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Local Government Law--1959 Tennessee Survey

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LOCAL GOVERNMENT LAW—1959 TENNESSEE SURVEY

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Local government law is primarily made up of special exceptions to and provisions concerning laws of general application, both substantive and procedural. Starting with that premise, this survey is classified into two basic subsections: exceptions resulting from relations between sovereign agents, and exceptions resulting from relations between a sovereign agent and private parties. Because of a trend believed to be of significance with regard to other areas of law, the section on financial policy is considered separately as another subdivision herein.

Satisfactory review of all of the substantive legal subjects touched upon by decisions and legislation which involved local agents of the sovereign is beyond the scope of this article.

I. FINANCIAL POLICY

The majority opinion written by Justice Sweptson in *McConnell v. City of Lebanon*[1] presents a clear reflection of the attitude of the court toward business activity, both generally and as it relates to local government. The case was brought to court to test the constitutionality of the issuance of bonds pledging the tax revenue of the city of Lebanon for the purpose of construction of an industrial building to be leased under an existing contract to Hartman Luggage Co., a private corporation organized for profit under the laws of Wisconsin. The action of the city complied with the provisions of a general enabling act[2] which required a three-fourths majority vote of the electors of the local government unit.

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1. 314 S.W.2d 12 (Tenn. 1958).
2. TENN. CODE ANN. § 6-2097 (Supp. 1959).

On the basis of the present necessity for industrialization, the actions of the city were sustained, notwithstanding the decision in *Ferrell v. Doak*[3] which found similar actions by Lebanon under authority of a private act to offend the provisions of the Tennessee Constitution[4] which prohibit lending public credit (tax revenue) to a private enterprise except, upon approval by a three-fourths vote of the governmental unit, for a *public purpose*. The majority opinion distinguished *Ferrell v. Doak* and specifically approved and reaffirmed the *principle* of that case which, according to the opinion in the *McConnell* case, was that in 1925 attracting industry to Tennessee was not a *public purpose* within the meaning of the Tennessee Constitution as then (and now) interpreted. The McConnell decision was distinguished because attracting industry to Tennessee is, as a matter of fact established in that case, under present circumstances of decreasing population proportionally to other states, a proper public purpose.

This decision judicially approves the legislatively declared public policy of encouraging an industrial economy. Chief Justice Neil and Justice Prewitt in their dissents limited themselves to criticism of the means adopted rather than attacking the policy of encouraging such enterprise within Tennessee. It seems probable that the policy indicated by the enabling act, and the decision upholding Lebanon's application of it in the *McConnell* case, will affect decisions on other legal questions where business or industry are concerned either directly or indirectly.

The trend noted in the discussion of the *McConnell* case is further indicated by several statutes passed during the survey period. Several enactments ratify liberal construction heretofore placed upon public bonding obligations and powers by local government units and allow issuance of refunding and highway construction bonds, as well as payments from funds not specifically pledged on the face of the bonds.[5] Also indicative of the trend of "Public" activity for a business

3. 152 Tenn. 88, 275 S.W. 29 (1924), Annot., 46 A.L.R. 593 (1924). For definitions of "public purpose" from other jurisdictions, see 35 Words & Phrases 297 (1940). A case indicating a position contrary to the instant case concerning whether urgency of need effects the "puhlic-private" classification is People v. Salem, 20 Mich. 452, 4 Am. Rep. 400 (1870). See also Davis v. Moon, 77 Idaho 142, 289 P.2d 614 (1955). In support of the majority, see McClure v. Hagerman, 155 Ohio St. Rep. 320, 98 N.E.2d 835 (1951).

4. TENN. CONST. art. II, § 29 (1870).

5. Tenn. Pub. Acts 1959, ch. 12 regarding utility district bonds; chapter 59 relating to refunding bonds and ratification of some bonds already issued; chapter 162 concerning funds for retiring outstanding bonds; chapter 320 authorizing counties to issue bonds for highways, bridges, and roads (see also chapter 216 conferring eminent domain powers on countries); and chapter 328 allowing municipalities (defined as "County, City, Town, Township, Utility District, or Sanitary District") to issue refunding bonds.

economy are chapters 50,[6] 53,[7] 188[8] and 90.[9] Chapter 125[10] obviates the necessity of an election on bonds for sewage or water work if a municipality declares the need to be an "emergency."

Perhaps the legislative acts of greatest long run significance to local government and business are the Development Credit Corporation Act[11] and chapter 243 of the Public Acts of 1959.[12] The former statute provides for incorporation for the purpose of providing financing for business development not available through normal lending channels. Chapter 243 allows counties and incorporated cities and towns to purchase stock of Development Credit Corporations and to expend and/or levy tax money for the purpose. The enactments clearly extend the principle enumerated in the *McConnell* case.

II. Inter-governmental Relations

Neither the cases nor statutes relating to this topic during the survey period present any cohesive pattern of policy. The cases do reflect the vices of the traditional system of overlapping territorial-jurisdictional government patchwork which happened rather than being developed from a plan. In *Election Comm'rs v. Chattanooga Bd. of Educ.*[13] the court was presented with a case which could not be equitably solved. An election on proposed charter amendments was held in Chattanooga as required by three private acts[14] which fixed the voter requirements as in general elections, thus disfranchising a portion of the electorate.[15] The court was asked to determine who was

6. Tenn. Code Ann. § 5-1102 (Supp. 1959), amending Tenn. Code Ann. § 5-1102 (1956) to include 'industrial park' under the County Recovery and Post War Act of 1945.

7. Tenn. Code Ann. § 70-1835 (Supp. 1959), amending Tenn. Code Ann. § 70-1835 (1956) to allow assessment of "benefits" by Watershed Districts smaller than 250,000 acres in excess of 25% of the assessed evaluation for tax purposes.

8. Tenn. Code Ann. § 5-1039 (Supp. 1959) (exempting capital outlay notes and bond anticipation notes issued by counties from state and local tax).

9. Provides for business-like budgeting by quarterly county courts as the clearing house for county departments.

10. Tenn. Code Ann. § 6-1609 (Supp. 1959).

11. Tenn. Code Ann. §§ 48-1702 to -1720 (Supp. 1959).

12. Tenn. Code Ann. § 48-1708 (Supp. 1959).

13. 313 S.W.2d 256 (Tenn. 1958).

14. Tenn. Priv. Acts 1957 chs. 73, 193, 240.

15. By the pleading of the city, taken as admitted. That nonuniform voter requirements are possible, see Trotter v. Maryville, 191 Tenn. 510, 235 S.W2d. 13 (1950) and 29 C.J.S. *Elections*, § 13(a) (1942). The degree of non-uniformity which is allowable is open to some question. Need for a study of attenuation of the franchise, to ascertain how much of a "republican form of government" actually exists, is indicated by such cases as this. When a body of delegates representing the whole state decides issues concerning purely local affairs, the value of a local resident's franchise is watered down. An index to the degree of self government actually exercised could be ascertained by multiplying the fractional ratio of voters to total population in the locality affected by an enactment times the fractional ratio of their representatives to the total of representatives having a vote on the issue. A one-to-one ratio

liable for the costs—the city, a portion of whose electorate were not allowed to vote, or the county which would be chargeable for a general election but whose residents were not involved or enfranchised. The court assessed the election expense to the city.

The *Franklin Special School District* case[16] arose as a result of the legislative-judicial creation of a systematized educational plan, which must work within the frame of pre-existing institutions. The court held that the intent of the statutes[17] requiring the trustee to pay over to special school districts a pro rata share[18] of school funds was to preclude "double" taxation on county residents who were within a special school district not supported by the county, and upheld the power of the county administration[19] to issue bonds for the limited purpose of building a high school. The decision negated the claim of Franklin Special School District (whose territorial area is contiguous with Williamson County) to a proportional share in the proceeds of bonds limited on their face to high school purposes, pledging taxes which were issued to replace a high school destroyed by fire, because Franklin Special School District maintains only primary schools and does not discharge the duty of the county[20] to provide adequate secondary education.

The case of the *City Judge of Elizabethton*[21] presents, as do most governmental cases either directly or indirectly, a constitutional question as well as a matter of statutory construction. The question of whether the legislature may, by private enactment[22] creating the appointive office of city judge and vesting the judge with the criminal jurisdiction of a justice of the peace, circumvent the constitutional requirement of election of judges, is a matter which is left for constitutional scholars.[23] The issue of statutory interpretation decided in the case, however, is subject to considerable question. The legislature, as part of a judicial reform plan, by private act,[24] divested the justices of the peace of Carter County of authority to try criminal cases. The court held that the city judge was not thereby divested of that author-

would indicate a theoretical 'pure' democracy, impossible to achieve unless infants, etc., are enfranchised. However, the degree of deviation from one-to-one could be used to provide an objective and non-political test for minimum requirements for democratic choice.

16. Guffee v. Crockett, Trustee, 315 S.W.2d 646 (Tenn. 1958).
17. TENN. CODE ANN. §§ 49-711, -712, -715 (1956).
18. Based on school population.
19. The quarterly county court in this instance.
20. The county's duty is established by TENN. CODE ANN. § 49-201 (1956).
21. City of Elizabethton v. Carter County, 321 S.W.2d 822 (Tenn. 1959).
22. Tenn. Priv. Acts 1937, art. II, ch. 437.
23. The point, however, is now moot except for validity of past acts by an appointive judge. The legislature corrected the situation by enacting TENN. CODE ANN. § 6-3302 (Supp. 1959), fixing qualifications for, and requiring popular election of, city judges.
24. Tenn. Priv. Acts 1943, ch. 333.

ity. The holding is, in effect, that the reference to justice of the peace in the 1937 act was purely descriptive of the powers *then* existant in the office of justice of the peace, as though the enactments relative thereto were adopted by reference. Thus, no new enactment relative to justices of the peace would either expand or limit the powers of the city judge.[25] The court did not consider the alternative probability that the language of the legislature was consistent with an intention to keep jurisdiction of criminal matters uniform between justices of the peace and the city judge, thus preventing confusion and overlapping. The majority opinion cited the usual rule that repeal by implication is not favored, and did not construe the City Judge Act of 1937 as in *pari materia* with the current acts dealing with the authority of Carter County justices of the peace.[26]

The problem of attaining sufficient uniformity to promote efficient administration of local affairs is, of course, compounded by the Tennessee system of private acts based upon negligable distinctions.[27]

An attempt to use the courts to resolve a dispute over inspection of the books of the Supervisor of Roads of Rhea County by the Purchasing and Finance Commission of that county, both offices created as agencies of the county by the 1955 Private Acts,[28] failed.[29] The court sustained the defendant supervisor's demurrer on the basis that neither agency had the capacity to sue or be sued. In the process of distinguishing cases involving quasi corporations and *Park Comm'rs v. Nashville*,[30] on the basis of necessarily implied power to sue, the court gave considerable weight to defendant's contention that the courts are without authority to supervise the executive affairs of the county.[31]

Contract relations involving statutory offer and acceptance, actions by sovereigns under enabling legislation, and adoption of varied terms of contract by action were at issue in appeals joined for hearing in the Sixth Circuit in which Sevier County, the State of Tennessee, the United States (Department of Interior and/or Park Commission for Great Smoky National Park) and Southern Bell Telephone Co.,

25. See 82 C.J.S. *Statutes* § 370 (1953).

26. *Id.* § 366; 50 AM. JUR. *Statutes* § 36 (1944).

27. 50 AM. JUR. *Statutes* § 50 (1944); 82 C.J.S. *Statutes* § 159 (1953). These authorities contain in notes and the supplement a compilation of Tennessee cases indicating that Tennessee is a minority of one, except in a few instances where Mississippi is also reluctant to let go of legislative power to enact special legislation. See also cases cited in the annotations to TENN. CONST. art. 1, § 8 (1870). The vicissitudes of this system were recognized early by most states. See 50 AM. JUR. *Statutes* § 36 (1944).

28. Tenn. Priv. Acts 1955, ch. 313.

29. Abel v. Welch, 315 S.W.2d 268 (Tenn. 1958).

30. 134 Tenn. 612, 195 S.W. 694 (1915).

31. See also 14 AM. JUR. *Courts* § 198 (1938).

were all adverse parties.[32] The opinion, however, is less than clear as to the basis for the decision. Some aspects of the case will be discussed in the section on Eminent Domain which follows.

Three Public Acts concerning inter-governmental relations were passed during the survey period. Chapter 67[33] deletes from *Tenn. Code Ann.* section 67-3047, the provision excluding municipalities incorporated subsequent to 1957 with less than 1,000 population from participation in sales tax fund distribution and clarifies the method of ascertaining population for determination of the ratio of entitlement to the tax fund. Chapter 261[34] provides for delegation of control of certain municipality owned utilities to a Board of Trustees by the Municipality. Chapter 267,[35] which amends *Tenn. Code Ann.* section 57-622 to provide that fifty per cent of the proceeds of sale of vehicles confiscated for violation of the liquor tax provisions be paid to any incorporated municipality whose police officers seized the vehicle, should result in more rigorous enforcement of the liquor tax law.

III. RELATIONS OF LOCAL GOVERNMENT AND PRIVATE PARTIES

1. Eminent Domain—Procedure.—In *City of Knoxville v. Roach*[36] the court determined that the time for appeal[37] to the circuit court from an order for possession and award of compensation in ordinance method condemnation[38] runs from the date the order is entered, not from the date of receipt of notice of the order. In this case the appeal was considered by the court as commenced by a letter, although the statutory language contemplates filing in circuit court.

Chapters 194,[39] and 269,[40] of the Public Acts of 1959 deal with procedural matters. Chapters 216[41] and 204[42] delegate the condemnation power to counties for highway purposes and to certain senior colleges,[43] respectively.

2. Substance—Sovereignty and Condemnation.—The *Southern Bell* case decided in the Sixth Circuit[44] presents several issues which

32. 256 F.2d 244 (6th Cir. 1958).
33. TENN. CODE ANN. § 67-3047 (Supp. 1959).
34. TENN. CODE ANN. § 6-1511 (Supp. 1959).
35. TENN. CODE ANN. § 57-622 (Supp. 1959).
36. 319 S.W.2d 225 (Tenn. 1958).
37. Twenty days.
38. TENN. CODE ANN. §§ 6-1000 to -1013 (1956).
39. TENN. CODE ANN. § 23-1405 (Supp. 1959), amending TENN. CODE ANN. § 23-1405 (1956).
40. TENN. CODE ANN. § 49-804 (Supp. 1959), amending TENN. CODE ANN. § 49-804 (1956).
41. TENN. CODE ANN. § 23-1528 (Supp. 1959).
42. TENN. CODE ANN. § 23-1506 (Supp. 1959).
43. The problem involved in delegation of condemnation powers to private corporations other than public utilities is considerable. See 18 AM. JUR. *Eminent Domain* § 34 (1938).
44. Tennessee v. United States, 256 F.2d 241 (6th Cir. 1958).

deserve more extensive treatment than is provided here. The court determined: that the United States was entitled to obtain fee title to lands for construction of a highway to be supervised by the Director of Great Smoky National Park by condemnation procedure;[45] and that the U. S. was entitled to be indemnified by Tennessee for compensation required to be paid to Southern Bell, under a covenant in deed by Tennessee to the United States gratuitously made;[46] and that Southern Bell was entitled to compensation both for temporary relocation of its telephone line done at the request of the U. S. (which was also assessed against Tennessee)[47] and for permanent relocation of that portion of its line originally located by its predecessor in interest on private land (off the right-of-way owned by Sevier County and/or Tennessee);[48] and that the State of Tennessee might require Southern Bell to relocate at its own expense that portion of the line originally located on the county-state right-of-way, thus exercising the police power of Tennessee and the eminent domain power of the U. S. in conjunction;[49] and that agreements between Sevier County and Tennessee[50] required that Sevier County pay one-third of the "compensation" assessed against Tennessee.

45. Authority for the action of the United States is a 1944 act of Congress, 48 Stat. 964 (1934), 16 U.S.C. § 403 (h) (1952), which provides for acceptance by the Secretary of Interior on behalf of the United States of donations of land or interests in land to construct a scenic highway into Great Smoky Nat'l Park to be under the control of the Park. By what authority the Department of Interior demanded fee title by exercise of the power of eminent domain for this purpose is not discussed in the opinion. The Statute does not provide for the acquisition of land for the purpose of a scenic parkway outside the park boundaries by condemnation. See: 18 AM. JUR. *Eminent Domain* § 115 (1938) to the effect that the power of condemnation is ordinarily limited to the least estate necessary to serve the public purpose. The federal condemnation power is a legislative power. 18 AM. JUR. *Eminent Domain* § 9 (1938). See also Annot., 79 A.L.R. 515 (1932); and Ann. Cas. 1918E, 41; cited therein.

46. The exhibits included in the court's opinion are referred to but not reproduced here.

47. The rationale of the assessment was that the gratuitous covenant of Tennessee to obtain settlement with Southern Bell was breached, although the time problem was not discussed. Presumptively, Tennessee was entitled to a reasonable time to accomplish the settlement before the United States was entitled to substitute litigation.

48. Nowhere in the opinion is the issue of the title of Southern Bell discussed. The interest is described as a perpetual easement or franchise. If a franchise, it is not validly granted affecting use of private property. Such a grant by the state would constitute a taking without due process. Richmond v. Southern Bell, 174 U.S. 761 (1956); Annot., 6 A.L.R. 1326 (1920); 18 AM. JUR. *Eminent Domain* § 130 (1938). If an easement, Southern Bell presented no muniment of title but claimed solely by use. There is every indication that such use was not openly adverse since the line was intended to be run on the state right of way, and the court did not consider any duration requirements, but concluded that the right of Southern Bell, whatever its nature *vested* at the time the pole-line was erected.

49. Construing the retained powers in TENN. CODE ANN. § 65-2105-6 (1956) granting the right to use streets and highways to public utilities.

50. See note 46 *supra*. The basis of the decision included facts not reported in the opinion and was limited in application to the instant case only.

The case of *City of Shelbyville v. Kilpatrick*,[51] presented the Tennessee court with the problem of whether condemnation is required in a peculiar factual situation. City had acquired a lot in a subdivision restricted, by plot entry duly recorded, to residential use. The city proposed to erect a water tower thereon and sought a declaratory judgment adjudicating whether it could be required to pay "compensation" to other lot owners in the subdivision. City claimed that all limitations on use of land by restrictive covenant were ineffective against it, when acting in its capacity as a sovereign.[52] The court held that the covenant created an "equitable easement" since the other owners might seek injunction against breach; that, as such, it created an interest in land which might not be taken without compensation; and that compensation is equivalent to damages, *if any are sustained*.[53] The court's argument is, of course, non sequitur. No injunctive or other relief, legal or equitable, except possibly damages for breach of the restriction, is obtainable *against a sovereign*. The real issue is whether a sovereign may interpose police power immunity to avoid liability for breach of a restrictive covenant. The non sequitur, however, flows from excellent authority.[54] The result of the case is in accord with the trend limiting sovereign immunity by broad construction of "property,"[55] although the rationale is doubtful because of its property right implications.

3. Police Power—Zoning.—During the survey period there were two cases decided relating to zoning and one statute was passed. The statute[56] provides for "district" zoning by the chief legislative body of a municipality extending beyond the boundaries of the municipality. The only protection afforded to out-of-town residents in such a district is a possible protest voice and the reserved power of the county to supersede such "district" zoning. The statute attenuates the "representation" afforded to the individuals whose property is to be

51. 322 S.W.2d 203 (Tenn. 1959).

52. For authority supporting sovereign power to inflict indirect damage without entry under police power, see 122 A.L.R. 1465 (1939), cited by the court. See also 29 C.J.S. *Eminent Domain* § 110 (1941); 18 AM. JUR. *Eminent Domain* § 132 at 756 n. 9 (1938). *Contra*, Johnstone v. Detroit, 245 Mich. 65, 222 N.W. 325 (1928); Annot., 67 A.L.R. 373 (1928). The issue is more realistically described as a determination of whether damages resultant from the sovereign act are immediate or remote. See 29 C.J.S. *Eminent Domain* §§ 110, 111 (1941); 18 AM. JUR. *Eminent Domain* § 132 at 757 n. 10 (1938).

53. The fact that the city is acting as sovereign should provide a prima facie case of benefit to the residents rather than damage. This open issue could shift the burden of going forward with evidence and practically annul the significance of this case. Compare the question left open with the rationale of cases supporting the right of the sovereign under the police power to immunity from consequential damages cited in note 52 *supra*.

54. See note 52 *supra*.

55. See authorities cited in note 52 *supra*.

56. TENN. CODE ANN. § 13-711 (Supp. 1959).

affected. The statute may have little practical effect, however, since the Tennessee Supreme Court reaffirmed its position strictly interpreting zoning laws adversely affecting free use of property.[57]

In *City of Norris v. Bradford*,[58] the court struck down an ordinance prohibiting front yard fencing in residence zones, in an opinion saying that the police power may not be exercised solely to promote the aesthetic taste of a governing body. The court cited two cases which it said were the only cases relating directly to the Norris type of ordinance.[59]

In *State ex rel. Wright v. City of Oak Hill*[60] the Tennessee court ordered building permits issued to two complainants. The court held that powers of City Managers or Zoning Boards are restricted to those specifically conferred by legislation, ordinance or charter; that zoning laws are to be construed strictly in favor of the common law property right of unlimited user; and that mandamus is a proper remedy to obtain permits unlawfully withheld by an administrative official.

4. Sovereign vs. Private Persons.—McConnell v. Lebanon has been treated in the section on finance. Tort cases, covered in another portion of the survey are excluded from this section.[61] The only other case decided by the Supreme Court of Tennessee during the survey period to be covered in this subsection is *Hughes v. Commissioners*.[62] In that case the court[63] sustained the enactment[64] authorizing a Board of Electrical Examiners and the code provision of Chattanooga[65] effectuating the act which excluded certain classes of persons from the licensing requirement, on the basis of the usual rule of reasonable classification. The court also approved the adequacy of the membership of the board[66] and the fairness of their requirement that all three

57. Red Acres Improvement Club v. Burkhalter, 193 Tenn. 79, 241 S.W.2d 921 (1951); State *ex rel.* Wright v. Oak Hill, 321 S.W.2d 557 (Tenn. 1959).

58. 321 S.W.2d 543 (Tenn. 1959).

59. *In re* Parker, 214 N.C. 51, 197 S.E. 706 (1938); Williams v. City of Hudson, 219 Wis. 119, 262 N.W. 607 (1935). An annotation on this subject appears in 66 A.L.R.2d 1295 (1959), citing Bellaire v. Lamkin, 317 S.W.2d 43 (Tex. 1958), Annot., 6 A.L.R.2d 1289 (1949), which reaches a result contra to the Tennessee case.

60. 321 S.W.2d 557 (Tenn. 1959).

61. For discussion of Henry v. Nashville, 318 S.W.2d 567 (Tenn. App. M.S. 1958), see Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350 (1959).

62. Hughes v. Board of Comm'rs of City of Chattanooga, 319 S.W.2d 481 (Tenn. 1958).

63. Opinion by Justice Burnett for unanimous court.

64. Tenn. Priv. Acts ch. 572 (1933).

65. CHATTANOOGA, TENN. CODE ch. 15.

66. Included were an electrical engineer, teacher, electrical contractor, journeyman electrician, representative of the Chattanooga Electrical Power Board, representative of the Tennessee Inspection Bureau, and a member not connected with the industry.

parts of the examination[67] for licenses be passed at one time.[68] The case reiterates the usual rule relating to causes for which a court may overturn the findings of an administrative tribunal.[69]

5. *Tax.*—Four statutes were passed relating to local government tax matters. Chapter 67 is reported above. Chapter 188[70] furthers the legislative policy of liberal local financing laws by exempting county capital outlay notes, bond anticipation notes, and tax anticipation notes from state and local taxes. Chapter 53[71] amended *Tenn. Code Ann.* section 70-1835 to allow watershed districts of less than 250,000 acres to assess more than twenty-five per cent of the assessed value of lands as benefits of the district. Chapter 184[72] affects a procedural detail relating to delinquent tax lists, amending *Tennessee Code Annotated* section 67-1304.

6. *Elections and Representations.*—See cases and statutes discussed elsewhere herein relating indirectly to elections and representation.[73] The local election laws generally do not reflect a cohesive policy of representation, and would be a timely subject for a study much beyond the scope of this survey.

7. *Officers and Employees.*—Several enactments effecting salaries of specific officers and employees were passed during the survey period.[74]

67. The propriety of the examination was sustained on the basis of the authorities by whom it was constructed (Purdue University professors) although Hughes contended that some of the questions were susceptible of more than one correct answer.

68. Hughes claimed to have passed all sections at different times.

69. See 42 AM. JUR. *Public Administrative Law* § 209 at 611 (1942).

70. TENN. CODE ANN. § 5-1039 (Supp. 1959).

71. TENN. CODE ANN. § 70-1835 (Supp. 1959).

72. TENN. CODE ANN. § 67-1304 (Supp. 1959).

73. TENN. CODE ANN. § 13-711 (Supp. 1959); City of Elizabethton v. Carter County, note 21 *supra;* Election Comm'rs v. Chattanooga, note 13 *supra.* TENN. CODE ANN. §§ 6-3601 to -3608, -3114 to -3116, -3118 to -3121 (Supp. 1959), relating to election of specified officers referred to in the next section of this article, "Officers and Employees."

74. TENN. CODE ANN. § 8-2403 (Supp. 1959), amending TENN. CODE ANN. § 8-2403 (1956) (salaries of corporation clerks and company officers); TENN. CODE ANN. § 8-2409 (Supp. 1959) (salaries and fees of chancery courts); TENN. CODE ANN. § 5-834 (Supp. 1959), amending TENN. CODE ANN. § 5-834 (1956) (compensation of county revenue commissioners); TENN. CODE ANN. §§ 6-3302 to -3304 (Supp. 1959), amending TENN. CODE ANN. §§ 6-3302 to -3304 (1956) (providing that the salary of such judges may not be related to fines, penalties, etc.) TENN. CODE ANN. §§ 5-616 to -618 (Supp. 1959) is a new act providing for appointment of stenographic and clerical help by county judges and county chairmen and fixes minimum salaries in countries by population class. The act specifically does not amend existant private acts on the subject. That exception is, of course, an invitation to litigate the constitutionality of the except clause as an arbitrary classification, not based on a real difference in law or fact. See note 25 *supra.*

Two statutes, chapters 187[75] and 189,[76] deal with county officials' surety bonds. Chapter 137[77] amends sections 6-3602 and 6-3603 of the *Code.* The amendment to 3602 changes only two words, but the change could produce confusion.[78] The amendment of 3603 in the same chapter merely deletes "and in the same manner"[79] from the first sentence providing for adoption of the election procedure for councilmen in board of education elections under the alternative new incorporation law.[80] Chapter 321[81] amends section 6-3101, relating to election of councilmen, to specify voter and councilmanic districts when the incorporated area includes portions of election precincts.

Chapters 138,[82] 139,[83] 140,[84] all deal with the city government organization established in sections 6-3001 to 6-3618.[85] Chapter 138 provides for adoption of that type of incorporated government. Chapter 139 contains amendments of *Tenn. Code Ann.* sections 6-3002, -3004, -3104, -3105, -3108, -3114, -3115, and -3118, providing for definitions of terms, mode of adoption or surrender of this enabling legislation, election qualification, conduct of elections, four year terms of councilmen, vacancies in council and recall. Chapter 140 creates a new act, section 6-3119, providing for election of a justice of the peace within the incorporated area who will be a member of the quarterly county court.

Two cases decided during the survey period involve procedure to review discharge of an employee of a local government unit. In *Mayor*

75. New act fixing minimum amounts of surety bond required of County Trustee, based upon county revenues handled by him. TENN. CODE ANN. § 8-1103 (Supp. 1959).

76. TENN. CODE ANN. § 8-1911 (Supp. 1959), amending TENN. CODE ANN. § 8-1911 (1956), by adding uniform condition for surety bonds of all county officials.

77. TENN. CODE ANN. §§ 6-3602, -3603 (Supp. 1959).

78. "Members shall be nominated by petition and elected in the same manner and at the same times and places . . ." is the language affected. "Elected" is changed to "election" and "times" is changed to "time." The net effect is to provide that candidates are nominated: (1) by petition only—if the language change does not affect the meaning; (2) either by petition or by primary election—if the "and" is read as a disjunctive (or); (3) both by petition and by primary election, both methods of nomination being required to obtain a place on the ballot—if a logical sum conjunctive was intended.

79. This change would seem to indicate that the change in § 6-3602 was intended to accomplish the "either-or" result indicated by the second construction in note 78 *supra.*

80. TENN. CODE ANN. § 6-3103 (Supp. 1959).

81. TENN. CODE ANN. § 6-3101 (Supp. 1959).

82. TENN. CODE ANN. § 6-3006 (Supp. 1959).

83. See Sections of TENN. CODE ANN. Cited in note 73 *Supra.*

84. TENN. CODE ANN. §§ 6-3119 to -3121 (Supp. 1959).

85. These sections are an effort to provide a uniform governmental system for municipal corporations, avoiding the troublesome problem of dealing with the individual problems resulting from the institutions developed by prior local acts by providing for voluntary local adoption.

of Jackson v. Thomas,[86] the court of appeals, western section,[87] determined that the action of the Mayor of Jackson (discharging four or five commissioners of the City Housing Authority based upon his determination that their action in voting for discharge and thereby discharging the Executive Director of the Housing Authority constituted failure to perform their duties and misconduct in office) was a judicial as distinguished from a ministerial act[88] and was, therefore, in absence of a specified appeal procedure, reviewable by certiorari. The court then ruled that the action of the commissioners did not constitute misconduct or justify their discharge.[89]

In *Lansden v. Tucker*,[90] the supreme court overruled an order of reinstatement by the circuit court. The circuit judge had ordered reinstatement based upon the failure of the Civil Service Commission to forward a transcript of evidence in its return to the writ of certiorari[91] sued out by Tucker. The return did contain the Commission's summary of testimony, which the supreme court ruled was sufficient to require a determination on the merits by the circuit court, and the cause was remanded for that purpose.[92]

In *State ex rel. Atkin v. Knoxville*,[93] the power assumed by the Civil Service Commission to "waive" the provisions of section 65 of the city charter of Knoxville,[94] designed to preclude nepotism, was overruled by the court. The decision is in accord with authority cited in section 12.80 of *McQuillen, Municipal Corporations* (3d ed. 1949), which was cited with approval by the court.

In *Keeble v. City of Alcoa*[95] the court reasserted the doctrine that statutory provisions enunciating the policy of the state regarding relationships which exist between governmental agencies and private parties do not apply to the detriment of the sovereign unless specific

86. 313 S.W.2d 468 (Tenn. App. W.S. 1957).
87. Certiorari denied, Dec. 6, 1957.
88. Case contains a considerable brief on the distinction. The court approved the definition of a ministerial act in 42 AM. JUR. *Public Officers* § 29, at 900 (1942), and a definition of judicial act as "an act resulting from judgement or discretion based upon evidence received at hearing provided by law," from 23 WORDS & PHRASES 113 (1959).
89. Grounds for discharge of commissioners are set out, generally, in Housing Authority Law, TENN. CODE ANN. § 13-911 (1956). Grounds for discharge of the executive director are discretionary with the appointing authority, and no mode is provided by statute.
90. 321 S.W.2d 795 (Tenn. 1959).
91. Under the provisions of TENN. CODE ANN. § 27-914 (1956), a common law writ.
92. The ruling could render the writ of certiorari nugatory as far as review of sufficiency of evidence is concerned. The summary of the tribunal will always support its conclusions unless the tribunal is vastly stupid.
93. 315 S.W.2d 115 (Tenn. 1958).
94. This section dealing with the powers of the Civil Service Board was held by the court to be "purely administrative."
95. 319 S.W.2d 249 (Tenn. 1958).

language certifies an intention to include the sovereign. Plaintiff had contested her discharge, claiming that the sole cause thereof was her membership in a labor organization. The court cited several authorities, placing considerable reliance upon *United States v. Mine Workers*[96] in which the United States Supreme Court construed the Norris-LaGuardia Act as inapplicable to the United States. The opinion in that case does not support the use made of the decision by the Tennessee court.[97] The application of Norris-LaGuardia to the United States generally would have extended that enactment far beyond the limits expected by Congress. Secondly, the Tennessee court did not determine whether the Right-to-Work Law[98] terminated a pre-existing right or privilege of the sovereign, or whether the enactment changed the policy of Tennessee with regard to cause for discharging employees.[99]

96. 330 U.S. 258 (1947).

97. The opinion in the *Mine Worker's* case refers to and relies upon statutory history. The rule as stated by the court is that "statutes which in general terms divest pre-existing rights and privileges will not be applied to the sovereign without express words to that effect . . . a rule of construction only." 330 U.S. at 272-73. For decisions not applying that construction rule see cases cited by the Supreme Court, 330 U.S. at 273 n.21. The Court further said: "we need not place entire reliance in this exclusionary rule." 330 U.S. at 273. See also the special concurrence of Justice Frankfurter. 330 U.S. at 307. The *Mine Workers* case has been further explained and limited on the ground that the diversity nature of the case was cause for judicial circumspection. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 224 (1957).

98. TENN. CODE ANN. § 50-208, 209 (1956).

99. That discrimination by municipality in favor of union laborers may constitute a denial of equal protection of the laws (and presumably the same principle would apply to discrimination against union laborers), see 12 AM. JUR., *Constitutional Law* § 503 (1938); *contra,* 16 C.J.S. *Constitutional Law* § 213 at 1160 n. 27.75 (1956).