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Local Government Law -- 1960 Tennessee Survey

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LOCAL GOVERNMENT LAW — 1960 TENNESSEE SURVEY

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This survey is directed to the law peculiar to local government. Although nearly every case involves law applicable to parties other than governmental agencies, the focus of attention here is on the aspects peculiar to such agencies. Critique of the law of general application is not within the scope of this article.

Although "Elections and Representation" could be treated (as it was last year) under the topic of "Relations of Local Government and Private Persons," it is separated here to emphasize the logical distinction between laws concerned with the creation of governmental agencies on the theory that power is derivative from consent of the people, and laws concerned with the relations between individual persons and an established government.

I. FINANCIAL POLICY

The policy of aid and comfort to industrial activity noted in the review of *McConnell v. Lebanon* last year[1] was reaffirmed in a declaratory judgment action brought by Mayor West of Nashville.[2] The supreme court opinion by Justice Prewitt sustained Chancellor Lentz's decree approving execution of a lease of land by Nashville to the Industrial Development Board to be improved by the Board and re-leased to Genesco, a private corporation.

Holding that encouraging industrial activity is a public purpose

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1. Ryman, *Local Government Law—1959 Tennessee Survey*, 12 VAND. L. REV. 1257 (1959).
2. West v. Industrial Dev. Bd., 332 S.W.2d 201 (Tenn. 1960).

and therefore a proper city action, the court cited *Holly v. City of Elizabethton*[3] to the effect that if the financing of such a venture is not provided by the city through a charge on tax revenues, but is to be accomplished through bonds repayable only from earnings of the project, then the public credit is not pledged within the meaning of article 2, section 29 of the Tennessee Constitution.

If the public credit is pledged, as in the *McConnell* case, a referendum election is required. If the public credit is not pledged *to repay outlay for the project,* no such election is required, according to the *Holly* case, which was followed in the *West* case.

The extensive governmental activity permitted by these cases and recent legislation[4] indicates a clear policy, but it also opens the possibility of considerable abuse. Perhaps some registration and prospectus laws would be in order, coupled with legislative standards for financial responsibility of persons or corporations to benefit from public assisted programs.

II. ELECTIONS AND REPRESENTATION

A. Notice to Voters: Substantial Compliance

The validity of an incorporation election was sustained by Chancellor Townsend in *Seaver v. Shaver,* and his decision was affirmed by the Tennessee Supreme Court.[5] In the supreme court opinion, Justice Prewitt cited *State ex rel. Williams v. Jones*[6] and cases cited therein for the proposition that: "This court . . . will not permit trifling irregularities to defeat the will of the majority as expressed at the polls."

To establish that the substitution of a new first page of a petition requesting an incorporation election was a "trifling irregularity" the court stated that the description of area included within the proposed municipality was "substantially the same" as the original first page, and that no prejudice occurred because complainants and the legal voters were well advised at the time of and prior to the election of the territory to be included.

There seems to be an implication that a proper remedy for known irregularities in a petition for an election is injunction before the election is held. Such a course is reasonable, and obviates the expense of repetitive elections and use of technical objections to defeat the majority intention.

3. 193 Tenn. 46, 241 S.W.2d 1001 (1951).
4. Ryman, *supra* note 1.
5. 331 S.W.2d 288 (Tenn. 1960).
6. 179 Tenn. 206, 164 S.W.2d 823 (1942).

B. Annexation

The problem of annexation is included under this heading because one main issue involved in such proceedings is that of representation, although the Tennessee Supreme Court evaded the problem in *Morton v. Johnson City.*[7]

By the terms of Tennessee Code Annotated section 6-309[8] two methods of municipal annexation are established in addition to the referendum method of section 6-301.[9] The first alternative method may be referred to as the voluntary method; it requires a petition of a majority of the residents and property owners of the "affected territory." The second alternative method can be classed as involuntary; it allows the ordinance making body of a municipality to annex by ordinance after notice and public hearing.

In the *Johnson City* case, the supreme court had before it a quo warranto contest[10] of an involuntary annexation. By the decision, the court effectively negatived the public hearing feature of the statute by holding that the hearing might be held in a room too small to accommodate a substantial number of those wishing to participate. The court seemed to feel that the sole purpose of such a meeting is a parade of petitioners, negativing any possible effect of developing public opinion, or affecting official opinion, through group discussion. The court went so far as to approve refusal by the city council to move to an available larger room. It appears that mere formal gestures are a sufficient compliance with the notice and hearing requirements.

The involuntary annexation method adopted by Tennessee in 1955 is a variation of a Missouri statute[11] which was proposed in substantially the form adopted by Wallace Mendelson, a political scientist at the University of Tennessee and consultant to the Municipal Technical Advisory Service, in an article in 8 *Vanderbilt Law Review* 1. The proposals were stimulated by the limitation on annexation by private act contained in Amendment VII to the Tennessee Constitution.[12] The involuntary annexation method presents three distinct problems in addition to the matter of compliance with, and necessity for, provisions for notice and hearing by those affected.

1. Right to Representation.—The slogan "Annexation without Representation" leading to "Taxation without Representation" could be truthfully adopted by those affected by the Johnson City annexation. American courts have consistently refused to hold they have juris-

7. 333 S.W.2d 924 (Tenn. 1960).
8. TENN. CODE ANN. § 6-309 (Supp. 1959).
9. TENN. CODE ANN. § 6-301 (1956).
10. TENN. CODE ANN. § 6-309 (Supp. 1959).
11. MO. ANN. STAT. § 75.020 (1952), construed in State v. City of Joplin, 332 Mo. 1193, 62 S.W.2d 393 (1933), referred to by Mr. Mendelson.
12. 7 VAND. L. REV. 768 (1954).

diction to review undemocratic actions.[13] The federal guarantee of a "republican form of government" has never been effectuated through judicial sanction. Courts are wont to label such claims as "political" rather than judicial.[14] While the number and classes of persons entitled to be enfranchised has consistently increased in the United States, the effective power of the individual's franchise has decreased, not only by reason of the increased number of persons entitled to vote, but primarily because of attenuation through delegation of government actions to non-elective officers. The watering process is clearly presented in annexation problems and in extra-territorial zoning.[15] The persons affected, or their ancestors or predecessors in title, *may* have had a vote for some member or members of the legislative body which delegated legislative power to municipalities, but they have no political control over the legislative determination of the administrative agency.

The courts have said that enforcement of democratic process is political if the court is not provided with a specific criterion either by constitution or legislation.[16] It would appear that a mathematical formula could be established to ascertain the degree of remoteness of representation. For example: A theoretically perfect ratio would be a vote on every issue by every person affected directly, *i.e.*, 1:1. An outside limit could be established based upon the degree of remoteness of the voter from the final decision maker. If every person had a right to vote annually on each person making political decisions affecting the voter, an arbitrary ratio of 1:2 could be established. If the individual voted for a person who appointed a decision maker, a ratio of 1:3 would then follow on the same basis. If the vote were for a person who had one of two votes for a decision maker, a ratio of 1:4 would follow. If one-half of the voters affected by a decision voted annually on the decision maker, a ratio of 1:4 would result. If the vote were held every two years by all affected persons on the decision maker, the ratio would be 1:4. A major problem would arise in even attempting to define what persons were "affected" by a decision, and periodic review and re-enactment of laws would be a necessary corollary of such a concept.

If powers continue to be delegated as they are now, such legislation will be necessary to preserve a semblance of democracy.

In many cases the lack of representation is curable by affording parties affected by decisions a judicial remedy. This is the theory of

13. See, *e.g.*, Morton v. Johnson City, *supra* note 7, and City of St. Joseph v. Hankinson, 312 S.W.2d 4 (Mo. 1958).
14. 16 C.J.S. *Constitutional Law* § 145 (1956) at note 69. See also Annot., 66 A.L.R. 1466 (1930).
15. See 8 VAND. L. REV. 806 (1955).
16. 16 C.J.S. *Constitutional Law* § 145 (1956) at 700.

limitation or governmental power through an independent judiciary which protects vested private rights. The degree of protection afforded is affected by the scope of judicial review and by the substantive law granting private rights and/or remedies. The scope of judicial review in annexation cases is discussed herein under the next heading. The question of remedies in general is not present since Tennessee Code Annotated section 6-310 provides for a quo warranto proceeding. Capacity to contest annexation in general is discussed in Annotations, 13 A.L.R.2d 1279 (1950) and 18 A.L.R.2d 1255 (1951).

2. Delegation of Legislative Power.—If section 6-309 provided for a commission on annexation which might hold a hearing and order annexation where necessary, there would be no doubt that the statute, absent specific criteria, would be an unlawful delegation of power.[17] The criterion included in that act is "the prosperity of such municipality and territory will be materially retarded *and* the safety and welfare of the inhabitants *and* property thereof endangered . . . [if annexation is not affected]." (Emphasis added.) There is no question of the power of the judiciary to review actions of administrative bodies to ascertain whether the criterion on which the *power* of the administrative agency depends in fact existed in any particular case. In general review is limited to whether the agency acted within its authority[18] and whether there is material evidence to sustain the facts found by the agency.[19]

Although logically it would seem that whether the facts in the *Johnson City* case actually were such as to fall within the statutory criterion would go to the authority of the city council to authorize annexation and that the issue would be a mixed question of law and fact subject to review by trial of that issue to a jury, there is authority for the proposition that such questions are reviewable only for arbitrariness; such was the holding in Missouri, and that holding might reasonably be said to have been adopted by the legislature of Tennessee because of the legislative history of its statute.[20] On that authority the question to be determined would be whether there was material evidence presented at the administrative hearing which supports the action of the City Council. Section 6-310, which provides for quo warranto to attack the validity of such annexation, is not clear. In paragraph one the ground for the proceeding is "that

17. Recognized but not applied in City of St. Joseph v. Hankinson, 312 S.W.2d 4, 8 (Mo. 1958), citing 16 C.J.S. *Constitutional Law* § 139 (1956) and 69 A.L.R. 266 (1930) *inter alia.*

18. State v. Yoakum, 201 Tenn. 180, 297 S.W.2d 635 (1956); TENN. CODE ANN. §§ 27-901 to -914 (1956).

19. Milne Chair Co. v. Hake, 190 Tenn. 395, 230 S.W.2d 393 (1950). See Annot., 18 A.L.R.2d 1280 (1951).

20. See note 11 *supra* and accompanying text.

it *reasonably may not be deemed necessary* for the welfare of the residents and property owners . . . and so constitutes an exercise of power not conferred by law. . . ." (Emphasis added.) Paragraph two provides that in multiple suits consolidated for trial the issue shall be *"whether . . . annexation be or be not unreasonable* in consideration of the health, safety and welfare of the citizens and property owners. . . ." (Emphasis added.)

The Tennessee Supreme Court did not adopt either of the theories above noted, but held that the ordinance was *presumed* valid.

3. Presumption of Reasonableness.—The power of the legislature was delegated by section 6-309 to the ordinance making body of municipal corporations. The court held in the *Johnson City* case that such a body was a legislative organization (impliedly distinguished from an administrative agency) and their annexation ordinance was entitled to the presumption of validity.

If the council were acting on a delegated legislative power in a manner affecting only residents within the municipality who were enfranchised and whom the council represented, such a presumption would not be subject to criticism. Such, however, is not the case in annexation or extra-territorial zoning matters.

The seriousness of this distinction can be readily ascertained by reviewing the *Johnson City* case. A jury was impaneled, and heard several days of testimony. The jury viewed the territory intended to be annexed. The jury found the annexation unreasonable. The trial judge accepted the jury finding. The supreme court cited in support of its decision reversing the trial judge and jury that (1) property values of farm land adjacent to the city were higher than for farm land elsewhere; (2) abortive attempts had been made by some person or persons to incorporate the annexed area; and (3) no allegation of personal misconduct of any member of the city council was made. Relative property values would be irrelevant under the statutory criterion. Where such relative values are material, the issue is whether the increase in value is due to proximity to a market or because of urban use of the land.[21] The attempted incorporation was alleged to be a sham, and it was not successful.

The net effect of the opinion of the supreme court is that in order to establish that a finding of a city council of grounds for annexation is not reasonable it is necessary to establish that the action was arbitrary. To establish arbitrariness, apparently, it is necessary to establish specific misconduct of members of the council.

Since the council is not a legislative body with reference to the

21. State v. Kansas City, 233 Mo. 162, 134 S.W. 1007 (1911) cited and approved in State v. City of Joplin, *supra* note 11.

territory to be annexed, and the Tennessee court held that the issue is not whether particular criteria are met but is a political issue, it follows that the delegation of legislative power is unlawful. I am constrained to agree with counsel for those protesting annexation that the supreme court opinion denies meaningful judicial review to residents of the annexed territory.

Involuntary annexation by representatives of one of the interested areas, not subject to judicial review except for provable nnisconduct of such representatives, not limited by reasonable and enforceable criterions is a procedure so autocratic as to demand corrective action either by legislation or constitutional amendment or reversal of the decision.

III. Conflicts of Local Government Agencies

A. School Bond Allocation

Chief Justice Neil delivered the opinion of the Tennessee Supreme Court in *City of Elizabethton v. Boone*,[22] affirming a decree of Judge Campbell in a declaratory judgment action. At issue was the proper formula for allocation of school bond receipts between Carter County and the City of Elizabethton. Tennessee Code Annotated section 49-711 (Supp. 1959) requires the county trustee to pay over to the city treasurer (where county and city operate independent schools) such an amount of school funds as "shall bear the same ratio to the entire amount . . . as the average daily attendance of the year ending June 30 next preceding the sale of the bonds of said county. . . ."

Prior to sale of the bonds and during the referendum election thereon it was agreed that the ratio should be based on the average daily attendance of the schools, city and county, grades 1-12. However the county claimed, prior to distribution of the proceeds of the bond sale, that the ratio should be calculated for elementary grades and high school grades separately and paid on that proportion. The difference in the two methods of computation was substantial. In support of its claim Carter County cited section 49-603 which requires reports of school superintendents on average daily attendance to be made on June 30 of each year, *separately for elementary schools and high schools.* The supreme court ruled that the construction of section 49-711 requested by Carter County was not proper and would do violence to the language of that statute, nor would construction in pari materia require such construction, since the mere severance of reports of high and grade school attendance does not require separate fund allocation of bonds sold for general school purposes.

22. 329 S.W.2d 832 (Tenn. 1959).

The case of *Guffee v. Crockett*,[23] was distinguished by Justice Neil. The bonds were limited to high school purposes in that case, and it was held proper to allocate funds on the ratio of average daily attendance in high school in that cause. Comparison of the decisions provides a stable and reasonable formula: Funds from bonds sold for general school purposes will be distributed to independent city schools in proportion to the ratio of average daily attendance of grades 1-12; if the bonds are sold for elementary school purposes the ratio will be established on elementary school average daily attendance figures, and if for high school purposes, high school average attendance figures will be used.

This leaves the question of whether special purpose school bonds not broken along lines where statistics are required to be submitted for allocation of state funds could be allocated on any basis other than either total average daily attendance grades 1-12 or elementary grades or high school. County officials might be well advised to avoid such special purpose bonds.

Tennessee Code Annotated sections 49-603 and 49-711 were both supplanted by Tennessee Public Acts chapter 53 (1959), but the supreme court noted that the 1959 act carries the same general proviso concerning allocation and ratio. It is probable that the methods of allocation established by the cases above noted are not affected by the statutory change.

IV. Local Government and Private Persons

A. Contract

In *State v. Stewart*,[24] Judge Bejach wrote the opinion of the Western Section Court of Appeals reversing a decree of Chancellor Cox. The action was brought by Southern Oil and Grease Co., a partnership, and by the several partners against Henderson County, the superintendent of schools and his surety, and the members of the county board of education, in the name of the state. The action against the superintendent of schools and his surety was dismissed by the chancellor and not appealed. Decree was entered against Henderson County and its board of education for $653.87 for supplies contracted for by the superintendent of schools and delivered.

The issue was the proper effect of Tennessee Private Acts chapter 642 (1947), which provides for a purchasing agent for Henderson County, an elective official, and further provides that Henderson County "shall not be liable . . ." for purchases made contrary to the provisions of the act vesting exclusive power in the purchasing agent

23. 315 S.W.2d 646 (Tenn. 1958), 12 VAND. L. REV. 1257, 1260 (1959).
24. 326 S.W.2d 688 (Tenn. App. W.S. 1959).

to buy materials, supplies and equipment for the county.

The court of appeals decided that the purchasing agent was not a ministerial officer, and impliedly negatived any compulsory process to require him to ratify the sale. The court further held that no recovery on the quantum meruit was allowable, following *Kreis & Co. v. City of Knoxville*,[25] wherein the supreme court held that a compromise and ratification of a void contract for service would not avail the contractor where the city charter expressly prohibited remuneration for services not contracted for in writing and approved by a board of commissioners; and *Carter County v. Williams*,[26] which contains a summary of Tennessee cases and draws a distinction between cases where execution of the contract was contrary to a specific legal inhibition such as the *Kreis & Co.* case and cases where the irregularity in execution did not violate a specific proscription, such as *Bozeman v. State*[27] which is discussed below. The instant case falls within the class of the *Kreis* case.

This is a harsh decision, yet the position of the court of appeals is readily justified by the necessity for organized planning of municipal expenditures. However, it would seem that such policy could be more equitably carried out by providing for punitive measures against public officials who exceed their authority by such contracts and reserving the rather harsh remedy of forfeiture for cases in which the supplier engaged in fraud or collusion.

In the *Bozeman*[28] case the Tennessee Supreme Court sustained a judgment of Judge Kelly granting mandamus against the judge of Knox County Quarterly Court, requiring payment of attorney's fees. Tennessee Private Acts chapter 183 (1937), created a board of county commissioners for Knox County and transferred some powers and duties from the quarterly county court. Internal warfare ensued in the course of which relator was employed by the quarterly court to assist in test litigation, including cases nominally involving private parties.[29] The contention that payment for relator's services would be expending county funds to aid private individuals was disposed of by Justice Tomlinson by reference to the finding that the cases were maintained for the benefit of the county, citing *Reece v. Polk County*,[30] in which it was held that testing constitutionality of acts imposing a burden on a county was a proper county function and that the mode in which the test was effectuated was irrelevant.

25. 145 Tenn. 297, 237 S.W. 55 (1921).
26. 28 Tenn. App. 352, 190 S.W.2d 311 (1945).
27. 330 S.W.2d 553 (Tenn. 1959).
28. *Ibid.*
29. Bayless v. Maynard, 200 Tenn. 568, 292 S.W.2d 774 (1956); State v. Armstrong, 200 Tenn. 191, 292 S.W.2d 7 (1956).
30. 3 Tenn. Civ. App. 354 (1912).

It was also contended that the contract of employment of relator was void because authorized at a special call of the quarterly court and the matter of legal services was not included in the call. The employment was ratified at a later session, however, and the defect in initial employment was treated as a mere irregularity by the court.

The disputed payment covered all legal services, some of which were rendered prior to the ratification. Tennessee Private Acts chapter 231 (1939) provides that no county officer shall employ counsel without "first" obtaining authority of the quarterly court. The supreme court held, however, that the act applies to officers but not to the quarterly court itself. It is clear that the distinction between this case and *State v. Stewart*[31] is rather attenuated, although justifiable in a technical sense.

In *Bybees Branch Water Association v. Town of McMinnville*[32] the supreme court ruled that a municipal corporation acts in a proprietarial or quasi-public utility capacity when it contracts to supply water to private users in the course of a regular business of maintaining a waterworks system and supplying water to customers both within and without the municipality. In an opinion by Chief Justice Prewitt, the court affirmed the decree of Chancellor Garrett ordering specific performance of such a contract to provide water at the same rate as users within the corporate limits, thereby voiding an ordinance purporting to increase the rates to complainants to 50% more than the rates of in-town users.

B. Tort

The double fiction of Sovereignty and Infallibility still is in force in Tennessee. Although many states have discarded as inapplicable, or severely curtailed, the doctrine that "The King can do no Wrong" which reflects a synonymous relation between Power and Right, Tennessee has taken little direct legislative or judicial action to provide remedies against local governments.[33]

However, a note of hope is sounded by the Tennessee Supreme Court in its decision in *Ballew v. City of Chattanooga*.[34] Ballew sued Chattanooga for damage resulting from the alleged negligent operation of a motor vehicle belonging to Chattanooga by a police officer. City's demurrer was sustained by the circuit judge. In an opinion by Justice Tomlinson, the supreme court reversed and remanded for trial.

The city contended that failure to join the officer was a fatal defect, but the court summarily disposed of the point in accordance with the

31. Note 24 *supra*.
32. 333 S.W.2d 815 (Tenn. 1960).
33. For criticism of the doctrine see, *inter alia*, Annot., 75 A.L.R. 1196 (1931).
34. 326 S.W.2d 466 (Tenn. 1959).

overwhelming weight of authority in actions based on the doctrine of respondeat superior.[35]

The main issue was whether immunity from suit was waived by Ordinance No. 4045 of the defendant. The ordinance was passed to effectuate a self-insurance scheme, and provided for a substantial contribution to a fund for payment of claims from the police and fire department budgets. The ordinance required the city attorney to investigate and settle claims and actions arising from operation of city motor equipment where there is "legal liability."

The city argued that the police officer was acting in a governmental rather than a proprietary capacity, that immunity attached, and, therefore, no "legal liability" of the city followed. The court, however, implied an intention to waive immunity from the fact that the ordinance required contribution from police and fire funds. The court said policemen and firemen act in a governmental capacity at all times,[36] and the contribution from their budget evidenced an expectation that "legal liability" could attach to their acts.

The decision indicates a tendency to limit the effect of immunity as far as possible without overturning prior decisions. It seems clear that the theory on which Chattanooga was sued, and on which the court ruled, was respondeat superior, but there are serious difficulties to the application of that theory which apparently were not brought to the attention of the court.

It has been held that a police officer is not an agent or servant of the city or town which employs him.[37] It has also been held that a city is not liable in negligence for selection or retention of police officers who are known to be insane[38] or of violent character.[39] Although those cases may have turned on the immunity question, it is clear that the status of a police officer is not that of a servant, but that he holds a state office of public trust.[40] There is considerable doubt whether there is "legal liability" on a theory of respondeat superior for negligence of a police officer, although the City of Chattanooga is bound by the decision. It is to be noted that no such status problem exists with reference to firemen, and the ordinance is not necessarily inconsistent with a waiver of immunity in cases based on negligence of firemen and no liability for negligent actions by police officers.

35. 57 C.J.S. *Master and Servant* § 579 (1948) (to the effect that liability of master and servant is several or joint and several).
36. See generally, 63 C.J.S. *Municipal Corporations* § 775, note 25 (1950); *but see* Howard v. Chattanooga, 170 Tenn. 663, 98 S.W.2d 510 (1936).
37. Cuffman v. City of Nashville, 175 S.W.2d 331 (Tenn. App. M.S. 1943); 19 R.C.L. § 398 (1917).
38. Bobo v. City of Kenton, 186 Tenn. 515, 212 S.W.2d 363 (1948) (Neil, J.).
39. Combs v. City of Elizabethton, 318 S.W.2d 691 (Tenn. 1960) (Green, C. J.).
40. State v. Knoxville, 166 Tenn. 530, 64 S.W.2d 7 (1933).