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## COMMENT AND CASE NOTES

### THE POLL TAX AND CONSTITUTIONAL PROBLEMS INVOLVED IN ITS REPEAL

HENRY N. WILLIAMS\*

The decision of the Supreme Court of Tennessee in *Biggs v. Beeler*<sup>1</sup> is the climax to efforts to remove the payment of a poll tax as a prerequisite to voting in Tennessee. The fight to eliminate this qualification for voting, although raised on occasion for the past twenty-five years, actually became an issue in the 1938 gubernatorial election. Bills designed to abolish

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<sup>1</sup> 173 S.W. 2d 144 (July 3, 1943).

the requirement of the payment of poll taxes for voting failed in the 1939 and 1941 legislatures. The legislature of 1943 repealed the statutory provisions for poll taxes both as a tax<sup>2</sup> and as a prerequisite for voting.<sup>3</sup>

The case arose on complaint of "taxpayers, owners of real and personal property," praying for an injunction restraining the execution of Chapter 38<sup>4</sup> and for a declaratory judgment<sup>5</sup> on the constitutionality of both acts.

Various state and county officials were made defendants in the action. The attorney general filed a demurrer on behalf of state officials averring (1) that the acts were constitutional because the poll tax sections of the state constitution were not self-executing, and (2) that the acts were not defective on "technical" grounds. Polk County and its trustee adopted the demurrer of the state officials as to Chapter 38, but charged that Chapter 37 was unconstitutional. A county election commissioner filed an answer alleging that the payment of a poll tax as a qualification for voting is contrary to a republican form of government.<sup>6</sup>

The complainants attacked the validity of the acts upon a number of grounds, the most important being that they violated Article II, Section 28, and Article IV, Section 1, of the Tennessee constitution.<sup>7</sup> The case reached the supreme court on an appeal from the lower court's holding

<sup>2</sup> Public Acts of 1943, Chapter 37 repealing Sections 1082, 1558, and 1559 of Williams Tennessee Code (1934).

<sup>3</sup> Public Acts of 1943, Chapter 38 provided inter alia for the repeal of Sections 2027-2043, 2198, and 2202 of the Code and a portion of Section 2, Chapter 2, Public Acts of Second Extraordinary Session of 1937.

<sup>4</sup> "An Act to prescribe certain qualifications for voters by providing for their permanent registration and for the removal of the requirements for payment of the poll tax as a prerequisite to their voting in all general, special, primary, state, county and municipal elections; and providing for the administration of this Act and prescribing punishments for violation of the same . . ." and to repeal various sections of the Code.

<sup>5</sup> Declaratory judgments are provided for by Chapter 29, Public Acts of 1923, sections 8835-8847, Williams Tennessee Code.

<sup>6</sup> The chancellor ("Opinion of the Chancellor," Brief for Defendants and Appellants, *Biggs v. Beeler*) overruled this contention on the authority of *Pirtle v. Brown*, 118 Fed. 2d 218, 139 A. L. R. 557 (1941), cert. denied 314 U.S. 621. This case represented an unsuccessful attempt to challenge the poll tax as a prerequisite for voting in Tennessee congressional elections. The annotation in A. L. R. is useful.

<sup>7</sup> Art. II, sec. 28 provides in part: "All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Art. IV, sec. 1: ". . . and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received. And all male citizens of the State shall be subject to the payment of poll taxes. . . ."

unconstitutional the repealing acts of the legislature of 1943. The supreme court confined its attention to the constitutionality of Chapter 37.<sup>8</sup>

Although the Supreme Court of Tennessee is committed to a liberal interpretation of the Declaratory Judgments Law,<sup>9</sup> there seems to be some question of the standing of the complainants to bring this suit under that act or to challenge the constitutionality of the poll tax repeal statutes.<sup>10</sup> The court has held<sup>11</sup> that "To authorize a taxpayer to maintain a suit under the Declaratory Judgments Law, to determine the constitutionality of a charter provision of a municipal government,<sup>12</sup> he must have a 'real interest' in the subject of the litigation, and this real interest is in no wise different from that which he must have to enjoin a proposed municipal action on the ground of illegality.<sup>13</sup> We see no ground for any distinction in the interest which would authorize the one suit from the interest which is necessary to the other." The most plausible explanation for passing on the question is, perhaps, as Borchard has written:<sup>14</sup> "State courts, when they think the public issue important, are disposed to find a taxpayer's interest, however trifling, as adequate to sustain the justiciability of the action."

Aside from the Declaratory Judgments Law, the standing of the complainants to challenge the constitutionality of the statutes is less easy to explain. It is well settled that one not adversely affected by a statute cannot challenge its validity. Even after adopting the policy that in a taxpayer's action the total amount involved for all taxpayers rather than the individual's part is the amount at issue in the action<sup>15</sup> it is rather difficult to understand how the possibility of increased taxation by some other statute that might have followed the repeal of the poll tax statutes would create a

<sup>8</sup> Chapter 38 provided (sec. 26) that it was enacted in anticipation of the repeal of Section 1082 of the Code, one of the sections repealed by Chapter 37.

<sup>9</sup> "This Court is committed to a liberal interpretation of the Declaratory Judgments Act so as to make it of real service to the people and the profession." *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S. W. 901 (1925).

<sup>10</sup> These matters were not discussed in the court's opinion.

<sup>11</sup> *Perry v. City of Elizabethton*, 160 Tenn. 102, 22 S. W. 2d 359 (1929).

<sup>12</sup> Most municipal charters in Tennessee are special or "private" acts of the legislature.

<sup>13</sup> See *Reams v. Board of Mayor and Aldermen of McMinnville*, 155 Tenn. 222, 291 S. W. 1067 (1927), which held: "The taxpayer may maintain the suit to restrain action by the municipal authorities only when they are acting illegally, and when the effect of their illegal action will impose an additional burden of taxation."

<sup>14</sup> Edwin M. Borchard, *Declaratory Judgments* 36 (2d ed. 1941).

<sup>15</sup> See *Brown v. Trousdale*, 138 U.S. 389 (1891).

burden upon taxpayers or otherwise deprive them of a constitutional right or privilege.<sup>16</sup>

The court made an attempt to create the impression that the statute before it, Chapter 37, was solely a school revenue statute. This seems to be completely answered by Justice Neil, in his dissenting opinion. He stated that the legislature which repealed the poll tax had provided for the proper maintenance of both elementary and high schools by appropriating \$10,568,000 for school purposes. He also denounced, "with all deference to counsel," the argument that the Tennessee constitution contemplated that poll taxes would be set aside as a "sacred fund" for school purposes. This was a "pure fiction" because "it is a well known fact that there has been no such fund in existence for more than fifty years."

Another question before the court was whether the provisions of Article II, Section 28, and Article IV, Section 1 were directory or mandatory<sup>17</sup> and, if the latter, whether they were self-executing or non-self-executing.<sup>18</sup> The court held that the provisions of both sections were mandatory, but non-self-executing.<sup>19</sup> Thereupon the court posed the decisive problem: "When the legislature, in the execution of a trust conferred on it by the constitution, has, by appropriate legislation, executed that trust and put into operation and effect a constitutional mandate, may the legislature, at a subsequent session, revoke and nullify that which it had [sic] done?" (p. 146). Having been presented a problem without a direct precedent, the court turned to "principle and reason" for guidance.

The court distinguished a mandatory non-self-executing provision from a directory or permissive provision on the basis of the legislature's power to enact legislation.<sup>20</sup> The court at the same time expressed doubt as to the power of the legislature to repeal statutes resting upon directory provisions;<sup>21</sup> but it had no uncertainty as to the inability of the legislature to

<sup>16</sup> Cf. dissenting opinions by Chief Justice Green and Justice Neil in *Biggs v. Beeler*, supra, note 1 at pp. 148-150.

<sup>17</sup> See 11 Am. Jur. 686-688, 12 C. J. 740-741, 15 C. J. S. 120-24, 6 R. C. L. 55-57.

<sup>18</sup> See 11 Am. Jur. 688-697, 12 C. J. 729-39, 16 C. J. S. 98-120, 6 R. C. L. 57-62.

<sup>19</sup> *Biggs v. Beeler*, supra, note 1 at 147.

<sup>20</sup> In terms of effect, this appears to be more a distinction than difference. "The legislature is left free to execute and act on . . . [a directory provision], or not, at its pleasure, . . . but a mandatory non-self-executing constitutional provision delegates to the legislature the execution of a power coupled with a command which, it is true, the legislature may disregard and the courts are without authority to enforce performance of by affirmative decree" (p. 147).

<sup>21</sup> The legislature ". . . *perhaps* has the power to repeal and revoke its execution thereof [directory provisions] by such action as it may from time to time elect to take . . ." (italics supplied).

repeal statutes founded on mandatory non-self-executing provisions.<sup>22</sup> Characterizing such provisions as “‘dormant and quiescent until some statute brings them into life and operation,’” the court wrote: “. . . We have here a case where a constitutional mandate, if originally ‘dormant’ and ‘inoperative,’ has had vitality breathed into it, has been ‘rendered effective by supplemental legislation,’ is now a live, active, operative thing and to kill and destroy it requires affirmative action, which may be taken only by its creator through constitutional amendment, or convention, not by either the legislature or the courts. This constitutional mandate has been so ‘welded into intimate and permanent union’ (Webster) with the statute that the two have become one and indivisible, and the statute may not now be divorced and destroyed. The necessary effect would be to nullify and defeat operation of the constitutional mandate also.”<sup>23</sup> Accordingly, the court held that Chapter 37 was unconstitutional and that, therefore, Chapter 38, by its own terms, became inoperative.

The dissenting opinions agreed with the opinion of the court that the constitutional provisions in question were mandatory non-self-executing. But both dissenting opinions held that the statutes under consideration were valid, although Justice Neil implied that this was true only because Article XI, Section 12 had in fact been complied with.<sup>24</sup> Chief Justice Green, who dissented, expressed his views succinctly: “Stripped of its eloquence and ethics, the substance of the majority opinion is that obedience to a mandate of the constitution by one legislature introduces into that instrument a warrant to this court to compel obedience to the mandate by a subsequent legislature. But the legislature cannot amend the

<sup>22</sup> “But when the constitutional command has been carried into execution, and incorporated into operative law, the courts, which may not say shall, have the authority and solemn obligation to say shall not.”

<sup>23</sup> The court indicated that the legislature could repeal the requirement that *women* pay poll taxes, but held that in the absence of an indication of intention for the instant act to apply to women it attempted to relieve all alike.

<sup>24</sup> “If . . . the legislature finds sources of revenue for school purposes otherwise than from poll taxes, as it has done, I think it may repeal the [poll] tax without doing violence to the state constitution.” Art. XI, Section 12 provides in part: “. . . And the fund called the common school fund, and all the lands and proceeds thereof, dividends, stocks and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by Legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools. The State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law. . . .”

constitution nor can it bind future legislatures."<sup>25</sup> Justice Neil impliedly agreed with the chief justice that the doctrine of the separation of powers<sup>26</sup> made the court powerless to restrain the legislature from repealing the poll tax law.

The opinion of the court is far from satisfactory. The rule on the power of a legislature to repeal acts of former legislatures has been stated: "As a general principle, one legislature is competent to repeal or modify an act of a former legislature, and one legislature cannot abridge the power of a succeeding legislature. . . . But this general principle has exceptions. . . . These exceptions depend entirely on constitutional limitations of the legislative powers."<sup>27</sup> The cases cited by these authorities refer to contracts that statutes created. The term "constitutional limitations" suggests prohibitions that may exist in a particular constitution that refer to the legislative *power*. A mandatory non-self-executing provision would hardly fall within this classification. The writer has been unable to locate any other decision that purports to enlarge the restriction upon a legislature's power to repeal its former act to include mandatory non-self-executing provisions. Certainly the application of this innovation in policy is likely to result in numerous difficulties.

The court's decision applied *only* to the poll tax as a source of revenue. Most proponents of poll tax repeal are, however, primarily interested in the abolition of the poll tax as a qualification for voting. As a source of revenue the poll tax is of minor importance.

It is perhaps idle to speculate on the Tennessee court's reaction to a statute providing only for the repeal of statutory provisions for the payment of a poll tax as a prerequisite for voting.<sup>28</sup> The constitutional provisions for the poll tax as a source of revenue and as a prerequisite for voting are in similar terms. The section of the constitution relating to revenue is buttressed with another constitutional provision that poll

<sup>25</sup> Elsewhere in his opinion, Chief Justice Green by a reference to the provision that forbids the impairment of the obligation of a contract qualified this last clause. The first clause of the last-quoted sentence must, of course, be read in its proper context.

<sup>26</sup> Art. II, sec. 2 provides: "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

<sup>27</sup> 25 R. C. L. 162. Cf. "The power of the legislature to repeal a statute is subject to, and only subject to, such limitations as are imposed by the constitution of the state and the United States." 59 C. J. 899.

<sup>28</sup> Had Chapter 38 not been dependent upon Chapter 37, the court, following the reasoning in the instant case, might well have held the elimination of the payment of the poll tax as a requirement for voting in primary and municipal elections to be constitutional. The act (sec. 29) contains the usual severability clause.

taxes shall be used for educational purposes.<sup>29</sup> A repeal statute of the poll tax as it relates to voting qualifications would have as a legislative precedent that for nineteen years immediately after the adoption of the Tennessee constitution, Tennessee had no such qualification for voting.<sup>30</sup>

Two courses of action conceivably are open to the advocates of the abolition of the poll tax as a qualification for voting.<sup>31</sup> The Tennessee constitution might be amended in accordance with Article XI, Section 3. The possibility of success in this way seems most remote.<sup>32</sup> The more promising possibility would be to repeal the statutory requirement of the payment of the poll tax as a qualification for voting in primary and municipal elections. There appears to be no constitutional obstacle to this procedure.<sup>33</sup> Although logically it might appear that different voters would participate in the primaries and general elections or at least a different majority would dominate each, in practice there would appear little likelihood that party regularity would so deteriorate that an "independent" would defeat both party nominees in the general election.

Further there is nothing to prevent the removal of the poll tax as a qualification for women to vote.<sup>34</sup> A gynarchy would hardly result if this were done. Might not the effect—whatever that might be—of complete poll tax abolition be attained by repealing its requirement as a prerequisite for voting in municipal elections and primaries and by women in all elections?<sup>36</sup>

<sup>29</sup> See, *supra*, note 24.

<sup>30</sup> Shortly after the adoption of the present (1870) constitution the legislature exercised its power under Art. IV, sec. 1, and by Chapter 10, Acts of the First Extraordinary Session, 1870, provided for the payment of a poll tax as a prerequisite to voting. This prerequisite was repealed by Chapter 124, Acts of 1871, and Chapter 1, Acts of 1873. It was not until 1890 that payment of a poll tax was again a qualification for voting. See Chapter 26, Acts of First Extraordinary Session, 1890; cf. Chapter 222, Acts of 1891. Throughout this period of nineteen years, however, the poll tax was used as a revenue measure. See Chapter 26, Acts of First Extraordinary Session, 1870.

<sup>31</sup> These are in addition to the reduction of the amount of the poll tax to fifty cents per annum which, it is submitted, would be clearly constitutional, despite the eloquence of the court concerning the constitution and the statute being welded into a permanent union.

<sup>32</sup> See Combs, "An Unamended State Constitution: The Tennessee Constitution of 1870," 32 *American Political Science Review* 514-24 (1938).

<sup>33</sup> *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S.W. 1036 (1910).

<sup>34</sup> *Biggs v. Beeler*, *supra*, note 1 at 147-48.

<sup>35</sup> Since this comment was written, attention has been called to the opinion written by Chambliss, Justice, on a petition to rehear. But there is nothing in this opinion that requires a modification in this comment.