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Recommended Citation
Brief of Respondent, *Dennis v. Matheson*, No. 15814 (Utah Supreme Court, 1978).
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IN THE SUPREME COURT OF THE STATE OF UTAH

DANNIEL S. DENNIS, RAY NIELSEN, P. LLOYD SELLENEIT, GLEN E. BROWN and RAY S. SCHMUTZ,	)	
Plaintiffs-Respondents	)	
-vs-	)	Case No. 15814
SCOTT M. MATHESON, GOVERNOR OF THE STATE OF UTAH, RICHARD JENSEN, AUDITOR OF THE STATE OF UTAH, and DALE D. WILLIAMS, UTAH FINANCE DIRECTOR,	)	
Defendants-Appellants	)	

RESPONDENTS' BRIEF

Appeal from Judgment
In the District Court of the Third Judicial District
in and for Salt Lake County, State of Utah
Honorable David K. Winder, Judge

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FILED

MAY 10 1978

Clerk, Supreme Court, Utah

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Defendants- Appellants	:	

RESPONDENTS' BRIEF

NATURE OF THE CASE

This is an action brought by five Utah State Representatives seeking a declaration that H. B. No. 48, Appropriation for Low Income Housing by Representative Sherman D. Harmer, Jr. of the 1978 Budget Session of the 42nd Legislature, was unconstitutionally enacted.

DISPOSITION IN LOWER COURT

H. B. No. 48 was declared to have been unconstitutionally enacted

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and to be null and void and of no effect by Judgment dated March 29, 1978.

STATEMENT OF FACTS

The parties submitted this matter to the District Court on stipulat facts. That Stipulation was supplemented at trial by the introduction of copies of the House Journals, the Senate Amendment to H. B. No. 48, and the opinio of the Legislative Counsel.

Plaintiffs would only stress that the failure of the House of Representatives to take a final vote on H. B. No. 48, as amended, and to rec in its journal the vote on motion to concur in the Senate amendment was not th result of clerical error. Even the House Journal for the 20th day reflects that H. B. No. 48 was considered further by uncircling only moments before midnight.

ARGUMENT

POINT I.

THE CONSTITUTIONAL PROVISIONS OF ARTICLE VI, SECTION 22, ARE MANDATORY.

Section 22, Article VI, of the Constitution of Utah provides as follows:

> " Every bill shall be read by title three separate times in each house except in cases where two-thirds of the house where such bill is pending suspend this requirement. Except general appropriation bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed

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> in its title. 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. No bill or joint resolution shall be passed except with the assent of the majority of all the members elected to each house of the Legislature. "

The records shows that the procedure followed in the Utah Legislature is to take a final record vote after concurring in an amendment. In fact, the vote on a motion to concur customarily is, and was in this case, taken by voice vote. An electronic vote is sometimes taken for the purpose of expediting a count. When an electronic vote is taken for the purpose of expediting a count, such as in this case, neither the vote total nor the vote of each individual representative is recorded.

It should be recognized at the outset that the " motion to concur" is the last or final vote taken in the legislatures of many states. There is no constitutional prohibition against the " motion to concur" being the last or final vote in the State of Utah. However, in order that the " motion to concur" be the last or final vote in Utah, compliance must be had with Article VI, Section 22, of the Constitution of Utah. The vote on " motion to concur" would have to be taken by yeas and nays and entered upon the respective journals. Further, that vote would require the assent of the majority of all members elected to each house. In the case of the Utah House of Representatives, a majority of all members elected is 38.

The mandatory nature of constitutional provisions for the journal entry of votes upon final passage has been considered by other courts. In

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County Commissioners of Washington County v. Baker, 141 Md. 623, 119 Atl. 461 (1922), the Maryland Supreme Court held a similar constitutional provision to be mandatory and gave its reasoning by quoting from Cooley's Constitutional Limitations, 6th Ed. at page 168:

> " It is also provided in the Constitutions of some of the states that, on the final passage of every bill, the yeas and nays shall be entered on the journal. Such a provision is designed to serve an important purpose on compelling each member present to assume as well as to feel his due share of responsibility in legislation, and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not. ' The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the journal is to record the proceedings of the house, and authenticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and cannot be dispensed with by the Legislature. ' "
> 119 Atl. 461, 464

Such a provision was also held to be mandatory in State ex.rel. General Motors Corp. v. City of Oak Creek, 49 Wis. 2d 299, 182 N.W. 2d 481 (1971). In that case the Wisconsin Supreme Court considered a number of decisions and then announced the rule supported by the great weight of authority:

> "By the great weight of authority it is held that an enrolled bill will be declared void where the journals fail to show upon final passage thereof a yea and nay vote was taken which together with those voting for and against a measure was spread

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> upon the journals if the constitution so requires. It has been so held in Alabama, Arkansas, Colorado, Delaware, Florida, Idaho, Missouri, Montana, Oregon, Virginia, Wyoming, and in the federal court. For citation of authorities see 40 L.R.A., N. S., p. 19, under heading 'Failure to Record Vote as Constitution Directs.''
> 182 N.W. 2d 481, 492

This Court has considered the mandatory nature of constitutional provisions on at least two occasions. The decision in Ritchie v. Richards, 14 Utah 345, 47 Pac. 670 (1896), is replete with references to the mandatory nature of constitutional provisions. In fact, the Court specifically referred to the restrictions of Article VI, Section 22, as mandatory. The syllabus by the Court reads as follows on page 670:

> " 6. The limitations and restrictions contained in article 6, section 14, 22, 24, and in section 8, art. 7, of the constitution of this state, respecting the enactment of laws, are mandatory and binding upon the legislature. The mandatory provisions of the constitution are conclusive upon all departments of government. Per Bartch, J. Miner. J., concurring. "

Although Article VI, Section 22 has since been amended, this Court recently cited the Ritchie case with approval in Dean v. Rampton, 538 P.2d 169 (Utah 1975). In Dean v. Rampton this Court was concerned with the constitutional requirement that the presiding officer sign all bills within five days following adjournment. In holding that bill to have been constitutionally enacted, this Court looked to the purpose behind the "mandatory" requirement. The Court expressly recognized that any other

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interpretation would permit the frustration of clearly expressed legislative intent by inadvertence or by, in effect, establishing a veto power in the presiding officer. The case of Jensen v. Matheson, No. 15826, to be argued concurrently with this case, is similar to Dean v. Rampton because inadvertence and neglect is again involved. In Jensen v. Matheson the error might be considered as clerical. The possibility then arises that the clear legislative intent could be frustrated by a clerical mistake or by clerical sabotage.

The instant case presents an entirely different situation. No mistake or inadvertence is involved. The House of Representatives followed its own recognized procedure and simply did not reach a final vote on H.B. 48 before midnight on the 20th day. This is reflected in the journal by the absence of any vote total or individual votes after Senate amendment.

In Hansen v. Jensen, Case No. 15433, filed September 30, 1977, this Court considered the same constitutional provision. The Court looked to the purpose for recording votes in the journal and held that compliance was had when the vote of each individual senator could be ascertained from the journal.

In this case, the vote on motion to concur was the last vote taken (except to circle and uncircle), and with respect to that vote, the house journal is silent. Constituents will know how their

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representatives voted only if the journal entry requirement is held to be mandatory. The Constitution of Utah by Article I, Section 26, expressly states that its provisions are mandatory:

> "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

POINT II.

FINAL PASSAGE OF A BILL OCCURS AFTER THE BILL IS IN ITS FINAL FORM AND AFTER ANY AMENDMENTS.

The record clearly shows that no vote was taken on H. B. No. 48 after the motion to concur, except to circle and later to uncircle. If the vote on motion to concur was considered as the vote on final passage, the constitutional requirement that the vote be taken by yeas and nays entered upon the journal would clearly not be met. The only alternative is to consider the initial vote taken by the House, prior to amendment by the Senate, as the vote on final passage. The defendants apparently urge such an interpretation upon this Court.

Since similar references to "final passage" are common in state constitutions, other states have been faced with this same issue. The better reasoned decisions hold that the initial vote taken by the originating house does not constitute final passage where the bill is subsequently amended by the other house. One such decision clearly

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defining " final passage" is <u>Minnehaha County v. South Dakota State Board of Equalization</u>, 176 N. W. 2d 56, 59 (S.D. 1970):

> "... Final passage of a bill occurs in either House when it receives the required vote taken by the ayes and nays on roll call following last reading of a bill, for there is nothing further for that House to do relative to it other than transmit it to the other House for its consideration and if that House approves it as passed in the other by the required vote and record, that is not merely final passage in that branch but " final passage" of the bill because it has passed both Houses in the same form and there is nothing further for either of them to do to complete it. But in case the House to which it is transmitted amends it and returns it to the House in which it originated, it is clear that concurrence by this House completes the passage of the bill and this act is " final passage" within the meaning of Art. III, Sec. 18... "

If the initial vote before Amendment was considered as " final passage" the mandatory provisions of Article VI, Section 22, would be circumvented. The potential abuses become obvious when the cases are considered.

In <u>Roane Iron Co. v. Francis</u>, 130 Tenn. 694, 172 S. W. 816 (1915), the initial vote taken by the Senate obtained the necessary 17 votes for a constitutional majority, but the vote on acceptance of the conference committee report received only a majority of the votes cast and not a constitutional majority. In holding the particular bill to have been unconstitutionally enacted, the Court said:

> " We are of the opinion that the object of the makers of the Constitution was to require the assent of such a constitutional majority to all of the provisions of the act on passage-- not merely or necessarily the third passage. The third passage of

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> the bill under review by the Senate was not its final passage, since it was amended to make it satisfactory to the House. *** If the contrary be true, and the Senate needed only to make the report of the conferees (with its amendment for the first time sought to be imported into the measure) the action of the upper branch by a majority of a quorum, it is easily to be seen that the solemn mandatory check of the Constitution may be subverted by a resort to a parliamentary trick..."
> 172 S.W. 816, 816,817.

In Cox v. Stults Eagle Drug Co., 42 Ariz. 1, 21 P.2d 914 (1933), the Arizona Supreme Court considered an emergency measure which required a two-thirds vote. The initial house vote carried with two-thirds in the affirmative. However, the concurrence in the Senate amendments received only a bare majority. The bill was declared unconstitutional. A contrary decision would have permitted the bill, as amended, to pass without the constitutional two-thirds vote.

> "... But in case the House to which it is transmitted amends it before passing it on third reading and as amended returns it to the House in which it originated, it is clear that concurrence in the amendments by this House completes the "final passage" within the meaning of the Constitution"
>
> "... But those decisions which hold that concurrence by the House in which a bill originates and is passed with the amendments made by the other House constitutes "final passage" announce, as I see it, the better rule, because they are based on the situation that actually exists and on reason so sound that it is unanswerable..."
> 21 P. 2d 914, 915

In Caples v. Cole, 129 Tex. 370, 102 S.W. 2d 173 (1937), the original House vote was taken by voice vote without being recorded in

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the journal. However, the concurrence in a Senate amendment by the Hou[se] was properly taken by yeas and nays. The bill was thus upheld. If the initial vote had been considered as " final passage", there would have bee[n] no supporting journal entry.

> " ... It is clear that the object of the provision of the Constitution above quoted is that if a bill is to take effect immediately on its passage, it must contain an emergency clause and such bill must be passed by a vote of two-thirds of all the members elected to each house, and such vote to be taken by yeas and nays and entered upon the journals. We think the rule prescribed by the Constitution also applies to amendments and reports of conference committees. If this were not true, it is quite obvious how the rule could be abused. A harmless bill might be passed in its inception by the requisite vote, and then be radically amended and such amendments be put into immediate effect without the vote required by the Constitution. If such were the rule, the vote on the original bill would control as to whether it became a law immediately after its final passage, and not the final vote subsequently taken on the amendments placed thereon by the other branch of the Legislature, and the plain provision of the Constitution requiring that it be adopted by a vote of two-thirds of all the members of each house, in order to declare an emergency, could be evaded. "
> 102 S. W. 2d 173, 195

In <u>County Commissioners of Washington County v. Baker</u>, 141 Md. 623, 119 Atl. 461 (1922), the bill was initiated in and passed by the House. The bill was later amended by the Senate and still later amended again by a conference committee. The bill as finally amended was passed by the House. However, the bill, as amended, was not given further actio[n] by the Senate. If the Maryland Supreme Court had considered the initial Se[nate] vote as constituting " final passage", the bill, as amended, would have

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been valid without any Senate action whatsoever.

The facts of Norman v. Kentucky Board of Managers of World's Columbian Exposition, 93 Ky, 537, 20 S.W. 901 (1892), are substantially identical to the facts in the instant case. The bill there originated in the Senate and was passed by that body upon the proper vote entered upon the journal. The bill was then amended by the House and passed by the proper vote entered in its journal. However, when the bill came back to the Senate, amendments were concurred in without a yea and nay vote, and without the vote of a majority of the members elected. The Kentucky Supreme Court held that bill to have been unconstitutionally enacted. If that case had been decided otherwise, and similarly if H.B. No. 48 is held to be constitutional, the effect would be the approval of that act as amended by less than a constitutional majority and without the votes being entered on the journal. The reason behind the constitutional requirement, to hold legislators accountable for their votes, would thus be defeated. The object of recording votes in the journal is appropriately illustrated by the language of the Kentucky Supreme Court:

> " ... The words ' final passage', as used in our constitution, mean final passage. They do not mean some passage of a part of a bill, or what is first introduced, and which may, by reason of amendment, become the least important. If so, then the body may pass what is practically a new bill in a manner counter to both the letter and spirit of the constitution. When the bill was voted on in the senate, as amended, and after its returnfrom the house, there never was any further action by the senate. It was the

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final vote, and therefore its final passage; and, being so, a majority vote of all the members elected, with an entry by yea and nay vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two houses and by the governor, never was passed by the senate, by a majority of all its members, nor by a yea and nay vote."
20 S. W. 900, 902

"... It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the constitution. It complied with it in neither letter nor spirit. The object of the section above cited was to have the assent of a majority of all the members elected to each house to all the provisions of the act, and that this should appear by a yea and nay vote entered upon its journal. If a bill, after passing one house in the proper manner, and then, after amendment, passing the other house in like manner, could come back to the house in which it originated, and be adopted by a majority of those voting, or a quorum, it would defeat this object, and render the section ineffectual. Let us look at it practically. An appropriation bill of $100.00 originates in the senate, and is properly passed. It goes to the house, where it is amended by making the sum $10,000, and is then properly passed by it. It returns to the senate for concurrence, and is adopted as amended, by a majority of those present, without a yea and nay vote. Can it be well contended that this would be a compliance with the constitution?..."
20 S. W. 900, 902

POINT III.

THE JUDGMENT IS SUPPORTED BY FACTS PROPERLY BEFORE THE COURT.

In this case the parties entered into a Stipulation containing certain relevant facts. It is obvious that the source of some facts was neither the enrolled bill nor the House Journal. In the companion case of

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Jensen v. Matheson, Case No. 15826, the source and admissibility of evidence will likely be determinative. However, in this case, the judgment is clearly supported by reference to only those facts or the evidence found in House Journals.

There are basically three alternative sources of evidence. The " enrolled bill doctrine" does not permit the court to look beyond the enrolled bill-- not even to the legislative journals. The " affirmative contradiction rule" takes a middle position and allows reference to the legislative journals. A third rule would permit reference to other legislative sources.

A review of the authorities will soon disclose that there exists a great diversity of opinion among the courts as to what evidence is admissible to impeach the validity of a statute. 82 C.J.S., Statutes, Sec. 85; 1 Sutherland, Statutory Construction, Sec. 15.04 et. seq. (1972) To this writer there appears to be a trend towards more liberal admission of evidence. Nevertheless, in 82 C.J.S., Statutes, Sec. 85 at page 141, the general rule is given as follows:

> "Broadly speaking the courts agree that as a general rule extrinsic evidence other than legislative journals is inadmissible to impeach the validity of a statute."

The Utah Supreme Court directly ruled on this issue in 1896. At that time, in Ritchie v. Richards, 14 Utah 345, 47 Pac. 670 (1896), this Court decided between the " enrolled bill doctrine" and the " affirmative contradiction rule." This Court adopted the latter rule and held it proper to

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take judicial notice of the legislative journals. The Ritchie case was cited with approval in Dean v. Rampton, 538 P. 2d 169 (Utah 1975), for the proposition that the legislative journals were a proper source of evidence. In Ritchie, this Court stated the " affirmative contradiction rule" as follows on page 676:

> " ... and if, in such case, it should affirmatively appear upon the journals or either of them, that in passing the act the legislature had disregarded a mandatory provision of the constitution, the court would be justified in holding the same unconstitutional and void. If, however, the journals are merely silent as to the subject under investigation, then the presumption that the legislature acted according to its delegated power should prevail, unless an omission of some matter which the constitution expressly requires to be entered therein be shown by such journals or either of them. ... " (emphasis added)

Although the " affirmative contradiction rule" as stated by the Court appears to consider all constitutional provisions as mandatory, it clea[r]ly draws a distinction between those matters required to be entered in the journals and those matters not specifically required to be entered in the journals. In Utah, the only proceeding specifically required to be entered in the legislative journals is the "... vote upon the final passage of all bills... by yeas and nays... ". From the " affirmative contradiction rule" as stated by this Court, it is clear that silence of the journal as to mandatory constitutional provisions is not fatal unless compliance with that constitutional provision is specifically required to be entered in the journal.

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This aspect of the " affirmative contradiction rule" is similarly stated by authorities.

> "Mere silence of the legislative journals in respect of a particular matter is insufficient to overcome the presumption that an act was validly passed, unless the matter is one mandatorily required to be recorded in the journals, in which case their silence on the subject will result in invalidating the act. "
> 82 C.J.S., Statutes, Sec. 89b, P. 148

* * * *

> " If the constitution requires certain proceedings in the process of legislation to be entered in the journal, the entry is a condition necessary to the validity of the act. The most frequent requirement is the recording of the vote on final passage of a bill, together with the names of those voted. This provision must be strictly complied with and no presumption that the required vote was given will arise if the journal is silent. It must affirmatively appear in the journal that there has been a compliance with the constitutional provision. "
> 1 Sutherland, Statutory Construction, Sec. 15.13, P. 425 (1972)

In this case the contemplated vote on final passage was never taken because time ran out. But even if the vote on motion to concur was considered as final passage, there would still exist no journal entry showing the individual votes or the vote total. This omission of a matter constitutionally required to be entered in the journal can be ascertained from the House Journal without resort to other evidence. Neither the vote total nor the vote of each individual representative appears at page 33, or elsewhere, in the House Journal for the 20th day. On this basis alone, the Judgment can be sustained.

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Reference to the vote total from a private journal and to the transcript merely point out the potential abuse in not following the constitutional mandate and more clearly show that the failure of H.B. 48 was not due to clerical error.

This Court has held on numerous occasions that a judgment under review should be affirmed if it is sustainable on any proper legal ground apparent from the record whether or not the trial judge gave the correct reason for his ruling. Rasmussen v. Davis, 1 Utah 2d 96, 262 P.2d 488 (1953); Foss Lewis & Sons Constr. Co. v. General Insurance Company of America, 30 Utah 2d 290, 517 P. 2d 539 (1973); Edwards v. Iron County, 531 P.2d 476 (Utah 1975)

CONCLUSION

This suit was brought for the purpose of clarifying legislative rules and procedure. It is imperative that legislators know the status of bills at all times, and particularly upon adjournment sine die. Neither having bills struck down on technicalities after adjournment nor having bills rise from the ashes after adjournment, like the legendary Phoenix, contribute to good government. This Court should fashion a rule which will assist the Legislature in the orderly conduct of its business.

Respectfully submitted,

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