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LEGISLATION

THE INDIANA ANNEXATION ACT OF 1949

The problem of enlarging the area of municipalities has often troubled state legislatures, for in seeking a solution the interests of the residents of the area in question must be balanced against the interests of the people in the community to which the land is sought to be annexed. The conflicting interests involved are often complex, for burdens of taxation may outweigh the advantages of urban society conferred upon the territory to be acquired. Conversely, by becoming a part of the municipality, the residents of the adjacent lands may be given the benefits of fire and police protection, water and sanitary facilities without contributing sufficient revenue to the city treasury to compensate for this added service.

The 1949 session of the Indiana Legislature enacted a bill to govern the procedure by which such adjacent lands may be annexed to a city.[1] The act provides for two methods to effectuate the annexation. The interested owners of real estate adjacent to the city may request annexation by presenting to the common council of the city a petition bearing the signature of fifty-one per cent of the persons owning property in the territory and requesting a special ordinance annexing the contiguous territory described in the petition. If the proposed annexation is approved by the common council, the land is annexed. If the ordinance is not passed within sixty days, the petitioners may file, with the circuit or superior court of the county wherein such territory is situated, a duplicate of the petition in which reasons supporting annexation are stated. After appropriate notice to the city officials, the court is required to hear the petition and give judgment upon the question of annexation according to the evidence produced by both parties. Should the court be satisfied that the annexation will be for the best interest of the city and will cause no manifest injuries to property holders in either the city or the

1. There are, of course, other methods by which land may be annexed to a city. For example, the boundaries may be enlarged by an ordinance originating from within the council itself. IND. STAT. ANN. (Burns 1933) § 48-701.

continguous territory, such annexation shall take place.[2] *Indiana Acts 1949, Chapter 216.*

It is with the provision making the annexation turn upon the decision of the circuit court that certain questions of constitutional law and public policy arise. Can the legislature withdraw from the city the power to annex territory? Is this power to cause annexation exclusively legislative? Can the legislature confer upon the circuit courts the power to cause annexation, even though the city has disapproved the petition?[3] The answers to these questions will provide some basis for determining the wisdom and validity of this enactment.

The well recognized rule defining the power of the legislature over the municipal corporations of a state was stated by the United States Supreme Court:[4]

> The right of a state to repeal the charter . . . (of a city) . . . cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure.

Following this principle, the courts have upheld legislative enactments revoking the character of a city entirely,[5] granting to the citizens the right to declare their community anti-saloon land,[6] or withdrawing power granted to one municipality and conferring it upon another.[7] While this rule is quoted in the opinions of the highest state and federal courts, exceptions

2. IND. ACTS 1949, c. 216:

> If the court should be satisfied upon the hearing that the adding of such territory to the city will be for its interest and will cause no manifest injuries to the persons owning property in the city or in the territory sought to be annexed, it shall so find and such annexation shall take place.
>
> If the court shall find . . . that the prosperity of such city and territory will be materially retarded and the safety of the inhabitants and property thereto endangered without such annexation, the annexation shall take place.

3. Much of the confusion relating to the question of whether legislative powers can be conferred upon the courts in reviewing the actions of local administrative bodies can be traced to the early English system of county government. There the chief legislative and executive officers were the justices of the peace. Since the actions of these officials, regardless of the division of government in which exercised, were inherently judicial, review by higher courts of all matters relating to county government was accepted as proper.

This practice, although no longer justified where the municipal corporation is under the exclusive control of the state legislature, has continued to influence the legislature in granting to the courts the power to review local governing units. See GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES 184 (1905).

4. Meriwether v. Garrett, 102 U. S. 472, 511 (1880).

5. *Ibid.*

6. People v. McBride, 234 Ill. 146, 94 N. E. 865 (1908).

7. People v. Barthoff, 388 Ill. 445, 58 N. E.2d 172 (1944); People v. Bartlett, 304 Ill. 283, 136 N. E. 654 (1922).

have arisen. The exceptions recognize that there are purely local functions of the municipality that cannot be abridged by the legislature.[8]

The earlier Indiana decisions were careful to preserve a distinction between the powers of the municipality that are granted to the city as an agency of the state and those powers which are exclusively local. Thus, an attempted grant of power to the governor to appoint city commissioners of public safety to control the fire and police department was declared invalid as an encroachment upon home rule in *State v. Fox*.[9] The court there noted that the cities were state agencies, to assist the state in the administration of such laws as pertain to the people of the state at large, but also that the cities are organized for the promotion of local interests which are peculiar to concentrated populations and in which the state has no more right of interference than it has with the private affairs of the citizens. However, more recently, an attack on a state law regulating the working hours of firemen failed despite the cry of "home rule."[10] The court ruled that the city is, within its territorial jurisdiction, an agent of the state and except as *specifically exempted by the Constitution,* is within the continuous, exclusive control of the legislature. Following this ruling, there remain few municipal functions not subject to such control.

Can it be said that the right to decide what lands shall be included within the boundaries of a city is a purely local question which does not concern the state? In view of the number of revenue measures and apportionment statutes based on the size and population of the municipality,[11] a valid conclusion is that the state has sufficient interest to warrent the withdrawing of the final decision of annexation from the common council.

The question, is this power exclusively legislative, is answered both affirmatively[12] and negatively[13] by the courts. Those decisions holding the power not to be legislative rely on the statutory requirement that the finding of specific facts automatically justifies annexation, and that courts may properly determine these facts. The Indiana Supreme Court held this to be

8. State v. Fox, 158 Ind. 126, 63 N. E. 19 (1902); State v. Denny, 118 Ind. 382, 21 N. E. 252 (1889).

9. 158 Ind. 126, 63 N. E. 19 (1902).

10. State v. Morris, 199 Ind. 78, 155 N. E. 198 (1927).

11. *E.g.*, IND. STAT. ANN. (Burns 1945 Supp.) § 48-7701 (Appropriation for art associations in cities between 75,000 and 250,000); IND. STAT. ANN. (Burns 1945 Supp.) § 48-7511 (Appropriation for hospitals in cities between 101,000 and 112,000).

12. Forsyth v. City of Hammond, 71 Fed. 443 (7th Cir. 1896); North v. Bd. of Education, 313 Ill. 422, 145 N. E. 158 (1924); Rutland v. City of Augusta, 120 Kan. 42, 242 Pac. 456 (1926); In re Benke, 105 Minn. 84, 117 N. W. 157 (1908); Searle v. Yensen, 118 Neb. 835, 226 N. W. 464 (1929); In re Incorporation of Village of N. Milwaukee, 93 Wis. 616, 67 N. W. 1033 (1911).

13. People v. Lee, 72 Colo. 598, 213 Pac. 583 (1923); County of Henrico v. Richmond, 177 Va. 754, 15 S. E.2d 309 (1941).

a legislative power in a case involving an early annexation law.[14] However, this unequivocal pronouncement is tempered by the facts of the case. The statute involved provided for judicial review of a county council's decision denying a petition for annexation. The statute was upheld as not being a delegation of legislative authority to the court by finding that the court was required only to determine whether the conditions authorizing annexation were present. In view of the very vague conditions deemed to authorize the annexation, it is questionable if this decision is a sound one. Indeed, the United States Court of Appeals for the Seventh Circuit, in a subsequent case challanging the constitutionality of the law, found that the delegated power was purely legislative and invalidated the statute.[15] The United States Supreme Court reversed this decision, holding the original Indiana proceeding to be res adjudicata and finding no federal question involved.[16]

The courts of Kansas and Illinois have also considered the problem, and under similar fact situations have disagreed with the Indiana court. In *Rutland v. City of Augusta*,[17] the statute provided that annexation should take place when the judge was satisfied that the addition would be to the best interest of the city, and would cause no manifest injury. The Kansas court construed this law to make annexation turn purely upon a question of advisability and not on a finding of specific facts. The court, having gone behind fact finding, was found to have assumed a legislative character denied it by the state constitution.

The Illinois court, in *North v. Board of Education*,[18] met a statute authorizing the judge to order or deny annexation upon the merits of the petition and invalidated it, tersely saying: "It is difficult to conceive of an act more clearly unconstitutional. . . . This court has held by a long line of decisions that the laying out of . . . boundaries . . . is a legislative function."[19]

The legislative character of annexation proceedings, then, turns upon the judicial interpretation of the standard fixed by the statute as to the necessary facts authorizing the addition. The standard in the Indiana Annexation Act, couched as it is in terms of "no manifest injuries"; "safety of the inhabitants"; and material retarding of prosperity is not sufficiently precise to be regarded as based on findings of fact. The standard is appropriate only for the guidance of a legislature in drafting an act. Assuming intelligent consideration by the members of the legislature, would any bill be

14. Forsythe v. Hammond, 142 Ind. 505, 44 N. E. 593 (1895).
15. Forsyth v. City of Hammond, 71 Fed. 443 (7th Cir. 1896).
16. Forsyth v. City of Hammond, 166 U. S. 506 (1896).
17. 120 Kan. 42, 242 Pac. 456 (1926).
18. 313 Ill. 422, 145 N. E. 158 (1924).
19. 313 Ill. 422, 424, 145 N. E. 158, 159 (1924).

passed if it resulted in "manifest injuries" to certain of the citizens, or endangered the "safety of the inhabitants" in the area where it was to be effective? Or if the bill was likely to result in the material retarding of prosperity, would a legislature not refuse to pass such a measure? These considerations are of a discretionary nature, depending not on the finding of specific facts, but on the inherent feeling of rightness engendered in the legislator from a consideration of many facts, some of which are pertinent to the issue and some of which are only incidentally germane.[20] A court requires something more definite to pass judgment. For example, a standard specifying that the increased revenue to the city caused by the annexation must equal the cost of services supplied the residents would require findings of fact which a court is qualified to ascertain. But, while similar fact findings may be implicit in the standard of the Indiana act, the general terms employed by the General Assembly constitute a delegation of legislative discretion to the court. The standard lacks any specification of facts which will lead to one irresistable conclusion.

Assuming, then, that the Indiana Annexation Law calls upon the court to determine the wisdom of a measure designed to promote the public health, convenience and welfare, and that this determination is a legislative function, the question is raised, can this power be conferred upon the circuit or superior courts?[21] The short answer is found in Article III, Section I of the Indiana Constitution which provides for the separation of powers into a legislative, executive and judicial branch and concludes that ". . . no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."[22] Nowhere in the Constitution can be found the express exception that authorizes the delegation provided for in the Annexation Act of 1949.

20. "A statute confers discretion when it refers an official for the use of his powers to beliefs, expectations, or tendencies instead of facts, or to such terms as 'adequate,' . . . 'beneficial,' . . . 'detrimental,' . . . 'safe.' . . ." FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND STATES § 44 (1928).

21. An instance of the confusion of thought arising in judicial review of municipal governing bodies is found in Peden v. Board of Review of Cass County, 208 Ind. 215, 195 N. E. 87 (1934). There the Supreme Court denied the power of the circuit court to review tax assessments. The Board of Review was found to be acting in an administrative capacity since no evidence was necessary to establish the value of the property. Absent fraud, there was nothing of a judicial nature for the court to consider. In so concluding, the court distinguished the judicial review authorized when a petition to establish a drainage district is rejected by the county commissioners. In this situation, evidence must be heard as to the propriety of the proposal. Thus, the county commissioners were acting in a judicial capacity and subject to review by the court.

However, in either situation the court conducts an independent hearing at which evidence is introduced to refute the conclusion of the administrative board. The validity of the judicial review, then, turns not upon the legislative character of the decision of the court, which is the controlling constitutional consideration, but upon the arbitrary characterization of the action of the administrative body as legislative or judicial.

22. This provision of the Constitution has been construed several times by the Indiana courts. The substance of these decisions is that powers non-judicial in nature may be

To paraphrase the Wisconsin court in *In re Incorporation of Village of N. Milwaukee,*[23] the sum and substance of the law is this: land may be added to the city if the circuit court thinks best. The statute does nothing less than vest in the court the powers of a third house of the legislature. The legislature has passed the law, it has been signed by the governor, and is on the statute books, but before it can go into operation the judge of the circuit court must decide if he agrees with the law making body. The decision is not based upon certain specific facts which make the law operative, but upon the implanting of a general feeling of public welfare in the mind of the judge. Accordingly, the 1949 Indiana Annexation Act, insofar as it makes annexation turn upon an exercise of legislative discretion by the circuit court, violates the separation of powers doctrine of the state as specified in Article III, Section I of the Indiana Constitution.

TAXATION

THE TANGIBLES—INTANGIBLES DISTINCTION

For thirty years after its adoption the Due Process Clause of the Fourteenth Amendment was not interpreted as limiting the states' power to tax.[1] First utilized in 1905 to strike down an *ad valorem* tax on tangible personalty kept out of the state, it was soon extended to forbid a death tax in the same circumstance. Then came its further extension to prevent multiple death or *ad valorem* taxes on intangibles. A subsequent narrowing of the Fourteenth Amendment not only removed most of the recently-imposed limitations on the power to tax intangibles, but also appeared to forecast the abolition of the restraints on taxation of tangibles.

In 1943, a citizen of Wisconsin died in that state leaving property located in Wisconsin, Illinois and Florida. In computing the tax base for an emergency inheritance tax on the estate, Wisconsin included the value of the tangible personality located in Illinois and Florida. This inclusion was held to infringe the Due Process Clause. *Treichler v. Wisconsin,* 338 U. S.

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conferred upon the courts. However, these powers are not of a nature to be definitely classified in any division of the government. Thus, the courts have been authorized to acknowledge deeds, to solemnize marriages, and to certify to the qualifications of notary publics. These acts, while not strictly of a judicial nature, are not the "function of another" branch of the government. *See* Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N. E. 496 (1914); Indianapolis v. Barnett, 172 Ind. 472, 132 N. E. 165 (1909); City of Terre Haute v. Evansville & Terre Haute R. R., 149 Ind. 174, 46 N. E. 77 (1897); Board, etc. v. First Nat'l Bank, 71 Ind. App. 290, 124 N. E. 768 (1919).

23. 93 Wis. 616, 67 N. W. 1033 (1911).

1. Prior to 1902, states' taxes had been declared invalid for lack of jurisdiction, but not on the ground that the tax violated due process. St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S. 1870); Northern Central Railway Co. v. Jackson, 7 Wall. 262 (U. S. 1869).