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ANNUAL SURVEY OF TENNESSEE LAW

ADMINISTRATIVE LAW—1959 TENNESSEE SURVEY

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The subject of administrative law in Tennessee remained generally static in the year in review. The supreme court held consistently to its line of decisions concerning review of administrative actions in the limited number of decided cases concerning the subject. The 1959 General Assembly of Tennessee made some sweeping revisions in the organization of several departments of government and various agencies and boards but these changes were solely for purposes of administrative efficiency and economy with no practical jurisdictional, regulatory or substantive effect.

I. ESTABLISHMENT OF ADMINISTRATIVE AGENCIES—CONSTITUTIONALITY

Although the case of *Livesay v. Tennessee Bd. of Examiners in Watchmaking*[1] does little more than possibly indicate an announcement by the supreme court that bureaucracy must ultimately have a stopping point, the reasoning by which the decision was reached was interesting. This case tests the constitutionality of a law[2] which established a board of examiners for those persons engaged in the occupation of watchmaking. The court finds this case to be one of first impression on the ground that there has been no other case involving watchmakers in Tennessee. This finding totally disregards the previous decisions handed down relating to the myriad boards and bureaus created by legislative enactment. The question in the case turns upon the application of police power rules to determine the issue of the constitutionality of the creating act, and the court finds the watchmaking occupation is not subject to the rule. The court concludes that if the opportunity for a dishonest person to defraud a customer were justification for the regulation by the legislature, then every conceivable business could be regulated. Although the

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1. 322 S.W.2d 209 (Tenn. 1959).
2. TENN. CODE ANN. §§ 62-1401 to -1410 (Supp. 1959).

legislature deemed it necessary to regulate the qualifications of watchmakers, the court states it is unable to imagine how the public welfare will be promoted by the creation of the board. In effect the court appears to be exercising its judgment as to whether the act is in the public interest. This point is pertinent in light of some of the past pronouncements of the court in deciding the constitutional question of legislative enactment. At almost the other extreme the supreme court has stated that in determining the constitutionality of an act, it is not concerned with whether the act was dictated by a wise or foolish policy or whether it will ultimately go down to the public good, as these considerations are solely for the legislature.[3] In the case of *Motlow v. State*,[4] the court reserved the right to pass on the constitutionality of statutes, but in so doing it stated that it will not inquire into the policy of the legislature if there is any plausible reason back of the legislation. The *Motlow* decision was recently cited on this point in *Cosmopolitan Life Ins. Co. v. Northington*.[5] The supreme court recently stated in *Phillips v. State*,[6] in upholding the constitutionality of a law forbidding daylight saving time, that the police power rule embraces all matters reasonably deemed necessary or expedient for the safety, health, morals, comfort, private happiness, domestic peace and public welfare of the people. As the court also stated in the *Motlow* case, an innocent activity may be regulated or prohibited if its pursuit offers opportunity for fraud or deception.[7] Thus, while the court in the past has left to the wisdom of the legislature those professions and occupations which are to be regulated and sought only to determine whether or not the constitution has been violated through their enactment, in the *Livesay* case it would appear that the court interjects itself to protect the public from the continued creation of boards and agencies.[8]

II. SCOPE OF REVIEW OF ADMINISTRATIVE DECISIONS

During the survey year the Tennessee Supreme Court decided three cases reviewing decisions of the Tennessee Public Service Commission. All three were proceedings involving motor carriers

3. Motlow v. State, 125 Tenn. 547, 145 S.W. 177 (1912).
4. *Ibid.*
5. 201 Tenn. 541, 300 S.W.2d 911 (1957).
6. Phillips v. State, 304 S.W.2d 614 (Tenn. 1947). See also Nashville C. & St. L. R.R. v. Walters, 294 U.S. 405, 429 (1934); Harbison v. Knoxville Iron Co., 103 Tenn. 421, 441-42, 53 S.W. 955, 960 (1899); Lonas v. State, 50 Tenn. 287, 310 (1871).
7. See also McCanless v. State *ex rel.* Hamm, 181 Tenn. 308, 181 S.W.2d 154 (1944).
8. For discussion of the subject matter generally, see 33 AM. JUR. *Licenses* § 17 (1941). Also, for discussion of the delegation of power generally, see 1 DAVIS, ADMINISTRATIVE LAW § 2.10 (1958).

and in each the decision of the Commission was upheld. Some confusion might exist due to the fact that two of the cases are styled precisely the same[9] and were decided and reported by the court at the same time, although they involved different parties and different subject matter. In the first case, *Blue Ridge Transp. Co. v. Hammer*,[10] the court reviewed a decision which construed or interpreted the scope of operating rights of a motor carrier holding a certificate of convenience and necessity previously issued by the Commission. This case involves Gasoline Transport Company which company was issued a certificate in the year 1945 authorizing the transportation of petroleum products over certain regular routes between given points in Tennessee. Subsequently a controversy as to whether the certificate authorized Gasoline Transport Co. to operate over irregular routes[11] was brought before the Commission for determination. The Commission interpreted the certificates to be sufficiently broad as to authorize the carrier to travel over all highways within the general area over irregular routes. On appeal, the lower court found that the interpretation by the Commission was too broad and interfered with the rights of the appellant, Blue Ridge Transportation Co. The supreme court followed its numerous recent pronouncements[12] that, if there is material evidence to support the finding of the Commission, the Commission's order will be upheld, and so reversed the holding of the chancellor below. In this case the court appears to have taken one step further in limiting its review of a decision of an administrative agency through its statement that, "It has been the policy of this Court to give every reasonable presumption in favor of the lawfulness of the Commission's order . . . ."[13] By giving *every* presumption

9. Blue Ridge Transp. Co. v. Hammer, 313 S.W.2d 431 (Tenn. 1958); Blue Ridge Transp. Co. v. Hammer, 313 S.W.2d 433 (Tenn. 1958). The style of the case comes about by the party bringing suit whose name becomes the complainant and most frequently a contraction of the individual members of the Commission serving in their official capacity, using the Commission chairman's individual name as a reference. The two cases decided here, coincidentally, were styled the same and reported on succeeding pages.

10. 313 S.W.2d 431 (Tenn. 1958).

11. Irregular routes are generally referred to as being over any and all highways within a given area, while regular route authority specifies a particular highway over which carrier must travel between its points.

12. Continental Tenn. Lines v. Fowler, 199 Tenn. 365, 287 S.W.2d 22 (1956); Louisville & N. R.R. v. Fowler, 198 Tenn. 266, 271 S.W.2d 188 (1953); Hoover Motor Express v. Hammer, 195 Tenn. 593, 261 S.W.2d 233 (1952). For recent decisions of other jurisdictions on this point, see Railway Express v. Alabama Pub. Serv. Comm'n, 265 Ala. 369, 91 So. 2d 489 (1956); Parrish v. Public Util. Comm'n, 134 Colo. 192, 301 P.2d 343 (1956); Woodside Transfer & Storage Co. v. Georgia Pub. Serv. Comm'n, 212 Ga. 625, 94 S.E.2d 706 (1956); Public Serv. Comm'n v. Indiana Bell Tel., 235 Ind. 1, 130 N.E.2d 467 (1955); Public Serv. Comm'n v. Boone Circuit Court, 236 Ind. 202, 138 N.E.2d 4 (1956); State *ex rel.* Olson v. Public Serv. Comm'n, 133 Mont. 104, 308 P.2d 633 (1957); Petition of Stowell, 125 A.2d 807, 119 Vt. 298 (1956). See generally 4 DAVIS, ADMINISTRATIVE LAW §§ 29.01 to .03 (1958).

13. 313 S.W.2d 431, 433 (Tenn. 1958).

in favor of the lawfulness of the Commission's order, the court appears to be limiting its review not to whether there is substantial and material evidence to uphold the order of the Commission, but simply to a determination of whether any material evidence exists, and then giving the benefit of every doubt or presumption to the Commission.

This point is again quite plainly brought out in the second *Blue Ridge Transp. Co. v. Hammer*,[14] which involved the grant of certificates of convenience and necessity to two contract haulers[15] over the objection of certain already certified common carriers. In upholding the Commission's decision in that case, the court states very clearly that, unless there is a plain abuse of discretion by the Commission, its orders will not be disturbed on appeal. The court goes on to describe the Commission as a fact-finding body with trained experts, and in evaluating evidence the court says it must give due consideration to the discretion of the Commission. In upholding the decision in this case, the supreme court goes one step further and points out that "more especially" where the chancellor has considered the record on the common law writ of certiorari, and affirmed the order of the Commission, this concurrent finding is conclusive of the issue. The court appears to be saying that where the chancellor upholds the decision of the Commission review is for all practicality at an end. It would appear that this wording imposes somewhat on the statute[16] which provides that any aggrieved party may secure a review of any final judgment of the chancery court by direct appeal to the supreme court, notwithstanding the provisions of any other statute to the contrary. The holding in this case would seem to almost foreclose this appeal which is a matter of right under statute in cases even where the chancellor below has upheld the Commission. The court brushes aside the question of whether or not the Commission gave reasonable consideration to the transportation service being performed by other carriers as provided by statute[17] by saying that such contention was not supported by the record and the contrary was conclusively presumed. The court in the instant case states that there is no mandatory direction for the refusal of a contract hauler's permit and such a matter is left to the discretion of the Commission as a fact-finding body.

14. 313 S.W.2d 433 (1958).

15. TENN. CODE ANN. § 65-1502(c) (1956). A contract carrier is one which may transport for hire only limited specified commodities under special contract for one or more shippers.

TENN. CODE ANN. § 65-1502(b) (1956). A common carrier is one obligated to render service in the area or over the routes for which it holds a certificate to any person tendering traffic.

16. TENN. CODE ANN. § 65-230 (1956).

17. TENN. CODE ANN. § 65-1507(a) (1956).

Probably the most far reaching of the three cases decided is that of *Refiners Transp. Co. v. Pentecost*,[18] which involved the application of a carrier for a certificate of convenience and necessity to transport liquid petroleum gas to all points within the State of Tennessee. The applicant in the case, Frank C. Martin, d/b/a Martin Propane Transport, had a single base of operation, namely, McMinnville, Tennessee, and testified at the hearing that he had talked to a large number of the distributors of liquid gas in Tennessee and had found that there was a definite need for the type of intrastate carrier service proposed to be furnished. Four distributors of liquid gas who appeared as witnesses supporting the applicant testified that they needed the service whether it was furnished by Martin or common carriers. Protestant carriers appeared testifying as to the availability of their equipment and their willingness and desire to render the service.

The court unhesitatingly found there was substantial evidence to support the decision of the Commission and recited the self-serving statement of witness Martin as uncontradicted proof. This decision is in extreme contrast to those decisions entered by the Interstate Commerce Commission for carriers seeking interstate authority under similar statutes.[19] The supreme court in an earlier case involving the review of a grant of a certificate to a motor carrier stated in *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*,[20] that, since the Tennessee statutes creating the Public Utilities Commission were modeled on the federal statutes, the federal decisions are particularly persuasive involving questions arising under those statutes. In reviewing decisions of the Interstate Commerce Commission on this point, it has been held that the burden of proof is upon the applicant[21] and it must be affirmatively shown that existing authorized carriers caunot perform the services satisfactorily before grant of additional authority.[22] The Interstate Commerce Commission has gone further to state that the applicant for authority must show that the supporting shipper has tried and failed to obtain service or that the service, when provided, was unsatisfactory.[23] The Tennessee statute[24] similarly provides that the burden of proof shall be on the party or parties asserting the affirmative of an issue. To the practitioner this case appears to be one of the weakest from the standpoint of proof as to convenience and necessity which has been

18. 325 S.W.2d 267 (Tenn. 1959).
19. 64 Stat. 574 (1951), 49 U.S.C. § 306 (1952).
20. 195 Tenn. 593, 261 S.W.2d 233 (1953).
21. Sinnett v. United States, 136 F. Supp. 37 (D.N.J. 1955).
22. Clyde R. Savers, 61 M.C.C. 65 (1952).
23. Warren Transport, Inc., 59 M.C.C. 241 (1956); John G. Miller, 61 M.C.C. 631 (1953).
24. TENN. CODE ANN. § 65-209(e) (1956).

offered for a statewide operation. No economical feasibility appears to be shown, yet the supreme court reiterates its consistent position that it will not disturb the findings of the Commission on matters in which it has exercised its discretion.

III. MANDAMUS

In the case of *Neas v. Tennessee Burley Tobacco Growers' Ass'n*,[25] certain tobacco growers brought a mandamus proceeding against the growers' association, which was an agent of the Commodity Credit Corporation, for the distribution of certain monies held by the association for the benefit of the growers. The association maintained that until such time as it saw fit to distribute the cash, it has the right to use the surplus monies for its own purposes as an association. Both the chancellor and the supreme court found that mandamus would lie in such a case for the association had only to perform a ministerial duty involving no discretion which it was already bound to perform. The court held, in effect, that this was on all fours with the case of *Range v. Tennessee Burley Tobacco Growers' Ass'n*,[26] in which similar action was taken and that said case was binding on the issue.

IV. LEGISLATION

The General Assembly of Tennessee passed a sweeping reorganization act[27] in which certain of the administrative departments, commissions, boards and agencies of the state government were reorganized, consolidated and transferred. The express purpose of the enactments was for efficiency and economy. Various of the boards and agencies were renamed, some placed in different divisions or departments, but little or no change was made affecting the public generally other than the possible economies of operation to the state government. To the public this reorganization act is basically a renaming of the roses. Two laws were passed relative to the regulation of motor vehicles under the jurisdiction of the Tennessee Public Service Commission. The new enactment of primary interest[28] repeals that provision of the Motor Carrier Act,[29] which allows a motor carrier holding two certificates of convenience and necessity to tack them together and serve the extreme terminii of both certificates. This law was commonly referred to as the "Joe Davis" Act and

25. 321 S.W.2d 802 (Tenn. 1959).

26. 298 S.W.2d 545 (E.D. Tenn. 1956).

27. TENN. CODE ANN. §§ 4-301 to -304, 4-309, 4-314 to -315, 4-317, 4-323, 4-326, 4-328 to -332, 4-338 to -340, 8-2301, 10-101 to -102, 43-610, 58-401, 63-101 (Supp. 1959).

28. Tennessee Public Acts 1959, ch. 248.

29. TENN. CODE ANN. § 65-1508 (1955).

originally passed in 1937 to aid an individual carrier who could not otherwise acquire authority.

A second enactment[30] of very limited application exempts from regulation a limited number of motor carriers transporting petroleum products. This law was passed solely to exclude from regulation certain oil companies which had undertaken to allow their distributors to transport products for which they were paid a transportation charge without the necessity for regulation by the Tennessee Public Service Commission. At best the act is so ambiguous as to be difficult of interpretation for it exempts "any motor vehicle presently operating pursuant to a consignment contract," leaving the obvious question of whether the motor vehicle presently operating refers to specific pieces of equipment or to a limited class of persons conducting operations at the time of the passage of the enactment.

A law was passed completely reorganizing the Board of Cosmetology[31] but without making any substantial changes in its existence as an administrative agency.

30. TENN. CODE ANN. § 65-1503 (Supp. 1959).
31. TENN. CODE ANN. §§ 62-401 to -402, 62-404 to -406, 62-409 to -410, 62-412, 62-415 to -422, 62-425 to -426 (Supp. 1959).