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Criminal Law--Indictments--Indorsements on Reverse Side

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be afforded the normal safeguards surrounding criminal prosecutions", *Nye v. United States, supra*, at 53; (2) the ordinary methods for disciplining attorneys, such as suspension or disbarment, could be used, as the dissent in the instant case stated at page 330.

It is submitted that courts use more restraint in the future, and abstain from the extension of penal statutes *ad infinitum*, particularly where the courts themselves are the immediate beneficiaries, *i.e.*, in prosecutions for contempt of court.

M. J. P.

CRIMINAL LAW—INDICTMENTS—INDORSEMENTS ON REVERSE SIDE.

—*D* was indicted for rape. The indorsement on the indictment was signed by the foreman of the grand jury and by the prosecuting attorney, but it designated *D* as David Lee Hudson instead of David Lee Huffman. When *D* was arraigned he moved to quash the indictment for misnomer in the indorsement, as not fulfilling the statutory requirements of an indorsement. W. VA. CODE c. 62, art. 9, § 1 (Michie 1955). The court overruled the motion and, at the instance of the prosecuting attorney, amended the indorsement by substituting the correct name of *D*. Conviction followed. *D* assigns this action of the trial court as reversible error. *Held*, that the misstatement of defendant's name was not fatal for the statutory requirement that an indictment have the name of defendant endorsed on its reverse side is only directory. But the requirement that the reverse side of the indictment be signed by the foreman of the grand jury and attested by the prosecuting attorney is mandatory. Verdict set aside and a new trial awarded on different grounds. *State v. Huffman*, 87 S.E.2d 541 (W. Va. 1955).

The West Virginia legislature enacted the present statute, hereinafter referred to as the indorsement statute, in the Code of 1931 which provided that an "indictment shall have legibly indorsed on the reverse side thereof the words 'State of West Virginia versus Indictment for a (Felony or Misdemeanor, as the case may be). Foreman of the Grand Jury. Attest:, Prosecuting Attorney of county, West Virginia.'" W. VA. CODE c. 62, art. 9, § 1 (Michie 1955). Prior to the enactment of the indorsement statute, the rule in West Virginia was that the indorsement is no part of the indictment other than a mark of identification. *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140,

38 S.E. 539 (1901). The want of the usual memorandum on the back of an indictment, "a true bill", signed by the foreman of the grand jury, did not vitiate the indictment. *State v. Grove*, 61 W. Va. 697, 57 S.E. 296 (1907). Under these decisions the court order alone was relied upon to show whether the indictment had been returned as a true bill by the grand jury. Inasmuch as a court order is merely reflective of what has taken place *aliunde*, a better rule, even in the absence of statute, would require the authentication of an indictment to be incorporated in the instrument itself as primary evidence of its genuineness. *State v. Burnette*, 118 W. Va. 501, 505, 190 S.E. 905, 907 (1937) (dictum). Since the indorsement statute changes the common law rule, it is paramount that we determine the legal requirements of an indorsement on the reverse side of the indictment.

When the legislature enacts that something "shall" be done, the requirement is mandatory unless some other provision makes it necessary to construe "shall" as "may". But in the indorsement statute there is no possible basis for impairment of the rigor of the word "shall". *State v. Burnette*, *supra* at 504, 190 S.E. at 906. Hence, every provision in the indorsement statute is mandatory. However, it has been held that a substantial compliance with the statute is sufficient. *State v. Foley*, 131 W. Va. 326, 47 S.E.2d 40 (1948). Any of the statutory requirements are mandatory, if they are essential to the accomplishment of the clear purpose of the indorsement statute. This purpose is the identification and authentication of the indictment so as to prevent the substitution or the use of an indictment other than the one returned by the grand jury. *State v. Huffman*, *supra*, at 551. These last two decisions hold that the legislature did not intend to require the entire statutory form to be followed, but only that the signatures of the grand jury foreman and the prosecuting attorney be present in order to authenticate and identify the indictment. Had the legislature intended only that the foreman of the grand jury and the prosecuting attorney should sign the indorsement, would they not have followed the form used prior to the enactment of the indorsement statute? Then they would have merely provided that the indorsement state, "a true bill" and be signed by both the named individuals. Since the legislature provided an entirely new form and is presumed to have known the previous practice, coupled with the fact, that they used the word "shall", they must have meant that the entire form of indorsement was mandatory.

Since the legislature has demanded that the form of indorse-

ment provided by the indorsement statute be followed exactly, then the statute itself must be interpreted to determine the requirements provided by it. The indorsement statute does not state specifically that the prosecuting attorney and the foreman of the grand jury shall place their signatures in the space provided for their names, while in the preceding paragraph of the section embracing the indorsement statute, the legislature expressed the intention that the general form of indictment should be signed by, "(Signed) -----." W. VA. CODE c. 62, art. 9, § 1 (Michie 1955). None of the cases expressing the requirement that the foreman of the grand jury must sign the indorsement, are in point. There the signature was present. It follows that the name of the grand jury foreman may not be required to be in his own handwriting. However, it must have been the intention of the legislature that the signature be present for the name of the foreman of the grand jury would serve practically no purpose other than to authenticate and identify the indictment.

As to the provision requiring the signature of the prosecuting attorney, the statute is much clearer. The legislature preceded his name with the word "attest". To attest is "to signify by subscription of his name that the signer has witnessed the execution of the particular instrument." BLACK, LAW DICTIONARY (4th ed. 1951). Therefore, it was correctly stated that the legislature has demanded and required that every indictment returned by a grand jury in this state shall be authenticated on the reverse side thereof by both the signature of the grand jury foreman and the signature of the prosecuting attorney. *State v. Burnette, supra* at 505, 190 S.E. at 907. "When the signature of any person is required, it must be in his own proper handwriting, or his mark, attested, proved, or acknowledged." W. VA. CODE c. 2, art. 2, § 10 (c) (Michie 1955). An indictment not carrying on its back the indorsement of the prosecuting attorney, is fatally defective on a motion to quash, timely made. *State v. Burnette, supra* at 505, 190 S.E. at 907. "The timely made motion must specifically direct the court's attention to such defect." *State v. De Board*, 119 W. Va. 396, 194 S.E. 349 (1937). "The attestation by the prosecuting attorney should be made not later than at the time of the reporting of the indictment to the court by the grand jury." *State v. Burnette, supra* at 506, 190 S.E. at 907 (dictum). In a case in which on the back of the indictment appeared the following "[a] true bill. Ellis Friend, Foreman, S. W. Byrant, Acting Prosecuting Attorney," the court held, that an attestation of an indictment by the prosecutor of a particular case,

at the date the indictment therein is returned, is sufficient, and substantially meets the requirement of the statute. *State v. Foley*, *supra* at 338, 47 S.E.2d at 47. Apparently, in that case the court's attention was not directed to the fact that this form of indorsement, although signed, did not comply with the indorsement statute.

In deciding the question whether the misnomer in the indorsement rendered the indictment fatally defective, the court reasoned first, that the indorsement on the indictment is not a substantive part thereof, and therefore, a misnomer does not detract from the legal force in the charging part of the indictment; and secondly, that the purpose of the statutory form of indorsement is to identify and authenticate the indictment. Since the name of the defendant is not essential to that purpose, then the misnomer did not render the indictment defective. As to the first argument, the court relied upon the decisions prior to the enactment of the indorsement statute and therefore, failed to recognize that the legislature had made the entire indorsement a mandatory requirement. As to the second argument the court also did not recognize that this statutory requirement was mandatory in its entirety. Had there been no name of the accused in the indorsement, the statutory requirement clearly would not have been met, and the indictment would have been fatally defective. However, in West Virginia it is provided that no indictment shall be abated for any misnomer of the accused; but the court may, in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact. W. VA. CODE c. 62, art. 2, § 10 (Michie 1955). Since the statute applies to any misnomer in an indictment, it includes that on the reverse side of the indictment; therefore, the action of the trial court in permitting the amendment of the indictment and inserting the correct name of the accused, was without error, although not for the reasons stated by the appellate court, but rather due to the curative provisions of the statute. W. VA. CODE c. 62, art. 2, § 10 (Michie 1955).

In conclusion, the requirements for a valid indorsement of an indictment in West Virginia appear to be: (1) that it include the entire form provided by the statute; (2) the signature of the foreman of the grand jury, although the statute does not expressly require it; (3) the signature of the prosecuting attorney; and (4) the name of the accused in the indorsement, although a misnomer will be cured by the provisions of the statute. W. VA. CODE c. 62, art. 2, § 10 (Michie 1955).

R. W. F.