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Legislatures - Bills Passed after Legislature Clock Stopped Held Void - State ex rel. Heck's Discount Center, Inc. v. Winters, 132 S.E. 2d 374 (W.Va. 1963)

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a holding would destroy the exclusionary rule,"[24] which in essence states that the ultimate corroboration provided by the fruits of the search cannot be used retroactively to justify the search.[25] Thus, "only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the information can the court make a fair determination of the issue."[26]

Hence, it can be readily observed that the informant's identity is truly essential to the defense of the accused, for if the informant's identity is withheld, the defendant is without power to establish lack of probable cause.[27]

[24] *Ibid.*

[25] Johnson v. United States, 333 U.S. 10 (1948).

[26] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963) (dissenting opinion).

[27] This conclusion relates only to situations where the informant's information is used to establish probable cause.

LEGISLATURES–BILL PASSED AFTER LEGISLATURE CLOCK STOPPED HELD VOID

The appellants, Heck's Discount Center, Inc., and other merchants in West Virginia, were brought to court for violation of a West Virginia statute[1] which limited merchandising and selling activities "on a Sabbath day." The present action was brought to prohibit the respondents from continuing prosecution of the indictment on the ground that the statute was unconstitutional. The West Virginia legislature, in order to be technically within the sixty days allowed for a legislative session,[2] stopped the clock on the wall of the Assembly at 11:28 P.M. of the sixtieth day.[3] The legislature continued to discuss the bill and passed it around 12:15 A.M. on the sixty-first day. Neither the enrolled bill nor the legislative journal clearly stated the time of the bill's passage, although it was correct in all other respects. Appellant introduced evidence from the legislative

[1] West Virginia Code, Art. 10, Sec. 6112(6) (1963, c. 37).

[2] "The regular session of the Legislature . . . shall not exceed sixty days. . . . All regular sessions may be extended by concurrence of two-thirds of the members elected to each house." W. VA. CONST., art. VI, sec. 22. This requirement of two-thirds of each house was not met.

[3] This procedure is present in other states as well. In sixteen states, the state constitution limits the number of days the legislature may be in session. In the remaining states, adjournment is agreed upon by a concurrence of the two houses. Because of the inevitable accumulation of bills to be discussed and acted upon at the close of the session, the legislatures in some of these states have stopped the clock in order to gain more time for consideration and passage of the bills.

journal which showed that the bill was passed after midnight. The Supreme Court of Appeals of West Virginia declared the statute unconstitutional on the ground that the legislature was not authorized to enact bills after the end of the legislative session. *State ex rel. Heck's Discount Center, Inc. v. Winter's* 132 S.E.2d 374 (W.Va. 1963).

The legislative tactic of "stopping the clock" raises the basic issue of the constitutionality of bills passed subsequent to such a maneuver. Another important issue here is the problem of the judicial review of such schemes; namely, how and under what circumstances may the courts examine the method of procedure used by the legislature in passing a bill. In weighing the evidence presented, it is the duty of the court to balance two basic tenets: the presumption of the verity of legislative bills duly enrolled, authenticated and approved, as against evidence rebutting this presumption by showing that, in "passing" the bill, an unconstitutional maneuver was employed.

In attempting to balance these two factors, the court must consider and weigh the effect of certain prerogatives to perform these activities. Inasmuch as the United States Constitution, as well as the constitutions of the states, has created the judicial and legislative departments, direct or indirect encroachment by one department upon the other is forbidden and considered to be an unwarranted assumption of power.[4] The legislature makes the laws, while the judiciary, captained by the United States Supreme Court, interprets these laws within the broad framework of constitutional limitations. However, it was not until the landmark case of *Marbury v. Madison*[5] that the Court took upon itself the duty of passing upon the constitutionality of laws enacted by Congress. In *Winter v. Jones*,[6] Justice Lumpkin of the Georgia Supreme Court expressed a view substantially in accord with that propounded by Chief Justice Marshall in *Marbury v. Madison*:[7]

> While . . . I shall always feel it to be both my duty and pleasure fairly and patiently to compare legislative Acts with both the State and Federal Constitutions, and if possible, to reconcile the one with the other, yet, when fully satisfied in my judgment and conscience, that they violate these paramount laws which I have sworn to support, I shall not hesitate to adjudge them nugatory, regardless of the consequences; deriving consolation from the conviction that I have faithfully performed my duty, and that the people will sooner or later do me justice.[8]

[4] See COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903).

[5] 1 Cranch (U.S.) 137, 2 L. Ed. 60 (1803).

[6] 10 Ga. 190, 54 Am. Dec. 379 (1851).

[7] 1 Cranch (U.S.) 137, 2 L. Ed. 60 (1803).

[8] Winter v. Jones, 10 Ga. 190, 195, 54 Am. Dec. 379, 381 (1851).

Although given the authority to review the acts of the legislature, the judiciary has exercised this power with great care, maintaining the view that the court's function is not to review or revise legislation but to enforce the legislative will.[9] In the continuing effort to interfere with the legislature as little as possible, the courts have refused to declare a statute unconstitutional, unless it clearly violates a constitutional provision,[10] and have allowed all reasonable doubt to be resolved in favor of a statute's validity.[11]

When the constitutionality of a statute is challenged because of the procedure followed by the legislature in enacting it, an issue of fact is created: Did the legislature follow the procedure established by the Constitution? Again, the courts will presume that the statute is constitutional, and the burden of proof is on the complaining party to overcome the presumption by proving that the legislature did not follow the constitutional procedure.[12] The two major methods developed by the state courts in reviewing the evidence in cases of this type are: the "enrolled bill rule" and the "modified journal entry rule."[13]

The "enrolled bill rule," which is considered the common law rule,[14] was originally followed by the federal courts[15] and many of the state courts.[16] The "enrolled bill rule" is based on the premise that a duly enacted bill–signed by the presiding officers of both houses, approved by the governor and filed in the appropriate office–is conclusively presumed

[9] See COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903).

[10] State v. Joseph, 175 Ala. 579, 57 So. 942 (1911); Cutts and Johnson v. Hardee, 38 Ga. 350 (1868); State *ex rel.* Brassey v. Hanson, 81 Idaho 403, 342 P. 2d 706 (1959); Wright v. Wiles, 173 Tenn. 334, 117 S.W. 2d 736 (1938); Franklin National Bank of Long Island v. Clark, 212 N.Y.S. 2d 942 (1961).

[11] See note 10, and State *ex rel.* Buford v. Carley, 89 Fla. 361, 104 So. 577 (1925); People *ex rel.* Koch v. Rinaker, 252 Ill. 266, 96 N.E. 897 (1911); Witmer v. Polk County, 222 Ia. 1075, 270 N.W. 323 (1937).

[12] Worthy v. Bush, 262 Ill. 560, 562, 104 N.E. 904, 905 (1914): "whether a statute was passed by the General Assembly in compliance with the constitutional requirements is a matter of fact which must be proved by the party attacking the validity of the act . . ."; Postal Telegraph-Cable Co. v. Robertson, 716 Miss. 204, 76 So. 560 (1917).

[13] See Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6 (1952). Mr. Lloyd's article discusses five methods of reviewing evidence, but the two major ones are discussed above. Mr. Lloyd's article also gives the breakdown as to the states following each rule and the leading decision for the state.

[14] Prince's Case, 8 Co. Rep. 13 (1606).

[15] The leading federal cases supporting this view are Field v. Clark, 143 U.S. 649 (1892) and United States v. Ballin, 144 U.S. 1 (1892). A recent federal case affirming this view is United States v. Gugel, 119 F. Supp. 897 (DC Ky. 1954).

[16] Capitol Distributing Co. v. Redwine, 206 Ga. 477, 57 S.E. 2d 578 (1950); Carlton v. Grimes, 237 Ia. 912, 23 N.W. 2d 883 (1946); Nash v. Giffen, 61 S.D. 114, 246 N.W. 299 (1933).

to have been enacted pursuant to the procedure required by the constitution. In effect, the courts are saying that they will not look beyond the enrolling of a bill to determine its constitutionality, provided that the proper authentication appears on its face. This rule is held to be more within the spirit of separation of powers and is felt to be less of an interference with the lawmaking process. The enrolled bill is considered to be best evidence of due enactment. While the courts always take judicial notice of the enrolled bill in deciding procedural problems, the legislative journal will be judicially noticed in, at least, three instances: interpretation of the statute;[17] confirmation of the Governor's appointments;[18] or "notice of whatever is or ought to be generally known within the limits of [the court's] jurisdiction."[19] In an early Indiana case, the principle of judicial review was tersely stated, as follows:

> It is a maxim as old as the common law, and a rule of necessity, that the courts take judicial notice of public law; it is presumed to know what it is, and is its (the court's) duty to know it.[20]

It has been estimated recently that one-half of the states still follow the "enrolled bill rule" accompanied by its offspring, the "modified enrolled bill rule."[21]

The "modified journal entry rule" which is a descendant of the "journal entry rule"[22] has become much more important today than its ancestor. An enrolled bill is presumed to be constitutional, but the presumption can be rebutted by clear evidence showing affirmative non-compliance with the procedural requirements of the legislative journals.[23] Under this rule which considers the journal to be superior to the enrolled bill, the court is allowed a greater degree of leeway in weighing the merits of the evidence

17 Sharpe v. Lowe, 214 Ga. 513, 106 S.E. 2d 29 (1959).

18 Witherspoon v. State *ex rel.* West, 138 Miss. 310, 103 So. 134 (1925).

19 State v. Broad River Power Co., 177 S.C. 240, 255, 181 S.E. 41, 48 (1935).

20 Evans, Auditor v. Browne, 30 Ind. 514, 520 (1869).

21 See Lloyd, *Judicial Control of Legislative Procedure*, 4 Syracuse L. Rev. 6 (1952). The "modified enrolled bill rule" conclusively presumes a duly enacted bill in accordance with all constitutional requirements, except for those facts required by the state constitution to be recorded in the legislative journal. For a discussion of legislative journals, see note 23.

22 The "journal entry rule" conclusively presumes that the legislative journal states the procedure that was followed, such statement being true and able to impeach the enrolled bill. Silence by the journal regarding the failure of the legislature to follow the rules of procedure raises a conclusive presumption that these rules were not followed.

23 ILL. CONST., art. IV, sec. 10: "Each house shall keep a journal of its proceedings, which shall be published . . . the yeas and nays shall be taken on any question, and entered upon the journal." Each and every state has a constitutional article which is similar to this one.

available. The court can, under this rule, look at the legislative journal as well as the enrolled bill. The "modified journal entry rule" is considered to be a compromise between these two extremes, in that it allows superiority to the legislative journal while according to the enrolled bill sufficient verity to create a presumption of validity which persists until rebutted by clear evidence to the contrary.

While a majority of state courts follow the "enrolled bill rule," many of them, in an attempt to broaden this rule, have held that the legislative journal may be used as evidence of the correctness of legislative procedure:

> a proper authentication of an enrolled act is conclusive, as a matter of law that the act was duly passed in conformity to the constitution. . . . This is a rule of substantive law and not of evidence, and there is no pleading known to the law by which the existence of an act can be put in issue and tried as a question of fact.[24]

The "enrolled bill rule" and the "modified journal entry rule" have at least one point in common. Neither rule permits the introduction of extrinsic evidence from sources other than the legislature (enrolled bill and/or the legislative journal), unless there is a clear ambiguity or omission from the legislative records.[25]

West Virginia originally followed the common law rule of giving a conclusive presumption to the constitutionality of an act of the legislature. In an early case,[26] the Supreme Court of Appeals of West Virginia compared the rights of the English Parliament with the rights of the West Virginia legislature under this rule and concluded that the conclusive presumption of constitutionality allowed to the acts of parliament was applicable to the acts of the state legislature. It was not long before the "enrolled bill rule" began to be undermined by exceptions. In *Osburn v. Staley*,[27] the West Virginia court held that because the constitution of the state required the recording of the "yeas" and "nays" to be placed in the legislative journal,[28] the court could take judicial notice of the journals for this purpose. This decision is a good example of judicial application of the "modified enrolled bill rule."[29] However, the court was quick to point out that this decision did not contradict *Lusher v. Scites*[30] (which recognized the "enrolled bill rule"). The legislative journal was judicially noticed

[24] State *ex. rel.* Cline v. Schricker, 228 Ind. 41, 46–7, 88 N.E. 2d 746, 748 (1949).

[25] State *ex rel.* Buford v. Carley, 89 Fla. 361, 104 So. 577 (1925); State *ex rel.* City of Alcoa v. Hannum, 158 Tenn. 119, 11 S.W. 2d 858 (1928); Vaughan v. Town of Galax, 173 Va. 335, 4 S.E. 2d 386 (1939).

[26] Lusher v. Scites, 4 W.Va. 11 (1870).

[27] 5 W.Va. 85 (1871).

[28] W. VA. CONST., art. VI, sec. 41.

[29] See note 21.

[30] 4 W.Va. 11 (1870).

in *Slack v. Jacob*.[31] However, it was only noticed for the purpose of determining the intent of the legislature and its interpretation of the statute. While neither *Osburn v. Staley*[32] nor *Slack v. Jacob*[33] openly questioned the validity of the "enrolled bill rule," these cases did undermine it sufficiently to allow the legislative journal to be judicially noticed for matters of procedure other than the recording of the "yeas" and "nays." In *Capito v. Topping*[34] the plaintiff questioned the validity of a bill. According to the legislative journal, the bill was passed on February 26, 1909. The journal also showed that the bill was one of four or five bills discussed and decided in twenty minutes. The court held that if the legislative journals are clear and unambiguous as to the time of adjournment, they will be conclusively presumed to be correct and no extrinsic evidence may be introduced to impeach them. The journal was held to be unambiguous and the court said it "does not judicially know how much legislative business can be transacted in twenty minutes."[35] Thus the state was introduced to the "modified journal entry rule."

Later, it was held that a bill was conclusive evidence of its own authenticity.[36] Although it seemed that the court was returning to the "enrolled bill rule," it was, on the contrary, stating that if the enrolled bill were not overcome by contrary proof in the legislative journal, then it was to be considered valid. The plaintiff had argued that the bill was unconstitutional because the legislative journal did not state that the bill had been read the required three times. By holding for the defendant, the court manifested its refusal to accept the "journal entry rule."[37]

Three recent West Virginia cases[38] have dealt with substantially the same problem as that involved in *State ex rel. Heck's Discount Center, Inc. v. Winters*,[39] namely, the alleged unconstitutionality of a statute enacted after the legislature "stopped the clock." In these cases, the court held that the legislative journal was sufficiently clear to determine whether the legislature followed the rules of procedure. The *Heck's Discount* case[40] is distinguishable from these other cases in that the legislative journal was not considered sufficiently clear to warrant a refusal to notice extrinsic evidence. By so deciding, the Supreme Court of Appeals of West

[31] 8 W.Va. 612 (1875).

[32] 5 W.Va. 85 (1871).

[33] 8 W.Va. 612 (1875).

[34] 65 W.Va. 587, 64 S.E. 845 (1909).

[35] *Id.* at 594, 64 S.E. at 848.

[36] Anderson v. Bowen, 78 W.Va. 559, 89 S.E. 677 (1916).

[37] See note 22.

[38] Tanner v. Premier Photo Service, Inc., 125 S.E. 2d 612 (W.Va. 1962); State v. Heston, 137 W.Va. 375, 71 S.E.2d 481 (1952); State *ex rel.* Armbrecht v. Thornburg, 137 W.Va. 60, 70 S.E.2d 73 (1952).

[39] 132 S.E. 2d 374 (W.Va. 1963).

[40] *Ibid.*

Virginia has established a judicial definition of "unambiguous and clear." West Virginia now has opinions stating what is clear and what is not.

TORTS–ACTION FOR WRONGFUL LIFE BY ADULTERINE BASTARD AGAINST HIS FATHER–DAMNUM ABSQUE INJURIA

In an unusual and novel case of first impression in Illinois, the plaintiff sued his father for damages for causing him to be born an adulterine bastard, raising constitutional questions and presenting two theories of recovery, one in tort and the other in contract.[1] The complaint averred, *inter alia:* that the plaintiff's father induced the plaintiff's mother to have sexual relations by promising to marry her; that this promise was not and could not be kept because the father was already married; that the promise was fraudulent; that the acts of the defendant were willful and injured the plaintiff in his person, property and reputation by causing him to be born an adulterine bastard. The plaintiff claimed damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors[2] and for being stigmatized as a bastard. On the defendant's motion[3] the trial court dismissed the suit for legal insufficiency of the complaint. The plaintiff appealed directly to the Supreme Court of Illinois which refused to hear the case and transferred it to the Illinois Appellate Court which, in a lengthy opinion containing much dicta, affirmed the dismissal. *Zepeda v. Zepeda,* 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

The question presented on appeal was whether the complaint stated a cause of action in tort. This question, in turn, divided itself into other thought-provoking questions. The first, prompted by the unique averments of the complaint, was whether the act of the defendant was a legal wrong, a tortious act? The court found that the defendant's act was willful in that he was completely indifferent to the foreseeable consequences of his act; that he pursued a course of conduct which showed a conscious disregard

[1] The Constitutional questions were disposed of under the rule stated in City of Chicago v. Campbell, 27 Ill. App. 2d 456, 170 N.E.2d 19 (1960): "If a case in which constitutional issues are advanced is transferred to the Appellate Court, it must be concluded that the Supreme Court has determined no such issues are involved or that they are not material to the disposition of the appeal." The contract theory was not available because the complaint sounded in tort.

[2] The trial court pointed out that a legitimate child had no absolute right of inheritance because he could be disinherited by will.

[3] The motion to strike contained three grounds: (*a*) an illegitimate child has no rights against its father under the common law; (*b*) all rights of an illegitimate father and child are governed by statute; and (*c*) at the time of the alleged cause of action, plaintiff was not in being.