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The Amendment of West Virginia Statutes

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amendment\textsuperscript{29} to the present code section\textsuperscript{20} should give legislative definition to the existing doctrine of general capacity, remove the threat of constructive notice, protect third parties who have dealt in reliance on the corporation’s power to act, and at the same time preserve the rights and protections of shareholders and the public.

—KINGSLEY R. SMITH.

\textbf{The Amendment of West Virginia Statutes.} — The recent case of \textit{De Turk v. City of Buckhannon},\textsuperscript{1} has cast doubts upon the validity of numerous amendatory statutes in this state. Inasmuch as the major portion of legislation is amendatory in form,\textsuperscript{2} a safe, simple, and practical amending device is a legislative neces-

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\textsuperscript{29} The following is submitted as an amendment to the present code provision—see n. 29, \textit{infra}.

"Except for the carrying on of professions, every corporation of this State shall have the capacity to act possessed by natural persons, but shall have authority to perform only such acts as are necessary or proper to accomplish the purposes expressed or implied in its charter.

"No limitation on the exercise of the authority of the corporation shall be asserted in any action between the corporation and any person, except:

(1) by or on behalf of a corporation against a director or officer having actual knowledge of such limitation;

(2) by a shareholder to prevent the performance of a wholly executory contract;

(3) by a corporation or shareholders suing in a representative suit against the officers or directors of the corporation for violation of their authority;

(4) by the State to enjoin the continuation of unauthorized business, or to dissolve the corporation;

(5) in any action in which the liability of a public utility or banking corporation is in issue.

"The filing and recording of the articles and other certificates pursuant to this Act is required for the purpose of affording all persons the opportunity of acquiring knowledge of the contents thereof, but no person dealing with a corporation shall be charged with constructive notice of the contents of any such articles or paper by reason of such filing or recording."

\textsuperscript{20} W. Va. Code (1931) c. 31, art. 1, § 3, is the section defining the powers of corporations, and to which the amendment is suggested.

\textsuperscript{1} 163 S. E. 812 (W. Va., 1932). In this case the court held unconstitutional a statute which sought to amend the charter of the city of Buckhannon by reference only. The statute (Municipal Charters, 1925, c. 35) was in the following form: "That section fifty-six of chapter fifteen of the acts of the legislature of West Virginia at its one thousand nine hundred and nineteen session be amended and re-enacted by adding after the words ‘one year’ in the one hundred and fifth line of said section fifty-six the following: ******" The court declared this procedure invalid for failure to include the original section as amended.

\textsuperscript{2} Statutes are ordinarily in one of three forms: original, amendatory, and repealing. The West Virginia Legislature in the 1929 session passed 164
sity. The method must, of course, comply with the constitutional provision that "no law shall be revived, or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at large in the new act."¹

This constitutional provision requires a title which will acquaint the reader with the subject matter of the amendment, and a purview that will indicate the changes made in the old law. A compliance with these two requirements should prevent the adoption of legislation through ignorance or deception and should provide a ready means of ascertaining the character and effect of the new law.² Court decisions have frequently, however, frustrated this result.³ Unfortunately the De Turk case⁴ may inflict a complicated amendatory form upon the draftsman of West Virginia statutes.

At the present time the form of both the title and the purview are comparatively satisfactory. With a few exceptions⁵ the title sets forth the act to be amended and its subject matter in a clear and simple manner. Reference to the former act may be to the original act,⁶ to the original act as amended,⁷ to the last acts — 86 were original in form, 76 amendatory in form, and 2 repeal. Of the original acts the great majority were appropriation and validating acts—in fact, not more than 20 were concerned with substantive law. The amendatory form is the most practical for changing substantive provisions, for it does not purport radically to alter the law and thus allays fears that the proposed act is creating new and untried regulations.

¹W. Va. Const., art. 6, § 30.
²This provision together with the provision concerning original acts ("No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title") set for the test by which the courts measure the constitutionality of this legislative procedure. These provisions exist in about half of the states. See, for example, N. Y. Const. (1934) art. 3, §§ 16, 17; Ohio Const. (1851) art. 2, § 16; Pa. Const. (1874) art. 2, § 6; Va. Const. (1832) art. 4, § 52; Ill. Const. (1870) art. 4, § 13.
³The purposes of these constitutional provisions were to prevent the inclusion of diverse legislative materials in one act, to prevent the resulting log-rolling and to prevent the evil of the "blind" amendment. E. g., amendments of this kind: Iowa Acts 1931, c. 3, § 1. "Section one hundred fifty-six (156), Code, 1927, is amended * * * by striking from said line the word 'four' and by inserting in lieu thereof the word 'two'."
⁴Indiana, for example, has long suffered from technical and obstructive judicial decisions. See Note (1930) 43 Harv. L. Rev. 482.
⁵Supra, n. 1.
⁶An overly detailed title may defeat its own purpose. See W. Va. Acts 1929, c. 23. The title to this act is one hundred and one lines long and covers two and one half pages in the printed acts. Unsatisfied with such a catalogue the ritual was repeated following the enacting clause.
⁷E. g., W. Va. Acts, 1939, c. 159: "AN ACT to amend and re-enact section three of chapter one hundred and eighty-three of the acts of the legislature of West Virginia of one thousand nine hundred and twenty-one, relating to . . . ."
⁸See, W. Va. Acts, 1929, c. 90. "AN ACT to amend and re-enact section
amendatory act, or to the code. The court has been liberal in sustaining any reference that clearly identifies the legislation to be amended. This liberality has perhaps led to one inconsistency.

The Supreme Court of Appeals treats the amendment as a part of the original act, rather than considering it as replacing the original act. This result, of course, is eminently desirable. But if the amendment becomes a part of the original act, then it seems logical to amend the original act rather than the last amendment. Perhaps the most convenient method of amendment since the adoption of an official code, is by reference to the code itself. And this method apparently has judicial approval.


W. Va. Acts, 1927, c. 19. "AN ACT to amend and re-enact section eighty-a (2) of chapter fifty-four of Barnes' West Virginia code of one thousand nine hundred and twenty-three." Draftsmen seldom risk reference to the act alone, although that seems sufficient (see, infra, n. 17); the more common practice is to add, following reference to the former act, a short statement concerning its content. See W. Va. Acts, 1931, chaps. 14, 16, 63.

The court will adopt "the most liberal construction favorable to the validity of the legislation which the language admits." Shields v. Bennett, 8 W. Va. 74, 85 (1874); State v. Mines, 38 W. Va. 125, 17 S. E. 400 (1893); Roby v. Sheppard, 42 W. Va. 286, 26 S. E. 278 (1896); State v. Furr, 101 W. Va. 178, 132 S. E. 504 (1926).

State v. Vendetta, 86 W. Va. 186, 103 S. E. 53 (1920) "an amendment of a prior act is to be construed as if the amendment had been in the act from the beginning." Accord: State v. Sine, 91 W. Va. 605, 114 S. E. 150 (1922); State v. Montgomery, 94 W. Va. 153, 117 S. E. 870 (1923). The West Virginia draftsman use the form "amend and re-enact" almost exclusively. This is illogical in the light of the court's decision that the amendment becomes a part of the former act. As to the unchanged portions there seems to be no necessity for re-enacting; as to the amended portions the intent is to repeal; and as to the new material it is, of course, its first enactment. For a more desirable form see n. 21, infra.

See Note (1930) 43 Harv. L. Rev. 482, particularly n. 10.

There seems to be an increased use of this form. See W. Va. Acts, 1931, c. 14, "An act to amend chapter thirty-one of the official code of West Virginia, etc."

Where an act amends a certain chapter and section or sections of the Code, or any other act, in its title refers to the chapter and section or sections of the Code or the act amended specifically, that is sufficient, so far as it concerns the requirement that the object shall be expressed in the title." Roby v. Sheppard, Supra n. 13, at 290. Cf. State v. Mines, supra, n. 13; Comm. v. Brown, 91 Va. 762, 21 S. E. 357 (1895); Bertram v. Comm., 108 Va. 902, 62 S. E. 376 (1908).
The constitution also requires that the title contain a statement concerning the subject matter of the act. The court accepts reference to the former act as a sufficient compliance with this provision if the title of the original act was satisfactory. Thus few titles have been burdened with an index of former legislative objects. It is enough if the object of the original act is stated. And this statement may be of the briefest kind.

The purpose of the constitutional requirement that the "section amended, shall be inserted at large in the new act" was to prevent the pernicious practice of the blind amendment. Various interpretations have been given this provision. Some courts have required the old act to be set forth in its original form followed by the new amendatory section. It is doubtful that its purpose — the easy comparison of the old law and the new — was ever accomplished. The common practice has been to declare the inclusion of the section as amended to be a sufficient compliance with the constitutional provision. Where the section is long and the changes few, (though perhaps significant) the situation raises evils similar to those raised by the blind amendment. Few legislators have either the patience or the craft of Sisyphus. To expect them to find a minute change in a long and complicated section or to search the subject of a blind amendment is to expect too much.

The careful exposition of the new provision is of particular

18 "Where the title of an original act sufficiently expresses its object in the manner required by the constitution, an act amendatory thereof or to be substituted therefore, if its provisions are germane to the purpose expressed in the title of the original and not inconsistent therewith, may, by its title, simply refer to the section of the original act which it is intended to amend, and this will be a sufficient compliance with section 30 of article 6 of the Constitution." State v. Furr, supra n. 13, at 184; and cases cited supra n. 17.
19 Supra, n. 8.
20 Supra, n. 17.
21 A statement that the act is amendatory and that it concerns a certain general subject matter seems sufficient; thus in 43 HARV. L. REV. 1143 (1930) it is urged that the title need only be in the following form: "An Act amending an act relating to Negotiable Instruments," leaving to the purview the more detailed description of the act. The reverse practice has been employed in West Virginia on several occasions. See, W. Va. Acts, 1931, c. 61, "An Act to amend and re-enact article fifteen, chapter nineteen of the Code of West Virginia relating to commercial fertilizers." "Do it enacted by the Leg. of W. Va. Section I * * * *" Unlike most acts reference to the original act is not repeated in the purview.
22 Supra, n. 5.
23 See Langdon v. Applegate, 5 Ind. 327 (1854); Jones, STATUTE LAW MAKING, (1912) 174-175.
import during the consideration of the measure prior to its enactment. In an attempt to indicate more clearly the proposed change some states have resorted to certain typographical aids." In Wisconsin, the amendatory material is printed in italics and the material to be excised printed with a line through it. Upon final enactment the omitted material is simply indicated by asterisks. The desirability of the method is considerable: It reduces the size of the statute books; it points most clearly to the new material; it leaves a clue as to the omission of the old.

If the amendment only adds new material the problem is slightly different. If the added material has no relation to the section amended there would seem to be no more reason to republish the unaffected material that precedes it than to republish any other unaffected material in the code. If the new material impliedly amends the existing section should the doctrine be different from the general rule on implied repeals and amendments? If the new material actually changes the old then the constitutional provision should apply. The difficulty arises because of the desirability of drafting original acts in amendatory form. The courts have three courses; they may look only to the

24 See Note (1930) 43 HARV. L. REV. 1143, 1146.
25 See supra n. 24.
26 Frequently this is done merely to gain the advantage of the amendatory form. Jones, STATUTE LAW MAKING, (1912) 171 et seq. In such a case it is necessary to reprint a section one hundred lines or more long to add a five line addition. This procedure was declared necessary in the De Turk case. The form of amendment declared unconstitutional in that case is not uncommon in West Virginia. For example, see W. Va. Acts 1929, c. 29; W. Va. Acts 1929, c. 25; W. Va. Acts 1929, c. 160; W. Va. Acts 1931, c. 45; W. Va. Acts 1931, c. 52.
27 "It is a common and unobjectionable practice to add a section or sections to an act for a separate and distinct purpose, and the Constitution does not require any part of the act, to which the section or sections are added, to be printed at length in the amendatory act where there is no change made in the general law except to add a section or sections." Mauling v. Skillet, etc., Drainage District, 313 Ill. 216, 217, 145 N. E. 227, 228 (1924). Accord: People v. City of Springfield, 252 Ill. 108, 98 N. E. 914 (1911); Black v. Powell, 248 Mich. 150, 226 N. W. 190 (1929); State v. Pasta, 44 Id. 671, 258 Pac. 1075 (1927); People v. Myers, 275 Pac. 219 (Calif. 1929). Many courts require the inclusion of the preceding section although the new material does not affect it. A typical resume of this position will be found in Board, etc., v. Spencer, 159 Ky. 255, 166 S. W. 1017 (1914).
28 "Statutes which amend others by implication are not within the provisions of section thirty of the sixth article of the constitution . . . and it is not essential that they even refer to the acts or sections which, by implication, they amend." State v. Cain, 8 W. Va. 720, 730 (1875).
form, look behind the form to the substance, or sustain all acts which give substantial protection to the constitutionally protected interests.

But these constitutional requirements should be of temporary importance only. Their purpose is to facilitate the consideration of proposed legislation and to protect the legislature from fraud and deception. A private individual should have no right to raise the constitutional objection unless he has sustained injury because of non-compliance with its provisions. Criminal statutes are held not to impose tort liability for that is not their purpose; in the same degree the constitutional provision should not be urged by private citizens who do not oppose the manner in which the act was passed but merely seek to escape liability for its violation. The propriety of the legislative process would be better insured if during a short period after the enactment of new legislation ex rel. proceedings by the attorney general on behalf of aggrieved legislators would lie to determine the validity of the procedure. Such a constitutional provision would protect the state against the destruction of beneficial statutes after years of reliance in their constitutionality. West Virginia should pioneer this advancement.

—TRIXY M. PETERS.

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a The court may apply the constitutional provision dryly and hold that so long as the amendatory form is used the act must comply strictly with the constitutional requirements.

b The court may look behind the form of the statute and declare that inasmuch as the act would have met the constitutional requirements for an original act, its constitutionality will be sustained.

c The court may declare that wherever the act substantially complies with the requirement so that the legislature has been in fact protected from hasty or deceptive action the act will be sustained. There is of course always the additional alternative — the court may declare that constitutional mandates as to legislative procedure are addressed to the legislature and not to the court and the court will leave the legislature free to determine whether there has been compliance with the constitution.

d "After that chance has been given and no one has availed himself of it, the violated constitutional provision becomes merely a technical loophole of escape from the law, and the constitution makes it possible, not to protect legitimate interests, but to defeat the legislative will." FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 156-7.