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Constitutional Law--Amending Constitutions--Construction

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RECENT CASE COMMENTS

CONSTITUTIONAL LAW — AMENDING CONSTITUTIONS — CONSTRUCTION. — According to Lord Selden the rules of equity vary with the chancellor's foot; the rules of law follow a more Procrustean example. The rules of constitutional construction are, if possible, even more strict. Yet the Court of Appeals in *Herold v. Townsend, Tax Comm.*,[1] has abandoned all rules, all the safety of certainty in the interpretation of constitutions for a willa'-the-wisp of "substatntial compliance".

On a petition for writ of mandamus to require the state tax commissioner to revoke instructions to assessors issued under the authority of the Tax Limitation Amendment it was alleged that the amendment failed for want of regular adoption — the amendment not having been published in the several counties of the state at least three months prior to the election as required by the constitution.[2] The evidence indicates that the amendment was published as required by the constitution in only fifteen counties.[3] In the remaining counties according to the more favorable evidence it was published four or five days after the expiration of the statutory period.[4]

The question for the court was simply this: Does the constitution requirement of publication mean three months when it says three months, or does it mean three months and four days? Similarly when it requires that there be publication in every county which has a newspaper, does it mean every county or nearly every county.

The court answers that the provisions of constitutions concerning the amendatory process are mandatory and directory and thus by all the rules must be strictly interpreted.[5] The magic of

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[1] State *ex rel.* Herold v. Townsend, Tax Com'r., 169 S. E. 74 (W. Va., 1933).

[2] W. Va. Const., Art. 14, Sec. 2. " . . . . It shall be the duty of the Legislature to . . . . cause the same to be published, at least three months before such election in some newspaper in every county in which a newspaper is printed."

[3] In the counties of Brooke, Cabell, Hancock, Harrison, Kanawha, Marion, Marshall, Mercer, Mingo, McDowell, Ohio, Randolph, Summers, Taylor and Tyler. See Harold v. Townsend, *supra* n. 1, at 75.

[4] Less favorable evidence suggests that in some counties publication was much later; that the text of the amendment was difficult or impossible to procure; and that in at least three counties the amendment was not even included on the ballot.

[5] Some courts interpret all constitutional provision as mandatory. District Board, *etc.*, v. Bradley, 188 Ky. 426, 222 S. W. 518 (1920); Commonwealth v. Bowman, 191 Ky. 647, 231 S. W. 35 (1921); People v. Lawrence, 36 Barb. 177 (N. Y. 1862). Most states, however, including West Virginia, hold that

these words seems dead, however, when we learn that though the provisions is mandatory *substantial compliance* with its terms is sufficient.[6] But the court rejoins, 335,482 persons voted for the amendment, only 43,931 against it. Mr. Dooley is vindicated.[7] Of what legal significance is the vote? Had the suit been brought before the election to remove the amendment from the ballot the question would still have arisen. Should the favorable vote make any difference?[8]

The court urges that "the publication, so far as actual notice to the electorate was concerned, was necessarily far superior to that which could have been accorded an amendment submitted soon after the adoption of our Constitution in 1872. Today there is not a county in the state which does not receive copies of some daily published in the state on the date of its publication."[9] By the same token if proof of greater efficiency could be accorded radio reception would the court consider that a valid substitution or should we say compliance?[10]

The court cites as precedent seven decisions from as many

"usually" constitutional provisions are to be construed as mandatory. Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293 (1870); Capito v. Topping, 65 W. Va. 587, 64 S. E. 845 (1909); Simms v. Sawyers, 85 W. Va. 245, 101 S. E. 467 (1919); Parker v. State, 133 Ind. 178, 32 N. E. 836 (1892); Barkley v. Pool, 102 Neb. 799, 169 N. W. 730 (1918); Boyd v. Olcott, 102 Ore. 327, 202 Pac. 431 (1921); State v. Dixon, 66 Mont. 76, 213 Pac. 227 (1923); Powell v. State, 193 Ind. 258, 139 N. E. 670 (1923); State v. Malcom, 39 Idaho 185, 226 Pac. 1083 (1924).

[6] It is a contradiction in terms that there may be substantial compliance with a provision which is mandatory. A mandatory provision requires exact and literal compliance. "When the constitution designates in express terms the time when a fundamental act shall be done, and is silent as to performance at any other time, such act cannot be done at any other time." State v. Johnson, 26 Ark. 281 (1870); In re Opinions of the Justices, 18 Me. (6 Shep.) 458 (1841).

[7] "The court follows th' iliction rethurns" as quoted by Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379 at 385.

[8] "The provisions of the Constitution . . . . are mandatory and binding not only upon the legislative assembly but also upon all the people as well; and, consequently a failure to observe the mandates of the Constitution is fatal to a proposed amendment, even though the electors have with practical unanimity voted for it." Boyd v. Olcott, 102 Ore. 327, 359, 202 Pac. 431, 441 (1921). "However large a majority of the electorate may have voted upon the proposed amendment, even though the members of the Senate and Assembly may have been unanimous in their vote on a submission of the amendment to the people, the Constitution nevertheless will remain unchanged if any of the requirements, express or implied, contained in article 14, are not strictly observed and complied with." Browne v. City of New York, 213 App. Div. 206, 211 N. Y. Sppp. 306 (1925), reversing judgment 125 Misc. 1 (1925), 210 N. Y. Supp. 786, order affirmed 241 N. Y. 96, 149 N. E. 211 (1926).

[9] *Supra* n. 1, at 77.

[10] *Quaere,* what result if the amendment was not passed by the requisite two-thirds vote in each house of the legislature, but was correctly published

states supporting the proposition that substantial compliance, is sufficient compliance.[11] The court's silence in failing to consider cases offered by counsel for the relator is not impressive.[12] Indeed to make a straw man of *McCreary v. Speer*,[13] and agilely knock it over by showing that there the deviation from the constitutional standard was much greater than in the *Herold* case is not persuasive.[14] What of the language in *Capito v. Topping*,[15]

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and adopted by an overwhelming vote of the people? Would it matter if there was only one vote less than the two-thirds required? Would this be substantial compliance?

[11] As long as the West Virginia court treats the amendment requirement as mandatory, the seven cases cited in support of their position are, in part, distinguishable. Those cases treat the constitutional requirements which they are applying as directory. When the provision is mandatory they require strict compliance. See, for example, the dissenting opinion in Marten v. Foster, 68 Mont. 450, 219 Pac. 817 (1923), and also the early Montana cases now apparently abandoned. State *ex rel.* v. Tooker, 15 Mont. 8, 37 Pac. 840 (1894); Durfee v. Harper, 22 Mont. 354, 56 Pac. 582. Likewise, see State v. Sessions, 87 Kan. 497, 124 Pac. 483 (1912); State *ex rel.* v. Gordon, 251 Mo. 303, 158 S. W. 683 (1913); Hunt v. State, 22 Tex. App. 397, 38 S. W. 233 (1886); Wells v. Bain, 75 Pa. St. 39 (1874).

[12] What of the cases cited by the relator? Why should only McCreary v. Speer, *infra* n. 13, be selected for consideration? The court had before it cases urging the necessity of strict compliance with mandatory requirements. See, Johnson v. Craft, 205 Ala. 386, 87 So. 375 (1921); McBee v. Brady, Governor, 15 Idaho 761, 100 Pac. 97 (1909); State *ex rel.* Woods v. Tooker, 15 Mont. 8, 37 Pac. 804 (1894); Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912); State v. Zimmerman, 187 Wis. 180, 204 N. W. 803 (1925); Browne v. City of New York, 241 N. Y. 96, 149 N. E. 211 (1925); McAdams v. Henley, 169 Ark. 97, 273 S. W. 355 (1925); Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3 (1886); State *ex rel.* Stevenson v. Tufley, 19 Nev. 391, 12 Pac. 835 (1887); State *ex rel.* Bailey v. Brookhart, 113 Ia. 250, 84 N. W. 1064 (1901); Switzer v. State, 103 Ohio St. 306, 133 N. E. 552 (1921).

A consideration of opinion of the Justices, 6 Cush. 573 (Mass., 1833); Hunt v. State, *supra* n. 10; Wells v. Bain, *supra* n. 10, would likewise have been useful.

[13] 156 Ky. 783, 162 S. W. 99 (1913).

[14] The Kentucky provision concerning publication was, as our own, ninety days. By mistake the secretary of state did not publish the amendment until sixty days prior to the election, but he then gave it additional publicity in an attempt to rectify the error. The court refused to sustain the procedure. But the West Virginia court distinguishes this case because of the greater disparity between the day on which the amendment was actually published and the day it was required to be published. But what of the additional publicity? If additional publicity could not save the amendment in the McCreary case why should the improved methods in the dissemination of information validate the publication in the Herold case. It is difficult to see how the number of days of non-compliance can be important. Publication is a part of the amendatory process; if the vote was not sufficient, clearly the amendment would be declared lost. Voting like publication is only a part of the process. If one of the steps calculated to influence the vote was not complied with it is difficult to say what a vote might have been if taken according to the constitutional requirements. For example, there were only 335,482 votes cast in favor of the amendment, there were 748,225 votes cast for the office of governor, and at the primaries in May, 931,378 votes were recorded.

[15] 65 W. Va. 587, 64 S. E. 845 (1909).

where the court said, "Nor have we any doubt that it (the governor's veto) must be filed within the prescribed time. If not within five days, then within how many? Who shall say? Is not a time limit, beyond which the citizen must know the fate of an act passed, important?"[16] If there must be certainty in the statute law, is there not a like need for certainty in the superior law of the constitution?

If there are not adequate means by which the constitution can be amended then there is need for a new constitutional convention; but there is no excuse for the court to remake the law to reach a popular result. Decisions such as *Herold v. Townsend*,[17] make even the amendatory phase of constitutional law in West Virginia no more than an unpredictable guess. Even the conservative, after such a decision, would agree with Jerome Frank that "What the courts in fact do is to manipulate the language of former decisions."[18] If judicial humility is more than a misleading myth it is time that courts fearlessly apply the law as it is and not as they wish it.[19]

—TRIXY M. PETERS.

CONSTITUTIONAL LAW — DISCRIMINATION IN ASSESSMENT FOR TAXATION AS DENIAL OF EQUAL PROTECTION OF THE LAWS. — An electric power plant was assessed at one hundred per cent of its actual value while all other properties in the county in the same class were assessed at only eighty per cent of their value. An appeal was taken from an order affirming the assessment of the Board of Equalization, and the Supreme Court of Appeals, two judges dissenting, held the assessment a denial of equal protection of the law in violation of the Fourteenth Amendment of the Constitution, by reason of which the power company was entitled to have its property assessed on the same basis as other properties in the same class. *West Penn Power Co. v. Board of Review and Equalization of Brooke County.*[1]

There is nothing unique about this proposition of law. It merely brings the West Virginia court in line with a long list

[16] *Supra* n. 15, at 592.
[17] *Supra* n. 1.
[18] LAW AND THE MODERN MIND (1931) 148.
[19] "One swallow alone doesn't make the summer". Nor do seven scattered cases make the law.

[1] 164 S. E. 862 (W. Va., 1932).