1977

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

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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ATTORNEY GENERAL
ROBERT B. HANSEN,
Plaintiff and Appellant,

vs.

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

Defendants and Respondents.

Case No.

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BRIEF OF DEFENDANTS

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APPEAL FROM JUDGMENT OF THE
IN AND FOR
HONORABLE ERNEST

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| Defendants and Respondents. | ) | |

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# BRIEF OF DEFENDANTS AND RESPONDENTS

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## STATEMENT OF THE NATURE OF THE CASE

Action by Plaintiff and Appellant (hereinafter Plaintiff) for declaratory judgment commenced pursuant to Section 78-33-1, et seq., Utah Code Annotated 1953, for declaration that Senate Bill No. 201 (Chapter 114, Laws of Utah 1977) is unconstitutional because it passed the Senate without a roll call vote in contravention of the requirements of Article VI, Sec. 22, Constitution of Utah.

## DISPOSITION IN LOWER COURT

Contrary Motions for Summary Judgment were made to the Court by the Plaintiff and by the Defendants and Respondents (hereinafter Defendants) upon an agreed statement of facts

September 16, 1977. On September 19, 1977, the Court granted Defendants' Motion for Summary Judgment, denied Plaintiff's contrary Motion, and entered judgment accordingly.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmation of Summary Judgment in their favor.

STATEMENT OF FACTS

The facts in the action before the Court are not in issue.

Senate Bill No. 201 (Utah State Fieldhouse Bonds) was read a third and final time on the consent calendar on February 1977. It passed the Senate upon the unanimous voice vote of all senators present, Senator Blaine Peterson being absent. The Senate Journal (Ex. "C", Page 592 of Exhibit attached to Statement of Facts) reflects this as follows:

> "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."

Prior to passage, Senate Bill No. 201 travelled through the Senate on the consent calendar. A bill or resolution is placed on the consent calendar if: (a) its author requests the committee to which it is referred to recommend such placement; (b) the request is unanimously approved by the committee with a quorum present; and (c) the Senate at large adopts the committee recommendation (Ex. "A" attached to Statement of

of Facts). If objection is raised by three or more senators to placing or leaving a bill or resolution on the consent calendar, it is removed to its appropriate place on the second reading calendar.

A measure on the consent calendar cannot be considered for final passage until after it has there remained for a minimum of three days; nor, may it be amended or debated while on the calendar. The President of the Senate is required to call attention each day to the measures appearing on the calendar and inquire of the membership if there is any objection to the measur remaining on the calendar (Ex. "A" attached to Statement of Facts).

After a measure has been on the consent calendar for three days or longer, the President is required to call for a final vote on the measure in the following prescribed manner:

> "The President declares the [sic] and rules that a quorum is present."
>
> "As many as favor the question say, yea."
>
> "Does the chair hear a single dissenting, nay to the question."

(Ex. "B" Rule 12.11 attached to Statement of Facts). Hearing no nays, Rule 12.11 directs the President to have the clerk enter a unanimous vote of all senators present. If a single nay vote is cast, the same rule directs the President to instruct the clerk to call the roll. Rule 12.08 requires every senator present to vote except in certain instances not

here germane (See Ex. "B" attached to Statement of Facts).

The consent procedure was used by the Senate to pass 127 bills and resolutions during the last General Session of the Utah Legislature, all of which are now numbered as being effective.

## ARGUMENT

### POINT I

### THE DISTRICT COURT PROPERLY HELD SENATE BILL NO. 201 WAS PASSED IN COMPLIANCE WITH THE "YEA AND NAY" VOTE REQUIREMENT OF ARTICLE VI, SEC. 22, CONSTITUTION OF UTAH.

Article VI, Sec. 22, Constitution of Utah, provides:

> ". . .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."

Resolution of the dispute between the parties depends upon whether the "yeas and nays" proviso of Sec. 22 contemplates a roll call vote upon final passage as the sole and exclusive means of tallying individual votes cast by members of the legislature. At the outset, it is conceded that Sec. 22 mandates a yea and nay vote be taken upon the final passage of bills, but it is not conceded that Sec. 22 mandates the yeas and nays be called upon the roll. In construing the provi to quote from Henshaw v. Foster, 9 Pick. (Mass) 312:

> "We are to suppose that those who were delegated to the great business of distributing the

> powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce."

The purpose underlying the requirement that yeas and nays be entered upon the respective house journals has been stated to be twofold: to ensure that publicity and accountability attend the official action of legislators, on the one hand, and that their official action receive due thought and deliberation in advance, on the other. Opinion of Chief Justice Zane in Ritchie v. Richards, 14 Utah 345, 47 Pac. 670 (1896).

In The Official Report of the Proceedings and Debates of the Constitutional Convention, Vol II., the purpose of the yea and nay requirement is discussed by Mr. Van Horne:

> "The same question is as to the yeas and nays. The Legislature might say, 'we are willing to carry this thing through.' Some men might stand up there in defense of the rights of the people, and of the freedom of speech, or something else that the Legislature was attempting to infringe. There might be a wrong contemplated by the majority of a Legislature, perchance, and they might say, 'we will establish a rule contemplating that the yeas and nays shall not be called, and nobody shall be put on record as to how you vote on this question.' The purpose of calling the yeas and nays, and fixing it so that the house could not establish a contrary rule, is in the interests of men being able to force the legislators

to put themselves on record, in case they are attempting to pass any law that is against the interests of the people, and I think a simple consideration of that should make the members of this Convention loth to strike out that provision."

This latter purpose of the yea and nay requirement has also been emphasized in other jurisdictions. See: Barnett v. McCray, 169 Ark. 833, 277 S.W. 45 (1925); Neiburger v. McCullough 253 Ill. 312, 97 N.E. 660 (1912); To Certain Members of the House of Representatives in the General Assembly, 58 R. I. 51, 191 A. 269 (1937); and People v. Chicago & Eastern Illinois Railway Co., 314 Ill. 352, 145 N.E. 716 (1924).

The procedure used by the Senate in the passage of Senate Bill No. 201 satisfies the object of the proviso on both account

The Senate Journal reflects that all senators, except for Senator Peterson, who was absent, were present and that all voiced "yea" in favor of the measure. Constituents and others interested in the vote on Senate Bill No. 201 can, therefore, look to the record of the vote contained in the Senate Journal. The record there recorded is as complete as if the roll had been called and a "yea" vote listed opposite the name of each individual member.

Before Senate Bill No. 201 was voted upon each member had adequate time and opportunity to contemplate and reflect upon its merits. The measure remained on the consent calendar for at least three days, attention was called to the fact that it was on the calendar each day and inquiry made each day

concerning the desirability of having it remain on the calendar. The bill could have been removed from the calendar and placed upon the second reading calendar for debate, amendment, or some other consideration upon the objection of three members, but no objection was raised.

Plaintiff's brief devotes considerable attention to the possibility that the consent procedure admits of infirmity because it does not ensure that each individual member votes, that it makes no provision for abstention, and that it is conceivable that some members, through indifference or inattention, failed to cast a vote. There is nothing in the parties' stipulated Statement of Facts which supports an indulgence that all senators did not vote, nor does a yea and nay vote by roll call erase the possibility of inattention or indifference. Rule 12.08 of the Joint Rules and Rules of the Senate (Ex. "B" attached to Statement of Facts) specifically provides, "Every Senator present when a question is put. . .shall vote. . .". Senate Rule 12.01 (Ex. "B" attached to Statement of Facts) makes provision for abstention. No abstention is allowed unless the request to abstain is presented to, and approved by, the body of the Senate. An abstention under the consent procedure used to pass Senate Bill No. 201 could have been effected easily by the member casting a "nay" vote. Upon the call of the roll, the member could have given his reasons for desiring to abstain. In the last analysis, it seems, each legislator ought to be

presumed, absent a showing to the contrary, to be serving in the best interest of his constituents through conscientious effort and to be familiar with and abide the rules which govern the passage of legislation.

There is nothing sacred about the manner in which a yea and nay vote is cast. What is sacred, is the preservation of its purpose. It makes little difference if the "yeas" and "nays" are upon a viva voce vote or upon roll call if the elements of deliberation and public accountability are preserved. If the framers intended to insist that "yeas and nays" be cast exclusively upon a call of the roll, they need only have added the words "called upon the roll" after the word "nays" in Sec. 22 of Article VI. That they did not, it seems, is to their credit for it allows members of the Legislature to adopt rules establishing voting procedures pursuant to Article VI, Sec. 12, and consistent with Article VI, Sec. 22, to meet the increased demands of our society for efficiency and economy of time.

Defendants are unaware of any reported decision in this jurisdiction which construes the meaning of the "yea and nay" proviso contained in Sec. 22 of Article VI to always compel the unnecessary and laborious procedure of a roll call. There is precedent, however, for the proposition that this Court will look not only to the letter, but also to the spirit and purpose of a constitutional provision in determining its mandate.

The Court in the recent decision of Dean v. Rampton, 538 P.2d 169 (1975), looked to the purpose and intent of Article VI, Sec. 24, in deciding that Dean's failure to sign House Bill No. 41 within five days after adjournment was not fatal to the bill's constitutionality. Sec. 24 states, "The presiding officer of each house, not later than five days following adjournment shall sign all bills. . .". The Court rejected the strict construction of Sec. 24 urged upon it by Defendants and held that the purpose of the presiding officer's signature was to give accuracy and authenticity to legislation and that this purpose was satisfied because the bill's authenticity and accuracy was attested by the journals of each house.

Legislation enacted through means of an electronic device was called into question in Day v. Walker, 124 Neb. 500, 247 N.W. 350 (1933). Art II, Sec. 3 of the Nebraska Constitution which provided that ". . .all votes in either House shall be viva voce. . .and the yeas and nays. . .entered upon the Journal" gave rise to the dispute. In affirming the validity of the legislation, the Court looked to the object to be served by the constitutional proviso, declaring:

> "The journals in this instance show that house bill 56 was duly passed. The yeas and nays were recorded on the journals of the House and Senate. This is a record that complies with the constitutional requirement, and shows that the bill was properly passed. We may not go behind that record. Whether the requisite number of representatives and the requisite number of Senators

> voted for a bill on its final passage is absolutely determined by the House and Senate journals. The record itself, in this case, presupposes that the bill was regularly passed. But, aside from this, the question of whether they should resort to the electric roll call system, or the old-style viva voce voting, is a question entirely within the discretion of the legislative bodies. So long as the system used gives publicity to the member's vote, and his yea or nay vote is properly recorded on the journal, no other requirement in that respect is necessary.

The entry in the Senate Journal in the case at bar contains a precise record of how each member of the Senate voted upon Senate Bill No. 201. It gives publicity to each member's vote. It shows that a yea and nay vote was taken, that every member, except Senator Peterson, was present and that each member present voted "yea."

Plaintiff cites several cases for the proposition that "yeas and nays" requires a roll call vote with the name of each person and how such person voted being entered separately upon the record. Since a roll call vote is not indicated as taken on the final passage of Senate Bill No. 201, Plaintiff contends the lower court erred in declaring it valid. While it is not denied that there are cases which state that a "yea and nay" provision requires a roll call vote, such statements must be construed in light of the facts and discussion of the reasons for a roll call vote contained in those cases.

In To Certain Members of the House of Representatives in the General Assembly, supra, the Court, in refusing to give

an advisory opinion, did suggest that Article IV, Section 8 of the Rhode Island Constitution, requiring the yeas and nays to be entered on the journal at the request of one-fifth of those present, was mandatory and "requires a roll call. . .when proper and timely request is made therefor." However, the Court went on to indicate:

> "This provision is a limitation on the power of the House, in the conduct of its affairs, made by the people themselves and primarily intended for their protection and interest. It also operates as a check or restraint upon majorities and minorities alike, who might be willing to avoid the requirements of this constitutional safeguard. The people, in express and unmistakable language, have reserved to themselves the right to be informed, by means of a permanent and public record, of the actions of their elected representatives, on matters affecting the life, liberty and property of the people under the law."

People v. Chicago and Eastern Illinois Railway Co., supra., declared a resolution invalid where the record merely indicated that 23 supervisors were present, that one was absent, that all present voted "aye" and that none voted "nay". No names of those voting "aye" or of those absent were recorded. As a result, it was impossible for the Court to determine how each supervisor voted. The Court therein did not state a roll call vote was required but only that a record of how each person voted be kept:

> "The vote is required to be by yeas and nays, so that it may be known how each supervisor voted, and that the taxpayers may be able to place the responsibility for the action on the board.
>
> Section 12 of article 4 of the Constitution of 1870 has a provision similar to that of the

section in question here. It is that, 'on the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal.' In Neiberger v. McCullough, 253 Ill. 312, 97 N.E. 660, it is said in regard to this provision:

> 'The Constitution of 1818 provided that each house should keep a journal of its proceedings and publish the same, and that the ayes and noes of the members on any question should at the desire of any two of them be entered in the journal. That was a privilege given to members which could have had no object except to fix responsibility for votes. The Constitution of 1848 contained the same provision for the entry of the ayes and noes on any question at the desire of two members, but made it compulsory that on the final passage of all bills the votes should be by ayes and noes and should be entered on the journal. The provision was included in the present Constitution for the same evident purpose of fixing the responsibility of members of the General Assembly and compelling them to go on record when voting for or against bills.'

It is manifest that this provision was made to apply to the appropriation of money by the supervisors in every county in the state for the same reason: That the supervisors who vote for the levying of taxes and the appropriation of public funds may be compelled to go on record when doing so and may be held responsible for their acts. It has been held, ever since the adoption of this provision in the Constitution of 1848, that it was essential to an act's becoming a law that the journal of each house of the Legislature should show that the act was passed by a yea and nay vote entered on the journal, with the names of the persons voting."

Nothing appears from these cases which would invalidate Senate Bill No. 201 based upon the entry of the vote contained in the Senate Journal.

Plaintiff and Defendants have been able to locate only one case, People v. Chicago & N.W. Railway Co., 396 Ill. 466, 71 N.E.2d 701 (1947), in which it is held that failure to record a specific roll call vote constitutes a violation of the "yea and nay" requirement. This case involved a county commission meeting with all five commissioners present at which a motion was adopted where the record indicated, "Voting Aye 5. Nay none. Carried." The Illinois Supreme Court voided the motion after discussing other cases including People v. Chicago & Eastern Illinois Railway Co., supra., stating:

> "Appellee argues that since the city council record shows all yeas, it is certain that the statute has been complied with. It does not show, however, that the vote may not have been a viva voce vote which the statute does not permit, and so does not show a roll call as is required. It is a rule of general acceptance that the silence in the record of any legislative body as to anything required to be shown is evidence of its nonexistence. Neiberger v. McCullough, 253 Ill. 312, 97 N.E. 660.
>
> The minutes of the council meeting of the city of Sterling, stipulated to here, fall short of mandatory requirements. This court cannot indulge the speculation urged by appellee that the five members of the council noted as present were the five persons voting aye."

This latter Illinois case is not in line with the reasoning and holding of courts of the other states or predecessor courts in Illinois. Its insistence that a viva voce vote is now allowed, although the requirements of legislative accountability and deliberation are satisfied, is unnecessarily strict

and technical and, it is suggested, substitutes the black letter of the law for its spirit.

CONCLUSION

The object of the requirement that ". . .the vote upon the final passage of all bills shall be by yeas and nays and entered upon the journals. . ." is to ensure publicity to the proceedings of the legislature and a correspondent responsibility of the members to their respective constituents. Its policy is sound: It enables the public mind to be enlighten through examination of the journals and prevents plotting and devising schemes in secrecy by requiring votes be ascertained, not upon conjecture, but upon positive facts. The procedure adopted by the Senate to pass Senate Bill No. 201 accommodates the object and policy of "yeas and nays". Any member of the public reading the record on final passage contained in the Senate Journal can, without conjecture, determine the vote cast by each member of the Senate and judge the wisdom of the vote cast. While the mandate of Article VI, Sec. 22 may require a roll call vote to ascertain the "yeas and nays" and thus ensure publicity and responsibility in some instances, it does not so mandate in the instance before the Court.

Respectfully submitted,

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