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Constitutional Law--1959 Tennessee Survey

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CONSTITUTIONAL LAW—1959 TENNESSEE SURVEY

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A smaller number of cases have been selected for inclusion in this year's survey. Seven cases are included, including one federal court decision dealing with a municipal ordinance. In addition, two specific acts of the General Assembly are noted although there has as yet been no opportunity for the courts to rule upon them.

I. PROCEDURAL DUE PROCESS

The only case requiring mention here, *Werner v. City of Knoxville*,[1] struck down a Knoxville ordinance setting up a board of review with power to ban publications which

> prominently features an account of crime, or is obscene, or depicts, by the use of drawings or photographs or printed words, obscene actions and accounts, or the commission or attempted commission of the crimes of arson, assault with a deadly weapon, burglary, kidnapping, mayhem, murder, rape, robbery, theft or voluntary manslaughter.[2]

The district court held that the statute was too broad, since it described printed matter not sufficiently evil to be prohibited. In addition, the statute was too uncertain to meet the test of procedural due process because it did not make explicit what acts would be punished, nor did it provide any guides or standards for the board of review, despite the broad censorship powers granted. The decision seems entirely justified by the leading United States Supreme

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1. 161 F. Supp. 9 (E.D. Tenn. 1958). The case is dealt with more fully in the subsection of this survey, "Civil Liberties," since it raises essentially a freedom of speech problem.

2. KNOXVILLE, TENN., CODE Ch. 30, § 49 (1945), as amended, Ordinance 2077, § (e).

Court cases, including *Winters v. New York*[3] which was relied upon heavily in the opinion.

The problem of judicial jurisdiction is properly thought of as involving questions of procedural due process. An enactment of the 81st General Assembly broadens the basis of judicial power and revives interest in older Tennessee decisions. The most recent enactment is itself very brief. Chapter 110 of the Public Acts of 1959,[4] amends section 20-223 of the *Tennessee Code Annotated* by inserting in the first sentence thereof, immediately after the words "whether resident or non-resident," the words "including non-resident partnerships."

Section 20-223 is basically a 1957 act and provides that unincorporated associations and organizations, whether resident or nonresident, now including nonresident partnerships, doing or desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent upon whom process may be served. Upon failure to appoint such an agent, service may be upon the Secretary of State. The section further provides that judgments recovered through this process may be collected out of any real or personal property belonging to the association or organization. The statute apparently does not attempt to impose personal liability upon the members of the association or organization, but would supposedly have to be satisfied out of the assets of the association.[5]

The statute is clearly constitutional, under the United States Constitution. The original statute was sustained by the Tennessee Court of Appeals in 1952.[6] Judge McAmis' opinion recognized that *Henry L. Doherty & Co. v. Goodman*[7] permits judicial jurisdiction to be exercised against individuals who transact business through agents in a state and that *Flexner v. Farson*[8] has been overruled or at least is distinguishable on the ground that the agent had ceased to be an agent when served.[9] Thus, the court of appeals, in substance, found

3. 333 U.S. 507 (1948).

4. TENN. CODE ANN. § 20-223 (Supp. 1959), amending TENN. CODE ANN. § 20-223 (1956).

5. The distinction between collecting out of the partnership assets and the individual member's assets is well established. Thus, a judgment against a partnership only in a state which treats a partnership as an entity may be collected out of the firm assets in a state which treats a partnership as an aggregate; but it could not be collected out of individual assets of a partner who was not individually subject to the jurisdiction of the court giving the judgment. East Denver Municipal Irr. Dist. v. Doherty, 293 Fed. 804 (S.D.N.Y. 1923); Sugg v. Thornton, 132 U.S. 524 (1889).

6. McDaniel v. Textile Union, 36 Tenn. App. 236, 254 S.W.2d 1 (1952).

7. 294 U.S. 623 (1935).

8. 248 U.S. 289 (1919).

9. McDaniel v. Textile Union, 36 Tenn. App. 236, 245, 254 S.W.2d 1, 5 (1952).

that two older Tennessee cases,[10] which had followed *Flexner v. Farson,* were not controlling. Since the two older Tennessee cases held that the statute[11] authorizing service upon the agent of an individual was unconstitutional as applied to a nonresident, the constitutionality of the statute authorizing service upon the agent of a nonresident individual is now in doubt.

The United States Supreme Court decisions,[12] and the decision in the *McDaniel*[13] case, clearly would sustain a statute authorizing service upon the agent of a nonresident individual, limited of course to causes of action arising out of the doing of the business. As pointed out above, however, the statute has been held unconstitutional by the state supreme court; perhaps it should be re-enacted by the legislature if it is to have vitality. The 1959 act makes it clear that nonresident partnerships are subjected to the jurisdiction of Tennessee courts if they engage in business in Tennessee. It would be helpful if it were equally clear whether nonresident individuals subject themselves to the jurisdiction of Tennessee courts by doing business in Tennessee.

II. CIVIL LIBERTIES

In one sense of the term "civil liberties," all liberties which apply to protect the individual from unconstitutional infringement are included. However, the term is normally used rather narrowly to exclude such questions as the validity of restrictions applying to an individual in the field of business and economic regulation.

The principal case dealing with civil liberty in this narrower connotation decided during the period covered by the survey is *Werner v. City of Knoxville,*[14] previously mentioned as involving procedural due process.[15] The case is primarily a case of freedom of speech and censorship. The Knoxville ordinance[16] set up a board of review to ban various publications which were deemed injurious to public morals and likely to incite crime. In addition to holding the ordinance invalid because it was too uncertain and gave the board powers of censorship without guides or standards, the district court held that the ordinance was too broad and would have authorized the board to eliminate from bookstores and libraries many wholesome

10. Frolich v. Hanson, 155 Tenn. 601, 296 S.W. 353 (1927); Knox Bros. v. E. W. Wagner & Co., 141 Tenn. 348, 209 S.W. 638 (1918). Residence is under these cases recognized as a basis of judicial jurisdiction in the case of an individual engaged in business in Tennessee through an agent.
11. TENN. CODE ANN. § 20-218 (1956).
12. See Overton, *Broadening the Bases of Individual In Personam Jurisdiction in Tennessee,* 22 TENN. L. REV. 237 (1952).
13. Note 6 *supra.*
14. 161 F. Supp. 9 (E.D. Tenn. 1958).
15. Note 2 *supra.*
16. Note 4 *supra.*

books and publications. This seems entirely correct under United States Supreme Court decisions.[17]

In *Burton v. Jones*[18] the Tennessee Supreme Court simply stated that there could be no imprisonment for civil debt. The Tennessee Constitution provides in article 1, section 18, that "The legislature shall pass no law authorizing imprisonment for debt in civil cases." The lower court had cited the petitioner for contempt of court. The petitioner had consented to a judgment against him for $5000, and shortly thereafter filed a petition in bankruptcy. The lower court had apparently deemed this to be a fraud on the court since it found that he had intended to do this when he consented to the judgment. The supreme court said that this was civil contempt since the purpose of the court in confining the petitioner was to enforce the private right. Since the lower court had originally confined the petitioner to jail until he purged himself of contempt by making up back payments as provided in the consent decree and later changed it to a criminal contempt sentence of ten days in jail and a $50 fine, the supreme court reasoned that he was being imprisoned for failure to pay the judgment rather than for any fraud upon the court.

One could reasonably argue that confessing a judgment, or consenting to an adverse judgment with the intention of going into bankruptcy, is simply not contempt of court. This is not the situation where one creates a debt, intending at the time to go into bankruptcy. Confessing judgment is not the procuring of something additional from the claimant, as is the creation of a new indebtedness. Since the existing debt could be discharged as completely without being reduced to judgment as it could after being reduced to judgment, it is difficult to see why confessing judgment with knowledge of impending bankruptcy is contempt of court.

An enactment of the 81st General Assembly, replacing the old sedition statute,[19] has not yet been tested in the court, but it raises some important questions in several ways. The new section provides:

> Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the State of Tennessee or of the United States by

17. The opinion relied heavily upon Roth v. United States, 354 U.S. 476 (1957) which sustained statutes proscribing obscene, lewd, lascivious, filthy, and indecent material.

18. 322 S.W.2d 593 (Tenn. 1959).

19. The former section punished "seditious words or speeches, spreading abroad false news," "scurrilous libels against the state or general government," "obstructing any lawful officer," "instigating others to cabal or meet together to contrive, invent, suggest, or incite rebellious conspiracies, riots, or any manner of unlawful feuds or differences, thereby to stir people up maliciously to contrive the ruin and destruction of the peace, safety, and order of the government." TENN. CODE ANN. § 39-4405 (1956).

> force, or violence, or by the assassination of any officers of either government, or whoever, with intent to cause the overthrow or destruction of the government of Tennessee or of the United States, prints, publishes, edits, issues, circulates, sells, distributes or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing the government of Tennessee or of the United States by force or violence, or attempts to do so, or whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the government of Tennessee or of the United States by force or violence, or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purpose thereof, shall be fined not more than ten thousand dollars ($10,000) or imprisoned not more than ten (10) years in the State Penitentiary, or both, and shall be ineligible for employment by the State of Tennessee or any department or agency thereof, for the five (5) years following his conviction.[20]

The obvious constitutional law question arises as to whether this section violates the constitutional principles relating to freedom of speech and association. Since the statute requires knowledge of the propensities of the group or association, it avoids the evils of some legislation which has punished for membership without requiring "scienter."[21] The emphasis on force and violence is intended of course to make the act more clearly constitutional. But it is at least questionable whether the act is sufficiently narrow to withstand a constitutional attack.[22] Teaching and advocacy may not have the immediacy required for whatever substitute for the clear and present danger is currently in use.[23] Of course membership in the Communist party is more definite to the extent that the courts are recognizing that the Communist party is more than an advocate of communistic theory of government and that, in fact, its organizers intend the overthrow of the government as speedily as circumstances shall permit.[24]

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20. TENN. CODE ANN. § 39-4405 (Supp. 1959).

21. Weiman v. Updegraff, 344 U.S. 183 (1952) struck down an Oklahoma loyalty oath on the ground that it did not provide for scienter in an oath that the affiant had never been a member of a communist group or a group listed on the subversive list of the Attorney General.

However, an oath that the official did not advocate overthrow of the government by force and that they did not belong to organizations which did was sustained when scienter was implied. Garner v. Board of Public Works, 341 U.S. 716 (1951).

22. It will be remembered that the noncommunist oath required of labor leaders was at least partly hung upon the peculiar control Congress had over interstate commerce. American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950). Three justices did not participate. In Osman v. Douds, 339 U.S. 846 (1950), the Court was equally divided and Justice Clark took no part. Of course, oaths may be different from punishment for acts.

23. Chief Justice Vinson attempted to distinguish between conduct and speech in the noncommunistic oath case with respect to the clear and present danger problem. American Communications Ass'n, CIO v. Douds, *supra* note 22.

24. Dennis v. United States, 341 U.S. 494 (1951).

To the extent that the statute punishes mere teaching or advising the desirability and propriety of overthrowing a government by force, if lawful means are no longer available, or prove effective, or is so construed by a state court, it is believed that it interferes with freedom of speech, and to the extent that it punishes persons who organize a group to so teach and advise, it violates the right to association.

It may be noted in passing that under English law the American Revolutionists were traitors, and that the Tennessee Constitution appears to exhort the maintenance of the revolutionary spirit and temper.[25]

The act under discussion also raises serious constitutional issues under the next subheading.

III. Intergovernmental Relations

The problem of constitutional law dealing with the questions of what areas are open to the states, after Congress has entered the field, is part of the large question of what powers should be exercised by the individual states. There were no Tennessee cases during the period covered by this survey, but the enactment by the 81st General Assembly of the act just discussed[26] is clearly invalid, at least partially, unless Congress should act.

In the now famous *Nelson*[27] case, the Court, in accord with a similar previous decision,[28] affirmed the Supreme Court of Pennsylvania[29] in holding that the Pennsylvania Sedition Act was superseded by the Smith Act. Therefore, so far as the Tennessee act punishes sedition and subversion directed toward the United States, as distinguished from acts directed against Tennessee, it seems clearly to be superseded by the federal legislation.

Congress has taken cognizance of the decision though the earlier decision was disregarded and received little attention. In the current session of the Congress, various bills have been introduced and action has been taken on one or two,[30] but no final action has yet been taken on any of them.

25. Article 1, Section 2, of the Tennessee constitution states that government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

26. Note 21 *supra*.

27. Pennsylvania v. Nelson, 350 U.S. 497 (1956), *rehearing denied,* 351 U.S. 934 (1956).

28. Hines v. Davidowitz, 312 U.S. 52 (1941) held that title three of the Act of Congress of June 28, 1940, known as the "Alien Registration Act of 1940" superceded the Pennsylvania Alien Registration Act of 1939.

29. Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954) held that title one of the same congressional act, known as the "Smith Act," superceded the Pennsylvania Sedition Act of 1939.

30. H.R. 3, 86th Cong. 1st Sess. (1959) was passed by the House without

IV. ECONOMIC REGULATION

Included in this subheading is the single largest group of cases included in the survey. Sometimes the cases involve primarily due process and sometimes they turn on equal protection. Three cases out of the seven included in the survey fall directly in this field. *Livesay v. Tennessee Bd. of Examiners in Watchmaking*[31] is possibly one of the most provocative cases in the survey. The holding is very simply that the Tennessee statute[32] regulating the watch repairing business is unconstitutional.

The portions of the act dealt with in the case established a board of examiners with authority to set up standards of education, training, and experience which the board deems necessary to protect the public from incompetent and fraudulent watchmakers, and in addition require specifically that a license applicant be of good moral character and eighteen years of age. The basis of the decision was, rather bluntly, that the watchmaking business cannot be regulated. The court cited decisions from other states holding that their regulations were invalid.[33] It also cited a North Carolina case holding unconstitutional a regulation of photography on the ground that photography was no more regulatable than the occupation of repairing of watches[34] and a Tennessee case[35] holding a regulation of photography unconstitutional.

Once again, the result is not particularly objectionable, though it would have been somewhat more convincing if the court had held that the board was not given sufficient guiding standards or that there was unconstitutional delegation of legislative authority.[36] A more acceptable rationale of the problem would have been the balancing of the fundamental right to engage in work of one's choosing against the fundamental power of the state to protect its citizens in those areas in which incompetence and fraud injure the community.[37]

The grounding of the opinion seems unfortunate. The opinion states that regulations of the watch repair business are unconstitutional because watch repairing for money is an "inherent" property right,

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amendment on June 24, 1959 and sent to the Senate Judiciary Committee June 25, 1959. H.R. 2368, 86th Cong. 1st Sess. (1959) was reported without amendment on June 3, 1959. These two bills were designed primarily to overcome or modify the effects of the *Nelson* decision. Their exact scope is not known to the writer.

31. 322 S.W.2d 209 (Tenn. 1959).
32. TENN. CODE ANN. §§ 62-1401 to -1410 (1955).
33. State *ex rel.* Whetsel v. Wood, 207 Okl. 193, 248 P.2d 615 (1952). For other cases, see Livesay v. Tennessee Bd. of Examiners in Watchmaking, *supra* note 31, at 212.
34. State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).
35. Wright v. Wiles, 173 Tenn. 334, 117 S.W.2d 736 (1938).
36. This was the basis in State v. Morrow, 231 La. 572, 92 So. 2d 70 (1956).
37. Annot., 34 A.L.R.2d 1326 (1954).

that incompetency and fraud on the part of watchmakers do not affect the public but merely the parties to the transaction, and that if watchmakers can be regulated, then the legislature could regulate every conceivable business free from constitutional restraint. The inference is that regulations of a business, intended to protect the public from fraud and dishonesty, no matter what the regulations are, do not have any "substantial" or "real" tendency to protect the public. This inference is, of course, not valid, and undoubtedly the court did not intend the opinion to be so construed.

The statute was attacked under the due process clause and under article 1, section 8, and article 11, section 8,[38] of the Tennessee constitution. The opinion does not squarely base itself upon any particular section of the Tennessee constitution, but the headnotes do refer to the two sections. Certainly the mere regulation of watchmaking would not, under the United States Supreme Court decisions, violate the due process clause of the federal constitution.[39]

Even "inherent property rights" are subject to some reasonable regulation. Also a finding that a particular regulation is reasonable and valid does not, of necessity, immunize all other regulations from any requirement of reasonableness. A decision founded upon a factual conclusion that the dangers from fraud and incompetence were not currently sufficiently serious to allow such broad regulatory powers to be exercised by an administrative board, or that the dangers in the watchmaking business are not currently so much worse than in many other businesses which the legislature has not regulated, so that regulation of the watchmakers amounts to an arbitrary classification, would have built a sounder frame of reference for the future guidance of the state legislature.

It is fairly apparent that the Tennessee Supreme Court tends to view the police power as limited generally to dangers to health and property, though the language is sometimes broad enough to include "private happiness."[40]

The significance of physical or property danger is well shown in

38. Article 1, Section 8 is the quaint due process clause of the Tennessee constitution: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers of the law of the land." Article 11, Section 8 is the section dealing with class legislation and is roughly equivalent to an "equal protection" clause.

39. See *Overton, Constitutional Law—1958 Tennessee Survey,* 11 VAND. L. REV. 1194, 1201 (1958) pointing out that the state courts generally tend to give more freedom to businesses under state constitutions than the United States Supreme Court does nnder the due process clause.

40. Phillips v. State, 304 S.W.2d 614 (Tenn. 1957) sustaining a statute requiring the observance of standard time only.

another case, *Hughes v. Board of Comm'rs*,[41] sustaining the licensing of electricians. The court pointed out the dangers of hazards created by poor electrical work.[42] The court sustained the classification involved, since the regulations did not apply to such work done for electric public service corporations or in operation of signals for transmission of intelligence and in maintenance and repair of electrical equipment by the employees of a manufacturing concern. This seems sound.

Dilworth v. State[43] held a classification between public carriers and contract carriers to be unconstitutional. Of course, there are many situations in which a classification between common carriers and private carriers is constitutionally important. For example, it is clear that rates may be more fully regulated in the case of common carriers than in the case of private contract carriers.

The classification attempted by the statute would, under the facts, be unreasonable and discriminatory, however. The Public Acts of 1955[44] authorized counties, acting in conjunction with the county highway departments, to make regulations concerning the use of county roads. These regulations were not to be applicable to passenger buses or to common carriers authorized under certificates of convenience and necessity issued by the state public service commission or by the Interstate Commerce Commission, or to highways of the state highway system, or to streets within the boundaries of incorporated municipalities. Under this authority, Davidson County adopted certain weight regulations for county roads. The defendant was charged with operating a truck in excess of the maximum weight upon a by-pass around Nashville. The by-pass is widely used by common carriers, as well as by contract carriers, and local haulers. Justice Burnett, in writing the opinion of the court, pointed out that under the state law, common carriers might have a maximum weight up to 55,980 pounds,[45] while the limits set by the Davidson County regulations were 20,000 pounds. The unreasonableness of the distinction as applied to the particular road is entirely clear. Justice

41. 319 S.W.2d 481 (Tenn. 1959).

42. The opinion states: "All of us know that persons who do connect or have anything to do with putting in various electrical fixtures and things of that kind in the property, and especially in large urban areas, where there are a lot of houses close together, that unless they know what they are doing, the public is liable to be very much endangered. Houses can be burned up and people electrocuted and various and sundry things of the kind that we as a Court can and do take judicial knowledge of having happened when these electrical gadgets or what-not are attempted to be fooled with by one who lacks the necessary requisite knowledge to handle these electrical things." 319 S.W.2d at 486.

43. 322 S.W.2d 219 (Tenn. 1959).

44. TENN. CODE ANN. §§ 59-1113 to -1117 (1956).

45. TENN. CODE ANN. § 59-1109 (1956). Buses have a maximum weight of 42,000 pounds. TENN. CODE ANN. § 59-1111 (1956).

Burnett pointed out that there is no general rule by which to distinguish between reasonable and lawful classifications and unreasonable and arbitrary ones, but that the distinction was a practical one depending upon the facts of each case.[46] It is obvious, as the court said, that a contract carrier does not, on a particular road, do more damage than a common carrier of the same weight. The difference between the weights that roads can carry depends upon the road and not upon the nature of the carrier as a common or private one. The solution to the problem arising from the difference in roads must lie in a classification based upon that difference.

V. Administrative Law

One decision squarely deals with administrative law problems. *Hughes v. Board of Comm'rs*,[47] has just been discussed as a case allowing a regulation of the electrical business. One of the interesting problems was not discussed. The Code of the City of Chattanooga[48] provides for a board of electrical examiners to examine and license electricians. The court shows that the board used standard forms prepared by "vocational guidance and educational professors of Purdue University designed to test the knowledge of an electrical contractor."[49] The court said that the board could make up such rules and regulations as it sees fit, and that if there is no illegal and arbitrary action in preparing the examinations, the courts could not overrule the action of the board. This apparently authorizes large discretion to administrative boards without violating the delegation of legislative power principle. This in turn is further reflected in the very liberal view that the court adopted in giving administrative finality to administrative tribunals. The court said that it would not interfere with actions of the board in deciding such questions as the validity of the rules of the board relative to the examinations and passing grades, unless

> the determination is without or in excess of the statutory powers and jurisdiction of the administrative authority, the determination is an exercise of power so arbitrary or unreasonable as virtually to transcend the authority conferred, or is otherwise an abuse of discretion, or is in disregard of the fundamental rules of due process of law, as required by constitutional or statutory directions, as where made without adequate notice, fair hearing, and opportunity for the aggrieved party to present

46. The technique here should be compared with that involved in holding the regulations of watchmakers invalid.

47. 319 S.W.2d 481 (Tenn. 1959).

48. This was authorized by Tenn. Priv. Acts 1933, ch. 572. Pursuant to this authority the city enacted Chattanooga, Tenn., Code ch. 15 (1949).

49. 319 S.W.2d at 483.

> evidence, or in an otherwise irregular proceeding, or is tainted with matters which disclose fraud, mistake, bad faith, corruption, or collusion, or is based upon an error of law.[50]

Further quoting from the same source, the court said in the following language that it would not substitute its opinion for that of the board:

> [The court] must not substitute its judgment or notions of expediency and fairness or wisdom for those which have guided such agency, even where the proof is convincing that a different result would have been better.[51]

These quotations and the decisions are in accord with modern attitudes toward the finality of administrative determinations and the scope of judicial review. It is hoped that this decision may be the one that will clarify the previous inconsistencies, and the difficulties which have in the past arisen in trying to resolve the conflicting decisions on these questions in Tennessee.[52]

VI. GOVERNMENTAL LAW

The cases herein discussed do not involve any common ground except that they deal with the method of setting up governmental agencies or the expenditures of governmental funds.

The one case decided by the Supreme Court of Tennessee during the period involved in the survey that probably more directly affects more individuals, and more counties and municipalities than any other decision for several years is *State v. Southern Bell Tel. & Tel. Co.*,[53] holding that the Tennessee statute[54] authorizing the state to reimburse utilities for the relocation of their facilities located on publicly owned rights of way when necessary to construction of highways under the interstate system of highways as provided by the Federal-Aid Highway Act of 1956 is unconstitutional.

The court held[55] that the act violated article 2, section 31, which provides that the credit of the state should not be loaned or given in aid of any person, association, company, corporation or municipality.[56] The court also mentioned article 2, section 29 of the Tennessee con-

50. This was quoted by the court from 42 AM. JUR. *Pub. Administrative Law* § 209 at 611-17 (1942).
51. *Id.* at 621-22.
52. See *Overton, supra* note 39 at 1205-07.
53. 319 S.W.2d 90 (Tenn. 1958).
54. TENN. CODE ANN. §§ 54-543 to -545 (Supp. 1958).
55. After a subsidiary holding that the Commissioner of Highways had standing to institute suit attacking the constitutionality of the act. 319 S.W.2d at 92-94.
56. Other clauses prevent the state from becoming the owner of a bank, or a stockholder with others in any association, company, corporation, or municipality.

stitution which apparently permits the General Assembly to authorize municipal corporations to lend or give their credit to private persons and purposes, if authorized by a referendum. The court said that this section is permissive, while section 31 is prohibitory.[57]

It seems that what the court objects to is not so much a lending of the state's credit,[58] but rather the basic idea that the money of the state cannot be spent in what amounts to a donation. Citing an earlier case,[59] the court said: "The obvious purpose of this Section of our Constitution was to prevent the State from using its credit as a gratuity or donation to any person, corporation, or municipality."[60]

The gist of the opinion is simply that the primary purpose was for the benefit of the utilities and hence the purpose cannot be public. The court said that the statute involved "is primarily for the benefit of subscribers of utilities or their stockholders, and is neither a State nor a public purpose."[61] It seems obvious that the court was swayed by its understanding that the relocation of facilities would cost over $15 million out of the $30 million bond issue authorized.[62]

There was a dissenting opinion[63] which concluded that this was a public purpose and which pointed out that since the federal government would refund ninety per cent of the costs the amount of bond funds diverted for relocation expenses would be but ten per cent of the figures used by the majority. The dissent also pointed out that the so-called benefit to the utilities was a repayment of a "non-betterment cost." That is, the dissent concluded that this was not a gift, but simply prevented the relocation from causing damage.

The majority and the dissent differed on every question. They disagreed as to the interpretation of a Kentucky case.[64] They disagreed on the application of previous decisions. The majority construed a

57. 319 S.W.2d at 93.

58. Some states make a distinction apparently between lending the state's credit and appropriating money already in the treasury. Craig v. North Mississippi Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

59. Bedford County Hosp. v. Browning, 189 Tenn. 227, 225 S.W.2d 41 (1949). Annot., 161 A.L.R. 518 (1946) points out that under many state constitutions a state, or more properly "a municipal corporation cannot use its funds, exert its taxing powers, or loan its credit to promote a private enterprise," quoting 38 AM. JUR. *Municipal Corporation* §§ 401-02 (1941).

60. 189 Tenn. at 232, 225 S.W.2d at 43. The quotation continued, however, with the statement that it was obvious that it was not intended to prevent the state from aiding persons if required to accomplish a state or public purpose, or to fulfill a state duty or obligation under its police power.

61. 319 S.W.2d at 92.

62. Tenn. Pub. Acts 1957, ch. 264.

63. In the original opinion, Justice Tomlinson dissented. Chief Justice Neil did not participate. On a rehearing the Chief Justice dissented also. 319 S.W.2d at 94-102.

64. Southern Bell Tel. & Tel. Co. v. Commonwealth, 266 S.W.2d 308 (Ky. 1954). The majority said it held that relocation of facilities was not a public purpose. The dissent said that it dealt with a grant and not a statute authorizing the expenditure of public funds. 319 S.W.2d at 93-102.

previous case[65] as holding expenditures for public and private nonprofit hospitals to be a public purpose only because this was the performance of public duties "with no right to reap individual profit" and that the state, though it would not own the properties, "would continue to have the use of the hospitals for the people of the entire state," and that the hospitals would be "under State control, regulation and supervision." The dissent said that a majority of cases in other states had adjudged such use of public funds to be a public purpose[66] and that a previous case in Tennessee showed this was so.[67]

The dissent, in concluding its argument, pointed out that the utility customers through their federal gasoline taxes will pay a proportionate share of the cost of relocation in other states and as a consequence of this decision will pay the total cost of relocation in Tennessee. An opinion concurring with the majority concluded with the idea that if this legislation is upheld, there is no way to stop the legislature "whenever it may decide to do equity according to its own conception."[68]

It is submitted that the opinion of the court did not give enough weight to the fact that this is an expense of building roads and should not fall on individual companies any more than the damage done by raising or lowering the grade of a road adjacent to private property. However, to the extent that the utilities have a mere permissive use, the rule of eminent domain might be different. It is believed that the opinion failed to recognize that its reference to the consumers of public utilities constitutes almost the entire population of the state and that their benefit constitutes a "public purpose." Further, it would appear that the court overlooked the fact that the state can or does regulate, control and supervise public utilities about as fully as it can anything and about as fully as it could the hospitals in the *Bedford County Hospital* case.[69] If, as the dissent believed, public utilities may in many instances face bankruptcy, the public interest is obvious.

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65. Bedford County Hosp. v. Browning, *supra* note 59.

66. Opinion of the Justices, 132 A.2d 613 (N.H. 1957); Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957); Minneapolis Gas Co. v. Zimmerman, 91 N.W.2d 642 (Minn. 1958).

67. Nichol v. Mayor of Nashville, 28 Tenn. (9 Humph.) 252 (1848). This case sustained a subscription to a railroad as a public purpose. The dissent also said that it had been held that issuance of bonds to a luggage factory had been a public purpose. 319 S.W.2d at 96, citing McConnell v. City of Lebanon, 314 S.W.2d 12 (Tenn. 1958). The dissent could also have cited another recent case sustaining an agreement by a county to build an industrial plant and lease it to an industrial concern. Darnell v. County of Montgomery, 308 S.W.2d 373 (Tenn. 1957).

68. 319 S.W.2d at 95. This is a familiar but questionable argument. See note 39 *supra* and the text to which it refers.

69. *Supra* note 59.

It is believed that certain groups which originally opposed the payment to the utilities of the relocation costs have suffered a change of heart now that it is realized that, at least, increased rates will have to be charged by certain utilities.

The final case to be treated in this survey lacks the urgency of the case last discussed. *State ex rel. Johnson v. Davis*,[70] held briefly that the Clarksville city court was not a "constitutional" court and hence that the judge could be appointed and need not be elected under article 6, sections 1 and 4, of the Tennessee constitution. The opinion distinguished the city court from the juvenile and domestic relations court of Nashville, which was held to be a "constitutional" court in a previous case[71] since it exercised some powers concurrently with the circuit, criminal and chancery courts. A previous case[72] involving the corporation court of Elizabethton was held controlling. This case was also decided during the period covered by this survey.

VII. Conclusion

It is believed that the Tennessee Supreme Court achieved during the year, somewhat better than last,[73] the establishment of a frame of reference for the guidance of legislature, attorneys and litigants; but it is respectfully submitted that even more improvement would be of value to the State of Tennessee.

70. 322 S.W.2d 214 (Tenn. 1959).
71. Haywood v. Superintendent, Davidson County Workhouse, 195 Tenn. 265, 259 S.W.2d 159 (1953).
72. City of Elizabethton v. Carter County, 321 S.W.2d 822 (Tenn. 1959) holding that a legislative act providing for a General Sessions Court for Carter County had not repealed a private act amending the Charter of the City of Elizabethton.
73. Overton, *supra* note 39 at 1194.