1977

Attorney General Robert B. Hansen v. Moroni L. Jensen, President, Utah State Senate; Utah Board of Regents and Utah State University : Brief of Appellant, Attorney General Robert B. Hansen

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ATTORNEY GENERAL
ROBERT B. HANSEN,

Appellant,

-v-

MORONI L. JENSEN, President, Utah State Senate; UTAH BOARD OF REGENTS and UTAH STATE UNIVERSITY,

Respondents.

BRIEF OF

ATTORNEY GENERAL

APPEAL FROM AN

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IN THE SUPREME COURT OF THE STATE OF UTAH

ATTORNEY GENERAL ROBERT B. HANSEN, Appellant, -v- MORONI L. JENSEN, President, Utah State Senate; UTAH BOARD OF REGENTS and UTAH STATE UNIVERSITY, Respondents.	)	CASE NO.

BRIEF OF APPELLANT,

ATTORNEY GENERAL ROBERT B. HANSEN

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL

DISTRICT COURT

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BRIEF OF APPELLANT, ATTORNEY GENERAL

ROBERT B. HANSEN

NATURE OF THE CASE

This is an appeal by appellant from an Order of the Third Judicial District Court, denying appellant's Motion for Summary Judgment and granting respondents' Motions for Summary Judgment, thereby holding Senate Bill No. 201 (Chapter 114, Laws of Utah 1977), constitutional and valid.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order of the Third Judicial District Court which would then render Senate Bill 201 (Chapter 114,

Laws of Utah 1977), in violation of Article VI, Section 22 of the Utah Constitution and the Utah Senate's "Consent Calendar" procedure unconstitutional.

STATEMENT OF FACTS

The facts in this matter are not in dispute. Appellant and respondents have entered into a stipulated statement of facts which is contained in the record on appeal. Appellant does not intend to rely upon the Transcript of Proceedings before the Third Judicial District Court, pursuant to Rule 75 (a) of the Utah Rules of Civil Procedure. The notice requirements and other procedural matters are not in question in this appeal.

The issues presented center around the utilization of a "Consent Calendar" procedure adopted by the Utah State Senate on February 21, 1977. Copies of the written Consent Calendar procedure appear as Exhibit (A) and Exhibit (B) to the stipulated statement of facts. A copy is also attached as Exhibit (A) to appellant's (plaintiff's) Complaint.

The Consent Calendar procedure utilized by the Utah Senate provides that a bill or resolution may be considered for passage upon a finding that:

(1) A quorum is present,

(2) Those favoring passage when called for by the President of the Senate respond collectively with a "yea" vote; and

(3) When called for if a single "nay" vote is voiced at that time, then a full roll call vote is taken.

All senators present are presumed to have voted and voted affirmatively. It is recorded in the Senate Journal as all present having voted and voted "yea." Those senators not present are listed as absent. No provision is made for an abstention vote. Bills on the Consent Calendar may not be debated or amended on the floor but may only be referred back to a standing committee on a majority vote.

Appellant takes no issue with the Consent Calendar procedure, except on final passage. Whether the Consent Calendar requires a three-day waiting period, or applies to a first and second reading, or committee assignments, is irrelevant to this appeal.

Senate Bill 201 (Chapter 114, Laws of Utah 1977), was adopted on final passage by the Consent Calendar procedure utilized by the Utah Senate. The 1977 Senate Journal for day No. 46, at page 592, lists only the following:

> "S.B. No. 201 UTAH STATE FIELDHOUSE BONDS was read the third time and placed on its final passage.
>
> S.B. No. 201 was approved by unanimous voice vote of all Senators present. (Senator Peterson absent)
>
> S.B. No. 201 was transmitted to the House."

The senators present are not separately listed as voting in favor of S.B. 201. Nothing else is listed in the Senate Journal regarding the final passage of S.B. 201.

Senate Bill 201 authorizes, among other things, the issuance

of revenue bonds for the remodeling of the existing fieldhouse at Utah State University. All parties to this action have requested advance placement on the calendar of the Third Judicial District Court, and this Court as remodeling of the fieldhouse has already commenced. A final and expeditious resolution of the issues presented herein will enable bond counsel and administrators to make appropriate decisions regarding continued construction, once the constitutional questions have been answered. The Utah Senate passed 127 other bills and resolutions in the 1977 General Session, utilizing its Consent Calendar procedure.

ARGUMENT

POINT I

ARTICLE VI, SECTION 22, OF THE UTAH CONSTITUTION, REQUIRES A "YEA" AND "NAY" VOTE UPON FINAL PASSAGE OF ALL BILLS, AND, THEREFORE, THE "CONSENT PROCEDURE" FOLLOWED BY THE UTAH SENATE IS UNCONSTITUTIONAL.

Article VI, Section 22 of the Utah Constitution, requires, among other things, that:

> "... The vote upon the final passage of all bills shall be by yeas and nays and entered upon the respective journals of the house in which the vote occurs."

The Senate Journal shows that Senate Bill No. 201 was approved finally by unanimous voice vote of all senators present and with one senator absent. It does not separately list the individual senators voting "yea."

It only presumes everyone voted yea when collectively the body of senators responded yea. It is conceivable that some senators either through inattention or indifference did not vote at all, even though present at the time. No provision is made for abstention votes. In holding that a constitutional provision requiring "assent" for passage required an affirmative act, the Missouri Supreme Court in 1878 stated that one staying away from the polls on voting day does not express an agreement of his mind to a proper vote upon or simply manifest thereby an indifference on the subject. Words and Phrases, 'Yea'Vol. 46 (1970), at page 519, citing The State ex rel Woodson v. Brassfield, 67 Mo. 331, 335 (1878).

Taking a yea and nay vote contemplates a roll call vote whereupon each individual responds, and his vote is recorded separately with his name in the Journal. Black's Law Dictionary, (Revised 4th Ed. P. 1791), defines the phrase "the yeas and nays" as "calling for the individual and oral vote of each member, usually upon a call of the roll." (Emphasis supplied.) Robert's Rules of Order, Section 44, contains the following entry on p. 353:

> "ROLL CALL VOTE. Taking a vote by roll call (or by yeas and nays, as it is also called)... ." (Their emphasis.)

Robert's Rules of Order further discusses other voting procedures which are clearly separate and distinct from a yea-nay; i.e., roll call, vote; for example, illustrates how standing votes, voice votes, etc., are taken and these differ markedly in form from roll call votes.

The cases on the issue are in accord with the above authorities. Lincoln v. Haugen, 48 N.W. 196 (Minn. 1891), sustained the validity of Chapter 129, Gen. Laws 1885, Minnesota, against an attack based on the theory that the Legislature had not complied with a constitutional provision mandating yea-nay votes. Since the constitutional provision did not govern the bill before the Court, the Court's pronouncement is dicta. Nevertheless, the Court at p. 196, in discussing alternative voting procedures, stated that a yea-nay vote is synonymous with a roll call vote.

> "Apart from such constitutional provisions, the ordinary method of taking a vote upon a question is by the voices, show of hands, or by a rising vote, affirmative or negative. It may also be done by a roll-call. But where the object is to ascertain the names as well as the number voting on each side, with a view to have them entered on the journal, this method, when resorted to, to obtain such lists of names, is denominated, 'taking the yeas and nays on a question.'"

In To Certain Members of the House of Representatives in the General Assembly, 191 A. 269 (R.I. 1937), the Rhode Island Supreme Court declined to render an advisory opinion as certain procedural requirements necessary to authorize it to render an opinion were not satisfied. It appears that these requirements were not met because the presiding officer in the House would not permit roll call votes to be taken. In explaining its refusal to opine, the Court, at p. 27, had occasion to explain its understanding of what a yea-nay vote required:

> "... In this connection it is pertinent to point out the provisions of section 8 of article 4 of our Constitution, which provides: 'Each house shall keep

> a journal of its proceedings. The yeas and nays of the members of either house shall, at the desire of one-fifth of those present, be entered on the journal.' This mandatory provision of the Constitution requires a roll call, and a recording of the vote of the members of the House, when proper and timely request is made therefor. It is right that neither the House nor any member thereof, whatever position he may occupy in its organization, may disregard or willfully nullify."

In People v. Chicago & E.I. Ry. Co., 145 N.E. 716 (Ill. 1924), the Illinois Supreme Court invalidated a county tax not levied upon an aye and nay vote. The evidence showed that the

> "... resolutions in the matter of the levy of tax were adopted by a viva voce vote; that there was no roll call; that those who were in favor of adopting the resolutions voted by simply saying 'aye,' and those opposed voted collectively by saying 'no.'"

On the issue of whether this procedure complied with the requirement for an aye-nay vote, the Court held that this

> (The procedure)
>
> "... does not show an aye and nay vote, or a roll call, which is necessary to such a vote... . It shows the taking of a viva voce vote, and that the resolution was carried by such vote. It does not show any compliance or attempt at compliance with the requirement of the statute that there shall be an aye and nay vote and the entry of such vote on the record." (p. 717)

The procedure followed in People v. Chicago & E.I. Ry. Co. supra, is basically identical with the procedure utilized in adopting Senate Bill 201. In light of the preceding authorities, it seems fairly certain that, if the Utah courts were to follow the existing doctrine, they would be compelled to hold the Legislature did not take the roll call vote required by Article VI, Section 22, even though the journals would show the

result of the voice vote.

It is also well settled that provisions in state Constitutions requiring final votes to be upon yeas and nays are mandatory, not permissive. Article I, Section 26, Utah Constitution. People v. Chicago & E.I. Ry. Co., supra; State ex rel. General Motors Corp., A.C. Electronics Division v. City of Oak Creek, 182 N.W. 2d 481, 492 (Wisc. 1971). Therefore, the Legislature's failure to comply with the mandate of Article VI, Section 22, should result in a declaration that the law was not validly enacted. Such was the result in State ex rel. General Motors Corp., A.C. Electronics Division v. City of Oak Creek, supra. There the Wisconsin Supreme Court upheld an attack on a statute imposing a personal property tax on U.S. Government property in General Motors' possession. Despite Article VIII, Section 8 of the Wisconsin Constitution, which requires a vote by yeas and nays where the Legislature imposes a tax, the Legislature did not take the necessary vote. The Court, at page 492, rejected an attack on the rule therein set forth and held that

> "... where a tax is enacted it is mandatory that the yeas and nays be recorded in the legislative journals. This defect alone is sufficient to render Section 70.11 (8M), Stats., a nullity."

Courts will often strain to uphold legislation that does not strictly comply with constitutional requirements. While it is submitted that the case law treating the yea-nay vote as mandatory disposes of this possibility, a court might be susceptible to a substantial compliance

argument; i.e., one that claimed since the purpose behind the constitutional requirement had been met, the law should be declared validly enacted. An example of such a case is Day v. Walker, 247 N.W. 350 (Neb. 1933). The Nebraska Constitution requires final votes to be taken viva voce. The Legislature had installed an electronic voting system whereby the vote of each individual member appeared next to his name on a tally board mounted in the legislative chamber. The Court sustained the laws enacted while this device was in use because it interpreted the viva voce provision as requiring only that the votes of each and every legislator be public; that is, be open to all to know and see. In effect, the Court went beyond the language of the Constitution and sought to insure only that the procedure met the spirit, if not the language, of the Constitution.

Two possible rationales for the yea-nay requirement of Article VI, Section 22, are suggested. First, the vote could be required for the purpose of creating a public record which details how each member of the body voted. The rationale would be that democratic government works best only when the people know where their representatives stand on given matters. See People v. Chicago & N.W. Ry. Co., 71 N.E. 2d 701 (Ill. 1947); Day v. Walker, supra. This is the issue of accountability. There is no accountability when Utah senators may quietly abstain from voting, and when the specific vote is not listed next to their names in the Journal.

The second rationale, however, is more troublesome to those contending for the validity of Senate Bill 201. Cooley, Constitutional Limitations (5th Ed.), at page 169, declares that the yea-nay vote requirement

> "... is designed to serve an important purpose in compelling each member present to assume as well as feel his due share of responsibility in legislation... ."

If one considers the yea-nay vote provision as basically a device to protect against ill-conceived laws by forcing each legislator to take a position on the bill, thereby increasing the likelihood that he will study and think about the law, then the procedure utilized to adopt Senate Bill 201 does not satisfy the purpose for the provision. Likewise, according to the Consent Calendar procedure, the bill may not be debated or amended immediately prior to the vote for final passage. Accordingly, the substantial compliance argument is not a viable argument.

Respondents would urge this Court to follow the enrolled bill doctrine apparently first espoused by the Utah Supreme Court in 1896 in the case of Richie v. Richards, 14 Utah 345, at page 354, which provides:

> "The statutes in question having been duly signed, approved and deposited in the office of the secretary of state, we must conclusively presume that all constitutional requisites were complied with in their enactment... ."

It should be noted, however, that two of the three members of the Utah Supreme Court at that time, Justice Bartch and Justice Miner,

concurred in the ultimate holding, denying petitioner's request for a Writ of Prohibition, but, however, dissented from Chief Justice Zane's opinion and concluded at pages (commencing at page 361 and page 369, respectively), that the validity of a statute when duly enrolled, signed, approved and deposited with the secretary of state is prima facie, but not conclusive evidence of its constitutional enactment and of what the law is. Further, when that statute is drawn in question, the Courts who are called upon to determine its validity may have power to go beyond the enrolled act and look into the Journals of the Legislature required to be kept by the Constitution to satisfy the judicial mind as to its constitutional passage. (At page 362) It should also be noted in Richie v. Richards, supra, that the Utah Supreme Court specifically held that the limitations and restrictions contained in Article VI, Section 22 of the Utah Constitution, in question herein respecting the enactment of laws, are mandatory and binding upon the Legislature.

Respondents also submit the case of Dean v. Rampton, 538 P.2d 169 (1975). This case basically stands for the proposition that the Court may look to the Journals to uphold the constitutionality of any act. Appellants take no issue with this case, but note only that the Senate Journals do not list the respective yea votes of each senator pertaining to Senate Bill 201, but only list that one senator was absent. It is submitted that this does not meet the mandatory requirements of the Utah Constitution set forth in Article VI, Section 22, on its face.

CONCLUSION

Constitutional provisions calling for a yea-nay vote are satisfied only where a roll call vote is taken. Such provisions are mandatory and even if a court were disposed to find such a provision satisfied on the basis of substantial compliance, the possible dual rationales for the provision are such as to dictate against any finding of substantial compliance here. Accordingly, Senate Bill 201 would not appear to have been adopted in accordance with the provision of Article VI, Section 22 of the Utah Constitution which mandates that upon the final passage of all bills the vote is to be by yeas and nays.

Respectfully submitted,

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Attorney for Robert B. Hansen,
Appellant

Dated September 23, 1977.