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Legislation--Separability Clauses in Statutes--Cumulative Unconstitutional Items in Appropriations Acts

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plans which have represented the extremity of issues concerning which management must bargain? It does involve an additional relationship between an employer and his employees, namely, landlord-tenant.

Though it may be said that this subject stands on the extremity of mandatory fringe issues to be bargained, have not the two courts been unduly restrictive in saying that only when rentals have been lower than the community average do such become a matter to be bargained within the meaning of "wages?" Is this a fair test; rather, does it not discriminate against the employer who has unilaterally granted a "value" to his employees—as in the *Lehigh* case, a lower than average rent over a period of years? And does it not mean that once an employer grants an "emolument of value" to his employees, henceforth any proposed variation thereof becomes a subject to be bargained; whereas, the employees are denied the benefits of compulsory collective bargaining to secure an "emolument."

Hours of work are not to be bargained only when management proposes an increase nor rates of pay only when about to be decreased. They are also to be bargained when the employees seek to modify them so as to increase their benefits. By the same token should it not be mandatory that management bargain collectively with its employees when the latter propose to make rentals on company-owned houses an emolument of value by a decrease in rent payments? Should it not likewise be mandatory that the employer bargain when the employees propose to inaugurate a "wage" as when the employer grants a wage and then seeks to vary it? If this reasoning be adopted, then the matters about which management must bargain will be greatly expanded, for example, prices of goods sold in company-owned stores.

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LEGISLATION—SEPARABILITY CLAUSES IN STATUTES—CUMULATIVE UNCONSTITUTIONAL ITEMS IN APPROPRIATIONS ACTS.—In an original proceeding in mandamus brought by the state board of school finance to require the state auditor to honor a requisition pertaining to state aid for schools, the auditor's answer challenged the constitutionality of the budget act as passed by the legislature during the regular session of 1953. The Supreme Court of Appeals

held the act to be unconstitutional in its entirety, as being contrary to the provisions of Section 51 of Article VI of the Constitution of West Virginia . The court held that the legislature's act of substituting its estimate of funds available for appropriation for that of the Board of Public Works, its acts of amending the budget bill as submitted to it by the Board of Public Works by adding new items, increasing items not relating to either the legislative or judiciary departments, reducing items for the judiciary department, were all prohibited by Section 51 of Article VI, commonly known as "The Budget Amendment." *State* ex rel. *Trent v. Sims,* 77 S.E.2d 122 (W.Va. 1953).

Petitioners contended that even though some of the items of the appropriation bill were found to be unconstitutional, the whole bill should not fall, relying on saving clauses in both the budget amendment and the budget act, which expressly provide that should some portions of the bill be found invalid, such invalidity should not affect the legality of the bill or of any other item thereof.

The general rule concerning partial invalidity of statutes is that a statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement. *Allen v. Louisiana,* 103 U.S. 80 (1880); *State* ex rel. *Broughton* et al. *v. Zimmerman,* 261 Wis. 398, 52 N.W.2d 903 (1952). This rule has long been recognized in West Virginia. *Eckhart v. State,* 5 W. Va. 515 (1872).

A statute is held to be separable where after striking out the invalid portion, the remaining provisions are complete in themselves and would have been adopted by the legislature had it foreseen the partial invalidity, *Morganti v. Morganti,* 99 Cal. App.2d 512, 222 P.2d 78 (1950), if the remaining part is sufficient to accomplish the legislature's main purpose, *Moseley v. State,* 176 Ga. 889, 169 S.E. 97 (1933), if the valid portion may be sufficient for practical working purposes, *Oliver & Son v. Chicago, R.I. & P. Ry.,* 89 Ark. 446, 117 S.W. 238 (1909), and when the stricken and remaining provisions are not mutually dependent on one another. *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936).

In the absence of a provision that invalidity of a part of a statute shall not affect the remainder, there is a presumption that the legislature did not contemplate the enforcement of the statute

except as a whole. *Danielley v. City of Princeton,* 113 W. Va. 252, 167 S.E. 620 (1933). However, the West Virginia court has also said in *Meisel v. Tri-State Airport Authority,* 135 W. Va. 528, 64 S.E.2d 32 (1951), that it will be presumed that the legislature intended to enact a valid and effective statute, and therefore when it proves partially invalid, the remainder will not fail where it reflects legislative intent and is complete in itself.

But where the statute contains a saving clause the effect is somewhat different. Such saving clauses are recognized as valid and are not an invalid delegation of legislative authority or a presentation of an inconsistent alternative. *Snetzer v. Gregg,* 129 Ark. 542, 196 S.W. 925 (1917). However, a saving clause is invalid in so far as it attempts to control the judicial construction of a statute. *Spitcaufsky v. Hatten,* 353 Mo. 94, 182 S.W.2d 86 (1944). The legislature is clearly incompetent to place a binding construction on a constitutional provision, as such function belongs to the judiciary. *State v. Shumate,* 172 Tenn. 451, 113 S.W.2d 381 (1938). The effect of such a statutory declaration is to create, not the presumption of entirety in effect ordinarily accorded to statutes, but an opposite presumption of separability. *Stewart Machine Co. v. Davis,* 301 U.S. 548 (1937). Its presence raises the presumption that the legislature intended the court to consider and apply the separate provisions of a statute rather than the statute as a whole. *Lingamfelter v. Brown,* 132 W. Va. 566, 52 S.E.2d 687 (1949). But a saving clause is not absolute and, when the presumption of severability is overcome by a showing of the indivisible character of the act, the whole must fall with an invalid portion, regardless of the presence of such saving clause. *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936). And in the same case the Supreme Court said that the clause would not be effective where it is obvious that the remainder could not, or would not, be intended to stand as the legislative will. Such a clause has been held merely declaratory of the rules already laid down by the courts. *Springfield Gas Co. v. Springfield,* 292 Ill. 236, 126 N.E. 739 (1920). In *Carter v. Carter Coal Co.* it was said that the effect of a saving clause was to shift the burden of showing separability; where there is such a provision the burden is on the assailant to show inseparability, and where there is none it is on the supporter of the legislation to show separability.

In the principal case the court had two such saving clauses to contend with; one in the budget act itself—a declaration of intent by the legislature, and one in Article VI of the Constitution—a declaration of intent by the electorate. The court declared in its holding that, ". . . a saving clause is merely an aid to interpretation of a constitution or statute, and will not be held to operate so as to thwart the intent of the electorate . . . or the legislative intent." At page 140. The unconstitutional items were held to be so numerous and extensive that, if they were stricken from the act, the result would be entirely different from that intended by the legislature.

It has been said that authority to eliminate from a statute invalid provisions does not flow from legislative authority contained in a saving clause but from the inherent power of the court. *State v. Calhoun County,* 126 Fla. 376, 170 So. 883 (1936). It would seem that the authority might be of a different quality when flowing from a constitutional provision. It was said, in *Bacon Service Corp. v. Huss,* 199 Cal. 21, 248 Pac. 235 (1926), that a saving clause is mere evidence of legislative intent and not binding on the court. However, that court was not faced with a saving clause in the constitution, but in the statute only. In the principal case, the court, in overriding the saving clauses, based its decision on the fact that the resulting budget act would be a totally different one than that intended by the legislature, and such a result under the budget amendment would be contrary to the one intended by the electorate.

Courts have long held that they have the power to strike out invalid items from an appropriation act without invalidating the whole, even in the absence of an applicable saving clause. *State v. Clinton,* 28 La. Ann. 201 (1876). That certain items should not be contained in a general appropriation bill will not affect validity or constitutionality of the remainder. *State Board of Health v. Frohmiller,* 42 Ariz. 231, 23 P.2d 941 (1933). And where the state constitution gives the governor the power of item vote, the court should follow the presumption of severability. *Parker v. Bates,* 216 S.C. 52, 56 S.E.2d 723 (1949). It was held in *State* ex rel. *Fraser v. Gay,* 158 Fla. 465, 28 So.2d 901 (1947), that the invalid provisions of the general appropriations act were not so interdependent as to invalidate the remainder of the act. The West Virginia court held, in construing the 1921 budget bill, that it was constitutional even though such construction does not neces-

sarily apply to each item embraced therein. *State v. Bond,* 94 W. Va. 255, 118 S.E. 276 (1923).

However, the court does not set a limit on the number of items of equal rank required to be stricken from an appropriation bill to result in an act contrary to legislative intent. Here seventy-one items were found to be unconstitutional and that was held to be "too numerous and extensive." In In re *Opinion of the Justices,* 45 R.I. 289, 120 Atl. 868 (1923), it was the opinion of the court that if a general appropriation act, containing distinct and separable provisions for public and private purposes, were passed by a majority of a quorum, it would not be declared invalid as a whole, but merely as to the appropriations for private purposes which required a two-thirds majority of elected members. And a Wisconsin appropriation bill was upheld where two purposes were invalid but the remaining four important purposes were valid. *State* ex rel. *Wisconsin Development Authority v. Dommann,* 228 Wis. 147, 280 N.W. 698 (1938).

It is clear from the reported cases that the general rules regarding separability of statutes and saving clauses are applied to appropriation bills and general statutes alike, and that the number of invalid provisions is effective only as a guide to show legislative intent. *State* ex rel. *Hudson v. Carter,* 167 Okla. 32, 27 P.2d 617 (1934), spells out the test, "Where the valid portions of a general appropriation act are so separate and distinct from the invalid portions thereof that it may be presumed that the legislature would have enacted the valid portions thereof without the invalid portions if it had known of the invalidity," and elision from the act of the invalid portions leaves "a consistent and workable act complete in itself and capable of being executed in accordance with the apparent legislative intent," the valid parts of the act will be given effect. *Id.* at 42, 27 P.2d at 626.

G. W. S. G.

UNFAIR COMPETITION—NEWS—LITERARY PROPERTY.—*D,* the operator of a radio station, which competed with *P*'s newspaper for advertising, broadcast news from the newspaper, the broadcast coinciding in point of time with the completion of distribution of the newspaper to subscribers. *Held,* that a motion to dismiss a bill seeking an injunction, recovery for unjust enrichment, and