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AN EXAMINATION OF THE TENNESSEE LAW OF ADMINISTRATIVE PROCEDURE

GEORGE STREET BOONE *

INTRODUCTION

For many years in the United States administrative action has been vigorously criticized and defended, especially in three areas:¹ in the adjudication of individual cases by administrative agencies; in the consideration of the scope of judicial review of their actions; and in the delegation and exercise of their rule-making functions. The American Bar Association's Special Committee on Administrative Law has been active in studying the problems of administrative law and procedure and, in the federal field, has supported legislation in Congress.² As a result of the efforts of the American Bar Association, of the Attorney General's Committee on Administrative Procedure, and other interested organizations and individuals, Congress, in June, 1946, adopted a Federal Administrative Procedure Act³ sponsored by the American Bar Association.⁴

Concurrently, there has been, in many states, an increasing interest in state administrative activities. Several state legislatures have been sufficiently concerned over the growth and use of the administrative process to take affirmative action. In 1941 North Dakota adopted an act⁵ along the lines of the Model State Administrative Procedure Act⁶, and in the same year Ten-

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1. REP. ATT'Y GEN. COMM. AD. PROC., 1-2 (1941).

2. *Hearings before Subcommittee of the Committee of the Judiciary on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess.* 1578 (1941).

3. 60 STAT. 237, 5 U.S.C.A. § 1001 *et seq.* (Supp. 1946).

4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS SPECIAL REPORT, MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1946).

5. N. D. Laws 1941, c. 240.

6. The history of the current Model State Administrative Procedure Act is found in Dean Stason's special report made in October, 1946, to the National Conference of Commissioners on Uniform State Laws. The original proposal for a state administrative procedure act was made in the judicial administration section of the American Bar Association. The Bar Association on Administrative Agencies and Tribunals, created in 1937, presented a comprehensive report on judicial review of state administrative action in state courts at the American Bar Association meeting in 1938. The same section, in 1939, offered a draft of a proposed act dealing with certain major phases of state administrative procedure, and this act, designed to serve as a model for state legislation, was referred by the section of the National Conference of Commissioners on Uniform State Laws. After consideration and consultation with the American Bar Association Committee on Judicial Administration, a revised draft was presented at the 1940 session of the National Conference. After adopting this draft, the Conference referred it to the House of Delegates of the American Bar Association for approval, but no action was taken by that body. Subsequently, following the Report of the Attorney General's Committee on Administrative

nessee adopted a statute⁷ requiring approval of administrative regulations by the Attorney General and filing in the office of the Secretary of State. Prior to this legislation, in Tennessee, a form of statutory certiorari for the review of acts of boards and commissions had been adopted as a part of the 1932 Tennessee Code.⁸ Wisconsin adopted an early version of the Model Act in 1943,⁹ and in the same year North Carolina adopted a Revocation of Licenses Act.¹⁰ In 1942, Ohio adopted a Uniform Administrative Procedure Act¹¹ applicable to licensing functions. In 1944 Virginia adopted an Administrative Agencies Act¹² which was amended two years later.¹³ In 1945 Illinois adopted an Administrative Review Act¹⁴ and Pennsylvania enacted an Administrative Agency Law.¹⁵ The same year, following a careful study by its Judicial Council,¹⁶ California passed three separate acts: the Administrative Procedure Act,¹⁷ the Division of Administrative Procedure Act,¹⁸ and the Judicial Review Procedure Act.¹⁹ At the Iowa State Bar Association meeting in the summer of 1947 an analysis of administrative agency investigations was distributed.²⁰

In Tennessee, as in other jurisdictions, the considerably expanded scope of government regulation has resulted in an increase of power in the hands of administrative officers and agencies. In the state there are, for example, eighteen departments and at least twenty-nine commissions, most of which have been granted the power to make rules.²¹ Nor are these the only authorities

Procedure (1941) and the Benjamin Report on Administrative Adjudication in New York (1942), a completely revised draft was submitted for consideration at the 1942 session of the Conference and, after consideration, that draft was recommitted for further study but was enacted almost verbatim in Wisconsin. See note 9 *infra*. A proposed Uniform Act was submitted to the Conference at the annual session held in Chicago in 1943, but at this session it was decided to offer instead of a Uniform Act, a Model Act because the subject was one in which uniformity among the states was not necessary although it was felt that a tendency toward uniformity would be helpful. The Model Administrative Procedure Act was adopted by the Commissioners in 1944, but the promulgation was made subject to approval by the Board of Governors of the American Bar Association because that organization was sponsoring before Congress the so-called Federal Administrative Procedure Act which paralleled in most respects the minority report of the Attorney General's Committee, and it was desired to avoid interfering with the consideration of that measure. The Board of Governors has not yet given its approval to the Model Act despite the adoption of the federal act in June, 1946.

7. Tenn. Pub. Acts 1941, c. 111.

8. TENN. CODE §§ 9008-9018 (Williams, 1934).

9. Wis. Laws 1943, c. 375.

10. N. C. GEN. STAT. 150-1 to 150-8 (1943).

11. OHIO GEN. CODE, §§ 154-56 to 154-74 (Page, 1946).

12. Va. Acts 1944, c. 160.

13. Va. Acts 1946, c. 234.

14. Ill. Laws 1945, p. 1144.

15. Penn. Acts 1945, no. 442.

16. 10th JUD. COUNCIL CAL. BIENN. REP. (1944).

17. CAL. STATS. (1945), c. 867.

18. *Id.*, c. 869.

19. *Id.*, c. 868.

20. ADMINISTRATIVE AGENCY INVESTIGATIONS 1947 (Iowa).

21. These include the Departments of Accounts, Budget, Personnel, Purchasing, Local Finance, Veterans Affairs, Agriculture, Conservation, Education, Employment Security, Finance and Taxation, Highways and Public Works, Institutions, Insurance and Banking,

with such powers. Generally, it is held by the more than twenty examining and licensing boards which were formerly under the Department of Education.²²

Although there is, in Tennessee, no well-developed body of decisions dealing with the problems of administrative procedure, there are decisions concerning notice and hearing, administrative rule-making, the validity of rules, and judicial review of such actions. The aim herein is to collect these cases and consider the judicial principles which are being evolved, together with a consideration of certain representative local statutes. An attempt will be made in the discussion of certain agencies, to show problems which have arisen in administration and, to a limited degree, the attitude of the courts toward the administrative process in the state. The method of study combines the use of written materials, including statutes, reports, rules and regulations, the observation of a limited number of public hearings, interviews and correspondence with officials. So far as it is possible, the examination is restricted to procedural aspects of the administrative agencies and no attempt is made to illustrate the substantive rules.

RULE-MAKING

As noted, in 1941 the Tennessee legislature passed a statute governing the adoption of rules and regulations by state officers and agencies.²³ This legislation however, imposed no obligation to adopt rules or regulations and will be considered in more detail later. In addition to this general legislation, an examination of the statutes under which function various administrative officers and agencies discloses that delegation of rule-making power is a very popular device in the state—popular, at least with the legislature.

The Department of Finance and Taxation, for example, has been ex-

Labor, Public Health, Public Welfare, and Safety; the Commissions of Aeronautics, Armories, Athletic, Building, Charitable and Penal Institutions, Civil Service, Code, Conservation, Constitutional Revision, Crippled Children's, Forrest Park Memorial, Historical, Housing Handicapped Children, Inter-governmental Co-operation, Interstate on Crime, John Sevier Memorial, Law Library, Reelfoot Lake, State Planning, Surplus Property, Tuberculosis Hospital; State Retirement Board, Hospital Board, Unclaimed Bodies Board, Standardization, State Consolidation, Tennessee Nutrition, To Investigate Charitable and Penal Institutions.

22. The boards are: Examiners in the Basic Sciences, Healing Arts, Registration in Chiropody, Optometry, Osteopathic Registration, Licensing General Contractors, Stallion Enrollment, Anatomy, Plumbers, Committee on Nursing Education and Practice, Examiners for Nurses, Accountancy, Cosmetology, Architects and Engineers, Dental Examiners, Law Examiners, Barbers, Medical Examiners, Chiropractic Examiners, Pharmacy, Veterinary Medical Examiners, Advisory Committee of Librarians. Formerly the records of these boards were maintained by the Division of Professional Registration in the Department of Education under Tennessee Code (Williams, 1934) Secs. 6902 *et seq.* Section 2 of Chapter 211, Pub. Acts 1937, an appropriations bill, directed 90% of the fees collected by each board be paid to the boards and the balance to the general fund of the state. On the authority of this, the Division of Certification and Professional Registration ceased to function, and was instructed to return all business held to the secretary-treasurer of each board.

23. TENN. CODE §§ 1034.19-25 (Williams, 1934).

pressly authorized to make rules and regulations to carry into effect: the income tax;²⁴ the regulation of the sale of gas;²⁵ the registration of motor vehicles;²⁶ the administration of the alcohol beverage tax;²⁷ enforcement of the inheritance tax;²⁸ effectuation of the estate tax;²⁹ the excise tax;³⁰ the gift tax,³¹ and the sales tax;³² with the assistance of the State Board of Equalization, the rules for the conduct of that body;³³ the administration of the department of county tax assessors and county boards of equalization;³⁴ the act governing outdoor advertising;³⁵ the traffic in alcoholic beverages;³⁶ the act governing transfer of title to motor vehicles;³⁷ the inspection by state oil inspector;³⁸ the enforcement of limitation on importation of gasoline;³⁹ the government of the State Highway Department;⁴⁰ the enforcement of the Beer Tax statute.⁴¹

The State Department of Agriculture or administrative officers in that department have been granted the authority to make rules and regulations: for inspection, analysis, and tests of commercial fertilizers;⁴² to control insects, fungi and similar pests;⁴³ to effectuate quarantines;⁴⁴ to establish standards for commercial feed stuff;⁴⁵ to administer the Dairy and Dairy Production Act;⁴⁶ to carry on business of the State Planning Commission;⁴⁷ to administer the Agriculture Conservation Act;⁴⁸ concerning the conservation of lands;⁴⁹ for control of weights and measures;⁵⁰ to control licenses for hatching and sale of baby chicks;⁵¹ for the suppression of communicable diseases in cattle;⁵² to control the sale of oleomargarine;⁵³ to enforce the act

24. *Id.* § 1123.31.

25. *Id.* 1147.9

26. *Id.* 1152.3.

27. *Id.* 1191.8.

28. *Id.* 1273.

29. *Id.* 1308.

30. *Id.* 1323. This section provides that rules will be effective when published.

31. *Id.* 1328.10.

32. Tenn. Pub. Acts 1947, c. 3, § 13.

33. TENN. CODE § 1449 (Williams, 1934).

34. *Id.* § 1478.

35. *Id.* 5753.12.

36. *Id.* 6648.7 (Supp. 1947).

37. *Id.* 6770.23.

38. *Id.* 6850.2.

39. *Id.* 11392.3 (Supp. 1947).

40. *Id.* 11464.

41. Tenn. Pub. Acts 1947, c. 109, § 1.

42. TENN. CODE §§ 429, 514 (Williams, 1934).

43. *Id.* § 446.

44. *Id.* 452.

45. *Id.* 499.

46. *Id.* 535.

47. *Id.* 552.8.

48. *Id.* 552.30.

49. *Id.* 552.39.

50. *Id.* §§ 595, 6652.

51. *Id.* 525.4 (Supp. 1947).

52. *Id.* 5027.

53. *Id.* 6546.15.

governing marketing and sale of strawberries;⁵⁴ for the analysis and inspection of insecticides and fungicides;⁵⁵ to establish quality of food;⁵⁶ to control adulteration;⁵⁷ to enforce the Adulterated or Mishandled Foods Act;⁵⁸ for licensing pest eradicators;⁵⁹ for governing construction and operation of locker plants;⁶⁰ for licensing persons engaged in slaughtering livestock.⁶¹

The Railroad and Public Utilities Commission can prescribe rules or regulations: for the construction and maintenance of wires across railroad tracks;⁶² to govern hearings, to determine complaints,⁶³ and to subpoena witnesses;⁶⁴ to fix reasonable standards for public utility services and practices, their standards of measurement, and to secure accuracy of their measuring devices;⁶⁵ pertaining to motor carrier rates, fares and charges;⁶⁶ to fix rates, charges, tariffs, or prevent discrimination by railroads.⁶⁷

In the state the numerous statutory grants of rule-making power vary widely. A few have required notice and hearing as a condition precedent to rulemaking.⁶⁸ In one enactment, the Commissioner of Agriculture is authorized to make regulations for enforcement of the Adulterated or Misbranded Foods act, but before promulgation of any regulations, thirty days notice, specifying the time and place of hearing, must be given.⁶⁹ In connection with the regulation of public utilities, the Railroad and Public Utilities Commission has the power, after hearing, to fix just and reasonable standards of service and practice, to fix standards for measurements, and to enact rules to ensure accuracy of all meters and appliances for measurement.⁷⁰ This Commission has the power, also after hearing all interested persons, to prescribe regulations for construction and maintenance of wires across the tracks of a railroad.⁷¹ The State Oil and Gas Board can make no rule or order except after a public hearing upon at least ten days notice.⁷² Another variant is the authorization to the Commissioner of Public Welfare to hold hearings relating to fact determinations which he is required or authorized to make.⁷³ The latest instance is the

54. *Id.* § 6579.18.

55. *Id.* § 6807.

56. *Id.* § 6580.21 (Supp. 1947).

57. *Id.* § 6580.14 (Supp. 1947).

58. *Id.* § 6580.21 (Supp. 1947).

59. Tenn. Pub. Acts 1947, c 19, § 5.

60. *Id.* c. 143, § 10.

61. *Id.* c. 226, § 3.

62. TENN. CODE § 2668 (Williams, 1934).

63. *Id.* § 5399.

64. *Id.* § 5405.

65. *Id.* § 5450.

66. *Id.* § 5501.4.

67. *Id.* § 5397.

68. This requirement is included in the Model State Administrative Procedure Act, § 2.

69. TENN. CODE § 6580.21 (Williams, 1934).

70. *Id.* §§ 5450(e), (f), (g).

71. *Id.* § 2668.

72. *Id.* § 5240.6.

73. *Id.* § 4765.12.

prescription that "general and special rules may be adopted, amended or rescinded by the Commissioner [of Employment Security] only after public hearing or opportunity to be heard thereon, of which proper notice has been given."⁷⁴

The statutory procedures to be followed by rule-making authorities vary widely with the requirements of the particular circumstances. It is apparent that there can be no single uniform "quasi"-legislative procedure which will be appropriate for the formulation, in every circumstance, of all types of regulation. Among the more useful procedural methods for such action may be included: informal investigation and study by the agency; consultation by the agency with those who will be affected by the regulation; utilization of advisory committees; employment of other outside sources of information and advice; and private or public hearings.

These methods are adaptable to various uses. Consultation, for example, may be by informal conference or by correspondence, or may be with temporary or permanently organized advisory committees or by hearings. Such hearings, too, differ widely in nature and scope.

In rule-making procedures the leading characteristic is the exercise of discretion by the authorities entrusted with the task. Ordinarily the chief issues are not factual ones but involve such matters as the formulation of new policies. Despite these considerations the Model State Administrative Procedure Act provides that prior to the adoption of any rule, the adopting agency shall hold hearings.⁷⁵ Similarly, in the federal field, rule-making powers can be exercised, with limited exceptions, only after notice and hearing.⁷⁶

(1) *Delegation of Power*

The granting of power to make rules springs from the limitations of the legislature. Modern legislation with increasing frequency seeks to deal with regulatory problems by setting forth less frequently in the legislation itself the particular rules that shall control, but by granting to an administrator the power to prescribe governing regulations in certain spheres of activity. Although the doctrine of separation of powers is established by the state constitution⁷⁷ this has not prevented the growth of the administrative process.

While delegation has proved conducive to flexibility, it may also be subject to abuse⁷⁸ and, in their desire to prevent abuses, the courts of Tennessee have sought to control the rule-making power. They have spoken generally in terms of "delegation of power."

74. Tenn. Pub. Acts 1947, c. 29, § 11 (B).

75. Model State Administrative Procedure Act, § 2(3).

76. 60 STAT. 239 (1946), 5 U.S.C.A. § 1003 (Supp. 1946).

77. TENN. CONST. Art. II, §§ 1-2; Art. VI, § 1.

78. Statement by Dean Pound, *Hearing before Subcommittee of the Committee of the Judiciary on S. 674, S. 675, and S. 913, 77th Cong., 1st Sess. (1941) 1579-1584.*

"Delegation of law-making power," says a recent writer, "is the dynamo of modern government. . . . Today, while theory still affirms legislative supremacy, we see power flowing back increasingly to the executive, to referred rather than original power. Departure from the traditional rationalizations of the status quo arouses distrust. Delegation as the hand maiden of regulation is distasteful to holders of economic power, but there is also general concern that large decisions of policy should be grounded in consent. Consent is the product of compromise and can only be arrived at through representation. The legislature comprises a broader cross section of interests than any one administrative organ; it is less likely to be 'captured' by particular interests."⁷⁹

The Supreme Court of Tennessee has adopted the rule stated in *Corpus Juris*⁸⁰ as an apt statement of the rule regarding delegation of power: "While . . . the legislature may not delegate the exercise of its discretion as to what the law shall be, it may confer discretion in the administration of the law . . . The difficulty lies, not in determining the governing principle, but in the application to concrete cases. With the growing complexity of modern life, the multiplication of the subjects of regulation, and the increased difficulty of administering the laws, there is a constantly growing tendency toward the delegation of greater power by the legislature, and toward the approval of the Courts."⁸¹ The Court continues: "[W]hile the legislature cannot delegate the power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."⁸² It has repeated with approval the distinction of Judge Ranney, which Mr. Justice Harlan quoted in *Field v. Clark*,⁸³ that "the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."⁸⁴

But if the standard is a riddle, as Mr. Justice Cardozo said,⁸⁵ it is no answer to say that the "nature of the final act" determines the nature of the power which was alleged to have been delegated,⁸⁶ although the supreme court

79. Jaffee, *An Essay on Delegation of Legislative Powers: I*, 47 *Col. L. Rev.* 359 (1947).

80. 12 *C. J.* 840-841.

81. Quoted in: *Richardson v. Reese*, 165 *Tenn.* 661, 667, 57 *S.W.2d* 797, 799 (1933); *Llewellyn v. Knox County*, 165 *Tenn.* 319, 331, 54 *S.W.2d* 973, 976 (1932).

82. *Richardson v. Reese*, 165 *Tenn.* 661, 667, 57 *S.W.2d* 797, 799 (1933); *cf.* *Holliston Mills v. McGuffin*, 177 *Tenn.* 1, 146 *S.W.2d* 134 (1940); *Carothers v. Giles County*, 162 *Tenn.* 492, 39 *S.W.2d* 584 (1931).

83. 143 *U.S.* 649 (1892).

84. *Cincinnati, Wilmington & Co. v. Comm'rs.*, 1 *Ohio St.* 88, quoted in *Holliston Mills v. McGuffin*, 177 *Tenn.* 1, 14, 145 *S.W. 2d* 1, 6 (1940).

85. "The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fulness must supply the answer to the riddle." *Welch v. Helvering*, 290 *U.S.* 111, 115 (1933).

86. *Hughes, C. J.*, in *Louisville & N. R. Co. v. Garrett*, 231 *U.S.* 298 (1913).

has cited this as a guide.⁸⁷ The question remains of determining the nature of the final act.

The approach to the problem of delegation on the basis of ideal conceptions of judicial, executive, and legislative powers has led largely to semantic confusion and proved of little assistance in concrete cases. The fact-determination test, or what may be more aptly called a "contingency" test, well demonstrates that this conceptualistic approach is unrewarding.

The inadequacy of his "contingency" test is best shown by an illustration. Suppose a statute provides that if the Commissioner of Agriculture believes that the prohibition of growing Indian hemp may in the future be necessary to protect the health and welfare of the public, he may prohibit the cultivation of the plant except under such limitations or exceptions as he may prescribe. Disobedience will be punishable by fine. This clearly may be challenged as a delegation of legislative power because there is more than a fact determination; there is a prediction of future events and a determination of what the law shall be.

But suppose the act had been drafted differently. Suppose the provision had read that if the Commissioner, after hearing, determines that in the past the cultivation of Indian hemp has resulted in the injury to or impairment of the health of the citizens of the state, then cultivating the plant will be a criminal offense except in accordance with the rules and regulations made by the Commissioner to protect the health of the citizenry. There is no legislation here by the contingency test; there is merely a determination of fact. But it would take an exceedingly subtle mind to distinguish between the results reached in the same situation. Is the first case one of prediction of future events, the latter merely a factual determination? What is fact? Is there a manner of judging the fact except on the basis of past experience?

(2) *Validity of Rules*

But deficiencies in one test do not mean that there is no strength in the fundamental position or that the results reached in particular instances by the courts may not be workable. Although the general discussion of concepts discloses less of the substance of the theory of separation of powers than the enduring vitality of the doctrine indicates exists in practice, perhaps the conception of the courts in Tennessee will appear from what they have done in particular situations.

In the performance of his duties, the Commissioner of Finance and Taxation in Tennessee has issued many regulations, and his regulations governing the sale and transportation of liquor have been more frequently challenged in the appellate courts than any rules issued in the state. In a recent

87. *In re Cumberland Power Co.*, 147 Tenn. 504, 511-512, 249 S.W. 818, 820 (1923).

case, the Commissioner, in accordance with the rule he had adopted, refused to grant a liquor dealer license to a petitioner whose brother-in-law's license had been revoked. The petitioner, after complying with all the statutory prerequisites to obtaining a license, sought by mandamus to compel the issuance on the ground that the rule was too unreasonable to be sustained. After hearing testimony of the Commissioner concerning past experience with issuance to relatives of violators, the lower court refused to issue the writ. This decision was affirmed on appeal.⁸⁸

The following year the supreme court sustained a rule concerning the confiscation of vehicles used for the illegal transportation of liquor. The truck in question was hired by persons who used it for such purposes, but the owner claimed he was unaware of the reason for hiring. The rule placing the burden of knowledge on the owner was challenged as unreasonable but was sustained.⁸⁹

The next court challenge to a rule of the Commissioner arose over the suspension of a dealer's license for violation of a rule prohibiting the addition of brands of liquor to a dealer's stock without written approval by the Commissioner. The court, on a petition for certiorari from a hearing before the Commissioner, said the regulation was invalid because it tended to create a monopoly in violation of local laws and statutes. Reversing on appeal, the supreme court found no evidence of the use to create a monopoly and said that it refused to interfere lightly with the discretion of the Commissioner: "since the power of the state to prohibit sales altogether is beyond question, no provision for its regulation is beyond state power."⁹⁰

Nevertheless this dictum was speedily distinguished when the Commissioner sought to enforce a regulation prohibiting the operation of a retail liquor establishment within one hundred feet of public places in which liquor is consumed. This regulation was issued in September, 1945, and a dealer sought to enjoin interference with his operation under an annual license issued before the promulgation of the regulation. The court called the application of the regulation to this dealer "retroactive and oppressive" and said a license once granted for a fixed period should not be, in effect, withdrawn, cancelled or suspended without fault or failure on part of the holder.⁹¹

88. *McCanless v. Hamm*, 181 Tenn. 308, 181 S.W.2d 154 (1944).

89. *McQueen v. McCanless*, 182 Tenn. 453, 187 S.W.2d 630 (1945).

90. *McCanless v. Klein*, 182 Tenn. 631, 639, 188 S.W.2d 745, 748 (1945).

91. *Wise v. McCanless*, 183 Tenn. 107, 191 S.W.2d 169 (1945). The court said the test was whether the regulations were unreasonable or oppressive and cited as its precedents the following cases which involved municipal ordinances: *Newbern v. McCann*, 105 Tenn. 159, 58 S.W. 114 (1900); *Grills v. Jonesboro*, 87 Tenn. 247 (1874); *Maxwell v. Jonesboro*, 58 Tenn. 257 (1872). It is interesting to note that the court in the principal case says that the regulation is valid except in its application to dealers already licensed. The balance of public good against private rights is changed by the payment of a license fee. *But see Grubb v. Morristown*, 203 S.W.2d 593, 595 (Tenn., 1947) where a municipal ordinance prohibiting the sale of beer was adopted while licenses permitting the sale of

The next year in *Brown v. McCannless*⁹² the supreme court sustained the action of the Commissioner in refusing to issue a liquor dealer license because, under one of his regulations, the premises on which the applicant proposed to do business were too near a school.

Suppose, instead, the school had been built adjoining a liquor dispensary. Could the latter have continued operation until his annual license had expired?

The Commissioner has been less successful in the field of taxation. The Commissioner's rule interpreting a statutory provision concerning the loss of gallonage of gasoline in shipment was overruled because the court felt that it was not a correct interpretation of "legislative intent."⁹³ In another situation, however, the supreme court sustained an exercise of the power to define "net earnings" for a taxing statute, since granting this authority was not a delegation of legislative power.⁹⁴

The Railroad and Public Utilities Commission has experienced more difficulty with its regulations before the courts. While there has been judicial approval of rules of the Commission regarding crossing signs,⁹⁵ in more important matters it has not fared so well. In 1928, the Commission's rules required applicants who sought certificates of public convenience and necessity for hydro-electric developments to agree, in advance of hearing, to a fixing of a basis for future determinations of value, rates, and other valuable rights; to the payment of certain fixed charges; and to a right of recapture by the state after a stipulated period. The requirements were challenged by a declaratory judgment, and it was held that the Commission could not impose conditions such as these in advance of hearing although, by statute, the Commission had the power to impose such conditions as the public interest might require.⁹⁶ Only a year later the supreme court, again in a proceeding for a declaratory judgment, held invalid a rule of the Commission relating to the maintenance of railroad depots. It held that the Commission, in adopting a rule which would affect the terms of employment or hours of duty at depots, was acting *ultra vires*. Although the duty was imposed on the Commission "to require the location of such depots and . . . passenger buildings as the . . . public comfort may require," a rule prescribing "no such depot . . . now established or which may hereafter be established pursuant to orders made

beer issued by the city beer board still had some time to run. The court upheld the ordinance, saying the license was "merely a temporary permit to do what was otherwise unlawful," and it gave no property right entitling the holders to notice and hearing before revocation. *Wise v. McCannless* was not cited.

92. 195 S.W.2d 619 (Tenn., 1946).

93. TENN. CODE § 1130 (Williams, 1934); *State v. Texas Co.*, 173 Tenn. 154, 116 S.W.2d 583 (1938).

94. *Bank of Commerce v. Senter*, 149 Tenn. 569, 250 S.W. 144 (1924).

95. *See Steele v. Louisville & N. R.R.*, 154 Tenn. 208, 285 S.W. 582 (1926).

96. *Tenn. Eastern Elec. Co. v. Hannah*, 157 Tenn. 582, 12 S.W.2d 372 (1928).

by the Commission or voluntarily by such company, or otherwise established, shall be closed, removed, suspended, discontinued or abolished without authority granted by the Commission upon written application," was held to be an interference with the control of employees by the railroad and so beyond the power of the Commission.⁹⁷

Similarly, the State Board of Barber Examiners has not been handled gently by the courts. Under a statute which gave the Board the power to approve the minimum prices when a schedule was submitted by seventy-five percent of the barbers, that body ratified a schedule of fees. These standards were designed to protect the public health, but the court viewed this action very dimly. It held that such action invaded the right of personal liberty, the right of property, and the right to make contracts for the sale of labor.⁹⁸ The court quoted with approval the dissenting opinion in a Louisiana case⁹⁹ to the effect that the only appropriate way to protect public health or promote public welfare in barber shops was to establish sanitary regulations and requirements, to maintain cleanliness in the barber shops, to guard against unhealthy barbers, and similar provisions. This dissenting judge said he could see no way in which fixing minimum prices could protect, or have a tendency to protect, public health. The Tennessee court saw in the statute an imminent threat to the liberty of the individual and the right to contract. It also held invalid a regulation governing opening and closing hours on the ground that such power was not granted to the Board. It said by way of dictum that had this latter power been expressly conferred, it would have been "an unreasonable and unnecessary exercise of the police power."¹⁰⁰

But if the court thinks that the Board of Barber Examiners cannot be granted the power to approve prices to protect the public health, when the need becomes more immediately urgent, as in the case of a communicable disease, different results are reached. In a *habeas corpus* proceeding a rule of the State Board of Health was challenged. The rule prescribed that every person infected with a communicable disease should strictly observe quarantine regulations. The statutory authorization to make rules prescribed that violations of rules made thereunder should be misdemeanors. The court sustained imprisonment of the petitioner for violation of the quarantine rule when she was unable to pay her fine.¹⁰¹

The Commissioner of Agriculture's rules of quarantine have also been sustained. A cattle owner was fined for violation of a quarantine rule im-

97. Tenn. Pub. Acts 1907, c. 390, § 2; Nashville, C. & St. L. Ry. v. Railroad Comm., 159 Tenn. 43, 15 S.W.2d 751 (1925). Compare Cincinnati, N. O. & T. P. R. Co. v. State, 148 Tenn. 128, 252 S.W. 1000 (1923).

98. Board of Barber Examiners v. Melton, 174 Tenn. 178, 124 S.W.2d 253 (1939).

99. Board of Barber Examiners v. Parker, 190 La. 214, 298, 182 So. 484, 512 (1938).

100. Board of Barber Examiners v. Melton, 174 Tenn. 178, 192, 134 S.W.2d 253, 258 (1939).

101. State *ex rel.* Kennedy v. Head, 182 Tenn. 249, 185 S.W.2d 530 (1945).

posed upon cattle.¹⁰² On appeal the conviction was upheld; and the court, considering the challenge to the rule, said: "The question of reasonableness or unreasonableness of the rule or regulation of the Agriculture Department involved in this case was one for the court, and not for the jury to determine. The general rule is that the reasonableness of rules, regulations, or by-laws adopted and promulgated by officials and boards pursuant to authority delegated by the legislature is to be decided as a question of law, and that such by-law, rule or regulation, if unreasonable, is to be held void as a matter of law . . ." ¹⁰³

(3) *Extent of Present Utilization of Rule-Making Power*

These challenges to substantive rules amply demonstrate that regulation by administrative rule has been appreciable in Tennessee. Many of the rule-making powers have been exercised to formulate substantive regulations, but comparatively few authorities have used their powers to prescribe rules of procedure and practice, generally contenting themselves with the issuance of these substantive rules or regulations. Among the notable exceptions are the Board of Claims,¹⁰⁴ the Railroad and Public Utilities Commission,¹⁰⁵ and the Board of Review of the Division of Unemployment Compensation.¹⁰⁶ These agencies have published detailed procedural rules in printed form. None of the licensing boards has adopted such rules, nor has the Commissioner of Finance and Taxation,¹⁰⁷ nor has the Commissioner of Insurance and Banking.¹⁰⁸ The Department of Public Welfare has issued a *Welfare Manual*¹⁰⁹ which, in one section, describes the procedures in complaints and hearings¹¹⁰ under the public assistance statutes, but this latter is descriptive in form, setting out the aim of a fair hearing and the rights of applicants and recipients under the statutes. The manual, in loose-leaf format, is designed for the use of the staff in administration¹¹¹ and is supplemented at intervals by numbered bulletins disseminated to all regional and county offices. These bulletins serve to maintain the manual in a current condition.

102. *Bishop v. State*, 122 Tenn. 729, 127 S.W. 598 (1908).

103. *Id.* at 738-739.

104. RULES OF BOARD OF CLAIMS (Tenn. 1945).

105. RULES OF PROCEDURE AND PRACTICE BEFORE THE RAILROAD AND PUBLIC UTILITIES COMMISSION (Tenn. 1942).

106. RULES AND REGULATIONS OF BOARD OF REVIEW OF THE DIVISION OF UNEMPLOYMENT COMMISSION (Tenn. 1942).

107. Letter of Commissioner of Finance and Taxation, dated July 2, 1947.

108. Letter of Deputy Commissioner of Insurance and Banking, dated July 8, 1947.

109. TENNESSEE PUBLIC WELFARE MANUAL (1946).

110. *Id.* Vol. II, c. 2, § 8, pp. 2264-2267.

111. *Id.* Vol. II, *Foreword*.

(4) *Filing of Rules and Regulations with Secretary of State*

One of the grave sources of dissatisfaction with the administrative process generally has been the unavailability of rules and regulations issued by the agencies and commissions. Tennessee has sought to cope with this problem by a statute which requires that when any "state executive officer, board, department, bureau, authority [or] commission" promulgates a rule except "such as relate to the organization or internal management of such agency," then that rule must be printed and filed in the office of the Secretary of State¹¹² where it becomes a public record.¹¹³ This section required the filing of all rules and regulations effective at the time of the adoption of the act in 1941. The statute, Chapter 111 of the Acts of 1941, imposes the additional requirement that the regulations be approved by the Attorney General¹¹⁴ and printed and filed in a manner to be prescribed by a board composed of the Governor, the Secretary of State, and the Commissioner of Finance and Taxation.¹¹⁵ A regulation is not effective until filed¹¹⁶ and it is expressly stipulated in a separate section of the act that all rules and regulations published after the effective date "will be void . . . until the aforesaid requirements are complied with."¹¹⁷

The aim of this statute is to make available to the public the rules which are binding on individuals. Basic principles of fairness require that, before individuals are required to comply with administrative rules, notice and opportunity to become familiar with their contents should be provided.¹¹⁸ The statute seems to provide protection to the individual, but lack of compliance with the duties imposed by the enactment indicates some indifference.

Chapter 111 was drafted by the office of the Attorney General with the cooperation of the Commissioner of Finance and Taxation in 1941. The measure was sponsored by the state administration.

The board upon which was imposed the duty of establishing the form in which the rules and regulations should be published and filed has never met.¹¹⁹ The rules on file in the office of the Secretary of State are collected in a manila folder and vary in form from printed, permanently-bound rules through multigraphed ones to unbound carbon copies. Only nine agencies have

112. TENN. CODE § 1034.19 (Williams, 1934).

113. *Id.* § 1034.22.

114. *Id.* § 1034.21.

115. *Id.* § 1034.20.

116. *Id.* § 1034.21.

117. *Id.* § 1034.23.

118. The Model State Administrative Procedure Act in Section 3 and the 1943 Uniform Act, also in Section 3, require administrative rules be filed with the Secretary of State. Section 1003 of the Federal Administrative Procedure Act has a provision with similar aims, requiring adoption and publication in the Federal Register of substantive rules, statements of policy and procedures.

119. Former Commissioner of Finance and Taxation, letter dated June 21, 1947. (This fact was confirmed in the office of the Secretary of State.)

filed rules, virtually all of which have been approved by the Attorney General. The rules on file relate, in general, to substantive matters. The Commissioner of Finance and Taxation has filed substantially more than any other agency. Approximately fifty different rules or sets of rules are now on deposit in the file in the office of the Secretary. These vary from single regulations to complete booklets, such as the Rules and Regulations¹²⁰ for the administration of Finance and Taxation.

The statute imposes no obligation to adopt rules but only the filing of those adopted. It has not been cited in any reported case, but similar provisions have been incorporated in individual statutes both before and since the adoption of the act. The requirements of filing with the Secretary of State¹²² and that of approval by the Attorney General¹²³ are found in such statutes.

(5) *Publication of Rules*

In addition to the requirement of filing of rules with a state official some states require that rules and regulations be published.¹²⁴ In Oregon all rules and regulations must be filed with the Secretary of State who is required to publish summaries¹²⁵ while in Kansas all rules and regulations of a general nature must be deposited with the revisor of statutes.¹²⁶ In Wisconsin the revisor of statutes is required to assemble and publish them annually.¹²⁷ Massachusetts requires that all such materials be included in the annual reports required of the state officers.¹²⁸ California's Codification Board publishes all such material deposited with the Secretary of State in the California Administrative Register.¹²⁹

In Tennessee the rules must be collected and printed by the promulgating body¹³⁰ and copies filed with the Secretary of State in a form to be prescribed.¹³¹ When filed the rules become public records and are available for inspection.¹³² Copies of the rules are to be distributed on request to various

120. TENNESSEE RETAILERS' SALES TAX ACT RULES AND REGULATIONS (Tenn. 1947). the Tennessee Retailers' Sales Tax Act¹²¹ issued by the Department of

121. Tenn. Pub. Acts 1947, c. 3.

122. Tenn. Pub. Acts 1937, c. 305, § 19, Rules of Aeronautic Bureau; Tenn. Pub. Act 1947, c. 29, § 11(B), Rules of Dept. of Employment Security; Tenn. Pub. Acts 1935, c. 157, § 1(d), Rules of Dept. of Insurance and Banking.

123. Tenn. Pub. Acts 1939, c. 128, § 1, Regulations by Commissioner of Agriculture; Tenn. Pub. Acts, 1947, c. 29, § 11 (B), Rules of Dept. of Employment Security.

124. The Model Act provides, in Section 4, for compilation, indexing and periodical publication of rules and regulations under the supervision of the Secretary of State.

125. Ore. Laws 1939, c. 474.

126. Kan. Laws 1939, c. 308.

127. Wis. Pub. Acts 1939, c. 428.

128. Mass. Acts and Resolves 1939, c. 499.

129. Calif. Laws 1941, c. 628.

130. TENN. CODE § 1034.19 (Williams, 1934).

131. *Id.* §§ 1034.19-20. See § 3 of the Model Act.

132. *Id.* § 1034.21.

promulgating authorities¹³³ but there is no provision for their periodic publication. The duty of collecting and filing is a duty imposed, not on the Secretary of State, but on the various rule-making authorities. The duties of the Secretary of State seem to have been fulfilled in this respect when he maintains a file of the rules¹³⁴ and furnishes copies to the office of the Attorney General.¹³⁵

Certain statutes in Tennessee have, for a considerable time, imposed the duty of publishing rules and regulations, such as those regarding excise taxes¹³⁶ or for the enforcement and administration of the Employment Security Act.¹³⁷ The latter, a recent statute, requires publication in a newspaper of general circulation.¹³⁸ In the case of regulation of fish and game rights on private lands, the Department of Conservation must post rules and regulations¹³⁹ and must publish proclamations of open seasons in newspapers.¹⁴⁰ The Department of Institutions must publish its regulations concerning the management and supervision of state hospitals in the biennial report of the Commissioner.¹⁴¹

INDIVIDUAL RIGHTS AND ADMINISTRATIVE RULES

(1) *The Petition for Adoption of Rules*

There seems little doubt that the Constitutional guarantee of free speech insures the right of petition for the adoption of rules—a right in the sense that anyone can, at any time, request an agency to exercise its rule-making power. Many lawyers think that a formal statement of that right is desirable in order to acquaint individuals with it, and to apprise the agencies of their duty to receive and consider such requests.¹⁴²

The right to petition has been granted by statute in at least one instance in Tennessee though there is no court report of the section having ever been invoked. Under the Department of Agriculture the supervisors of soil conservation districts may make rules governing the use of lands in the interest of conserving soil. The owner of the land affected is given the right to ask for amendment, supplement or repeal.¹⁴³

133. *Ibid.*

134. TENN. CODE § 1034.21 (Williams, 1934).

135. *Id.* § 1034.22.

136. Tenn. Pub. Acts 1937, c. 99, § 3.

137. Tenn. Pub. Acts 1947, c. 29, § 11(B).

138. *Ibid.*

139. Tenn. Pub. Acts 1941, c. 103, § 3.

140. Tenn. Pub. Acts 1947, c. 59, § 2.

141. TENN. CODE § 4499 (Williams, 1934). See note 128, *supra*.

142. Both the Model Act in Section 5 and the 1943 Uniform Act in Section 7 grant the right to petition. The Federal Administrative Procedure Act grants the right to petition. 60 STAT. 245, (1946) 5 U.S.C.A. sec. 1009(a) (Supp. 1946).

143. TENN. CODE § 532.39 (Williams, 1934).

(2) *Test of Validity of Rules by Declaratory Judgment*

A far more important right than that to petition for rules is the right to test the validity of an administrative rule in a judicial proceeding for a declaratory judgment. Criticism has been directed at the necessity of disobeying an administrative regulation in order to test its validity.¹⁴⁴ Dean Pound says: "Rules of . . . doubtful validity ought not to . . . await determination in litigation after action contravening them. Parties should not be required to run the risk of infringing rules having the force of law in order to find out what their rights are under the law. Every reason for the practice of declaratory judgments, now so generally adopted everywhere, applies to ascertainment of the validity of administrative rules in advance of infringement of them."¹⁴⁵

Professor Borchart of Yale thinks this is an area especially suitable for the use of declaratory judgments. He says: "Possibly in no branch of litigation is the declaration more useful than in the relation between the citizens and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasion for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly on questions of law involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity on the one hand, and public right and power, on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying ministrations of the declaratory judgment."¹⁴⁶

The Uniform Declaratory Judgments Act was adopted in Tennessee in 1923¹⁴⁷ and has been found useful in reviewing administrative actions.¹⁴⁸ The act provides that "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute and obtain a declaration of rights . . . thereunder."¹⁴⁹ The courts have not permitted the act to be used to satisfy curiosity merely or to employ the courts as advisory bodies. It does not contemplate declarations upon remote contingencies¹⁵⁰ or where actual rights are not shown to be involved.¹⁵¹ The Supreme Court of Tennessee says, "[T]o justify a declaration the question must be real, and not

144. Section 6 of the Model Act provides that the validity of any rule may be determined upon petition for a declaratory judgment.

145. *Hearing before Subcommittee of the Committee of the Judiciary on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess.* (1941) 1579, 1581.

146. BORCHARD, *DECLARATORY JUDGMENTS* CLXIV (2d ed. 1941).

147. *Tenn. Pub. Acts* 1923, c. 29.

148. *Nashville, C. & St. L. R.R. v. Wallace*, 288 U.S. 249 (1933).

149. *Tenn. Pub. Acts*, 1923, c. 29, § 2.

150. *Nashville Trust Co. v. Dake*, 162 *Tenn.* 356, 36 *S.W.2d* 905 (1931).

151. *General Securities Co. v. Williams*, 161 *Tenn.* 50, 39 *S.W.2d* 662 (1930).

a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, someone presently existing who has a true interest to oppose the declaration sought. . . . Parties are not entitled to an expression of opinion to help them in another transaction."¹⁵² Where these requirements are met, it is a proper method of testing constitutionality of a statute,¹⁵³ but not until some question arises under the law. Thus, the right to challenge a grant of rule-making power as an unconstitutional delegation gives no ground for challenge until that power is exercised, because there is no question for the court to consider,¹⁵⁴ but where a rule is promulgated by an administrative agency, then parties affected can challenge the rule in a proceeding for a declaratory judgment.¹⁵⁵

The Declaratory Judgment Act affords protection for an officer who seeks to avoid liability for his actions when he is uncertain of his powers and duties. Without such a device, the administrator may be unable to secure an advance determination of the application or validity of the law under which he acts.

Some states have enacted legislation specifically permitting declaratory judgments on administrative statutes and rules. The procedure has been used in New York to determine the "validity or reasonableness" of certain statutes or rules under them;¹⁵⁶ Wisconsin permits the review of reasonableness or lawfulness of rules of its State Board of Accountancy;¹⁵⁷ Illinois authorizes appeals from rules of its Department of Agriculture,¹⁵⁸ or the determination of the reasonableness or lawfulness of certain rules of its Industrial Commission.¹⁵⁹

(3) *Declaratory Rulings by Agencies*

An analogous proceeding to the declaratory judgment by the judiciary is the use of declaratory rulings by administrative agencies.¹⁶⁰

Procedures of this type are rare in state legislation¹⁶¹ but as a practical

152. *Hodges v. Hamblen*, 152 Tenn. 395, 399-400, 277 S.W. 901, 902 (1925).

153. *Goeta v. Smith*, 152 Tenn. 451, 278 S.W. 417 (1925).

154. *Mazanec v. Flannery*, 176 Tenn. 125, 138 S.W.2d 441 (1940).

155. *Nashville, C. & St. L. R.R. v. Railroad Com.*, 159 Tenn. 43, 15 S.W.2d 751 (1929); *Tenn. Eastern Electric Co. v. Hannah*, 157 Tenn. 582, 12 S.W.2d 372 (1928).

156. N. Y. LABOR LAW §§ 111, 112.

157. WIS. STAT. 1939, § 135.

158. III. STAT., c. 5, § 41 (*Smith-Hurd*, 1941),

159. *Id.* c. 48, § 137.7.

160. Section 7 of the Model Act grants the agencies the power to issue declaratory rulings but the section is permissive and not mandatory. The federal act, 60 STAT. 239 (1946), 5 U.S.C.A. § 1004(d) (Supp. 1946), provides that an agency may issue declaratory orders to "terminate a controversy or remove uncertainty," the power to be exercised in the agency's "sound discretion."

161. An instance is found in the New York Labor Law, Sec. 110, which provides: "I. Any person in interest or his duly authorized agent may petition the board of standards and appeals for review of the validity or reasonableness of any rule or order made under the provisions of this chapter. . . ."

matter in Tennessee, informal and unofficial consultation is not infrequently used. This presents the difficulty of having its basis too largely in personal relationship and the further difficulty that such rulings are not binding.

There are many instances in which it may be desirable that agencies declare rights and duties in advance so that conduct may be guided accordingly. The device has proved especially useful in the federal tax field where parties wish to know the tax effects of transactions.¹⁶²

If a ruling is to be binding, it must be applicable to only those situations in which the elements are certain. One eminent authority suggests that appropriate situations for the use of the advance judgments include rulings under the statutes which authorize revocation of licenses or the imposition of other penalties on persons who use advertising of an unacceptable character.¹⁶³ The boards can approve acceptable forms of advertisements and actions prior to liability.

These declaratory rulings have been widely approved. The Attorney General's Committee said in 1941: "The time is ripe for introducing into administration itself an instrument similarly devised [to the declaratory judgment], to achieve similar results in the administrative field. . . . A major step in that direction would be the establishment of procedures by

162. The power is granted by Int. Rev. Code § 3760.

163. GELLHORN, *ADMINISTRATIVE LAW—CASES AND COMMENTS* 2nd Ed. (1947) at 805-6. An example is provided by the authorization of the State Licensing Board for the Healing Arts to suspend or revoke licenses of dentists, doctors, osteopaths, chiropractors, optometrists, or for the Basic Sciences, for "unethical" advertising. Tenn. Pub. Acts 1947, c. 9, Secs. 11(6)-(7).

Was it an advance administrative decision perhaps the Tennessee Supreme Court was seeking in the following case decided nearly twenty years ago? Chapter 64 of the Public Acts of 1927 provided the Railroad Commission should "have the power, after notice and hearing, and it shall be its duty so to do, to authorize common carriers by railroad in Tennessee to entirely discontinue particular intrastate passenger service" when passenger service is regularly operated at a loss or become unnecessary in the public interest. The Railroad published notice it would discontinue two trains and the Commission issued an order to show cause. Denying that the Commission had power to pass on this discontinuance, Judge Chambliss, the late Chief Justice, said: "looking to the act as a whole, it appears to have been the intention of this act to confer upon the Commission power, not theretofore possessed, to relieve the railroad of public service obligations, which under changing conditions had become unduly burdensome; and that the act was passed for the benefit of the railroads of the State. While there appears to have been no statutory restriction upon the power of a railroad corporation to regulate in its discretion its train service, it was doubtless recognized that railroad corporations—in common with other public service utilities holding franchises conferring condemnation and other privileges—are under obligations to perform all their functions fairly and fully in the interest of the public, and that an arbitrary and unjustified failure in this regard would subject them to proceedings by mandamus, or perhaps their charters and franchise rights to forfeiture. . . . We think it may be fairly deduced that it was the intention of the Legislature . . . to provide . . . a method by which the reasonableness of . . . modifications found by the railroad managements to be necessary . . . might be passed upon by a duly authorized semi-judicial authority. . . . Upon the arising of a debatable issue between Railway Company and the public served by it, the act empowers the Commission to determine the issue and thereby relieve the Railroad of the danger of successful attack on the ground of abandonment, non-user, or inadequate discharge of its charter and franchise obligations and possible impairment of its valuable rights." *Nashville, C. & St. L. Ry. v. Hannah*, 160 Tenn. 586, 590-91, 27 S.W.2d 1089, 1090 (1930).

which an individual who proposes to pursue a course which might involve him in dispute with an administrative agency, could obtain from that agency, in the latter's discretion, a binding declaration concerning the consequences of his proposed action."¹⁶⁴

NOTICE AND HEARING

Although there is much less volume of formal adjudication than of other portions of administrative procedure, this phase of the process has been the source of more controversy than any other aspect of the subject.¹⁶⁵ It occurs in two general categories of cases: first, those where the state is one of the two parties in the proceeding; and second, cases in which the state is not a party but supplies an agency to conduct a proceeding, a special tribunal for determining a controversy between two or more outside interests. Falling between these categories are various proceedings which fit clearly neither classification. The methods of hearing and initial decision and the procedural structure within the agencies, where it is well enough developed to be called a structure, vary widely.

(1) *Statutory and Constitutional Requirements of Notice and Hearing*

The constitutional requirements of due process as a condition to depriving a person of life, liberty, or property¹⁶⁶ have been an important element in the consideration and development of the administrative process. The requirements regarding hearings or procedures may, however, be imposed not only by constitution but also by statute.

Notice customarily implies an opportunity to be heard. The requirement may, as noted, be imposed as a constitutional or statutory right or it may be merely desirable. The two bases should not be confused. The due process requirement is not a precisely defined one, and there is a strong tendency to consider that which is fair and customary to be due process.

In Tennessee there are a great number of statutory directions to give notice and hold hearings. These vary from a simple permission to hold hearings to assist in fact determinations by the Commissioner of Public Welfare¹⁶⁷ to a typical requirement of fifteen days notice before a license revocation hearing ordered by the Licensing Board of the Healing Arts.¹⁶⁸ Of the many provisions, the following may convey some idea of the diversity: The Board of Optometry can give twenty days notice by mail and must state

164. REP. ATT'Y GEN. COMM. AD. PROC. 30-31 (1941).

165. The Model act in Section 8, the 1943 Uniform act in Section 10, and the Federal act in Section 1004, provide in detail for notice and hearing.

166. U. S. CONST. AMEND. XIV; TENN. CONST. ART. I § 21.

167. TENN. CODE § 4765.12 (Williams, 1934).

168. Tenn. Pub. Acts 1947, c. 9, § 11.

the cause when it seeks to revoke a license.¹⁶⁹ The Board of Chiropractic Examiners may suspend a license on ten days notice, but a hearing must be granted in twenty days.¹⁷⁰ The Board of Pharmacy can revoke or suspend a license by methods or procedures the board itself determines.¹⁷¹ In other instances, the hearing may be had, but only if requested. This procedure is used by the Department of Health in connection with correction of unhealthy industrial conditions¹⁷² and by the Commissioner of Finance and Taxation in certain confiscation cases.¹⁷³ When no provision is made, a requirement of notice may sometimes be implied from the terms of the statute in order to satisfy due process requirements.¹⁷⁴

The statutory authorization to hold a hearing generally goes no further than a statement that a hearing is required although in exceptional cases it may direct a "public" hearing¹⁷⁵ or a "full" hearing¹⁷⁶ or a "fair" hearing.¹⁷⁷

As has been observed, among the few state agencies which have definite rules and procedures for hearings are the Board of Claims, the Railroad and Public Utilities Commission, and the Department of Unemployment Security.

The Department of Finance and Taxation, which held twenty or thirty hearings last year, has adopted no rules of procedure and practice. In the absence of formal rules, the hearings held by that department are conducted as though they were in court on oral testimony without a jury.¹⁷⁸

Nor has the Department of Insurance and Banking adopted formal rules. In cases involving official hearings, the Commissioner gives notice of the charges to be answered or of the official action about to be taken by the Department. Information is given as to the time of hearing or the time within which hearing must be requested. The hearings are conducted in an informal manner.¹⁷⁹

Similarly, none of the licensing boards, such as the Board of Medical Examiners or the Board of Barber Examiners, has adopted formal rules for hearings. These various boards hold a total of about twenty-five hearings annually. In these hearings the interests of the boards are represented by a special assistant to the Attorney General.¹⁸⁰ The rules of evidence are

169. TENN. CODE § 7039 (Williams, 1934).

170. *Id.* § 7021.

171. *Id.* § 7002.12.

172. *Id.* § 5788.17.

173. *Id.* § 6648.27; Tenn. Pub. Acts 1947, c. 3, § 12(c).

174. *Large v. Elizabethtown*, 203 S.W.2d 907 (Tenn. 1947); *Woolard v. Nashville*, 108 Tenn. 353, 67 S.W. 801 (1902). *But cf.* *Stockton v. Morris & Pierce*, 172 Tenn. 197, 110 S.W.2d 480 (1937).

175. Board of Barber Examiners, TENN. CODE § 7131 (Williams 1934).

176. Board of Plumber Examiners, TENN. CODE § 7172a (Williams 1934).

177. Board of Chiropractic Examiners, TENN. CODE § 7182.13 (Williams 1934).

178. S. K. Carson, Letter of Commissioner of Finance and Taxation, July 2, 1947.

179. C. T. Houston, Letter of Deputy Commissioner of Insurance and Banking, July 8, 1947.

180. The right of boards to hire attorneys is removed by a Miscellaneous Appro-

followed, and a court reporter is employed where it is anticipated that there will be court review. These boards employ trained investigators to prepare for action, and the hearings to suspend or revoke licenses are conducted by the agencies as authorized by the statutes granting the powers. The chief responsibility is not the revocation of licenses, in most instances, but the prevention of unauthorized practice.

The statutes under which the licensing boards function vary widely in their requirements of notice and similar details, for they have, in most instances, been drafted by the various groups wishing to have them adopted. Although these hearings have no established procedures it is interesting to note that they frequently deal with interests classified by the courts as property interests.¹⁸¹

(2) *Tennessee Agencies with Established Procedural Rules*

The statute setting up the Board of Claims is designed to provide a method of compensating state employees for injuries suffered in the line of duty¹⁸² or injuries to private individuals arising from construction or maintenance of state highways, state buildings, or the operation of state vehicles and equipment.¹⁸³ It sets up a board composed of the Commissioner of Highways and Public Works, of Finance and Taxation, the State Treasurer, the Secretary of State, the Attorney General, and Reporter.¹⁸⁴

The rules adopted by the board are brief and explicit.¹⁸⁵ Rule One requires the petition for a claim to be sworn to and supported by affidavits. The burden of establishing the jurisdiction of the board is placed on the petitioner by the second rule. The next rule imposes the duty of investigation upon an assistant Attorney General who makes recommendations to the board in accordance with Rule Four, the petitioner being furnished a copy

priations Act. Tenn. Pub. Acts 1941, c. 87, Sec. 7. This act established one special attorney for the boards. This act has been renewed biennially since 1941.

181. License to practice dentistry is a property right: *Prosterman v. Dental Examiners*, 168 Tenn. 16, 73 S.W.2d 687 (1934); License to practice medicine is a property right: *State Board v. Friedman*, 150 Tenn. 152, 263 S.W. 75 (1924). Right to study medicine is a qualified property right: *Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942); Right to sell insurance is a property right: *Richardson v. Reese*, 165 Tenn. 661, 57 S.W.2d 797 (1933). Law, medicine, dentistry, pharmacy, plumbing, subject to privilege tax; *See Thompson v. Dixie Finance Co.*, 152 Tenn. 306, 278 S.W. 59 (1925). Practice of law is a privilege: *Lamb v. Whitaker*, 171 Tenn. 485, 106 S.W.2d 105 (1937); *Gregory v. Memphis*, 157 Tenn. 68, 6 S.W.2d 332 (1928); *Lineberger v. State*, 174 Tenn. 538, 129 S.W.2d 198 (1939). Note, 16 TENN. L. REV. 239, (1941). Driving automobile is a privilege: *Sullins v. Butler*, 175 Tenn. 468, 135 S.W.2d 930 (1940). License to sell beer is no property right: *Grubb v. Morristown*, 203 S.W.2d 593 (Tenn. 1947); *Henderson v. Beer Committee*, 176 Tenn. 397, 141 S.W.2d 901 (1940). Public elective office is a species of property: *Rhea County v. White*, 163 Tenn. 388, 43 S.W.2d 375 (1931). *But see Nashville v. Martin*, 156 Tenn. 443, 3 S.W.2d 164 (1928).

182. Tenn. Pub. Acts 1945, c. 73, § 3.

183. *Id.* § 5.

184. *Id.* § 1.

185. RULES OF BOARD OF CLAIMS (Tenn. 1945).

if the recommendation is adverse to the claim. If the decision of the board is adverse, the claimant may thereafter file exceptions and be heard by the board. Rules Six, Seven and Eight prescribe notice of the hearing before the investigator, require that the evidence adduced at the hearing be reduced to writing and deny the right to re-examine witnesses without permission of the board or the Secretary. The form of depositions is prescribed, and in Rule Thirteen provision is made for action by a quorum of the board. Neither the statute nor the rules grant the board or claimant the right to subpoena witnesses. It is interesting that the board itself hears evidence only on exceptions to the report. The awards are carried out by payment by the board. In the proceedings, the Reporter who is an assistant Attorney General, and the Attorney General are present to supply legal advice for the conduct of the board, and the claimant may be represented by counsel. The decision of the board is final,¹⁸⁶ but reconsideration may be had at any time under Rule Nine if the board agrees unanimously.

The procedural rules of the Railroad and Public Utilities Commission¹⁸⁷ are considerably more complicated by reason of the scope of the Commission's activities.¹⁸⁸ As the last report of the Commission said: "The Railroad and Public Utilities Commission is charged with the regulation and assessment for taxation of privately owned utilities. This includes (1) railroad; (2) telephone; (3) telegraph; (4) freight cars; (5) sleeping cars; (6) express; (7) gas; (8) pipe-line; (9) electric light; (10) power transmission; (11) street car; (12) electric cooperatives; (13) bus; (14) truck; and (15) water companies. Street car and electric cooperative companies are assessed but not regulated."¹⁸⁹

The agency is composed of three commissioners, one from each grand division of the state. They are elected for six year terms, one each biennium.¹⁹⁰ The basic act¹⁹¹ is modeled after the Federal Interstate Commerce Act of 1887.¹⁹² The activities of the Commission include assessments for taxation,¹⁹³ fixing rates and charges, preventing discrimination by railroads,¹⁹⁴ motor

186. Tenn. Pub. Acts 1945, c. 73, Sec. 10.

187. RULES OF PROCEDURE AND PRACTICE BEFORE THE RAILROAD AND PUBLIC UTILITIES COMMISSION (Tenn. 1942).

188. The regulatory systems for railroads began in Tennessee in 1857 and a Railroad Commission was established in 1883. An interesting history of the development of this regulatory system by its secretary is found in *Tennessee's Railroad and Public Utilities Commission* 16 TENN. L. REV. 974 (1941).

189. REP. R.R. AND P.U. COMM. (1947). A discussion of some aspects of the duties of the Commission may be found in an article by a member of the Commission. Jourolmon, *Social Performance of Public Utilities: Effects of Monopoly and Competition*, 17 TENN. L. REV. 808 (1942).

190. TENN. CODE § 5380 (Williams, 1934).

191. *McCullom v. Southern Bell*, 153 Tenn. 277, 43 S.W.2d 390 (1931).

192. 24 STAT. 379 (1887), as amended, 49 U.S.C. §§ 1 *et seq.* (1940).

193. Tenn. Pub. Acts 1919, c. 3.

194. TENN. CODE § 5397 (Williams, 1934).

carriers,¹⁹⁵ and public utilities, for which latter category the Commission also fixes standards of service and practice.¹⁹⁶

In the regulatory field the Commission may grant certificates of public convenience and necessity, initiate action by orders to show cause. Action may also be begun by formal petition under Rule Nine, or by informal complaint, written or oral, under Rule Six. The pleadings need not be verified.

Subpoenas may be issued by the Commission, says the statute, under regulations it may adopt,¹⁹⁷ and the practice is to issue them on approval of two of the Commissioners. No affidavits are necessary, and they may be served in person or by mail under the authority of Rule Twelve. The statute does not specify the scope of the notice,¹⁹⁸ but Rule Ten, which requires the complaint to set forth all matters to be brought before the Commissioners, states that the general aim is to formulate issues. Formal objections are not accepted, but such substantive amendments as a request for more specific charges will be considered by the Commission.

If a complaint is not satisfied, then an answer is required. A failure to answer admits the allegations.

On the insufficiency of the complaint, hearing is a matter of right when it is requested by the party against whom the charges are lodged. Anyone having an interest, under Rule Twenty-five, may intervene at any time until the time of hearing, but after the hearing intervention may only be for good cause. Evidence is taken orally before the Commission or may be by deposition under Rule Nineteen. Technical rules of evidence are not binding on the Commission, and hearsay is admissible. The aim of the Commission is to obtain substantive, reliable evidence. Argument is generally permitted, and hearings are conventionally public except in taxing matters. The burden of establishing facts generally lies on the complainant in these adversary proceedings unless the facts are admitted or unless there is no answer.

Although by the statute a majority of the Commissioners constitute a quorum,¹⁹⁹ where parties consent, hearings are frequently held before individual commissioners.

In accordance with its Rules Twenty-one and Twenty-two, the orders of the Commission become effective when they are issued and may be enforced by mandamus, mandatory injunction, or other summary process.²⁰⁰ Rule Twenty-three provides that reconsideration of the orders may be requested by petition setting forth grounds on which the rehearing is sought.

The agency will not give a declaration of right, although the Com-

195. *Id.* § 5501.
196. *Id.* § 5450.
197. *Id.* § 5405.
198. *Id.* § 5399.
199. *Id.* § 5382.
200. *Id.* § 5445.

missioners individually may express an opinion informally, nor will the agency give advice on conduct. It will only decide issues presented to it in an actual case.

That these "quasi"-judicial powers are only a portion of the broad general powers conferred on the Commission has been long recognized by the supreme court.²⁰¹ In such matters as rate-making, the jurisdiction of the agency is exclusive²⁰² and the grant of such power is valid.²⁰³

The Department of Employment Security has a two-stage appellate procedure for review of benefits under the Tennessee Employment Security Act of 1947.²⁰⁴ Claims for benefits are filed in accordance with regulations made by the Commissioner. Initial determinations are made by a deputy or by an appeals referee to whom the deputy refers the case. Appeal from the decision of the deputy goes to the appeal referee, and in turn, appeal from the appeal referee may be taken to the Board of Review. In each stage there is a full consideration of the evidence, and in addition to the record, the appellate authority can receive new evidence.

The claim is instituted by a claimant, and appeal in the first appeal stage may be on prepared forms setting forth the requisite details or it may be by letter or in other informal petition.²⁰⁵ The appeal examiner can issue subpoenas, as can the Board of Review, although the former does not, as a practical matter, use this power. Notice of hearing is given by mail. The notice of disallowance from the deputy informs an applicant that appeal can be had and that it must be in written form but not necessarily in the form prescribed in the regulation. The appeal may be had in the form of a letter or written memorandum and need not be verified. The aim is to set the issue on which the claim is based. The employer is not a party to the proceeding, and it is not in the nature of an adversary proceeding. The hearing is a matter of right when requested, and legal counsel is permitted although rarely used. Generally the appeal examiners have legal backgrounds although proceedings are very informal in nature, usually in the form of a conference. The technical rules of evidence are not binding, and questioning and discussion are permitted. The burden of proof is on the claimant, and the record is kept by voice-recordings on disks. This is transcribed if appeal is taken to the next stage.

Either the deputy or the claimant may appeal to the Board of Review.²⁰⁶ The manner of filing appeal and the content of notice are prescribed. The

201. *In re* Cumberland Power Co., 147 Tenn 504, 249 S.W. 818 (1923).

202. *McCullom v. Southern Bell*, 163 Tenn. 277, 43 S.W.2d 390 (1931). On construction of the act, see *Oman v. Tenn. Sent. Ry.*, 7 Tenn. App. 141 (1927).

203. *Memphis v. Enloe*, 141 Tenn. 518, 214 S.W. 71 (1919).

204. Tenn. Pub. Acts 1947, c. 29, Sec. 6.

205. RULES AND REGULATIONS OF BOARD OF REVIEW OF THE DIVISION OF UNEMPLOYMENT COMPENSATION (Tenn. 1942) Regulation E.

206. *Id.* Regulations F-1 and F-2.

Appeal Board may take further evidence,²⁰⁷ may affirm, modify, or set aside any decision of the appeal tribunal on its own motion.²⁰⁸ The actual hearing procedure is the same before the Board of Review as before the appeal referee. The hearing is transcribed and records of evidence, findings of fact, and decision placed in a permanent file. Decision may be by a majority of this Board. Copies of all decisions of the appeal tribunal and the Board of Review are kept on file and are open to public inspection.

The volume of claims disposed by the Department is large. In the period from July, 1945 through June, 1946, there were 132,004 claims filed. The appeal authority in this same period disposed of 4472 cases and the Board of Review of 551. The appeals authority modified the original determination in 969 cases and the Board of Review modified determinations of the appeal authority 211 times. The number of cases handled demonstrates that there is good reason to have standardized procedures developed in this agency.

(3) *Notice and Hearing as Developed by Tennessee Courts*

Although only a limited number of agencies have adopted formal rules of procedure, the courts have, in several instances, discussed various aspects of administrative hearings.²⁰⁹

Among the essential elements of a hearing, the courts have said, are notice of the charge and a reasonably opportunity to make a defense.²¹⁰ The notice must indicate the time and the place where the trial body will meet in order that the party may be present in person with his witnesses,²¹¹ and there must be an inquiry upon the charge preferred.²¹² It may not be necessary to follow an actual trial procedure so long as the individual is given fair opportunity to present his side, but the evidence should be carefully received and considered although cross-examination is not necessarily required. The person whose rights are to be affected should be informed of at least the principal witnesses against him though there is not an absolute right to confront them,²¹³ and immunity may be accorded to the statements of parties to and witnesses in such investigations by administrative agencies.²¹⁴

If a hearing is held and a person fails to appear, he is nevertheless

207. *Id.* Regulation F-3.

208. *Id.* Regulation F-5.

209. It was in this area of the administrative process (the hearing) that Dean Pound stressed that an important contribution could be made by the legal profession in the development of fair procedures. *Hearings before Subcommittee of the Committee of the Judiciary on S. 674, S. 675, and S. 918. 77th Cong., 1st Sess. (1941) 1580.*

210. *Richardson v. Reese*, 165 Tenn. 661, 670, 57 S.W.2d 797, 800 (1933).

211. *Hayden v. Memphis*, 100 Tenn. 582, 47 S.W. 182 (1898).

212. *Ashcroft v. Goodman*, 139 Tenn. 625, 202 S.W. 939 (1918).

213. *Sherman v. Hyman*, 180 Tenn. 97, 171 S.W.2d 822 (1942).

214. *Independent Life Ins. Co. v. Rodgers*, 165 Tenn. 447, 55 S.W.2d 767 (1932).

bound by the result if he had notice.²¹⁵ In certain instances, although there may be a constitutional requirement of hearing in tax matters,²¹⁶ it may be satisfied if there is hearing at any stage of the proceeding.²¹⁷ In improvement assessments the rule is contrary, and hearing prior to action may be required.²¹⁸

Another aspect of the hearing process which has given rise to some speculation has been the contempt power of administrative agencies. In some instances the hearing authorities have the authority to punish directly for contempt,²¹⁹ while other statutes provide that punishment must be through the intervention of the courts.²²⁰ The validity of the authority to punish directly for contempt has never been passed on by the courts, but doubt has been expressed concerning constitutionality of the grant of such powers.²²¹

It seems established under early case law that where a statute creating a board makes no provision that a majority may act, then no action may be taken except by the entire board²²² although a majority may take action when the entire board is present.²²³ Thus where a statute requires that a majority hear and less than a majority hears, the party has not been accorded his right to hearing and the decision is void.²²⁴

(4) *Rules of Evidence in Administrative Proceedings*

While the administrative process in many instances involves a direct

215. *Paine v. Fox*, 172 Tenn. 290, 112 S.W.2d 1 (1937).

216. *Stockton v. Morris & Pierce*, 172 Tenn. 197, 110 S.W.2d 480 (1937).

217. *Fort v. Dixie Oil Co.*, 170 Tenn. 183, 93 S.W.2d 1260 (1936).

218. *Nashville v. Roberts*, 160 Tenn. 612, 26 S.W.2d 1086 (1930).

219. Board of Medical Examiners, TENN. CODE § 6932 (Williams, 1934); Board of Dental Examiners, *Id.* § 6969.9; Railroad and Public Utilities Commission, *Id.* § 5408.

220. TENN. CODE § 5709 (Williams, 1934).

221. Samuels, *Power of Administrative Agencies to Compel Testimony in Tennessee*, 16 TENN. L. REV. 928, 935-936 (1941). Mr. Samuels' argument proceeds generally as follows: The courts have the inherent power to punish for contempt: the judicial power is vested in the Supreme Court and inferior courts which are the only authorities which can exercise the judicial power. Since no one department can exercise the power properly belonging to another (TENN. CONST. Art. II, §§ 1-2), then the contempt power cannot be granted to administrative agencies. It may be observed that an identical argument can be made with relation to the subpoena power, the exercise of which by administrative agencies has been upheld in the state. *Rhinehart v. State*, 121 Tenn. 420, 117 S.W. 508 (1908). The court has recognized that the granting of contempt powers in other jurisdictions has been sustained. *Rushing v. Tenn. Crime Comm.*, 173 Tenn. 308, 318, 117 S.W.2d 4, 8 (1938). The legislature has contempt power by express constitutional grant. TENN. CONST. Art. II, § 14. If the legislature grants the power to an administrative body, there seems little reason for not sustaining it. Perhaps in case of necessity the courts might sustain a quasi-contempt power for quasi-judicial authorities.

222. See *Latture v. Board of Inspectors*, 114 Tenn. 516, 520, 86 S.W. 719 (1904). But see *Carroll v. Alsop*, 107 Tenn. 257, 64 S.W. 193 (1901) on the scope of applicability of TENN. CODE § 22 (Williams, 1934) which provides in case of joint authority to three or more officers, then a majority may exercise it unless the contrary is expressly stipulated.

223. See *Cowan v. Murch*, 97 Tenn. r90, r98, 37 S.W. 393, 395 (1896).

224. *Smoky Mt. Land Co. v. Lattimore*, 119 Tenn. 620, 105 S.W. 1028 (1907).

approach to facts, it is obvious that many hearings involve formal proceedings similar to judicial hearings, proceedings relating to past events or intangible considerations.²²⁵ It must be borne in mind that administrators have, in most instances, experience and training far beyond that of the juror and are under obligation to decide issues in a manner calculated to serve the public interest, a burden imposed on a juror to a lesser degree.

Common sense and the idea of fairness should be controlling factors in any proceeding.²²⁶ It has been suggested that the best possible procedure (that is, a procedure which permits effective government while at the same time giving fair assurance against individual oppression or mistake) may vary with different circumstances, so that the quest for it may not be successful if we commence with too rigid an insistence upon a full quota of preordained ingredients.²²⁷ Rather than insisting upon the strict application of the rules of evidence and upon such devices as cross-examination, fairness requires knowing what is the case made against one and then an opportunity to meet it.²²⁸

The marks of a trial—cross-examination, hearing, demeanor evidence, and similar ingredients—are not particularly suitable for many administrative proceedings.²²⁹ This is true in the matters dealing largely with documents and technical reports such as may confront the Commissioner of Insurance and Banking in the reorganization of banks,²³⁰ or in cases of fact finding which rest on evidence not readily adaptable to testimonial proof such as examinations for drivers licenses.²³¹

In Tennessee some statutes have dealt specifically with the question of the type of evidence acceptable in administrative proceedings. In cases involving unfair competition, the Commissioner of Insurance and Banking must grant a hearing, but he is not required to observe "formal rules of pleading or evidence";²³² and in the administration of the Tennessee Employment Security Act the Commissioner is not bound to comply with "common law or statutory rules of evidence and other technical rules of procedure."²³³ The courts have recognized that if "material and relevant evidence is adduced" to support a charge in revocation proceeding, then the requirements of hearing

225. GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 75 (1941).

226. Section 9 of the Model Act permits administrative agencies to take notice of general, technical or scientific facts within their specialized knowledge but requires parties be notified of the material noticed. The federal act ensures in § 1004(c) the right to rebut any facts officially noticed and sets up in § 1006 (c) that evidence must be "reliable, probative and substantial."

227. GELLHORN, *op. cit. supra* note 163, at 511.

228. *Id.* at 510-512.

229. Section 9 of the Model Act seems directed at guaranteeing these characteristics of judicial proceedings.

230. TENN. CODE §§ 6055.13-17 (Williams, 1934).

231. *Id.* § 2715.19.

232. Tenn. Pub. Acts 1947, c. 208, § 6(c).

233. *Id.* c. 29, § 6(F).

have been fulfilled.²³⁴ Though in receiving evidence the agency should "weigh it, determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances as to who is right, and then act upon it as a juror . . ." ²³⁵ it may be required to consider any specific evidence.²³⁶

In the course of receiving evidence and hearing cases, the problem arises of the notice to be taken by an agency of facts which are the results of the special knowledge in the sphere of activity of the body. The heart of the problem seems to be that those facts on which a decision rests do or do not appear in the record, nor do the parties know what these facts are. It is essential that the facts be distinguished from the utilization of special skills or expertness in deciding a case. It seems clear that in the course of receiving evidence and hearing cases, an administrative agency may take notice of those facts which a court would judicially notice.

For reasons which will appear in the subsequent consideration of the scope of judicial review, the problem of official notice by administrative officers has not been the subject of widespread consideration in the state although in some instances the courts have shown an inclination to defer to the decisions of expert bodies in the fields of their expertness,²³⁷ and have expressed a disinclination to assume the duties of detailed supervision of activities delegated to administrative agencies.²³⁸

(5) *Examination of the Evidence*

Another phase of the administrative process which has been soundly pummelled is the delegation of hearing responsibilities. In the federal system Chief Justice Hughes said a few years ago, in the early stages of the *Morgan Case* ²³⁹ that one who decides must "hear."²⁴⁰

In most instances in Tennessee, the hearing officer decides the case. The Board of Claims provides an exception in which the Reporter hears the

234. *Henderson v. Beer Committee*, 176 Tenn. 397, 141 S.W.2d 901 (1940).

235. *Sherman v. Hyman*, 180 Tenn. 97, 109, 171 S.W.2d 822, 826 (1942).

236. See *Treadwell Realty Co. v. Memphis*, 173 Tenn. 168, 116 S.W.2d 997 (1938), where the court would not concede that the municipal equalization board could be compelled to receive specific evidence of value.

237. Issuance of certificates of public convenience and necessity: *Dunlap v. Dixie Greyhound Lines*, 178 Tenn. 532, 160 S.W.2d 413 (1942). Approval of dental schools: *Williams v. Board of Dental Examiners*, 93 Tenn. 619, 27 S.W. 1019 (1894). Valuation for tax purposes: *W. J. Savage Co. v. Knoxville*, 167 Tenn. 642, 72 S.W.2d 1057 (1933). But see *Prosterman v. Board of Dental Examiners*, 168 Tenn. 16, 73 S.W.2d 687 (1934).

238. *Anderson v. Memphis*, 167 Tenn. 648, 72 S.W.2d 1059 (1934).

239. *Morgan v. United States*, 298 U.S. 468 (1936), 304 U.S. 1 (1937), 307 U.S. 183 (1939), 313 U.S. 409 (1941).

240. Both the Model Act in Section 10 and the 1943 Uniform Act in Section 15 seek to require the deciding officer to consider the evidence. The federal act in Section 1007 has provisions seeking the same result. Each of these acts provides a more or less detailed procedure for reaching decisions.

evidence and makes a recommendation to the board which reaches the decision. To this decision exceptions may be filed and hearing before the board granted when it is requested.²⁴¹ Another exception is the Board of Review under the Unemployment Compensation Act. This board can affirm, modify, or set aside any decision of the lower stage on the basis of evidence previously submitted.²⁴² A third possible instance is Rule Two of the Railroad and Public Utilities Commission, which permits the Commission to avail itself of trial examiners; a power virtually never used, however.²⁴³ The requirement of "hearing" evidence would seem actually satisfied if the deciding officer considers the evidence although the evidence is taken by another.

A device used in the state to insure consideration of the facts is the requirement of written findings of fact. The Commissioner of Insurance and Banking is empowered to investigate and prevent unfair competition. The act in addition to requiring the written findings of fact, directs the service of a copy of the resulting order on persons found guilty of violation.²⁴⁴

(6) *Compelling Witnesses*

The power of administrative agencies and officers in Tennessee to procure evidence has been the subject of more discussion than the rules of evidence or the examination of evidence.²⁴⁵ In Tennessee the power to subpoena witnesses has been granted to numerous administrative agencies and officials, both as ancillary to regulatory powers²⁴⁶ and for the use of agencies whose powers are purely inquisitorial.²⁴⁷ The power is not granted in a uniform manner, and in a recent Law Review Article Mr. Samuels has classified the grants of powers in the following manner:²⁴⁸ First, those in which the power to subpoena witnesses and compel their attendance is granted, but no method of enforcement is provided; second, those in which power is granted to issue attachment and to punish non-attendance or refusal to testify as a contempt; and third, those in which the administrative board may apply to a court for aid in enforcement of the right to require attendance.

Though the constitutionality of the grant of subpoena power has been

241. RULES OF BOARD OF CLAIMS (Tenn. 1945), Rule 5.

242. Tenn. Pub. Acts 1947, c. 29, § 6(E).

243. RULES OF PROCEDURE AND PRACTICE BEFORE THE RAILROAD AND PUBLIC UTILITIES COMMISSION (Tenn. 1942).

244. Tenn. Pub. Acts 1947, c. 208, § 7. The Model Act in Section 11 would require every order adverse to a party to a proceeding be in writing and accompanied by written findings of fact.

245. Samuels, *supra* note 221.

246. Railroad and Public Utilities Commission, Licensing Boards (with some exceptions), and the Commissioner of Finance and Taxation.

247. State Crime Commission; Commissioner of Insurance and Banking in investigation of fires; Commissioner of Employment Security to make fact findings.

248. Samuels, *supra* note 221.

upheld,²⁴⁹ some agencies have doubted their power to enforce their subpoenas where no machinery is provided in the statute for that purpose,²⁵⁰ and Samuels suggests that while this may be a sound interpretation of the statutes, enforcement may be had by invoking the assistance of a chancery court to compel attendance.²⁵¹

The doubt of power to enforce subpoenas directly arises from the general provision of the Code which provides for the enforcement of subpoenas issued by "justice or clerk."²⁵² Thus, says the agency doubting its power to issue subpoenas, there can be legal enforcement under this section only of process issued by the justice or clerk. It reasons that when process is issued by an administrative agency under power granted by the legislature, this general section is inapplicable since it imposes penalties only on those who refuse to comply with process issued by these designated officials. There seems to be no direct local authority to support this strict interpretation. In a less liberal time than our own, the court has sustained the applicability of this code section to enforce subpoena powers granted to the Insurance Commissioner²⁵³ where that official was granted all the power of a "trial justice" to subpoena witnesses.

A later case²⁵⁴ sustained the applicability of this general code section when the statute creating the Tennessee Crime Commission provided that the agency might ". . . issue a subpoena . . . [and] the provisions of the general law of this state in relation to enforcing obedience to a subpoena . . . shall apply."²⁵⁵

It is submitted that it would do no great violence to hold that the general code section was applicable to the power of boards and agencies to issue subpoenas, and it is questionable that the courts would not so hold were the question submitted to them.

Mr. Samuels also expresses doubt that the contempt power can be validly granted to administrative agencies,²⁵⁶ and supports his position with arguments which have been previously considered here. After concluding that the constitutional separation of powers renders the granting of the power impossible because it is judicial in nature, he continues: "[A]s a matter of government policy, it would be highly improper to grant such great power

249. *Rushing v. Tennessee Crime Commission*, 173 Tenn. 308, 117 S.W.2d 308 (1938).

250. State Board of Accountancy held that it lacked the power in *In re McIntyre*, trial hearing before State Board of Accountancy at Nashville, December 14, 1940, discussed by Samuels, *supra* note 221.

251. Samuels, *supra* note 221, at 931-932.

252. TENN. CODE § 9785 (Williams, 1934). This was adopted as the first chapter of the Tenn. Acts of 1794.

253. *Rhinehart v. State*, 121 Tenn. 420, 117 S.W. 508 (1908).

254. *Rushing v. Tennessee Crime Commission*, 173 Tenn. 308, 117 S.W.2d 308 (1938).

255. Tenn. Pub. Acts 1937, c. 13.

256. Samuels, *supra* note 221, at 937.

over the individual to numerous appointed officials who are responsible to the executive and not to the electorate."²⁵⁷

This latter seems a tenable position, but it seems hardly applicable to such an agency as the Railroad and Public Utilities Commission whose members are elected by the entire electorate of the state.

If this is the real reason, however, the wisdom of granting such power would seem to be vested in the legislature rather than in the judiciary under any theory of the "judicial" nature of contempt powers. This may be the result of what Goodhart describes as the unfortunate error of thinking that there is a "special virtue in describing a man as a judge."²⁵⁸

JUDICIAL REVIEW

One of the most important aspects of administration is the control which the judiciary exercises over the processes of administration. The fundamental question lies in the scope of review to be allowed. The range varies from a complete trial *de novo*, on the one hand, to an examination limited to controverted questions of law, on the other.²⁵⁹

The existing provisions for review in Tennessee may be classified as general or special. The first class includes the general judicial powers of certiorari,²⁶⁰ statutory certiorari for review of administrative boards,²⁶¹ injunction,²⁶² mandamus,²⁶³ declaratory judgment,²⁶⁴ habeas corpus,²⁶⁵ private action for damages,²⁶⁶ or review when action is brought to enforce an order or impose a penalty.²⁶⁷ Special powers are those which relate to the individual procedures provided for judicial review of the actions of specific agencies. This latter class is illustrated among others, by the provisions for

257. *Ibid.*

258. Goodhart, *An Apology for Jurisprudence* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 299 (1947).

259. The Model Act in Section 12 adopts the position of allowing full review of controverted questions of law but a limited review of questions of fact. This act demonstrates a change in recent years from the attitude that the scope of judicial review was the sole content of administrative law to a greater emphasis on the procedure before administrative bodies.

260. TENN. CODE §§ 8989 *et seq.* (Williams, 1934); *McCanless v. Klein*, 182 Tenn. 631, 188 S.W.2d 745 (1945).

261. TENN. CODE §§ 9008 *et seq.* (Williams, 1934).

262. *State Board of Examiners v. Rodgers*, 167 Tenn. 374, 69 S.W.2d 1093 (1934); *Bank of Commerce and Trust Co. v. McLemore*, 162 Tenn. 137, 35 S.W.2d 31 (1930); *State Board of Medical Examiners v. Friedman*, 150 Tenn. 152, 263 S.W. 75 (1923); *see Nashville, C. & St. L. R.R. v. R.R. and P. U. Comm.*, 161 Tenn. 592, 598, 32 S.W.2d 1043 (1930).

263. *State v. Hobbs*, 174 Tenn. 215, 124 S.W.2d 699 (1938); *State v. McCanless*, 184 Tenn. 83, 195 S.W.2d 619 (1946); *McCanless v. State*, 181 Tenn. 308, 181 S.W.2d 154 (1944); *see State v. Board of Education*, 122 Tenn. 161, 163, 121 S.W. 499, 500 (1909).

264. Tenn. Pub. Acts 1923, c. 29; *General Securities Co. v. Williams*, 161 Tenn. 50, 29 S.W.2d 662 (1930).

265. *State v. Head*, 182 Tenn. 249, 184 S.W.2d 572 (1945).

266. *Cantrell v. Perkins*, 177 Tenn. 47, 146 S.W.2d 134 (1940).

267. *Bishop v. State*, 122 Tenn. 729, 127 S.W. 698 (1909).

review involved in the enforcement of the unfair competition statute by the Commissioner of Insurance and Banking,²⁶⁸ in license revocation by the Game and Fish Commissioner,²⁶⁹ and in rulings of the Commissioner of Finance and Taxation in enforcement of the Tobacco Tax,²⁷⁰ and in the Employment Security Act of 1947.²⁷¹

The statement of these remedies leaves for consideration their application: first, which decisions are reviewable, and then, the scope of that review.

The legislature has sought to extend judicial review farther than is found in many jurisdictions. There is a code section establishing the right of judges and chancellors to issue writs of certiorari whenever authorized by law, where an inferior officer or board exercising judicial functions has exceeded jurisdiction or acted illegally, and when there is no other plain, speedy or adequate remedy. It provides that certiorari lies on suggestion of diminution, where no appeal is given, as a substitute for appeal, instead of *audita querela*, or instead of writ of error.²⁷² This is substantially the equivalent of common law certiorari.

An addition to this is the special statutory certiorari which originated in the Code of 1932 for review of actions of boards or commissions. It was apparently introduced by the official codifiers whose draft of the code was adopted by the legislature without amendment.²⁷³ This special statutory certiorari provides that anyone aggrieved by any final order or judgment of any board or commission, where there is not specific provision for review otherwise, may file a petition for certiorari in a chancery court and the hearing shall be on the proof introduced before the board or commission contained in the transcript and upon such other evidence as either party may desire to introduce. Discretion is also vested in the court to issue supersedeas.²⁷⁴ This is effectively a trial *de novo*, and in view of this, issues such as evidence admissible and the scope of official notice in administrative hearings are rather academic in nature. It seems substantially to be a refusal to utilize the talents, the specialized knowledge, and the special abilities of administrative agencies and officers.

This statutory certiorari was hardly an innovation, however, for there had been a line of cases, of which *Staples v. Brown*,²⁷⁵ a case involving the removal of a city attorney by the city council after hearing, is the most frequently cited. Stating that no man can be denied his day in court, the judge proceeds: "Circuit Courts have original jurisdiction of all cases where

268. Tenn. Pub. Acts 1947, c. 208 §§ 8 *et seq.*

269. TENN. CODE § 5176.66.

270. *Id.* §§ 1213.7, 1238.

271. Tenn. Pub. Acts 1947, c. 29, § 6(I).

272. *Id.* §§ 8989-8992.

273. TENN. CODE Preface, iv (Williams, Shannon, Harsh, 1932).

274. TENN. CODE §§ 9008-9018 (Williams, 1934).

275. 113 Tenn. 639, 85 S.W. 254 (1905).

jurisdiction is not conferred upon some other court, and a general appellate and revisory jurisdiction over all inferior tribunals, councils, and boards which may from time to time be created by the legislature and vested with judicial functions, to review their proceedings in all cases where they have exceeded their jurisdiction or acted illegally or erroneously. Where no appeal or writ of error will lie, this jurisdiction may be exercised by writs of certiorari and supersedeas and the case retried upon the merits."²⁷⁶ The court continues: ". . . there is, then, no doubt that the circuit court has . . . jurisdiction . . . for correction of their judgments . . . for errors of fact or law committed by them."²⁷⁷ The court recognized there were narrow exceptions, such as those involving valuation for taxation, but held that they were confined to their peculiar facts while its position in the instant case was well settled.

Though *Staples v. Brown* had not been overruled, some thirteen years later the city commissioners of Knoxville removed the chief of police without a hearing and the court granted certiorari. The supreme court held the scope of review was limited to the legality of removal on the record.²⁷⁸ *Staples v. Brown* was not cited.

In *Binford v. Carline*,²⁷⁹ ten years after this, the court of appeals approved of the *Staples* case but limited it to its facts, holding that a municipal censorship board, for which no review was provided, was not subject to judicial review. Judge Heiskell said: "It is true, the statute and the ordinance do not in express terms make the findings of the censors final, but . . . when an act creating a special tribunal, even one exercising judicial functions, gives power and authority to settle particular grievances such as this, and either expressly or by plain implication declares that the judgment of such special tribunal shall be final, and if it confines itself within its jurisdiction and does not act illegally the writ of certiorari will not lie to review its action upon the merits."²⁸⁰

The review of facts on writ of certiorari has been generally held not to extend to cases of assessment for taxation because there is conventionally a statutory provision that the findings of boards of equalization shall be final²⁸¹ although they are "quasi-judicial" tribunals.²⁸²

276. *Id.* at 255; *accord*, *Lewis v. Shelby County*, 116 Tenn. 454, 92 S.W. 1098 (1906).

277. *Id.* at 259.

278. *Knoxville v. Conners*, 139 Tenn. 45, 201 S.W. 133 (1918); *contra*: *McKee v. Board of Elections*, 173 Tenn. 269, 116 S.W.2d 1033 (1938).

279. 9 Tenn. App. 364 (1928).

280. *Id.* at 378. This was largely a quotation of dicta from *Tomlinson v. Board of Education*, 88 Tenn. 1, 12 S.W. 414 (1889), a case involving tax assessment, where statute provided valuation was final.

281. *Tenn. Mining & Mfg. Co. v. Cooper*, 176 Tenn. 229, 140 S.W.2d 411 (1940); *Anderson v. Memphis*, 167 Tenn. 648, 72 S.W.2d 1059 (1934); *W. J. Savage Co. v. Knoxville*, 167 Tenn. 642, 72 S.W.2d 1057 (1933); *Tomlinson v. Board of Equalization*, 88 Tenn. 1, 12 S.W. 414 (1889).

282. *See Briscoe v. McMillan*, 117 Tenn. 115, 100 S.W. 111 (1906).

The statutory certiorari has been held inapplicable to certain proceedings by the Commissioner of Finance and Taxation even though there is no provision that the findings shall be final.²⁸³ Nevertheless, certiorari can be employed to review assessments when the assessing authority "overleaps the prescribed limits of the law,"²⁸⁴ and, where there is a complete want of jurisdiction, before the entry of a final decree.²⁸⁵ Ordinarily, the taxpayer must first exhaust his administrative remedies.²⁸⁶

In other fields, where it is provided that administrative findings of fact shall be final, as in the dismissal of employees by a civil service board,²⁸⁷ or in revocation of beer permits,²⁸⁸ the courts have accepted such provisions.

The legislature has made frequent use of this device²⁸⁹ and it has also sought to meet the situation by providing that where the court thinks additional evidence necessary, then it may require the administrator to take evidence or modify findings if necessary.²⁹⁰ In the instance of the Board of Claims, its awards are final apparently in questions of law as well as fact.²⁹¹

Where there is no provision that findings of the agency are final, the court seems free to substitute its judgment.²⁹²

The Railroad and Public Utilities Commission presents difficulties on this point. The supreme court has said in a proper case that common law certiorari will lie to afford relief from any arbitrary or oppressive action,²⁹³ but the court has denied review to rate-making power as legislative,²⁹⁴ saying that the Commission is an administrative body rather than a court. "Many of the cases dealing with certiorari," says the court, "are cases which arise from inferior judicial tribunals and in such cases it is entirely proper for the

283. *Stockton v. Morris & Pierce*, 172 Tenn. 197, 110 S.W.2d 480 (1937); *Fort v. Dixie Oil Co.*, 170 Tenn. 183, 93 S.W.2d 1260 (1936).

284. *State v. Dixie Portland Cement Co.*, 151 Tenn. 53, 267 S.W. 595 (1925).

285. *State v. Hunt*, 137 Tenn. 243, 192 S.W. 931 (1916).

286. *Tenn. Mining & Mfg. Co. v. Cooper*, 176 Tenn. 229, 140 S.W.2d 411 (1940); *Mossy Creek Bank v. Jefferson County*, 153 Tenn. 332, 284 S.W. 64 (1926); *Bank of Commerce & Trust Co. v. McLemore*, 162 Tenn. 137, 35 S.W.2d 31 (1930) (injunction will lie to prevent illegal assessment).

287. *Groomes v. Nashville*, 176 Tenn. 391, 141 S.W.2d 899 (1940); *Nashville v. Martin*, 156 Tenn. 443, 3 S.W.2d 164 (1928).

288. *Putnam County Beer Board v. Speck*, 184 Tenn. 616, 201 S.W.2d 991 (1947).

289. Findings of fact by the Board of Review of the Department of Employment Security are final: *Tenn. Pub. Acts 1947, c. 29, § 6 (I)*. Findings of Commissioner of Finance and Taxation are final in matters relating to sale of gas: *TENN. CODE § 1147.9 (Williams, 1934)*. Findings of Fish and Game Director are final: *TENN. CODE § 5176.66 (Williams, 1934)*.

290. *Tenn. Pub. Acts 1947, c. 208, § 8*. This statute provides, however, in Section 10, that despite the findings by the Commissioner of Insurance and Banking to the contrary, the court can restrain acts if it finds such to be in the interest of the public.

291. *Tenn. Pub. Acts 1945, c. 73, § 10*; *Quinton v. Board of Claims*, 165 Tenn. 201, 54 S.W.2d 953 (1932).

292. *Prosterman v. Tenn. State Board of Dental Examiners*, 168 Tenn. 16, 73 S.W.2d 687 (1934). For an early case *contra*, see *Williams v. State Board of Dental Examiners*, 93 Tenn. 619, 27 S.W. 1019 (1894).

293. *Williams v. Southern Bell Tel. Co.*, 164 Tenn. 313, 47 S.W.2d 758 (1932).

294. *McCullom v. Southern Bell Tel. Co.*, 163 Tenn. 277, 43 S.W.2d 390 (1931).

courts to substitute their judgment for the judgment of the lower judicial tribunal, but it does not follow that the court should substitute its judgment for the judgment of an administrative body, being another constitutional branch of government."²⁹⁵ This result seems highly desirable.

Similarly, in a suit to enjoin the enforcement of an order of the Commission, there is a presumption of validity, and the burden of showing action is invalid rests upon the petitioner.²⁹⁶ An additional instance is provided by the recent attempt of a telephone company to effect a rise in rates by enjoining a rate suspension order of the Commission. Justice Prewitt of the Supreme Court of Tennessee, in granting a supersedeas to the Commission, said: "The injunctive relief of the chancery court should not be extended to interfere with the statutory provisions governing matters of this nature."²⁹⁷ Nor will the allegation of a constitutional question of due process be effective to carry a case under judicial review directly to the supreme court unless it appears "from the record that the complaining party has been denied due process and that the property has been taken from him as the direct result of such process."²⁹⁸

The supreme court has said in a frequently cited case²⁹⁹ that a public officer clothed with discretionary or quasi-judicial power cannot be coerced or restrained in the exercise of that power. He must be permitted to exercise a free and untrammelled judgment. It is his prerogative to construe the law under which he acts. Later cases have affirmed the principle that practical construction given an act by an administrative agency operating under it is entitled to persuasive weight in the judicial construction³⁰⁰ although the court is not bound by that construction if it is convinced that it is erroneous.³⁰¹

The classification of persons as employees by the Commissioner of Labor under the Unemployment Compensation Law has been upheld in some instances,³⁰² but the court has not hesitated to reverse the Commissioner

295. *S. E. Greyhound v. Dunlap*, 178 Tenn. 546, 160 S.W.2d 418 (1942); *accord*, *Dunlap v. Dixie Greyhound Lines*, 178 Tenn. 532, 160 S.W.2d 413 (1942). Neither will the appellate court interfere with the discretion of the trial court in ordinary circumstances. *State v. Bomar*, 179 Tenn. 67, 162 S.W.2d 515 (1942); *Thompson v. Denman*, 164 Tenn. 428, 50 S.W.2d 222 (1932); *Lewisburg & N. R. Co. v. Dudley*, 161 Tenn. 546, 30 S.W.2d 278 (1930); *Schrader v. Ky.-Tenn. Light & Power Co.*, 157 Tenn. 391, 8 S.W.2d 495 (1928). *Contra*: *Schoolfield v. Bean*, 26 Tenn. App. 30, 167 S.W.2d 359 (1942).

296. *Nashville, C. & St. L. Ry. v. Railroad Comm.*, 161 Tenn. 592, 32 S.W.2d 1043 (1930).

297. *Railroad and Public Utilities Commission v. Southern Bell*, Unpublished opinion dated August 4, 1947, filed in Office of the Clerk, Tennessee State Supreme Court August 5, 1947.

298. *Tenn. Cent. Ry. v. Pharr*, 183 Tenn. 658, 663, 194 S.W.2d 486, 488 (1946). The jurisdiction of the Court of Appeals is fixed by TENN. CODE § 10616. (Williams, 1934). This is considered in *Woodruff v. Nashville*, 183 Tenn. 483, 192 S.W.2d 1013 (1946).

299. *North British & Mercantile Co. v. Craig*, 106 Tenn. 621, 62 S.W. 155, 159 (1901).

300. *Cummings v. Sharp*, 173 Tenn. 637, 122 S.W.2d 423 (1923).

301. *Collins v. McCannless*, 179 Tenn. 656, 169 S.W.2d (1943).

302. *National Optical Stores v. Bryant*, 181 Tenn. 266, 181 S.W.2d 139 (1944).

even in "a very close question" because the act is a taxing statute and doubts must be resolved in favor of the taxpayer.³⁰³

The fundamental situation in Tennessee, in view of the foregoing cases and the statutes, seems to be, that barring some exception either by the nature of the proceeding or by statute, all administrative determinations are reviewable *de novo* in the circuit or chancery courts. As noted, the number of exceptions is substantial, the larger portion being statutory.

Both the Attorney General's Committee on Administrative Procedure³⁰⁴ and Commissioner Benjamin³⁰⁵ of New York take the position that the problem of judicial review cannot be worked out as attempted in this state by general legislation for all agencies and all types of procedures.

It seems wasteful of talent and time to refuse to avail oneself of the ability and experience of administrative officers and agencies, virtually the situation under the provisions for statutory certiorari. It seems strangely unintelligent to establish administrative agencies and deny their rulings the respect and finality necessary to develop an efficient administration. If the findings of fact by a jury of inexperienced laymen supported by substantial evidence, are binding on the court, should the findings of fact by personnel, trained and experienced in their field, be accorded less weight by a judicial official? It seems unlikely that their superior qualifications should render administrative personnel less trustworthy.

CONCLUSION

The purpose of this article has been the consideration of administrative procedure as it exists in Tennessee. In most situations the information is scanty and the cases few. This is due in large measure to the small volume of business handled by many of the administrative agencies and administrators.

Although the functions of the administrators are essential, it is nonetheless a difficult task to develop detailed rules of procedure and practice for an agency which hears twenty or thirty cases a year, for agencies which have no persons who practice regularly before them, but have at best general practitioners who participate in isolated hearings. To require the adoption of rules as has been proposed by some theorists, seems an unnecessary burden in such instances and, as a practicable matter, not likely to be successful. When the need arises, the convenience to the administrator will ordinarily bring about provisions for such details.

The publication of general descriptive statements of procedures, as the federal statute requires,³⁰⁶ to be filed with the Secretary of State and

303. *Wolfe v. Bryant*, 181 Tenn. 357, 181 S.W.2d 343, 345 (1945); *Guaranty Mortgage Co. v. Bryant*, 179 Tenn. 579, 166 S.W.2d 182 (1943).

304. REP. ATT'Y GEN. COMM. AD. PROC. 92 (1941).

305. BENJAMIN, ADMINISTRATIVE ADJUDICATION 326 (New York, 1942).

306. 60 STAT. 243, 5 U.S.C.A. §§ 1001 *et seq.* (Supp. 1946).

published by him with the rules promulgated by the agencies seems a practicable idea. Such statements would facilitate proceedings before the agencies, making such material more readily available to the public than if published individually by the agencies as local statutes now provide.³⁰⁷ In addition, the task of preparing and maintaining such statements might well serve to clarify for the administrator some aspects of his difficulties and make available to other agencies the fruits of his experience.

The problem of judicial review, which has been considered in some detail, seems a fertile field for reform. Without intending to deprecate the ability and conscientiousness of the judiciary of the state, the continued dominance of administrative procedure by this group will effectively prevent the development of an efficient body of administrative servants to discharge the ever increasing functions which are being delegated to them.

Cooperation and mutual respect between the judge and the administrator are the foundation stones upon which any satisfactory system must be constructed. This requires considerable legislation and an awareness on the part of the judge of the multiform problems which confront administrative agencies. The administrator must recognize his duty to respect the rights of individuals. This duty is not completely fulfilled if the persons dealt with cannot recognize that justice has been done.

There can be improvement both in administrative practices and in judicial responses. Essentially, the problem is the defense of democratic institutions while recognizing the necessity for government supervision. Our society is no longer a simple agrarian one and there are forces too great to be controlled by individual effort. No amount of piety or wit can block this current and no oratory can return us to those simpler days. Our task is to establish a dynamic balance among competing claims, to direct these forces in the manner which will best serve the interests of all the people.

307. TENN. CODE § 1034.19 (Williams, 1934).