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Legislation--Admission to Extrinsic Evidence to Show Irregularities in Passage of Bill

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Upon arguing legislative intent, the Commissioner said that apparently Congress was satisfied with the section as it existed and with the treasury regulation. As to the rejection of this revision, the court found that the change would not only have specifically allowed deductions as in this situation; it would also have allowed deductions in the year in which it was set aside by the employer, even though nonforfeitable at that time. It was not possible to determine what Congress was approving or disapproving by rejecting such a revision. *Russell Mfg. Co. v. United States, supra.*

In the principal case, the court placed heavy emphasis upon public policy. It felt that to deny such a deduction would be to penalize the employer with progressive plans and to encourage the use of less favorable ones. If the employer, for example, merely agreed to pay the money, but did not set it aside, his contributions when made would be clearly deductible. Rev. Rul. 525, 1955–2 CUM. BULL. 543 would permit a deduction for just such a plan. Thus to follow the treasury regulation and disallow a deduction in the principal case would have created the anomolous situation where under the regulations the employer who gives the employees the lesser protection is afforded the greater tax benefit.

It appears that if such a case again reaches the Commissioner, the same conflict will arise. The Commissioner is not bound by the Court of Claims, and there is no apparent evidence that the former has any intention of altering the regulation. This is certainly needless litigation with which the taxpayer should not be burdened. The decision of the court does not weaken the advantages legislatively granted to qualifying funds. Nor is there any apparent reason why allowance of these deductions would work to give a taxpayer undue advantage. The court's reasoning appears to be the better interpretation, and leaves two alternatives: The Commissioner should acquiesce; or Congress should be encouraged to enact a more clearly worded statute.

Charles Ellsworth Heilmann

Legislation—Admission of Extrinsic Evidence to Show Irregularities in Passage of Bill

Relators, both corporations, were indicted under a 1963 West Virginia statute which barred certain business activities on Sunday. By writ of prohibition brought against the county judge and

prosecutor, the relators attacked the statute on several grounds, one of which was that the law had been enacted after the expiration of the lawful sixty-day legislative session. *Held,* writ awarded. Although, by the official House of Delegates clock, the bill was passed at 11:30 P.M., March 9, 1963, the court examined the House journal, admitted extrinsic evidence, and concluded that the House clock had been purposely stopped. The actual time of passage was between 12:15 and 12:20 A.M., March 10, 1963, and as the session had ended by operation of law at midnight, the statute was null and void. *State ex rel. Heck's Discount Centers, Inc. v. Winters,* 132 S.E.2d 374 (W. Va. 1963).

W. VA. CONST. art. VI, § 22, provides that odd-year regular sessions of the legislature ". . . shall not exceed sixty days. . . ." In the past, law-makers in this and other states have indulged in the practice of stopping the official clock for last-minute legislation so that the constitutional time limit might be complied with in form if not in fact. The fundamental question raised by such a practice is whether a legislature should be allowed to "keep its own house" with respect to the fulfillment of constitutional requirements. Because the question is so basic, the decision in the principal case will cause much controversy.

The rules applied by the court in reaching its conclusion in the instant case had been laid down in previous West Virginia cases as follows: An enrolled bill, signed by the proper parties, and regular on its face, is presumed to have been passed in accordance with constitutional requirements, but the presumption can be overcome if it appears "clearly and convincingly" from the legislative records that requirements were not observed. *State v. Heston,* 137 W. Va. 375, 71 S.E.2d 481 (1952); *Capito v. Topping,* 65 W. Va. 587, 64 S.E. 845 (1909). The court will take notice of the journal or other records of either house in determining whether legislation has been properly enacted. *State ex rel. Armbrecht v. Thornburg,* 137 W. Va. 60, 70 S.E.2d 73 (1952). If the records are clear and without contradiction they will be conclusive, but if they fail to show clearly that requirements have been complied with, then extrinsic evidence may be considered in determining the question. *Capito, Armbrecht,* and *Heston, supra.*

In the *Capito, Armbrecht,* and *Heston* cases, *supra,* laws were challenged on the same ground as in the principal case. In all three of the cases the validity of the statutes was upheld because

the journals did not disclose any improper action by the legislature. The *Armbrecht* and *Heston* cases involved attacks on laws enacted during the 1951 regular session. The Senate journal for that term contained a statement by a senator that a certain bill had been "considered" on the morning of what would have been the sixty-first day of the session. The court refused to give the word "considered" any more value than its literal meaning, and held that the journal was not ambiguous to the degree that extraneous evidence could be admitted. In both these 1952 decisions, the court tacitly acknowledged that whether or not the Senate clock had been stopped during that 1951 session was immaterial, since the court was admittedly powerless to void the law due to the lack of proper evidence in the journal.

The court in the *Heston* case, *supra*, warned that ". . . the device or practice of stopping . . . the legislative clock is emphatically disapproved. Such device . . . cannot in law stop the actual passage of time or lawfully . . . prolong a regular session of the legislature beyond the end of the sixty day limit . . . ."

In the principal case, numerous delegates had inserted affirmative statements into the record, protesting that the clock had been stopped, and had repeatedly noted that the actual passage of the bill was after midnight. The court felt that the journal definitely showed ambiguity and contradition in regard to the actual facts. H.D. JOUR., March 9, 1963, 156-81. Accordingly, relator's extrinsic evidence in the form of affidavits was admitted and considered by the court in reaching its factual conclusion.

The West Virginia court has thus taken the position that it is the task of the judiciary to ensure legislative obedience to constitutional requirements of procedure. The decision clearly affirms West Virginia's agreement with those who would have the courts watch over the actions of the law-makers.

There are two views in this country concerning the validity of an enrolled bill regular on its face. The majority hold that courts do have the right and even the duty to take notice of legislative journals in determining whether a statute was in fact enacted according to statutory rules. 4 WIGMORE, EVIDENCE § 1350 (3d Ed. 1961). It is universal that an enrolled bill cannot be shown invalid by testimony other than that of the journal. 4 WIGMORE, *op. cit. supra*, § 1350. The convincing argument in favor

of consulting journals is that the court must have this power to prevent legislatures from abusing the prescribed rules; if the court cannot do this then constitutional requirements are useless. The court in *Fowler v. Pierce,* 2 Cal. 165 (1852), reasons that a citizen whose life, property, or liberty might be affected by a statute ought to be able to show that the law was passed in violation of his constitutional rights. Finally, it is the lesser of two evils to trust the memory of witnesses, than to entrust so much power to the legislatures.

Several states hold that the enrolled bill unless irregular on its face, is conclusive and may not be impeached by any source. This view is commonly called the "enrolled bill" rule. *Integration of Bar,* 244 Wis. 8, 11 N.W.2d 604 (1943); Annot., 40 L.R.A.(N.S.) 1, 4 (1912). The supporters of the "enrolled bill" rule reply with equally sound theories. They argue that the journals are usually compiled in haste and are likely to be uncertain. If courts claim the right to consult journals, there is nothing to stop them from bringing in all other kinds of evidence in order to void laws—such a practice would make statute law a chaotic and uncertain area. *Pangborn v. Young,* 32 N.J.L. 29 (1866); *Hunt v. Van Alstyne,* 25 Wend. 605 (1841). In *Evans v. Browne,* 30 Ind. 514 526 (1869), the court acknowledged the possibilities that human beings may abuse power, but the court cannot "claim for itself a purity beyond all others." Professor Wigmore states that if the bill is duly enrolled, authenticated, and regular on its face, the court should accept its validity without question. He feels that if law-makers insist on abusing rules it is up to the people to elect more conscientious representatives. 4 WIGMORE, *op. cit. supra,* § 1350.

The West Virginia court in the instant case took an unprecedented step by refusing to accept the legislature's official certification that a bill had in fact been enacted before the expiration of the session. In other states, when similar cases have arisen, the courts have been reluctant to assume the responsibility of actually reaching a factual conclusion to invalidate a bill regular in form. *State ex rel. Cline V Schricker,* 228 Ind. 41, 88 N.E.2d 746 (1949); *Earnest v. Sargent,* 20 N.M. 427, 150 P. 1018 (1915); *Morrow v. Henneford,* 182 Wash. 625, 47 P.2d 1016 (1935).

The Court was aided in its deliberations by *amici curiae* briefs, one of which urged that in computing the sixty days, W. VA. CODE ch. 2, art. 2, § 3, (Michie 1961), is controlling: The " . . . time

within which an act is to be done shall be computed by excluding the first day and including the last . . . ." By applying this statute, March 9 would have been only the fifty-ninth day of the session meaning that the act was passed well within the deadline. Most authorities would seem to prefer this interpretation. 38 L.R.A.(N.S.) 1161 (1912). The court resolved the question by holding the statute inapplicable since concern was not with the "time within which an act is to be done," but with the constitutional requirement that the regular session "shall not exceed sixty days." The constitution makes no mention of excluding the first day from the count.

The journal of the House of Delegates for March 9, 1963 discloses that the House acted upon several other bills after the vote on the now void "Blue Law" bill. Two existing statutes were amended and re-enacted, one concerning boundary changes of cities, towns, and villages. W. VA. CODE ch. 8, art. 2, § 8 (Michie Supp. 1963). The other dealt with warning and identification lights on school buses. W. VA. CODE ch. 17C, art. 12, §§ 7-8 (Michie Supp. 1963). The parties to any litigation involving these acts must consider the court's decision nullifying a bill passed earlier in time on the same day.

The holding in the principal case would suggest that the validity of any West Virginia statute could be questioned should the journals of either house disclose that some constitutional requirement was not met at the time of enactment.

Victor Alfred Barone

Negotiable Instruments—Defenses Available Against Holder in Due Course

D, the innocent purchaser of a stolen automobile, gave a note to the seller in the amount of 2270 dollars and executed a chattel mortgage as security for the note. The purhasing agreement signed by *D* stated *D* would pay the note irrespective of any imperfection in the chattel. The seller endorsed the note and transferred it and the mortgage to *D*-bank. The insurer of the true owner of the automobile instituted an action against *D* and *D*-bank to obtain the automobile. *D* and *D*-bank filed cross claims against one another. The trial court found that *D*-bank was a holder in due