947 (1940).

94. The phrase "the law of the land" in Art. I, § 8 of the Tennessee Constitution has been recognized as synonymous with the phrase "due process of law" in the Fifth and Fourteenth Amendments to the Constitution of the United States. Harbison v. Knoxville Iron Co., 103 Tenn. 421, 431 (1899); Motlow v. State, 125 Tenn. 547, 500, 145 S.W. 177 (1911); Nance v. Piano Co., 128 Tenn. 1, 9, 155 S.W. 1172 (1913). That the two phrases are exact equivalents had been previously declared. In Davidson v. New Orleans, 96 U.S. 97, 101, 24 L. Ed. 616, 618 (1878), the Court said: "The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land' in the Great Charter. . . ."

ordinances. These cases were *Jones v. City of Jackson*,[95] *Rule v. Town of Etowah*[96] and *City of Chattanooga v. Fanburg*.[97]

Jones v. City of Jackson[98] involved an attack upon an ordinance regulating the holding of auctions as violative of the law of the land (due process of law) clause of the Tennessee Constitution. Complainant had appealed from a decree of the chancery court which sustained the validity of the ordinance with certain deletions. After such deletions the ordinance required persons holding auctions, except judicial sales and sales by trustees, etc., to apply for and obtain a permit. Such permit was conditioned upon the giving of a bond in the sum of $1,000 and upon the filing of information as to the name, address and occupation of the person conducting the auction, as to the name, address and occupation of the person for whom the auction was to be conducted, as to the place and hour of the auction and its estimated duration, and as to auction sales by applicant or owner within the past two years.

Based upon the proposition that the business of auctioneering is a legitimate subject of regulation to protect the public and to minimize deception,[99] the opinion of the Tennessee Supreme Court by Justice Prewitt sustained the ordinance as it remained after deletions by the chancery court. The legal principle was given application that where the invalid part is severable from the rest, the portion of a statute or ordinance which remains after elision may be held constitutional. Apparently no contention was made in the Supreme Court that the elided portion of the ordinance should have been held valid, and, hence, this matter was not discussed. The elided parts of the ordinance required an applicant for license to give (1) the name and address of the owner of property to be auctioned, with itemized, sworn inventory as to cost, (2) copy of proposed advertisements, and (3) reasons for conducting auction.

Rule v. Town of Etowah[100] involved the validity of a municipal ordinance, the practical effect of which was to forbid the sale of beer within the town. The question arose from a bill filed in the chancery court to procure a decree declaring the ordinance unconstitutional. From a decree sustaining a demurrer complainants appealed.

A general state law[101] permits the sale of beer under circumstances prescribed in the statute. By such law county courts are authorized to forbid the sale of beer at any point closer than 2000 feet to a church

95. 195 Tenn. 329, 259 S.W.2d 649 (1953).
96. 195 Tenn. 634, 263 S.W.2d 498 (1953).
97. 265 S.W.2d 15 (Tenn. 1954).
98. 195 Tenn. 329, 259 S.W.2d 649 (1953).
99. *Id.* at 652.
100. 263 S.W.2d 498 (Tenn. 1953).
101. TENN. CODE SUPP. § 1191.1 *et seq.* (1950).

or school[102] and municipalities are authorized to "impose additional restrictions, fixing zones and territories . . . and such other rules and regulations as will promote public health, morals and safety as they may by ordinance provide."[103] The Town of Etowah adopted an ordinance forbidding the sale of beer at any point in the town within 5000 feet of a church or school, and such ordinance prohibited the sale of beer within the corporate limits. The contention was that such ordinance suspended a general law, to-wit, a revenue statute. The opinion of the Tennessee Supreme Court by Justice Tomlinson sustained the ordinance.[104] Such opinion held that the general law regulating the sale of beer[105] is a police measure as well as a revenue measure and reaffirmed a prior case[106] holding that the business of selling beer is subject to unlimited restriction, so that an ordinance prohibiting its sale does not violate the law of the land clause.[107]

City of Chattanooga v. Fanburg[108] involved the validity of an ordinance regulating and licensing auto wrecker and towing service. Such ordinance required those engaged in the business of offering towing service in Chattanooga by use of a wrecker or auto adapted to that purpose to obtain a license, the issuance of which was conditioned upon application therefor setting forth certain information, upon the payment of a license fee and upon the carrying of insurance as prescribed in the ordinance.[109] The ordinance required one engaged in such business to provide 24-hour service, including holidays, to have a minimum of two wreckers or towing cars and two men on duty at all times, and it prescribed maximum charges for wrecker, towing and storage service. It also prohibited any operator of a wrecker or towing car from taking his wrecker or towing car to the scene of a wreck without being called by the owner, the owner's agent or a police dispatcher.

Fanburg, who had not applied for or obtained a license as required by the ordinance, took his wrecker or towing car from his place of business to a wreck without being called by the owner or the owner's agent or the police dispatcher and was charged with violating the ordinance. The criminal court held the ordinance void as violating the constitutional provision which prohibits the passage of any law for the benefit of individuals inconsistent with the general laws[110] and as

102. TENN. CODE SUPP. § 1191.14 (1950).
103. *Ibid.*
104. 263 S.W.2d 498 (Tenn. 1953).
105. TENN. CODE SUPP. § 1191.1 *et seq.* (1950).
106. Grubb v. Mayor and Aldermen of Morristown, 185 Tenn. 114, 203 S.W.2d 593 (1947).
107. TENN. CONST. Art. I, § 8.
108. 265 S.W.2d 15 (Tenn. 1954).
109. The ordinance in full is copied as a footnote to the opinion, 265 S.W.2d 15 (Tenn. 1954).
110. TENN. CONST. Art. XI, § 8.

violating the law of the land clause of the Tennessee Constitution[111] and the due process clause of the Fourteenth Amendment.[112] The City appealed.

The Tennessee Supreme Court in an opinion by Justice Burnett reversed and sustained the validity of the ordinance.[113] Legislative sanction for the ordinance was found in a provision of the Charter of the City of Chattanooga.[114] The constitutionality of the ordinance was upheld, based upon the propositions that the business of transporting property for hire is a privilege subject to legislative control, that the regulation of roads and streets is also subject to legislative control, that such legislative powers may be delegated to the cities and that a city may regulate auto wrecker and towing service, not alone through its licensing power, but also in the exercise of police power to prevent traffic congestion and dangers incident thereto. The Supreme Court of the United States was quoted:

> "It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit."[115]

E. Separation of Powers.

Hoover Motor Express Co. v. Railroad & Public Utilities Commission,[116] was the only decision of the Tennessee Supreme Court during the Survey period in which the Court was divided on a constitutional question. The Railroad & Public Utilities Commission, after hearing and the introduction of evidence, had granted Robinson Freight Lines certificates of convenience and necessity to haul freight over eight highway routes in Tennessee. Those opposing the applications filed petitions for certiorari, which were granted, and the case was heard in the chancery court. The Chancellor found that there was no evidence whatever to support the issuance of certificates over five of these routes, but that there was material, substantial evidence to support the issuance over the remaining three routes, and therefore held the Commission's action as to the five certificates was arbitrary and illegal, but its action as to the other three certificates was legal. There was no appeal from the decree insofar as it annulled five

111. TENN. CONST. Art. I, § 8.
112. U. S. CONST. AMEND. XIV.
113. 265 S.W.2d 15 (Tenn. 1954).
114. Tenn. Private Acts 1941, c. 536, subs. 16, gives the City of Chattanooga authority "to license, tax and regulate taxicabs, automobiles for hire, trucks and buses; to fix a rate to be charged for the carriage of persons and property by any vehicle held out to the public use for hire within the City; to require indemnity bonds, issued by surety companies or indemnity insurance policies to be filed with the City by the owner or operator of any such vehicle.
115. Stephenson v. Binford, 287 U.S. 251, 256, 33 Sup. Ct. 181, 184, 77 L. Ed. 288, 294 (1932).
116. 195 Tenn. 593, 261 S.W.2d 233 (1953).

certificates, but there was an appeal as to the other three certificates.

When the Commission granted the eight challenged certificates a section[117] of the procedural statute[118] regulating the writ of certiorari directed the court in reviewing the findings of fact of an administrative board to "reduce his findings of fact and conclusions of law to writing and make them parts of the record." An act of 1951,[119] passed after the decision of the Commission, but prior to the decision of the Chancellor, amended this section so as to provide that "in making such findings of fact the Chancellor shall weigh the evidence and determine the facts by the preponderance of the proof." The whole case turned upon the effect, if any, to be given the Act of 1951, with the Chancellor, the Court of Appeals and the Supreme Court all taking different views of the statute.

The Chancellor held that the amendatory Act of 1951[120] had no application to review of administrative action taken prior to its passage, but that such administrative action was to be reviewed under the procedure for a common law writ of certiorari established and existing prior thereto. The Court of Appeals held that such Act of 1951, being procedural merely, applied to judicial review subsequent to its passage, although the administrative action being reviewed had taken place prior to its passage, that there was material, substantial evidence to support the findings of the Commission as to the three routes in controversy, but that the evidence strongly "preponderated" against the findings of the Commission. Accordingly, the Court of Appeals cancelled the order of the Commission granting the three disputed certificates.[121] The Tennessee Supreme Court in its opinion[122] by Justice Gailor, with a dissenting opinion by Justice Tomlinson, held that to construe the Act of 1951[123] as it had been interpreted by the Court of Appeals would render it unconstitutional "for the reasons stated in the opinion *In re Cumberland Power Co.*"[124] in that the court would be required to perform an administrative or legislative function and as violating the constitutional separation of the powers of government into three distinct and independent departments.[125]

117. TENN. CODE ANN. § 9014 (Williams 1934).
118. TENN. CODE ANN. §§ 9008-9018 (Williams 1934).
119. Tenn. Pub. Acts 1951, c. 261.
120. *Ibid.*
121. The holding of the Court of Appeals is stated in the opinion of the Supreme Court.
122. 195 Tenn. 593, 261 S.W.2d 233 (1953).
123. Tenn. Pub. Acts 1951, c. 261.
124. 147 Tenn. 504, 249 S.W. 818 (1922).
125. TENN. CONST. Art. II, §§ 1 and 2, divides the powers of government into three departments and forbids the exercise by one of these departments of "any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

The Tennessee Supreme Court, reaffirming that Code Sections 9008-9018 apply to the procedure under both petitions for the common law writ of certiorari[126] and the statutory writ of certiorari,[127] held that the common law writ does not bring up for determination any question except whether the inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally, arbitrarily or fraudulently. The court further held that the effect of the amendatory act of 1951[128] was "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." Such being the "long established limit of appropriate judicial review under the common law writ," the amendatory act of 1951 was construed as having no effect on procedure under the common law writ, whatever its effect "on a proceeding under the statutory writ." The opinion further declared that whether a certificate of convenience and necessity shall be issued to motor carriers over public highways is an administrative function no different from action in the rate-making power.

The dissenting opinion of Justice Tomlinson made these points: (1) that the interpretation given by the majority opinion to the act of 1951 renders that statute meaningless, (2) that the majority decision is not supported by the clearly distinguishable case of *In re Cumberland Power Co.*,[129] which held unconstitutional a statute that sought to confer original jurisdiction upon the Tennessee Supreme Court, whose constitutional jurisdiction is appellate only,[130] and (3) that the function of reviewing the conclusions of fact of an administrative board for the purpose of determining whether they are supported "by the preponderance of the proof" is a judicial function.

With due deference to the majority opinion,[131] the writer believes that the dissenting opinion of Justice Tomlinson is the correct conclusion.[132]

The majority opinion does not seriously insist that its construction of the Act of 1951[133] was a true expression of the legislative intent.[134]

126. A writ of certiorari is provided by TENN. CODE ANN. § 8989 (Williams 1934) "in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when in the judgment of the court, there is no other plain, speedy, or adequate remedy." This continues to be referred to as the common law writ, although in strictness it is statutory and no common law writ now exists in Tennessee.

127. TENN. CODE ANN. § 8990 (Williams 1934).

128. Tenn. Pub. Acts 1951, c. 261.

129. 147 Tenn. 504, 249 S.W. 818 (1922).

130. TENN. CONST. Art. VI, § 2.

131. 195 Tenn. 593, 261 S.W.2d 233 (1953).

132. A contrary view is taken by Forrest V. Lacey, *Judicial Review of Administrative Action in Tennessee*, 23 TENN. L. REV. 349, 352 (1954).

133. Tenn. Pub. Acts 1951, c. 261.

134. Prior to the opinion under discussion, but not referred to therein, Tenn. Pub. Acts 1953, c. 162, had been enacted. This is a procedural statute with

The strained interpretation of the Act of 1951 by the majority opinion was deemed necessary to save its constitutionality. Unless necessarily avoided for constitutional reasons, the obvious meaning of the Act of 1951, as held by the Court of Appeals and by Justice Tomlinson, is that the court shall determine whether a fact conclusion of an administrative commission is supported by a preponderance of the evidence. It is submitted that a statute so providing is by clear implication a legislative declaration that administrative action not supported by a preponderance of the evidence is unlawful.

In *Hoover Motor Express Co. v. Railroad & Public Utilities Commission,*[135] therefore, the controlling question as to the constitutionality of the statute is this: Does the legislature have the power to make illegal the decisions of administrative boards created by it when such decisions are not supported by a preponderance of the proof? The dissenting opinion indicates that this question requires an affirmative answer. The writer believes this is correct for the reason that the branch of government which is empowered to define and determine *legality,* as distinguished from *constitutionality,* is the legislative department. The majority recognizes that on certiorari the court reviews the record to determine "whether the inferior board or tribunal . . . has acted illegally," but then it holds in effect that the legislature is without power to define "illegally," *i.e.,* is powerless to change the common law as it existed under the common law writ of certiorari. The relief afforded by the common law writ of certiorari may not be taken away in view of the constitutional provision securing it,[136] but, as Justice Tomlinson says, "the quantity and quality of relief may be increased."

The Act of 1951, construed as requiring a reviewing court to determine whether an administrative board has acted illegally in that its findings of fact are not supported by a preponderance of the evidence, is to be distinguished from such a statute as was held unconstitutional in *Federal Radio Commission v. General Electric Co.*[137] The statute there involved, the Radio Act of 1927, provided that the Court of Appeals for the District of Columbia, on appeal from decisions of the Radio Commission should "hear, review, and determine the appeal" upon the record made before the Commission and upon such additional evidence as the court might receive, and was empowered to "alter or revise the decision appealed from and enter such judgment as to it

respect to the Railroad & Public Utilities Commission, section 29 of which authorizes the reviewing court to reverse the Commission's decision, *inter alia,* if "unsupported by the preponderance of the proof in view of the entire record before the Commission."

135. 195 Tenn. 593, 261 S.W.2d 233 (1953).

136. TENN. CONST. Art. VI, § 10.

137. 281 U.S. 464, 50 Sup. Ct. 389, 74 L. Ed. 969 (1930).

may seem just."[138] It was held that this provision made the court "a superior and revising agency" in the administrative field and consequently its decision was not a judicial judgment reviewable by the Supreme Court of the United States.

The Tennessee Act of 1951[139] does not purport to authorize the court upon review to make such decision as it thinks the Commission should have made. Such Act, an amendment to the procedural act as to certiorari, merely gives the court power to set aside for illegality administrative orders not supported by a preponderance of the proof. Such statute, it is submitted, no more attempts to make a court play a part in the administrative process than does a statute authorizing the judiciary to set aside administrative decisions not made in compliance with statutory procedural formalities or not supported by any material evidence. Under the Act of 1951, as construed by the Court of Appeals and Justice Tomlinson, the court examines the record, not for the purpose of deciding what administrative action the commission should have taken and the reviewing court will take, but solely for the purpose of adjudging whether the decision of the administrative agency is supported by a preponderance of the proof. If so, the action of the board is adjudged lawful; but, if not so, the action of the board is adjudged illegal and is set aside.

In determining whether a statute providing for judicial review of administrative decisions violates the constitutional principle of separation of powers, the basic question is whether the function to be exercised by the court is a judicial one.[140] If such function is a judicial one, its character is not affected by the fact that the administrative decision was itself of a legislative character.[141] The function of weighing the evidence to see where the preponderance is, as Justice Tomlinson said, "has always been considered a proper function for the courts."

F. Miscellaneous

Easterly v. Dempster[142] was the only decision in Tennessee touching on the segregation question. It resulted from an action by members of the negro race, residents of Knoxville, asserting the right under the equal protection clause[143] to equal use of the golfing facilities at a

138. 44 STAT. 1169 (1927).

139. Tenn. Pub. Acts 1951, c. 261.

140. Federal Radio Comm'n v. Nelson Bros. B. & Mortg. Co., 289 U.S. 266, 277, 53 Sup. Ct. 627, 77 L. Ed. 1166, 1174, (1933); "The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body."

141. Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716, 722, 49 Sup. Ct. 499, 73 L. Ed. 918, 925.

142. 112 F. Supp. 214 (E.D. Tenn. 1953).

143. U. S. CONST. AMEND. XIV.

municipally-owned golf course. District Judge Robert L. Taylor referred to "the principle that negroes are entitled to equal facilities with members of the white race with respect to certain recreational facilities including parks, golf courses, swimming pools and municipal auditoriums,"[144] but such principle was held not to be applicable where the city had leased the golf course to private operators for financial reasons, *i.e.*, a substantial rental, the lease did not exclude persons of color from using the golf course, and the lessee was not a party to the judicial proceeding.

Deitch v. City of Chattanooga.[145] An ordinance of Chattanooga (No. 4030) made it unlawful for any person in the city to possess the federal wagering stamp provided for by federal statute[146] and made violation a misdemeanor punishable by fine. The federal statute with reference to the wagering stamp expressly provides that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance of such business. Another ordinance (No. 4048) made possession of a federal wagering stamp and payment of the federal tax on wagers "conclusive evidence" of violation of the gambling or wagering ordinance of the city. Deitch, shown by undisputed evidence to possess a federal wagering stamp, was fined by city court for violation of the city ordinance. On appeal to the Criminal Court the cases were heard *de novo* and Deitch was fined in three cases, in two cases for gaming and in one case for "possessing a gaming device."

On appeal to the Tennessee Supreme Court the contention was that the two ordinances, No. 4030 and No. 4048, were unconstitutional, and hence the fine for possessing a gaming device was erroneous.

As to Ordinance No. 4048, making possession of the federal stamp and payment of the federal tax "conclusive evidence" of the violation of the gambling ordinance, the opinion by Justice Gailor,[147] upon the authority of the earlier case of *Diamond v. State*,[148] agreed with the insistence as to invalidity if the question were actually presented, but held that such question was not necessary to a disposition of the case because Deitch did not offer evidence and the city did not rely upon the provision as to conclusive evidence, but the city conceded that its proof merely made a "prima facie" case.

As to Ordinance No. 4030, the contention for invalidity was based upon the constitutional provision which protects against self-incrimi-

144. Citing Beale v. Holcombe, 193 F.2d 384 (5th Cir. 1951); Harris v. City of Daytona Beach, 105 F. Supp. 572 (S.D. Fla. 1952); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948); and Kern v. City Comm'rs of City of Newton, 151 Kan. 565, 100 P.2d 709, 129 A.L.R. 1156 (1940).
145. 195 Tenn. 245, 258 S.W.2d 776 (1953).
146. 26 U.S.C.A. § 3290 *et seq.* (1940).
147. 195 Tenn. 245, 258 S.W.2d 776 (1953).
148. 123 Tenn. 348, 131 S.W. 666 (1910).

nation and guarantees an accused the right to meet the witnesses face to face.[149] In accord with its prior decisions[150] the Court held that the constitutional provision relied upon, applicable only to "criminal prosecutions," did not apply to a proceeding for violation of a municipal ordinance, which is civil in nature. The Fourteenth Amendment was not invoked, but quite recently in *Irvine v. California*[151] the contention was rejected that the guaranty of due process of law prevents a state from using "compelled evidence" obtained under the federal wagering statute. In so holding the United States Supreme Court did little more than refer to its opinion in *United States v. Kahriger*,[152] where the federal wagering tax was sustained against the contention, *inter alia*, that it violated the guarantee against self-incrimination of the Fifth Amendment.

In *Trent v. State*,[153] opinion by Justice Gailor, there was involved the constitutionality and interpretation of the statute providing a summary proceeding for the removal of a clerk of a court "upon conviction of a misdemeanor in office or of a felony."[154] Trent had been elected to a four-year term as Circuit and Criminal Court Clerk of Hamblen County. During his term of office he was convicted in federal court upon a plea of guilty for violation of the Mann Act[155] and was given a suspended sentence. Following a joint hearing by the Circuit and Criminal Courts, Trent was removed from office under the summary proceeding provided by statute.[156]

On appeal (writ of error) Trent insisted that the judgment of removal violated his constitutional right to the four-year term to which he had been elected. This contention was rejected on the basis of earlier holdings that election for a definite term carries with it the implied condition of good behavior.[157]

Trent also urged that the exclusive method for removing civil officers, including clerks of courts, is prescribed by the provision of the Tennessee Constitution that such officers upon conviction for crimes of misdemeanors in office "shall be removed from office by said court ... and shall be subject to such other punishment as may be prescribed by law."[158] Also in accord with earlier decisions[159] it was reaffirmed

149. TENN. CONST. Art. I, § 9.
150. City of Nashville v. Baker, 167 Tenn. 661, 73 S.W.2d 170 (1934), and cases cited therein.
151. 74 Sup. Ct. 384 (U.S. 1954).
152. 345 U.S. 22, 73 Sup. Ct. 510, 97 L. Ed. 754 (1953).
153. 195 Tenn. 350, 259 S.W.2d 657 (1953).
154. TENN. CODE ANN. § 10076 *et seq.* (Williams 1934).
155. 18 U.S.C.A. § 1421 *et seq.* (1950).
156. TENN. CODE ANN. § 10076 *et seq.* (Williams 1934).
157. Sevier v. Justices, 7 Tenn. 334 (1824).
158. TENN. CONST. Art. V, § 5.
159. Ragsdale v. State, 32 Tenn. 416 (1852); State *ex rel.* v. Howse, 132 Tenn. 452, 178 S.W. 1110 (1915); State *ex rel.* v. Crump, 134 Tenn. 121, 183 S.W. 505 (1915).

that such constitutional provision relates alone to criminal proceedings and has nothing to do with a civil proceeding for the summary removal of a public officer. As to clerks of courts such civil proceeding for summary removal[160] was held authorized by the constitutional provision for removal from office "for malfeasance, incompetency, or neglect of duty, in such manner as may be prescribed by law."[161]

A contention that the statute authorizing removal does not apply to conviction in federal court for a felony, but is limited to a felony in office was also rejected, and the statute was construed to be applicable to all felonies, but only to misdemeanors in office. In view of the statutory language[162] no other plausible construction was possible.

Thrasher v. Lively[163] was a proceeding to challenge the constitutionality of a private act[164] by which the salaries of the judges of the Court of General Sessions of Hamilton County were increased during the term for which they were elected. A constitutional provision specifies that the compensation of "Judges of the Supreme or Inferior Courts" shall not be increased or diminished during the time for which they are elected.[165] The rather hopeless effort to sustain the Act was based upon the contention that a general sessions judge is not a judge of an inferior court, as contemplated by the Constitution. The chancellor, unimpressed by such argument, held the act unconstitutional.

On appeal the Tennessee Supreme Court was also unmoved by the contention and in an opinion by Justice Prewitt affirmed the decree holding the act violative of the Constitution. It was pointed out that in prior decisions[166] the court had assumed or stated that judges of general sessions courts are judges of inferior courts within the meaning of the Constitution, and it was reasoned that where the powers and jurisdiction of the several justices of the peace in a county are consolidated in one court, this (General Sessions Court) is one of the inferior courts, as to which the compensation of the judges cannot be increased or diminished during the term of office.

Dowlen v. Fitch[167] involved the interpretation and validity of an Act of 1953[168] providing that in tort actions where plaintiff and defendant are residents of different counties of Tennessee action may be brought in the county in which the cause of action arose. Prior to the

160. TENN. CODE ANN. § 10076 *et seq.* (Williams 1934).
161. TENN. CONST. Art. VI, § 13.
162. TENN. CODE ANN. § 10076 provides: "The court may remove its clerk upon conviction of a misdemeanor in office or of a felony. . . ."
163. 263 S.W.2d 497 (Tenn. 1953).
164. Tenn. Priv. Acts 1953, c. 25.
165. TENN. CONST. Art. VI, § 7.
166. Bickford v. Swafford, 194 Tenn. 481, 253 S.W.2d 557 (1952); Taylor v. Wilson County, 188 Tenn. 39, 216 S.W.2d 717 (1949).
167. 264 S.W.2d 824 (Tenn. 1954) and 266 S.W.2d 357 (Tenn. 1954), rehearsing denied.
168. Tenn. Pub. Acts 1953, c. 34.

enactment of such statute the right of action generally followed the person of the defendant who might be sued only in the county in which he was found.[169] A resident of Cheatham County was injured in an automobile collision occurring in Cheatham County prior to the passage of the new venue statute.[170] The injured person brought an action in Cheatham County against two residents of Hamilton County, Tennessee, the owner and the driver of one of the motor vehicles involved in the collision.

The trial court sustained pleas in abatement filed by the defendants, but on appeal the Tennessee Supreme Court reversed. The opinions[171] by Special Justice Weldon B. White held that with respect to a tort committed prior to the effective date[172] of the venue statute, such law permitted an action in the county where the tort was committed and further held that the statute so construed did not violate the constitutional provision forbidding retrospective laws.[173] The holding is in accord with prior Tennessee decisions both as to the interpretation of the statute[174] and as to its constitutionality when so construed.[175]

Carr v. State ex rel *Armour.*[176] Under the provisions of a general law[177] the quarterly court of Hardeman County elected a superintendent of schools for a term of four years from January 15, 1953, to January 15, 1957. Shortly thereafter a private act[178] was enacted which provided for election of the superintendent of schools of Hardeman County by popular vote, the first such election to be held in August, 1954, for a term of four years to begin on September 1, following election. The private act also named as county superintendent to serve from the date of its passage, February 19, 1953, until

169. TENN. CODE ANN. § 8640 (Williams 1934) provides: "In all transitory actions, the right of action follows the person of the defendant, unless otherwise expressly provided." Where plaintiff and defendant both reside in the same county [TENN. CODE ANN. § 8641 (Williams 1934)] or where the plaintiff and a material defendant reside in the county where the cause of action accrued [(Tims v. Carter, 192 Tenn. 386, 241 S.W.2d 501, (1951)], that county is the only proper venue for an otherwise transitory action.

170. Tenn. Pub. Acts 1953, c. 34.

171. 264 S.W.2d 824 (Tenn. 1954) and 266 S.W.2d 357 (Tenn. 1954).

172. March 23, 1953.

173. TENN. CONST. Art. I, § 20 provides: "That no retrospective law, or law impairing the obligations of contracts, shall be made." This section has been interpreted to read: "That no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made." Hamilton County v. Gerlach, 176 Tenn. 288, 140 S.W.2d 1084 (1940).

174. Collins v. East Tennessee V. & G. Railroad, 56 Tenn. 841 (1874); Cavender v. Hewitt, 145 Tenn. 471, 239 S.W. 767 (1921); National Life & Acc. Ins. Co. v. Atwood, 29 Tenn. App. 141, 194 S.W.2d 350 (1946).

175. Collins v. East Tennessee V. & G. Railroad, 56 Tenn. 841 (1874); Cavender v. Hewitt, 145 Tenn. 471, 239 S.W. 767 (1921); Sherrill v. Thomason, 145 Tenn. 499, 238 S.W. 876 (1921); State v. Bone, 185 Tenn. 78, 203 S.W.2d 362 (1947).

176. 265 S.W.2d 556 (Tenn. 1954).

177. TENN. CODE SUPP. § 2320 b (1950).

178. Tenn. Priv. Acts 1953, c. 19.

September 1, 1954, a person other than the incumbent previously elected by the quarterly court. The private act was attacked as violating the constitutional provision which requires that county offices created by the legislature shall be filled by the people or the county court.[179]

The Tennessee Supreme Court in its opinion by Justice Burnett[180] affirmed the decree of the chancellor and held that the office of superintendent of schools of Hardeman County was in existence prior to enactment of the private act providing for election by the people, and hence an attempt by the legislature to fill such existing office violated the constitutional requirement for election by the quarterly court or by the people.[181] The opinion points to a line of cases holding that where the legislature attempts to fill an office that is in existence such constitutional provision is violated,[182] and distinguishes the cases sustaining the power of the legislature upon the creation of a county office to be filled by popular election to appoint the person to hold such office until the next general election.[183] Citing precedents for invalidating portions of acts by which unconstitutional interim appointments were attempted,[184] the Court further held that the invalid provision attempting to fill the existing office was capable of elision, so that the remainder of the private act was constitutional.

179. TENN. CONST. Art. XI, § 17.
180. 265 S.W.2d 556 (Tenn. 1954).
181. TENN. CONST. Art. XI, § 17.
182. Treadway v. Carter County, 173 Tenn. 393, 118 S.W.2d 222 (1937), and cases cited therein.
183. Taylor v. Taylor, 189 Tenn. 81, 222 S.W.2d 372 (1949); Crewse v. Beeler, 186 Tenn. 475, 212 S.W.2d 39 (1948); Townsend v. Ray, 174 Tenn. 634, 130 S.W.2d 96 (1939).
184. Kyle v. Marcom, 181 Tenn. 57, 178 S.W.2d 618 (1944); Cheatham County v. Murff, 176 Tenn. 93, 138 S.W.2d 430 (1940).