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# Constitutional Law -- 1962 Tennessee Survey

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## I. Delegation of Legislative Power to Metropolitan Charter Commission

The eighth amendment of the 1953 amendments to the constitution of Tennessee[1] authorizes the General Assembly to "provide for" the consolidation of city and county governments subject to approval of such consolidations by majority vote of both the voters within a city and those in the county outside the city. Obviously, the legislature could itself pass a general act, or various private acts, proposing charters under which city and county governmental functions could be merged in one metropolitan government. Instead, it authorized the preparation and proposal of such charters in the state's four largest counties by local commissions which could be established

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1. Tenn. Const. art. 11, § 9, para. 9: "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."

either pursuant to resolutions of both the city and county governing bodies in a particular county or pursuant to private act of the legislature.[2]

These general acts and a private act[3] establishing a metropolitan charter commission for Nashville and Davidson County were held to be constitutional delegations of legislative power in *Frazer v. Carr*.[4] A unanimous Supreme Court of Tennessee affirmed a chancellor's ruling that such delegation was a lawful means of "providing for" consolidation. The decision cleared the way for Nashville's new metropolitan government, the charter of which had already been approved by the required popular referendum.[5]

The court's decision on the delegation issue was based principally upon two grounds: (1) In view of the legislative object, and considering that local conditions would vary from county to county, the court construed the constitutional phrase "may provide for" as sufficiently broad to authorize legislative delegation to local commissions so that "the needs of, and reliefs to, each such county and principal city in that county would be placed in the hands of representatives therein who respectively knew the respective needs of such governmental entities."[6] In other words, this particular delegation was constitutionally permissible from an interpretation of the language of the constitutional grant of legislative power involved. (2) The general legislation also contains sufficient "guide lines" to govern the charter commission in its "preparation of a charter suitable for the needs of the particular governmental entity it was serving."[7] These guiding legislative standards are not discussed, but the court obviously refers to the detailed listing in section 6-3711 of the Tennessee Code Annotated of numerous mandatory specific charter provisions and general considerations for the commission's guidance in proposing a charter. It views these as sufficient legislative standards to control the exercise of delegated legislative power. This brings this case within the scope of generally valid legislative delegations and is sufficient to justify the holding.

If one accepted as an absolute proposition the bare maxim that legislative power generally cannot be delegated, it would be difficult

2. TENN. CODE ANN. § 6-3704 (Supp. 1962). The basic metropolitan government statute was enacted in 1957 and includes §§ 6-3701 through 6-3723. Section 6-3703 limits the entire chapter to counties of more than 200,000 population in 1950. The procedure for creating a charter commission in a county was originally limited to establishment by resolutions of city and county governing bodies, but a 1961 amendment added § 6-3704(b) authorizing creation of a commission by private act.

3. Private Acts of Tenn., ch. 408 (1961).

4. 360 S.W.2d 449 (Tenn. 1962).

5. The case is also discussed in the Local Government survey article, p. 800 *infra*, and subsequently in this article under class legislation, p. 667 *infra*.

6. 360 S.W.2d at 453.

7. *Id.* at 454.

to attach any magic to the simple words, "may provide for," in an underlying constitutional grant to the legislature. Such language is hardly sufficient to authorize the use of an otherwise unconstitutional legislative technique. Under Tennessee decisions prior to the 1953 amendments it was doubtful whether the legislature had constitutional power to provide for city-county consolidations by laws dependent for their effectiveness upon approval by vote of the people.[8] Amendment eight clearly authorizes the legislature to pass a law otherwise complete in itself detailing the terms of consolidation and not only permits, but affirmatively requires, that its effectiveness depend upon approval by a dual city-county referendum. To this extent it clearly made a significant change in the constitutional law of Tennessee. But to ascribe to the mere words, "may provide for," the effect of an affirmative grant of authority to make otherwise invalid delegations of legislative power would be giving these words a far-reaching effect of constitutional change not apparent from their ordinary meaning.

Suppose the consolidation legislation was clearly in conflict with some specific section of the constitution. Could it be contended that this language gave the legislature *carte blanche* to override any and all constitutional provisions which were impediments to a desired scheme of consolidation? The words, "provide for," appear at several other points in the constitution of Tennessee and in each instance they appear to be the simple language of an ordinary grant of power to the General Assembly to legislate upon a particular subject.[9] These words alone could hardly be regarded as authorizing the legislature to override other constitutional provisions or to delegate legislative power if it could not otherwise do so.[10] The words "may provide for"

8. Halmontaller v. City of Nashville, 206 Tenn. 64, 332 S.W.2d 163 (1960); Wright v. Cunningham, 115 Tenn. 445, 91 S.W. 293 (1905). *But see* Clark v. State *ex rel.* Bobo, 172 Tenn. 429, 113 S.W.2d 374 (1938), allowing local referendum to determine the applicability in a particular county of legislation complete in itself and designed to operate throughout the entire state.

9. TENN. CONST. art. 11, § 7 (the legislature "may provide for" a conventional rate of interest); art. 6, § 15 (the legislature shall have power "to provide for" the appointment of justices of the peace); art. 11, § 8 (the legislature shall "provide" by general laws for the organization of corporations).

10. TENN. CONST. art. 11, § 9, para. 6, one of the home rule amendments, expressly authorizes proposal of charters or amendments for home rule municipalities by charter commissions similar to those used here. Such commissions may be "provided for" by act of the legislature and elected by the voters of the municipality, or in the absence of enabling legislation such a commission may be elected pursuant to a petition signed by ten per cent of the voters of the municipality. Since this amendment was proposed and adopted concurrently with the eighth amendment, if one looks solely to technical context and language it is arguable that the express authorization of local charter commissions here implied an intent of the framers of the 1953 amendments that such commissions were not to be used in proposing metropolitan charters of consolidation. Although the court's opinion does not deal with this point, the two provisions are distinguishable in that the home rule amendment was intended to be self-executing

should be regarded as merely conferring new legislative authority in an otherwise doubtful area. Other established principles of law justify upholding the legislative method employed in exercise of this new authority.

What the court actually did was to exercise a commendable deference to the legislature's choice of delegation as a means of carrying out a legitimate legislative purpose. This is involved in the second ground of the court's reasoning: that the legislative power had been delegated under sufficient legislative standards to guide and limit its exercise by the charter commission. There is no constitutional prohibition against delegation of legislative powers, and upholding the metropolitan charter commission procedure is not a departure from sound precedent in this respect. Reasonable delegations are one form of legitimate means to legislative ends, and *Frazer v. Carr* affords a good opportunity to put the so-called "non-delegation" doctrine in proper perspective.

The constitution of Tennessee, in common with those of most states and of the United States, contains no express prohibition against delegation of legislative powers. The non-delegation doctrine, here as elsewhere, has been based solely upon the typical clause vesting the sovereign legislative power of the state in the General Assembly.[11] This basic provision has never prohibited reasonable delegations under adequate legislative standards as a means of exercising legislative powers. Scholarly studies have concluded that the non-delegation doctrine, as a principle of constitutional law, "is built upon the thinnest of implication, or is the product of the unwritten super-constitution."[12] Professor Davis describes it as a "judge-made corollary of laissez-faire, inconsistent with positive government."[13] The doctrine is virtually a dead letter at the federal level and for many years has largely received only lip service from state courts. At the most it may now be said to require only that the legislature declare basic

and to provide a procedure whereby local voters could initiate procedures to amend or establish municipal charters if the legislature failed to act. This made it necessary for the constitution itself to specify some local procedure for evolving home rule charters. See Washington County Election Comm'n v. City of Johnson City, 209 Tenn. 131, 350 S.W.2d 601 (1961); Kirby, *Constitutional Law—1961 Tennessee Survey (II)*, 15 VAND. L. REV. 847, 849 (1962). Specification of local charter commission procedures under a self-executing constitutional provision should not preclude the legislature from using the same method under a provision which it must implement.

11. "The legislative authority of this State shall be vested in a General Assembly . . . ." TENN CONST. art. 2, § 3. The separation of powers clause provides that "no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others . . . ." TENN. CONST. art. 2, § 2. This prohibits only delegation of legislative power to the judicial and executive branches to insure the three branches' independence of each other.

12. Duff & Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 196 (1929).

13. DAVIS, ADMINISTRATIVE LAW § 16, at 58 (one vol. ed. 1951).

policy and furnish sufficiently precise standards for the exercise of delegated power.[14] Convincing argument is made that non-delegation doctrine is "completely obsolete" and that it is now unreal even to state it in terms of legislative standards because numerous cases uphold delegations in the absence of any actual standards, either by implying a standard from the statutory context or by ignoring the supposed requirement of a standard.[15]

Judicial persistence in the non-delegation rule has frequently led the courts to uphold legislative delegations as conferring non-legislative power or in Justice Holmes' phrase, a power "softened by a *quasi*."[16] This reasoning process has been put in a syllogism by Professor Cushman as follows:

> *Major premise*: Legislative power can not be constitutionally delegated by Congress.
>
> *Minor premise*: It is essential that certain powers be delegated to administrative officers and regulatory commissions.
>
> *Conclusion*: Therefore the powers thus delegated are not legislative powers.[17]

The courts thus often label the powers delegated by the legislature as either "administrative" or "quasi-legislative," rather than concede that the legislature has been allowed to exercise a portion of its power through a subordinate body.

The trend towards upholding reasonable delegations without such semantics is more than a recognition of the demands on modern government. It is actually a return to fundamental constitutional principles. As early as 1825 Chief Justice Marshall said on the subject:

> It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . .
>
> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.[18]

If the courts had more consistently followed Marshall's lead, cases

14. MERRILL, ADMINISTRATIVE LAW 48-58 (1954).
15. Davis, *op. cit. supra note* 13, § 27, at 86-88.
16. Springer v. Government of the Phil. Islands, 277 U.S. 189, 210 (1928).
17. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 429 (1941). See also Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 567 (1947).
18. Wayman v. Southard, 23 U.S. (10 Wheat.) 43-44 (1825).

like *Frazer v. Carr* would be less difficult. Numerous delegations of legislative power have been upheld in Tennessee, either by labeling the delegated power as "administrative" or by applying an exception to the non-delegation doctrine where the legislature sets forth adequate standards to govern the exercise of the delegated power.[19] It is easy to find cases in which delegations have been upheld under less precise standards than those governing metropolitan charter commissions under section 6-3711. For instance, in 1960, in *Gamble v. State*[20] the Supreme Court of Tennessee upheld a delegation to a county board of health in which the only legislative guide was that the board was to make such regulations as it deemed necessary "for the protection of the public health." A criminal conviction for violating such a regulation was affirmed. It would be small comfort to the defendant in such a case to tell him that the board's action was only "administrative" or "quasi-legislative" because, as Professor Schwartz has observed, he is certainly not imprisoned in a "quasi-cell."[21]

Unlike the local health board in *Gamble*, the Nashville Metropolitan Charter Commission was not exercising purely legislative powers because its actions did not automatically have the effect of law. Proposing the charter was ouly tentative in the legislative process. Only an affirmative vote of the people of Davidson County could breathe life into the charter and promulgate it into law, and this delegation was specifically authorized by the constitution.

Allowing the legislature to utilize local commissions for proposing the terms of consolidation charters is certainly desirable since such bodies are more likely to be able to make the extensive study necessary to produce a charter responsive to the complex needs of metropolitan communities. The alternative would require that these complicated, technical judgments be made by only the legislature sitting in its brief biennial assembly.

The concluding ground of the court's holding may be the best: "To be invalid a statute must be 'plainly obnoxious to some constitutional

19. One of the more candid dccisions is Richardson v. Reese, 165 Tenn. 661, 57 S.W.2d 797 (1933), which collects several earlier cases upholding delegations of legislative power and which quotes with approval this statement from 12 C.J. *Constitutional Law* § 323, at 84 (1917): "'With the growing complexity of modern life, the multiplication of the subjects of governmental regulation, and the increased difficulty of administering the laws, there is a constantly growing tendency toward the delegation of greater powers by the legislature, and toward the approval of the practice by the courts.'" *Id.* at 667, 57 S.W.2d at 799. See also Department of Pub. Welfare v. National Help "U" Ass'n, 197 Tenn. 8, 270 S.W.2d 337 (1954), and the general discussion in Sanders, *Administrative Law—1955 Tennessee Survey*, 8 VAND. L. REV. 940 (1955).

20. 206 Tenn. 376, 333 S.W.2d 816 (1960).

21. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 30 (2d ed. 1962).

provision.' "[22] It is a vain search to try to find a provision of the constitution of Tennessee offered by the metropolitan charter commission.

## II. Right to Jury Trial: Special Findings Without General Verdict

The plaintiff's constitutional right to trial by jury was denied by the use of Tennessee's procedure for special jury findings in *Harbison v. Briggs Brothers Paint Manufacturing Co.*[23] Plaintiff contractor alleged that he purchased from defendant paint dealer a can of liquid "bug killer" to be used in killing fleas in the basement of a residence. He also alleged that the defendant negligently failed to warn him that the liquid was dangerously inflammable and as a result when he used it, it exploded and severely burned him.

The jury had already been held beyond their regular term of service when the case was ready for submission to them. The pleadings and evidence raised several issues of fact including the question of whether defendant had actually sold the item to plaintiff. The trial judge submitted this question alone to the jury and instructed them that if they found for the defendant on this issue, the case would be concluded and the defendant exonerated from liability—but that if they found for the plaintiff, additional issues would then be submitted to them. The jury found the issue in favor of the defendant, and judgment was entered dismissing plaintiff's action. The court of appeals held that it was error to submit a single interrogatory to the jury but that in this case it was harmless because this factual question was determinative of plaintiff's right to recovery. The supreme court reversed in a divided opinion holding that plaintiff had a constitutional right to have all the issues submitted to the jury and to have the jury return a general verdict in addition to any special findings.

The error of the trial court was induced by the fact that the applicable statute does not expressly require a general verdict. Section 20-1316 of the Tennessee Code is as follows:

> *Special Verdicts.*—The trial judge, in his discretion, especially where the questions for solution are several or involved, may direct and supervise the formulation of special issue or issues of fact for submission to and answer by the jury. The response or responses of the jury shall have the force of other verdicts at law.

22. 360 S.W.2d 449, 457 (1962), quoting from City of Chattanooga v. Fanburg, 196 Tenn. 226, 235, 265 S.W.2d 15, 20 (1954).
23. 354 S.W.2d 464 (Tenn. 1962).

This provision appeared in the 1932 Code under the title "Special Issues"[24] and as construed by the supreme court in the instant case, it does not authorize "special verdicts" as such but only special findings in response to interrogatories submitted to the jury. Although the two procedures are frequently confused there are important differences between special verdicts and special findings in response to interrogatories. A special verdict is in lieu of a general verdiet; it "finds all the facts involved in the case, but refers the decision of the case upon those facts to the court."[25] The instant case precludes the use of special verdicts in Tennessee by holding that the right to jury trial includes the right to a general verdict.[26] Section 20-1316, as interpreted, authorizes the submission of special issues or interrogatories to the jury only when accompanied by general instructions and a charge that the jury should accompany its special answers or findings with a general verdict.

The majority disagreed with the court of appeals that the error was harmless, partly because of the time element involved. It could have rested its decision solely on this point. The jury might well have been influenced, in their hold-over status, by the court's advice that a special finding for defendant would conclude the case and immediately free them from further duty. It is generally error for the court to inform the jury of the legal effects resulting from particular special answers.[27] The court also applied the established rule that the harmless error statute will not be applied when the error invades a constitutional right.[28]

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24. TENN. CODE ANN. § 10346 (Williams 1934). There is some disagreement on whether the procedure was employed without statutory authority prior to 1932. HIGGINS & CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES 580 (1937); Wicker, *Trials and New Trials Under the New Federal Rules*, 15 TENN. L. REV. 570, 575 (1939). However, in Turney v. Mobile & O.R.R., 3 Tenn. Civ. App. 628, 632 (1912) the use of special jury findings together with a general verdict is discussed at length, and lower courts are advised to use the procedure more frequently. Judge Higgins states that if findings on a special issue conflict with a general verdict, the former controls the judgment. The practice appeared earlier in Clark v. Keith, 76 Tenn. 703 (1882), but there the court stated that if a special finding were irreconcilably in conflict with the general verdict, it would "feel constrained to reject the special finding and proceed as if there had been none." *Id.* at 709.

25. ABBOTT, CIVIL JURY TRIALS 951 (5th ed. 1935). See also Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923); Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296 (1926); Comment, *Special Issues of Fact in Tennessee: A Look Behind the General Verdict*, 22 TENN. L. REV. 1039 (1953).

26. The court states that although no Tennessee case holds that a jury may be required to render a special verdict, "a jury may be instructed to return a special verdict, in the event they cannot agree on a general verdict." 354 S.W.2d at 469, citing Keith v. Clarke, 72 Tenn. 718 (1880).

27. Wicker, *supra* note 25, at 303.

28. Dykes v. State, 201 Tenn. 65, 296 S.W.2d 861 (1956); Tennessee Gas Transmission Co. v. Vineyard, 191 Tenn. 331, 232 S.W.2d 403 (1950); Ford v. State, 101

The court's reasoning at several points emphasizes the common law privilege of a jury to decline to return anything but a general verdict, expressly holding the return of a general verdict to be an element of the right to jury trial in Tennessee.[29] Suppose special issues are properly submitted to a jury and it returns special findings which conflict with its general verdict. Does its right to return only a general verdict mean that inconsistent special findings must be disregarded and judgment entered on the general verdict? It could be argued that the right and power of the jury to return only a general verdict implies a correlative duty of the court to accept it and enter judgment accordingly regardless of inconsistent special findings which the jury could have withheld completely. This would reduce special findings to mere procedural devices to direct the jury's attention to particular issues. The *Harbison* holding requires no such result.

Statutes authorizing special interrogatories to juries are widespread; it is generally held that, although every effort will be made to reconcile inconsistent special findings with the general verdict, if there is an unavoidable conflict between them, the special findings control and judgment should be entered accordingly.[30] This does not violate the right to trial by jury as guaranteed in federal courts by the seventh amendment to the United States Constitution.[31] The power of a federal district court to disregard the general verdict is expressly stated in Rule 49B of the Federal Rules of Civil Procedure.

The provision of the second sentence of section 20-1316 that the jury's responses shall have "the force of other verdicts at law" is construed by one treatise as giving them the legal effect of special verdicts and thereby requiring that judgment be entered in accordance with the special finding rather than the general verdict.[32] In its discussion in the instant case the court noted that Tennessee's statute is "more or less similar" to special interrogatory procedures of other jurisdictions and by way of dictum said that "in case of conflict between such answers and the general verdict, the answers control."[33]

The paucity of reported cases indicates that the special interrogatory procedure is little used in Tennessee. The opinion in the *Harbi-*

Tenn. 454, 47 S.W. 703 (1898); Shook & Fletcher Supply Co. v. City of Nashville, 47 Tenn. App. 339, 338 S.W.2d 237 (M.S. 1960).

29. 354 S.W.2d 464 *passim*.

30. Turney v. Mobile & O.R.R., 3 Tenn. Civ. App. 628 (1912) (dictum); ABBOTT, CIVIL JURY TRIALS 998 (5th ed. 1935); Wicker, *supra* note 25, at 298; HIGGINS & CROWNOVER, *op. cit. supra* note 24, at 582. For a case going to considerable lengths to reconcile a special finding with a general verdict, see Lenoir Car Works v. Littleton, 41 Tenn. App. 323, 293 S.W.2d 585 (E.S. 1956).

31. Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593 (1897).

32. HIGGINS & CROWNOVER, *op. cit. supra* note 24, at 580.

33. 354 S.W.2d at 470 (dictum).

*son* case goes far to clarify the procedure, and perhaps special interrogatories will now be more widely employed to prevent juries from disregarding the court's instructions behind the cloak of a general verdict. Special interrogatories force the jury to pay special attention to specific points and tend to insure that the law is applied to the facts as found by the jury. This does not infringe the right to jury trial; it limits the jury to its proper function. The court did the bar a service in this case by going beyond what was necessary for its disposition to discuss the history, purpose, and proper usage of special jury findings in Tennessee.

## III. DUE PROCESS OF LAW: IN PERSONAM JURISDICTION OVER NONRESIDENT INDIVIDUAL

In *Goldberg v. Dean*[34] the Secretary of Labor brought suit in the United States District Court for the Western District of Tennessee against individuals operating a government surplus store in Memphis for minimum wages and overtime payments due employees under the Fair Labor Standards Act. One defendant resided in Missouri and process was served pursuant to section 20-218 of the Tennessee Code[35] upon his agent, who supervised the store and resided in Memphis. The district court held that such service was authorized by Tennessee law and that it subjected the nonresident defendant to in personam jurisdiction without violating due process of law.

The decision is in accord with modern holdings on jurisdiction over nonresident individuals doing business in a state, but it is somewhat unusual in that the court applied the pertinent Tennessee statute in a situation where its application had been held unconstitutional by the Supreme Court of Tennessee, in a decision which has never been expressly overruled. In 1919, in *Knox Bros. v. E. W. Wagner & Co.*,[36] the Tennessee court declared that this general statutory provision for service of process upon an agent of a defendant in counties other than that of the defendant's residence could not be applied constitutionally to a nonresident defendant who lived outside the state. However, the court there had relied on the decision of the United States

34. 200 F. Supp. 161 (W.D. Tenn. 1961) (default judgment).

35. "When a corporation, business trust, or any person has an officer or agency, or resident director, in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein in all actions brought in such county against same growing out of the business of, or connected with, said principal's business; but this section shall apply only to cases where the suit is brought in such counties in which such agency, resident director, or office is located." TENN. CODE ANN. § 20-218 (1956). Rule 4(d)(7) of the Federal Rules of Civil Procedure authorizes service in the manner prescribed by the law of the state in which service is made.

36. 141 Tenn. 348, 209 S.W. 638 (1919).

Supreme Court in *Flexner v. Farson*[37] holding unconstitutional a Kentucky statute providing for service upon the resident agent of a nonresident individual in suits arising out of business done in that state. *Flexner* has since totally lost its vitality as a result of the case of *Henry L. Doherty & Co. v. Goodman*[38] and the landmark decision in *International Shoe Co. v. Washington*,[39] which established the current standard,—such "minimum contacts" within the state that prosecution of a suit does not offend traditional ideas of fairness and justice.

In a well reasoned opinion, the court in *Goldberg v. Dean* traces the erosion in Tennessee of the principle of the *Knox Bros.* case. The leading case now is *McDaniel v. Textile Workers Union of America*,[40] which upheld the Tennessee statute providing for substituted service upon unincorporated associations and organizations doing business in Tennessee. Concluding that Tennessee courts would no longer follow *Knox Bros.*, the court then felt free on both statutory and constitutional grounds to reject the *Knox Bros.* case and to apply the clear language of the Tennessee statute in the present case.[41]

An interesting collateral question which the court did not consider is the effect of the previous state court holding of unconstitutionality upon the statute involved.[42] One writer has suggested that, despite the erosion of the basis of the *Knox Bros.* decision, the statute should perhaps be reenacted by the Tennessee legislature in order to give it new vitality.[43] However, the *Knox Bros.* decision did not declare

37. 248 U.S. 289 (1919).

38. 294 U.S. 623 (1935). The *Goodman* case held a nonresident partnership dealing in securities subject to Iowa in personam jurisdiction, but emphasized that the business was one particularly susceptible to state regulation.

39. 326 U.S. 310 (1945).

40. 36 Tenn. App. 236, 254 S.W.2d 1 (E.S. 1952). The statute involved, TENN. CODE ANN. § 20-223 (Supp. 1962), now also applies to nonresident partnerships. The nonresident business is required to appoint a resident agent for service, and service upon the secretary of state is authorized if such agent is not appointed. A federal case refusing to apply this section to a nonresident individual doing business in Tennessee under a trade name is Robertson v. Cumberland Gap Fuel Co., 202 F. Supp. 801 (E.D. Tenn. 1962). Section 20-218 is not available against an individual defendant unless he *employs* a resident agent in his business within the state. See note 35 *supra*.

41. For a case holding that jurisdiction of federal courts in Tennessee over nonresidents is determined solely by federal law see First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962), 16 VAND. L. REV. 422 (1963).

42. Although the statement is sometimes made that a statute declared to be unconstitutional is "not a law" or that it is inoperative, conferring no rights and imposing no duties, Norton v. Shelby County, 118 U.S. 425, 442 (1886), the better view is that since the courts have no power to repeal or abolish a statute, if it remains on the books and the decision declaring it unconstitutional is overruled, it then becomes effective. See BARRETT, BRUTON, & HONNOLD, CONSTITUTIONAL LAW: CASES AND MATERIALS 110 (1959).

43. Overton, *Constitutional Law—1959 Tennessee Survey*, 12 VAND. L. REV. 1096, 1098 (1959).

the statute unconstitutional, but merely held that its application to the particular facts of that case would deny due process of law.[44] Consequently, reenactment should not be necessary in order for the statute now to be applied to facts like those of the discredited *Knox Bros.* decision.

## IV. DUE PROCESS: EXPULSION FROM PUBLIC UNIVERSITY WITHOUT HEARING

During lunch counter "sit-ins" in Nashville in 1960, the Tennessee Board of Education adopted a regulation requiring the prompt dismissal of any college or university student "arrested and convicted on charges involving personal misconduct." The plaintiffs in *Knight v. State Board of Education*[45] were students at Tennessee A. & I. State University who traveled to Jackson, Mississippi, in 1961 as "freedom riders." There they refused to leave a bus terminal waiting room in response to orders from local police and were arrested and convicted under a Mississippi disorderly conduct statute. While they were in jail perfecting appeals, the discipline committee of the university, after an *ex parte* proceeding without notice, suspended them from further attendance.

Although letters of dismissal informed the students that their cases might be "reconsidered" if they later showed they had not violated the policy of the state board, when the students protested the action after release from jail, they were informed by the university president that their only recourse was to the courts. The students then brought this suit in the United States District Court for the Middle District of Tennessee, alleging that their dismissals denied them due process of law. This charge was sustained; plaintiffs were granted injunctive relief prohibiting their expulsion from school for misconduct without fair notice and opportunity for a hearing. The court did not pass on the merits of their dismissals, but only on the procedural question. The decision follows the recent holding of the Fifth Circuit Court of Appeals in *Dixon v. Alabama State Board of Education*,[46] where a similar result was reached with respect to Negro pupils dismissed from an Alabama college as a result of "sit-in" demonstrations.

On the narrow point of the right of a student in a public university to at least minimal standards of procedural due process before expul-

44. The statute makes no reference to nonresidents of the state but deals with all actions brought in a county other than that in which the defendant resides. See note 35 *supra*. As applied to suits against Tennessee residents in counties other than those in which they live, it has never been questioned.

45. 200 F. Supp. 174 (M.D. Teun. 1961).

46. 294 F.2d 150 (5th Cir. 1961), 14 ALA. L. REV. 126 (1961), 50 GEO. L.J. 314 (1961), 75 HARV. L. REV. 1429 (1962), 60 MICH. L. REV. 499 (1962), 38 N.D.L. REV. 346 (1962), 35 TEMP. L.Q. 437 (1962), 15 VAND. L. REV. 1005 (1962).

sion, the decision is in accord with the weight of authority,[47] and it does no real violence to Tennessee precedents. The leading Tennessee case is *State ex rel. Sherman v. Hyman*,[48] which passed upon a similar claim made by students expelled from the medical department of the University of Tennessee for alleged theft and sale of examination questions. After notice of the investigation concerning them, the medical students were successively afforded hearings before a special board of students, a faculty committee, and a special committee of the board of trustees. At each stage they were informed of the substance of the testimony against them and permitted to testify and present evidence in rebuttal. This procedure was reviewed by the Supreme Court of Tennessee to determine whether the students were dismissed or suspended "without notice and a fair hearing." Although denying that due process of law applied to academic disciplinary proceedings, the court laid down requirements for notice and hearing which are at least in accord with most rudiments of fair procedure.[49] Although the *Sherman* decision has been criticized for denying accused students the right to confront and cross-examine witnesses against them,[50] the court indicated that the student must be at least advised of the nature of the charge against him and of the names of his accusers. The Fifth Circuit Court of Appeals in the *Dixon* case agreed that a full-fledged right of confrontation and cross-examination is not necessary under these circumstances, and the district court's opinion in the *Knight* case referred to both *Dixon* and *Sherman* for guide lines to an adequate hearing.

The court did not question the power of university governing officials to promulgate the regulation involved; the decision concerned only the procedure by which it is determined whether a particular student has violated it. At the time of these plaintiffs' dismissal the discipline committee could not have known the nature of their

47. Since public school administration involves the action of governmental agencies, most cases indicate expressly, or by implication, that some form of notice and hearing are required before dismissal of a student. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 111, 171 S.W.2d 822, 826 (1942); Annot., 58 A.L.R.2d 903 (1958). No such rule applies to private schools, which are not limited by due process; in them the student's rights generally depend upon his contract of admission. However, there is some division of authority. *Compare* Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923) *and* John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924), *with* Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904).

48. 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).

49. "We think the student should be informed as to the nature of the charges, as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. He cannot claim the privilege of cross-examination as a matter of right. The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him." 180 Tenn. at 109-10, 171 S.W.2d at 826.

50. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1408 (1957).

conduct. By its terms, the regulation applied only to convictions involving "misconduct." While convictions of some offenses, such as murder, rape, or larceny, might reasonably be determined to be violations of the regulation without the need for formal notice and hearing, minor criminal violations, such as traffic offenses or the charge involved here, might, after a hearing and upon a full consideration of the facts, be held by the authorities not to involve "misconduct."

The decision in *Knight* is in accord with the trend of considering a citizen's right to procedural due process when injured by action of a governmental agency without regard to whether a "right" or "privilege" is involved.[51] The court expressly rejects this distinction, noting that regardless of labels there is involved "an interest of almost incalcuable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training."[52] Following a recent indication by the United States Supreme Court that determination of procedural due process standards in a given situation should turn upon consideration of "the nature both of the private interest which has been impaired and the governmental power which has been exercised,"[53] the court readily concluded that due process required that these plaintiffs be given notice and an opportunity to be heard.

When any governmental body injures an individual citizen in his enjoyment of a valuable interest, minimal requirements of procedural due process should be met unless there is some overriding public interest in allowing unfettered administrative action. The legitimate discretion needed by higher education officials in governing public colleges and universities is not likely to be infringed by recognition of basic principles of fair play. Examination of the numerous cases decided on this subject from various jurisdictions indicates that procedures which are usually followed as a matter of course by university officials will be held adequate by the courts.[54]

## V. EQUAL PROTECTION: LEGISLATIVE APPORTIONMENT

The long legal battle for constitutional representation of urban voters in the Tennessee legislature took a spectacular turn during the survey period with the historic decision of March 26, 1962, in *Baker*

51. See DAVIS, ADMINISTRATIVE LAW § 69 (1951); SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 122, 178 (2d ed. 1962); Forkosch, *American Democracy and Procedural Due Process*, 24 BROOKLYN L. REV. 173 (1958).

52. 200 F. Supp. at 178.

53. Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961).

54. See cases collected in Annot., 58 A.L.R.2d 903 (1958).

*v. Carr*.[55] The United States Supreme Court held that urban Tennessee voters stated a cause of action within the jurisdiction of the federal courts when they sought relief from denial of equal protection of the laws by invidious discrimination against them in the apportionment of the Tennessee legislature. The prior proceedings in the lower federal courts[56] and related proceedings in the Tennessee courts[57] have been treated in previous survey articles and the Supreme Court's decision has spawned a plethora of legal writing[58] matched in recent years only by the school desegregation case. Attention will be given here to subsequent proceedings in the United States district court and the Tennessee legislature.

Upon remand the District Court for the Middle District of Tennessee set a pre-trial conference for May 7, 1962, at which the defendants indicated they would not contest the allegations of the complaint and defend the constitutionality of the 1901 apportionment. They asked instead for a stay of the proceedings until a planned special session of the legislature could consider new apportionment legislation. The court continued the hearing until June 11, 1962.

Consequently, an extraordinary session of the eighty-second Gen-

55. 369 U.S. 186 (1962), 15 VAND. L. REV. 985 (1962). The proceedings on remand are reported at 206 F. Supp. 341 (M.D. Tenn. 1962).

56. Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959). Discussed in Kirby, *Constitutional Law—1960 Tennessee Survey*, 13 VAND. L. REV. 1021, 1029 (1960).

57. Kidd v. McCanless, 200 Tenn. 282, 292 S.W.2d 40 (1956). Discussed in Sanders, *Constitutional Law—1957 Tennessee Survey*, 10 VAND. L. REV. 1002 (1957).

58. The most comprchensive single eollection of materials is *The Problem of Malapportionment: A Symposium on Baker v. Carr*, 72 YALE L.J. 7 (1962), containing seven articles by distinguished writers. Among other individual articles devoted to the subject are: Bonfield, *Baker v. Carr: New Light on the Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962); Cormack, *Baker v. Carr and Minority Government in the United States*, 30 W. & M.L. REV. 282 (1962); Cox, *Current Constitutional Issues—Reapportionment*, 30 TENN. L. REV. 28 (1962); Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329 (1962); Edwards, *Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to Baker v. Carr*, 15 VAND. L. REV. 1265 (1962); Emerson, *Malapportionment and Judicial Power: The Supreme Court's Decision in Baker v. Carr*, 22 L. IN TRANS. 125 (1962); Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673 (1962); Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 AM. U.L. REV. 51 (1962); Israel, *On Charting a Course Through the Mathematical Quagmire*, 61 MICH. L. REV. 107 (1962); Katzenbach, *Some Reflections on Baker v. Carr*, 15 VAND. L. REV. 829 (1962); Lancaster, *What's Wrong With Baker v. Carr*, 15 VAND. L. REV. 1247 (1962); McCloskey, *Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252; Tyler, *Court Versus Legislature*, 27 LAW & CONTEMP. PROB. 930 (1962); Waddington, *Legislative Appointment and the Courts*, 24 ALA. L. REV. 65 (1963). Case notes and student material include: 27 ALBANY L. REV. 45 (1963); 42 B.U.L. REV. 553 (1962); 63 COLUM. L. REV. 98 (1963); 11 CATHOLIC U.L. REV. 96 (1962); 12 DE PAUL L. REV. 133 (1962); 30 GEO. WASH. L. REV. 1010 (1962); 34 MISS L.J. 117 (1962); 13 MERCER L. REV. 445 (1962); 41 TEXAS L. REV. 132 (1962); 36 TUL. L. REV. 853 (1962); 24 U. PITT. L. REV. 171 (1962); 15 VAND. L. REV. 985 (1962).

eral Assembly was held from May 29 to June 6, pursuant to call of the Governor. Two separate statutes resulted, one reapportioning seats in the house of representatives[59] and the other dealing with the senate.[60] Both were approved by the Governor on June 7th. The pleadings in the federal court action were then amended to bring into issue the constitutionality of the new statutes, and in a decision announced June 22, 1962, the three-judge district court indicated its opinion that the new apportionment was also unconstitutional.

The court concluded that equal protection requires that representation in at least one house of the legislature be based exclusively upon population or numbers of qualified voters, but that the other house may be apportioned upon some other rational basis. The fact that neither of the two new apportionments was based upon population settled the fate of the 1962 legislation. The court chose, nonetheless, to examine each apportionment to give the next legislature the benefit of its views on permissible "rational plans" for representation in whichever house is not apportioned according to population.

The 1962 apportionment of the house of representatives came close to meeting the test of rationality. Its basis is a "two-thirds rule" derived from the requirement of the Tennessee constitution that the ninety-nine house members be apportioned "among the several counties or districts, according to the number of qualified voters in each" but with any county having "two-thirds of the ratio" entitled to one member.[61] The 1962 act extended this principle to apply to floterial districts comprised of two or more counties each.[62] This gave a representative to sixteen floterial districts having less than the full

59. Tenn. Public Acts Extraordinary Sess. 1962, ch. 1. This will be codified under TENN. CODE ANN. §§ 3-101 to -106, which deals with apportionment of the General Assembly.

60. Tenn. Public Acts Extraordinary Sess. 1962, ch. 3. The old provision was TENN. CODE ANN. § 3-107 (Supp. 1962). Chapter 2 of these acts submitted to referendum the question of calling a constitutional convention to consider legislative apportionment, with delegates to be elected under the 1901 house apportionment. This was approved at the November 1962 general election.

61. TENN. CONST. art. 2, § 5. The parties agreed in this proceeding that "qualified voters" should be determined by the number of persons twenty-one years of age and over according to the 1960 Census and that this was the basis used by the legislature. The state's "voting population" was 2,092,891, thus making 21,140 qualified voters the ratio for house members. Two-thirds of the ratio is 14,093.

62. This is presumably done in order to allow significant representation to counties having less than the two-thirds ratio by combining them wherever possible into a district meeting this requirement. Instead of "floterial," the apportioning statute uses the term "joint representatives" and sets forth twenty-nine districts of two or more counties each which jointly elect one representative from the district. Every district contains at least one county not entitled to its own direct representative. Every district "floterial" comes from the custom under which such representatives rotate or "float" by local agreement or practice. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1957) defines a "floater" in political usage as "one who represents an irregular constituency, as one joined by the union of two counties, neither of which has a number sufficient to be allowed a (or an extra) representative of its own."

ratio and, like the application of the two-thirds rule to individual counties, had the effect of taking seats which would go to more populous counties if population were the sole criterion.

Nonetheless, if consistently followed, the court was of the opinion that the two-thirds plan for distribution of seats in one house would be predicated upon an acceptable rational basis. It affords a measure of protection in the legislature to governmental subdivisions of the state which, despite their lack of a full ratio of voters, nevertheless have substantial population and significant interests in state legislative policy. In the words of the court, "The State has the right, if it sees fit, to assure that its smaller and less populous areas and communities are not completely overridden by sheer weight of numbers."[63]

While approving the two-thirds rule in principle, the court found that its implementation in this instance had produced some inequities and unjustifiable discriminations which should be corrected. Loudon County with 14,054 voters was represented only by participation in a floterial district with Blount County, having 32,849 voters, but Fayette County with 11,652 voters was awarded a direct representative, as was Sevier County with only 14,011 voters. Anderson County, with 33,554 qualified voters, was limited to one direct representative while three counties with considerably lower populations were each given a direct representative and were also included in floterial districts.

Turning to the Senate apportionment, the court found a "crazy quilt" with no trace of a rational plan. Neither geography, demography, nor governmental subdivisions could explain it. The population ratios varied from 35,773 to 92,777 voters per senator. Although the malapportionment heavily favored rural voters over urban voters, the rural-urban discrimination could not account for the pattern or demonstrate a consistent scheme. Looking only at rural districts, those in east Tennessee ranged from 71,856 to 79,801 voters each, while those in middle Tennessee only ranged from 35,773 to 39,812 voters. West Tennessee rural voters were near the rural average, ranging from 40,306 to 51,119 per district. Middle Tennessee rural voters obviously were heavily favored within the rural population, largely at the expense of those in east Tennessee. Area differentials were examined and found to bear no consistent relationship to representation. Nor did the number of counties per senatorial district which, excluding urban areas, varied from two counties to nine. Looking only at the urban senatorial districts, the court found similar internal discrimination, with the district ratios ranging from 67,121 to 92,772.

The court relegated to footnote treatment the only justification

63. 206 F. Supp. at 346.

apparently advanced by the defendants as a rational scheme for the senate apportionment: to allot three seats to each of the state's nine congressional districts and then distribute the extra six seats among districts having the largest areas. Not only was this a sort of "boot strap" operation by which one malapportionment was urged to justify another, but the court found that the scheme had not actually been followed because the six extra seats had not been allocated on the basis of area.

Having dealt with the mathematical problem, the court then turned to the more difficult question of the remedy to be applied. If the 1962 statutes were declared unconstitutional, the court could hardly avoid also invalidating the 1901 act which is subject to greater constitutional infirmity. This would raise the difficult problem of the decision of the Supreme Court of Tennessee in *Kidd v. McCanless*,[64] which held state judicial relief unavailable to remedy legislative apportionment, partly on the ground that the *de facto* doctrine could not be applied to maintain members of the legislature in office if the statute under which they were elected were declared unconstitutional. Although hinting at disagreement with the Tennessee court's view of the *de facto* doctrine and indicating doubt that a federal court enforcing the federal constitution would be bound by the state court's viewpoint, the court chose a path which avoided this question for the time being. It specifically limited its opinion to an "expression of views" on the constitutionality of the 1962 acts and refrained from declaring them unconstitutional at this time. This enabled the 1963 General Assembly to be elected on the basis of the 1962 statutes and gave a new legislature, elected under a less discriminatory apportionment, an opportunity to enact a new apportionment in accordance with the court's guide lines. Noting that the 1962 legislature did not have the benefit of the court's opinions, the court expressed confidence that the next legislature, elected under a somewhat improved apportionment, would enact a plan in compliance with the commands of the United States Constitution. The court, therefore, reserved final judgment in the case until after the meeting of the 1963 General Assembly of Tennessee, but not later than June 3, 1963.

A similar procedure has been followed by at least three other federal district courts,[65] and the court's course is a wise equitable abstention in the hopes of minimizing conflict between federal and state governments and avoiding what the court termed a potential "far more drastic form of relief which could conceivably entail a

64. 200 Tenn. 282, 292 S.W.2d 40 (1956).

65. Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962); Sims v. Frink, 205 F. Supp. 245 (M.D. Ala. 1962); Magraw v. Donovan, 163 F. Supp. 184 (Minn. 1958).

direct intrusion into state affairs."[66] This obviously refers to the possibility of apportionment and supervision of elections under judicial decree.

The 1963 General Assembly responded with new reapportionment legislation for both the house and senate. Reports are that this legislation will also be challenged and that the final chapter has not yet been written concerning reapportionment in Tennessee.

The case of *State v. Bomar*[67] involves a related development in the Tennessee courts. A petitioner for the writ of habeas corpus had been convicted of rape and sentenced to death by electrocution. He alleged that the statutes permitting his electrocution[68] were unconstitutional because they were enacted by a legislature chosen pursuant to the 1901 legislative apportionment. He acknowledged that the *de facto* principles of *Kidd v. McCanless*[69] require generally that the courts enforce laws passed by the legislature in order to prevent confusion and chaos, but urged that the court except statutes whose nonenforcement would not produce confusion or chaos, which he alleged to be the case in this instance.

The Supreme Court of Tennessee understandably felt that it would at least promote confusion if it attempted to select among the statutes of Tennessee passed since 1901 and invalidate particular ones on this basis. The court also refused to accept the speculative conjecture that if the legislature had been properly apportioned the offense of capital punishment would have been abolished in 1959. In both respects the holding is difficult to criticize.

## VI. Legislative Classification: Suspension of General Law for One County

*Frazer v. Carr*,[70] the Nashville metropolitan charter case, involved a challenge that the charter was promulgated by a legislative procedure which suspended the state's general laws on city-county consolidations in favor of the citizens of a particular county, in violation of article 11, section 8, of the Tennessee constitution. The original metropolitan charter statute provided a single method of creating charter commissions: concurrent resolutions of the separate governing

66. 206 F. Supp. at 360.

67. 354 S.W.2d 763 (Tenn. 1962).

68. Tenn. Code Ann. §§ 39-3702, 40-3117 (1956). Since Tennessee statutes making rape a capital offense date from 1871, the petitioner would not have been aided by attacking post-1901 re-enactments of those statutes. The statutes providing for execution in the electric chair date from 1913, when this method was substituted for hanging.

69. *Supra* note 64.

70. 360 S.W.2d 449 (Tenn. 1962), also discussed in this article under "Delegation" and in the survey article on Local Government.

bodies of a city and county within the coverage of the act.[71] A 1961 amendment to the statute provided that a charter commission also could be created in the manner provided by private act of the General Assembly.[72] The Nashville Charter Commission was established in this manner by a private act designating by name eight members of the commission and providing for appointment of two others.[73]

In upholding the metropolitan charter against this argument, the court relied on the 1961 amendment's limitation of the private act authorization to counties within the original law's population requirements.[74] This was viewed as a reasonable classification which limited the private act procedure to the state's four largest urban counties. But this reasoning ignores the fact that these are the same counties under the original coverage of the metropolitan charter law and that consequently no classification whatever was made by this amendment.[75] The private act creating the Nashville Charter Commission was the law which made classification an issue by singling out Nashville and Davidson County for treatment different from that given the other three major urban centers.

The court doubtless could have conceived a possible basis for the legislature's provision of a special charter procedure for Nashville,[76] but the opinion does not discuss the point. In the absence of such considerations the case is difficult to reconcile with prior decisions invalidating suspensions of general laws for the benefit of one county where no reasonable basis for the classification was shown.[77]

## VII. LEGISLATION CLASSIFICATION: EXEMPTION FROM CARRIER REGULATION

*Gasoline Transport, Inc. v. Crozier*[78] involved a 1961 amendment to

71. TENN. CODE ANN. § 6-3704(a) (Supp. 1962).
72. TENN. CODE ANN. § 6-3704(b) (Supp. 1962).
73. Tenn. Priv. Acts 1961, ch. 408.
74. Counties having populations in excess of 200,000 under the 1950 census. TENN. CODE ANN. § 6-3703 (Supp. 1962).
75. It is donbtful that the amendment added anything to the power of the legislature to vary the operation of the general law with respect to a particular county. The Supreme Court has previously indicated that such bootstrap lifting cannot aid special legislation. "[T]he Legislature has undertaken to authorize a suspension of the general law by Private Act, which cannot be done under the State Constitution." Board of Educ. v. Shelby County, 207 Tenn. 330, 355, 339 S.W.2d 569, 580 (1960). Discussed in Kirby, *Constitutional Law—1961 Tennessee Survey*, 14 VAND. L. REV. 1171, 1189 (1961).
76. Such as that a local city or county governing body might have a special interest in preventing the people from voting on a metropolitan charter and that an alternative procedure was desirable to enable the voters to obtain metropolitan government without affirmative action by such bodies.
77. *E.g.*, Board of Educ. v. Shelby County, 207 Tenn. 330, 339 S.W.2d 569 (1960); Town of McMinnville v. Curtis, 183 Tenn. 442, 192 S.W.2d 998 (1946).
78. 355 S.W.2d 98 (Tenn. 1962).

the Motor Carrier Act which exempted any vehicle used in the transportation of petroleum products from the operation of the act "when the owner, lessee or bailee of the vehicle is legally and regularly engaged in the business of selling or distributing such petroleum products transported on such vehicle."[79] This relieved such a carrier from obtaining either a common carrier's certificate of convenience and necessity or a contract hauler's permit. Common carriers brought suit against the defendant Crozier alleging that the exemption was an unconstitutional statutory discrimination. Crozier was a distributor of petroleum products who received the products on consigment and was paid on a commission basis. He had previously utilized a common carrier to haul the products from the oil company's terminal to his place of business. Under a different arrangement made possible by the new law, he was transporting the products in his own vehicles and operating without any sort of authority from the public service commission. Defendant's commissions were increased under the new arrangements and complainants apparently viewed this as making him a carrier for hire, who would be subject to regulation by the commission except for the exemption.

The Supreme Court of Tennessee upheld the exemption noting that it applies to any vehicle used to transport petroleum products where the vehicle's operator is engaged in the business of selling or distributing such products. This was viewed as giving the operator of the vehicle an interest in the transported products unlike that of an ordinary contract hauler or common carrier, who is concerned only in compensation for his transportation services, and thus justifying different treatment by the legislature. This seems reasonable since the effect is to place the businessman transporting commodities which he holds on consignment on the same basis as a private carrier who has his own vehicle for transporting goods which he owns outright.

A better question, not dealt with by the opinion, is whether the legislature can single out those transporting consigned petroleum products for more favorable treatment than persons similarly situated with respect to different categories of freight.[80] However, it is not clear from the facts of this case that the defendant would have been treated as a contract hauler furnishing transportation for hire without the statutory exemption since he apparently was only paid commissions for selling the products and not specifically for hauling them.

79. TENN. CODE ANN. § 65-1503 (Supp. 1962).

80. *Cf.* Dilworth v. State, 204 Tenn. 522, 319 S.W.2d 481 (1959), invalidating statutory discrimination between private carriers and carriers for hire with respect to weight limitations designed to protect highways from damage. It would seem that discrimination based on the nature of the cargo in *Crozier*, like that based on the nature of the vehicle in *Dilworth*, bears no reasonable relation to the legislative purpose in either instance.

In any event, the common carrier plaintiffs could hardly complain that the legislature had not created a broader class of favored consignees.

## VIII. EQUAL PROTECTION: RACIAL DISCRIMINATION

A quickened pace in judicially enforced desegration in Tennessee is indicated both by the volume and the nature of the holdings in such cases decided by the federal courts during the survey period. One case from Tennessee was decided by the United States Supreme Court and three others went to the highest court for review.

*Turner v. City of Memphis*[81] demonstrates the flexibility and directness with which the federal judicial system can operate on occasion. Plaintiff had been refused non-segregated service in a restaurant operated by private lessee at the Memphis Municipal Airport. Defendant relied upon a regulation of the Division of Hotel and Restaurant Inspection of the Tennessee Department of Conservation which required separate seating of the races in public eating places. Plaintiff moved for summary judgment alleging that the regulation was unconstitutional because of its obvious racial discrimination. Treating the case as an action to restrain enforcement of a state administrative order for alleged unconstitutionality, the district court convened a three-judge court, which ordered the suit held in abeyance under the abstention doctrine[82] while the plaintiff prosecuted a declaratory judgment suit in the Tennessee state courts in order to obtain interpretations of the state laws involved.[83] Uncertain of his appellate remedy,[84] the plaintiff perfected appeals to both the Sixth Circuit Court of Appeals and to the United States Supreme Court.

In a per curiam opinion, the Supreme Court cut through the procedural tangle and brought the case to a quick conclusion in favor of the plaintiff. The three-judge district court was held improperly convened because the regulation was plainly invalid under the four-

81. 369 U.S. 350 (1962).

82. Harrison v. NAACP, 360 U.S. 167 (1959); Alabama Pub. Serv. Comm. v. Southern Ry., 341 U.S. 341 (1951); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

83. 199 F. Supp. 585 (1961).

84. If the action is one requiring a three-judge court under 28 U.S.C. § 2284 (1958), appeal from an order denying or granting an interlocutory or permanent injunction is made direct to the Supreme Court under 28 U.S.C. § 1253 (1958). But where no substantial question of unconstitutionality is presented, the single district judge should dispose of the action without convening a three-judge court, whether the challenged state law is obviously constitutional, *Ex parte* Poresky, 290 U.S. 30 (1933), or obviously unconstitutional, Bailey v. Patterson, 368 U.S. 963 (1962). If a three-judge court is improperly convened, its action is treated as that of an ordinary district court and appeal lies to the circuit court of appeals. Phillips v. United States, 312 U.S. 246 (1941).

teenth amendment[85] and no substantial question of constitutionality was presented for determination by a three-judge court.[86] For the same reason there was no occasion for abstention by the federal court to await state court determinations. The appellant's jurisdictional statement in the Supreme Court was treated as a petition for writ of certiorari prior to the judgment of the court of appeals. In the same opinion the Court granted this "petition," vacated the abstention order, and remanded to the district court for a decree granting the requested injunctive relief against discrimination.

The substantive law applied in the *Turner* case is now familiar. The case is significant primarily for the procedural dispatch with which the Supreme Court dealt with what it apparently viewed as sham reliance upon invalid regulations to delay desegregation. The case probably foreshadows an increase in the number of desegregation suits which will be disposed of by summary judgment for plaintiffs.

*Watson v. City of Memphis*[87] involved desegregation of Memphis' public parks and recreational facilities. The Sixth Circuit Court of Appeals approved a plan of gradual desegregation of these facilities, holding that the "all deliberate speed" standard of the *Brown* case is permissible in these facilities as well as public schools. The plaintiffs contended that judicially permitted gradualism in desegregation of governmental facilities is limited to public schools. As this article went to press, the United States Supreme Court reversed the decision.[88]

*Northcross v. Board of Education*[89] was an action brought by Negro parents and children to compel desegregation of the Memphis public schools. The defendant board admitted that the races were attending separate schools in Memphis but denied that this was the result of compulsion on its part, alleging that no racial integregation had occurred because no Negro children had made application for transfers to white schools under the Tennessee Pupil Assignment Law.[90] Defendants took the position that the assignment law was both an adequate administrative remedy for the relief sought by plaintiffs and also a sufficient desegregation plan for compliance with the Supreme Court's decisions without any affirmative move toward desegregation by school authorities. The district court held in favor of defendants. On appeal to the Sixth Circuit Court of Appeals this judgment was

85. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

86. Bailey v. Patterson, 368 U.S. 963 (1962), a case decided subsequent to the district court's action in this case.

87. 303 F.2d 863 (6th Cir. 1962).

88. 373 U.S. 526 (1963). The Supreme Court opinion will be discussed in next year's survey.

89. 302 F.2d 818 (6th Cir. 1962).

90. TENN. CODE ANN. §§ 49-1701, 49-1764 (Supp. 1962).

reversed and remanded with instructions to "restrain the defendants from operating a biracial school system in Memphis, or in the alternative to adopt a plan looking toward the reorganization of the schools, in accordance with the Constitution of the United States."[91]

The court of appeals conceded the defendants an honest and sincere desire to comply with the United States Constitution as interpreted by the Supreme Court but held that they had pursued a mistaken belief as to what constitutes such compliance. The continued maintenance of a biracial school system without affirmative action to remove racial bars to admission to all schools is non-compliance. The court said: "there cannot be 'Negro' schools and 'white' schools. There can now be only schools, requirements for admission to which must be on an equal basis without regard to race. . . . 'The maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs.' . . ."[92]

The Memphis school board was thus held to be under a duty to take affirmative action towards operation of its schools on a racially non-discriminatory basis.[93] While indicating some doubt as to the adequacy of the Pupil Assignment Law as an administrative remedy under any circumstances, the court held only that the assignment law could not relieve defendants of their duty to initiate action to convert their biracial system into a non-racial one.[94]

In *Maxwell v. County Board of Education*[95] a modified "Nashville plan" had been approved by the district court for Davidson County schools outside the city of Nashville. The first four grades were ordered desegregated immediately in order to place the county system on a parallel basis with the city system. Thereafter, desegregation was to proceed on the basis of one additional grade per year, thus placing the city and county on the same timetable for total desegregation.[96] On appeal by plaintiff the Sixth Circuit Court of Appeals affirmed. The Davidson County plan also included the transfer provision of the Nashville plan which allows the voluntary transfer of any student assigned to a school previously attended solely by members of another race or in which another race is presently in a majority. The court of appeals adhered to its previous decision upholding the transfer plan for Nashville schools[97] and ruled similarly

91. 302 F.2d at 824.
92. 302 F.2d at 822-23.
93. Relying on Cooper v. Aaron, 358 U.S. 1 (1958).
94. "These transfer provisions do not make of this law a vehicle to reorganize the schools on a non-racial basis. . . . Negro children cannot be required to apply for that to which they are entitled as a matter of right." 302 F.2d at 823 (1962).
95. 301 F.2d 828 (6th Cir. 1962), *rev'd as to transfer provisions*, 373 U.S. 683 (1963).
96. The district court's opinion is reported at 203 F. Supp. 768 (M.D. Tenn. 1960).
97. Kelley v. Board of Educ., 270 F.2d 209 (6th Cir. 1959), *cert. denied*, 361

for Davidson County. In a 1963 decision the United States Supreme Court reversed on the transfer question, holding that a classification based on race for purposes of transfer between public schools violates the equal protection clause.[98]

Limited and gradual desegregation of Chattanooga schools was ordered in *Mapp v. Board of Education*.[99] The defendants had originally defended on the grounds that they were engaged in a good faith program of public education preliminary to any actual implementation of desegregation. This resulted in summary judgment for plaintiff which was affirmed by the Sixth Circuit Court of Appeals.[100] After submission of several desegregation plans and extensive hearings, the court approved a modified "Nashville plan." Initial desegregation is limited to sixteen designated elementary schools in which grades one through three will be desegregated in September 1963. The first four grades in all schools are to be desegregated one year later. Thereafter, two grades will be desegregated in each annual step except for the first years of junior high school and high school where only the one grade at a time will be desegregated in the stair step procedure.

In rejecting plaintiff's demand for immediate and total desegregation, the court relied principally upon the good faith efforts of defendant, administrative and financial problems, and local hostility to integration. In merging two school systems into one, careful planning is necessary with respect to size of both classes and schools because of intricate problems involving divisions of state funds based on various size and attendance factors. The court recognized that under *Cooper v. Aaron*[101] neither community hostility nor even actual or threatened violence could justify a school board either in delaying a start towards desegregation or totally suspending its implementation. Nevertheless, where a prompt and reasonable start is made towards full desegregation and it appears that school authorities are acting in good faith, the court regarded local attitudes towards desegregation as a proper factor for consideration in arriving at the details of a plan.

In a significant departure from the Nashville plan, the court disapproved inclusion of its transfer provisions in the Chattanooga plan and expressed doubts as to its constitutionality.[102] However, the board

U.S. 924 (1959).

98. Gross v. Board of Educ., 373 U.S. 683 (1963). A detailed discussion must necessarily be postponed until next year.

99. 203 F. Supp. 843 (E.D. Tenn. 1962).

100. 295 F.2d 617 (6th Cir. 1961).

101. 358 U.S. 1 (1958).

102. Noting the holding of the Fifth Circuit in Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960), contrary to that of the Sixth Circuit in the *Kelley* case, *supra* note 97. The court also had evidence that the Nashville transfer plan had "minimized progress"

was authorized to adopt any admission or transfer plan it deemed reasonable or proper so long as it was not to any extent based upon race and did not have as its primary purpose the delay or prevention of implementation of the desegregation plan. The recent Supreme Court decision[103] throwing out the Nashville transfer plan confirms the *Mapp* court view.

*Vick v. County Board of Education*[104] is the only reported school desegregation case from outside the state's principal metropolitan areas. The district court had previously ordered defendants to submit a plan for complete desegregation of Obion County Schools for the 1962-63 school year. Upon consideration of a proposed plan the court followed the lead of the Chattanooga case and likewise disapproved inclusion of the transfer provision of the Nashville plan, substituting instead the same provisions approved for the Chattanooga plan.

The principal point of controversy in the Obion County plan was its "free choice" provisions. In school districts containing both previously white and previously Negro schools, both white and Negro children were given full choice as to which schools to attend. Because the freedom of choice is equally available to white and Negro children in every school within a district, this provision is not subject to the objections to the Nashville transfer plan. The fact that it might allow segregation to continue along previous patterns was held to be no objection because it is elimination of racial discrimination, not compulsory integration, which is required. The court also rejected arguments against the choice provisions based on the subservient economic position of Negroes in rural Obion County, which was alleged to make them vulnerable to economic pressure in the exercise of their choice,[105] and ignorance of Negro parents and students, which allegedly would prevent them from intelligent understanding and exercise of their opportunities for choice.[106]

In *Goss v. Board of Education*[107] the Sixth Circuit Court of Appeals reversed the district court's approval of grade-a-year desegregation for Knoxville schools beginning with the first grade in 1960-61. Con-

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under its desegregation plan and viewed the transfer provisions as likely to "delay the implementation of a plan already gradual in its provisions, if not prevent its ever becoming fully adopted." 203 F. Supp. at 853.

103. Goss v. Board of Educ., *supra* note 98.

104. 205 F. Supp. 436 (W.D. Tenn. 1962).

105. Noting that economic pressure aimed at depriving a citizen of federally-created rights can be prevented by separate action if necessary, and citing United States v. Beaty, 288 F.2d 653 (6th Cir. 1961).

106. However, the court did require as a safeguard that counsel for plaintiffs be furnished with the names and addresses of all Negro school children who would have a choice of school. 205 F. Supp. at 441.

107. 301 F.2d 164 (6th Cir. 1962), *rev'd as to transfer provisions*, 373 U.S. 683 (1963). A portion of the Knoxville proceedings dealing only with details of desegregation of vocational and technical courses is reported at 305 F.2d 523 (1962).

sidering that five years had elapsed since the Supreme Court's original school segregation decision, the court regarded twelve years as too long an additional period for the accomplishment of complete desegregation. The appellate court was influenced against the defendants' position by their admission that they had deliberately awaited legal compulsion before considering any steps towards desegregation. Expressly disclaiming any attempt to formulate or dictate details, the court merely remanded with instructions that the defendant school board be required to submit promptly "an amended and realistic plan for the acceleration of desegregation," in accordance with views expressed in the opinion.

The Knoxville plan also included the Nashville transfer features previously upheld by the Sixth Circuit. The court again adhered to its position that such provisions are not unlawful on their face but warned that they cannot be administered as a means of perpetuating segregation, likening them to pupil assignment laws which have been held not inherently unconstitutional[108] but which are subject to invalidity if used administratively over a period of time to systematically accomplish racial discrimination. As has been noted, the Supreme Court has recently disapproved these provisions.[109]

A Tennessee state court case arising in a racial context is *Ford v. State*[110] which affirmed criminal convictions under the Tennessee statute punishing disturbance of religious assemblies.[111] A group of Negro youths appeared during a religious meeting held in a municipal facility of the city of Memphis. They were first asked not to enter and then to take seats in the rear. They refused to do this and upon instruction from an apparent leader to "scatter out" they broke into groups and dispersed through the audience while the meeting was in progress. Most of them passed up empty seats at the ends of rows and stepped over people already seated in order to take center seats. A general disruption of the meeting resulted, followed by arrest of these defendants.

The statute was construed to apply to any willful disturbance of a religious assembly in any manner. An argument that public ownership of the facility gave defendants a right not to be excluded was

108. Shuttlesworth v. Birmingham Board of Educ., 162 F. Supp. 372 (N.D. Ala.), *aff'd*, 358 U.S. 101 (1958).

109. Goss v. Board of Educ., *supra* note 98.

110. 355 S.W.2d 102 (Tenn. 1962).

111. TENN. CODE ANN. § 39-1204 (1956): "If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of meeting, he shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200), and may also be imprisoned not exceeding six (6) months in the county jail."

viewed as immaterial because it was not the defendants' presence but their conduct in willfully disturbing a religious meeting which was being punished.

## IX. STANDING TO CHALLENGE CONSTITUTIONALITY

The Supreme Court of Tennessee followed its precedents on standing to challenge constitutionality of a statute in *Campbell v. Unicoi County*.[112] Under prior law Campbell had been elected county road superintendent by the quarterly court for a term of office which expired on November 1, 1961. A 1961 private act changed both the mode of election and the term of office of future superintendents and provided for an interim appointment to the office by the Governor. When his term expired, Campbell refused to deliver up the office to the appointee contending that the statute providing for gubernatorial appointment was unconstitutional. He brought suit against the county and the interim appointee seeking a declaratory judgment on the question. A demurrer to his action was sustained by the lower courts on the ground that Campbell, as a holdover in office, lacked standing to raise the question. The interim appointee then sought a writ of mandamus to compel Campbell to surrender the office and Campbell's demurrer to this action was overruled for the same reason. On appeal to the Supreme Court of Tennessee, the two cases were consolidated and in each of them the action of the lower court was affirmed.

In Tennessee a holdover in office is viewed as continuing to serve, not by reason of any vested interest which he has in the office, but solely for the benefit of the public to prevent interruption in the public service. In the language of the court in the present case he was only "to hold said office and to protect records and other public property in his possession until such time as his successor in office appeared . . . ."[113] One could easily reason that it is his duty to protect the office from assumption by someone not entitled to it[114] or by a person acting unlawfully or under authority of void statute, and that he therefore should have standing to question the constitutionality of the law purporting to vest the office in a successor. Nonetheless, a contrary view is well established by Tennessee cases.[115]

112. 356 S.W.2d 264 (Tenn. 1962).

113. 356 S.W.2d at 267. Most cases dealing with the status of a holdover arise when he argues that there is no "vacancy" in the office within the purview of an admittedly valid appointive power. 43 AM. JUR. *Public Officers* § 164, at 21 (1942).

114. It is generally stated that the "successor" to whom a holdover surrenders his office must be "legally elected or appointed and duly qualified." 67 C.J.S. *Officers* § 48, at 205 (1950).

115. State *ex rel.* Turner v. Wilson, 196 Tenn. 152, 264 S.W.2d 796 (1954); Kimsey v. Hyatt, 169 Tenn. 599, 89 S.W.2d 887 (1936); State *ex rel.* Barham v.

Despite his personal pecuniary loss when displaced from office, the holdover official is treated as a mere member of the general public with no special interest in the statute apart from that common to all citizens generally. Viewed in this way, he lacks sufficient justiciable interest to raise the question of constitutionality.[116]

Graham, 161 Tenn. 557, 30 S.W.2d 274 (1930); Graham v. England, 154 Tenn. 435, 288 S.W. 728 (1926).

116. Walldorf v. City of Chattanooga, 192 Tenn. 86, 237 S.W.2d 939 (1951).