

Judicial Interpretation of Constitutional Limitations on Legislative Procedure in Ohio

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Of prime importance in enacting a legislative bill into law is the question of whether or not the bill as enacted will stand up under judicial scrutiny when its validity is attacked in court. The validity of a statute is generally questioned on the ground of some constitutional defect under the federal or state constitution depending on the circumstances and may either be a matter of substance or procedure. It is the purpose of this paper to examine the problems involved from a procedural point of view as they have arisen in the State of Ohio.¹

The fundamental questions are (1) the attitude of the courts when they are requested to look behind the enacted bill to discover defects in its passage, and (2) in any event, if defects are alleged to exist, whether such defects will be considered by the court in determining the validity of the measure.

By way of introduction into the first above mentioned question it may be stated that the conflict is between the enrolled bill itself as precluding any further search of the records and the journal kept by the legislative body of its activities as the controlling instrument. The words "enrolled bill" have accumulated many shades of meaning but in general they refer to a bill which has been passed by both houses of a legislature and signed by the presiding officers thereof. Such may also include the signature of the governor and the filing of the bill with the secretary of state.² As to the journal in Ohio, it is a constitutional requirement and must be published.³

Throughout this country, the courts have adopted various theories in approaching the question of the validity of a statute.⁴ One such view is that the enrolled bill is conclusive and no evidence will be admitted to show that required procedure was not followed in its passage or that the contents of the enrolled bill differ from the contents of the bill as passed by the legislative body. A second view holds that the enrolled bill is *prima facie* correct and only when the legislative journal affirmatively shows an omission of a

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¹ The problems under discussion here are not peculiar to Ohio. For informative matter as to other jurisdictions see the following secondary sources: 46 MICH. L. REV. 989 (1948); 32 IOWA L. REV. 147 (1946); [1941] WISC. L. REV. 439, 15 NEB. L. BUL. 233 (1937); 21 IOWA L. REV. 538 (1936); 3 ROCKY MOUNTAIN L. REV. 38 (1936).

² SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 1401 (3rd 1943).

³ OHIO CONST. Art. II § 9.

⁴ Ritzman v. Campbell, 93 Ohio St. 246, 112 N.E. 591 (1915); SUTHERLAND, *supra* § 1402.

constitutionally-required procedural step will the enrolled bill be invalidated. Still another theory holds the enrolled bill is prima facie correct but evidence from the journal or from any other reliable source may be offered to show that the requisite procedure was not followed or that the enrolled bill differs in content from the bill as passed. A fourth and last view holds that the bill is valid only if the requisite steps are shown by the journal to have taken place.

In Ohio, the leading case of *Ritzman v. Campbell*⁵ established the enrolled bill theory as to the contents of a measure and handed down a dictum that went almost that far as to procedural requirements. In this case the court said⁶:

Meanwhile an enrolled bill bearing the solemn attestation that it was signed by the presiding officers of each house while the same was in session and capable of doing business, and which thereafter was presented to and signed by the Governor and by him filed with the Secretary of State, must, if the legislative journal shows it to have received the necessary constitutional majority be considered to be what it purports to be, and not under any circumstances subject to impeachment as to its contents or the mode of its passage.

It will be noted that the court provided an exception as to procedure, indicating that the journal must show the bill received the constitutional majority. Authority for this approach developed out of the earlier case of *Fordyce v. Goodman*⁷, which held that when the question of whether a bill has been passed by the requisite number of legislators is raised, the journals are proper evidence to determine the answer. While this represents an apparent deviation into another theory mentioned earlier, the court offered a very practical justification, pointing out that to hold otherwise would open the door for presiding officers to enact a bill without the proper vote. Further, until the journal itself is produced to show that the requisite number of votes was not received, the enrolled bill will be presumed to have received the required constitutional majority.⁸

Occasionally a question arises as to the authoritativeness of the certified copies of the enrolled bills published in the volumes of Ohio Laws under the authority of the secretary of state. Such copies are prima facie evidence of the law and may be controverted by reference to the enrolled bills¹⁰ but not to the journals of the

⁵ *Ritzman v. Campbell*, *supra*.

⁶ *Ritzman v. Campbell*, *supra*, at 263.

⁷ *Fordyce v. Goodman*, 20 Ohio St. 1 (1870).

⁸ *Hilton v. State ex rel. Bell*, 108 Ohio St. 233, 140 N.E. 681 (1923); *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 384 (1857).

⁹ *State ex rel. Rogers v. Price*, 8 Ohio C.C. 25, 4 Ohio C.D. 296 (1893).

¹⁰ *State v. Groves*, 8 Ohio St. 351, 88 N.E. 1096 (1909).

legislature.¹¹

Turning now to the second question involved in this discussion, namely, what limitations the court will consider in testing the validity of a bill, the law of Ohio seems clear. The Constitution of the State of Ohio provides for the reading of a bill fully and distinctly on three different days, unless this provision is properly waived.¹² As to this provision, the court will not travel behind the enacted bill to see if compliance therewith has been had, holding this provision to be merely directory in its nature and not mandatory upon the legislature.¹³ This last statement was made concrete in the later case of *Tim v. Nicholson*¹⁴ which dealt with the constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title.¹⁵ This limitation was held to be intended only as a permanent rule for proceedings in the legislature and therefore directory. The court said it would not be considered in determining the validity of the bill. The safeguard suggested by the court was the legislators' regard for and their oath to support the constitution of the State.

However, as to other provisions they have been labeled as mandatory,¹⁶ which in effect is saying that non-compliance will result in invalidating the bill.

The Ohio Constitution provides that no law shall be passed in either house without the concurrence of a majority of each House's members.¹⁷ This is clearly a mandatory limitation on the legislature.¹⁸

Presentment of a bill to the governor for his approval and the subsequent filing of a bill which is subject to referendum with the secretary of state are of a similar import.¹⁹

In the case of *State v. Kiesewetter*²⁰ the court held section 17 of Article II of the Constitution of Ohio was mandatory and there-

¹¹ *Ritzman v. Campbell*, *supra*, note 4. Contrary expressions in early lower court cases are, of course, without authority. See *State ex rel. Rogers v. Price*, *supra*, *Burke v. Cincinnati*, 10 Ohio Dec. 542 (1900).

¹² OHIO CONST. Art. II § 16.

¹³ *Miller and Gibson v. State*, 3 Ohio St. 475 (1854). *But see Bloom v. Xenia*, 32 Ohio St. 461 (1877).

¹⁴ *Tim v. Nicholson*, 6 Ohio St. 176 (1856); *Ohio ex rel. Atty. Gen. v. Covington et al.*, 29 Ohio St. 102 (1876); *Seeley v. Thomas*, 31 Ohio St. 301 (1877); *Weil v. State*, 46 Ohio St. 450, 21 N.E. 643 (1889); *Jones v. County Commissioners et al.*, 2 Ohio C.C. (N.S.) 14, 15 Ohio C. D. 510 (1903).

¹⁵ OHIO CONST. Art. II § 16.

¹⁶ *Ritzman v. Campbell*, *supra*.

¹⁷ OHIO CONST. Art. II § 9.

¹⁸ *Ritzman v. Campbell*, *supra*; *Fordyce v. Goodman*, *supra*.

¹⁹ *Werde v. Richardson*, 77 Ohio St. 182, 82 N.E. 1072 (1907) (As to presentation to governor).

²⁰ *State v. Kiesewetter*, 45 Ohio St. 254, 12 N.E. 807 (1887).

fore the presiding officers of each house must sign the bill publicly in the presence of the house and while it is in session and capable of doing business, or the bill is invalid and open to attack. As a practical matter, due to time limitations on the printing of bills, each House of the General Assembly oftentimes meets in skeleton session in order that this requirement may be met, without keeping the entire membership present for such purpose. Inasmuch as no roll call is taken on these days, the journal affirmatively fails to reflect the absence of a quorum, and it is problematical as to whether any court would question the procedure.

Directly related to this problem and necessary to a more complete understanding is the theory of the court concerning impeachment of the journal, or what evidence the court will admit in order to establish the facts as they differ from those reported in the journal.

In the interesting case of *Wrede v. Richardson*²¹, the court allowed reference to be made to (a) the "Minute Book" kept in the governor's office, (b) to receipts given by the governor's clerk, and (c) to a statement written on the enrolled bill itself to show that the bill in question has been presented to the governor and had become a law without his signature. The court, in this case, refused to admit the testimony of witnesses to the effect that the governor had not been presented with the bill and that he had been ill and had not been at his office at the time the bill was allegedly presented to him. The court was of the opinion that the Minute Book was admissible because it was kept, like the legislative journal, in accordance with law. The protection of the governor's daily record here is in line with the general rule applying to the journal; namely, that it cannot in cases of legislative procedure be impeached.²²

Outside the realm of legislative procedure, the journal has been the subject of two important cases. The first case, *State ex rel. Loomis v. Moffitt*²³, decided in 1832, came up on a writ of quo warranto to test the authority by which one Moffitt undertook the duties of a judgeship. A direct attack was made on the legislative journal, and the court held that the journal could not be contradicted by the parol evidence of one individual member, the journal being the action of the whole body and not of a single member. The doctrine of the *Moffitt* case was departed from in *Harbage v. Tracy*²⁴, decided in 1937. In this case, the journal indicated that

²¹ *Werde v. Richardson, supra.*

²² *State ex rel. Rogers v. Price, supra; State ex rel. Herron v. Smith, 44 Ohio St. 348, 7 N.E. 447 (1886).*

²³ *State ex rel. Loomis v. Moffitt, 5 Ohio 358 (1832).*

²⁴ *Harbage v. Tracy, 24 Ohio L. Abs. 553 (1937), aff'd. 64 Ohio App. 151 (1939), app. diss'd. 136 Ohio St. 534 (1939).* For a complete discussion of this case, see 5 OHIO ST. L. J. 213 (1939); 25 MINN. L. REV. 528 (1941).

the legislature had been in session during a particular period, when in fact it had not. The court permitted the journal to be impeached by extrinsic evidence saying,²⁵:

. . . we are of the opinion that such a manifest misstatement of facts cannot be shielded from scrutiny which would develop the truth by the claim that the journals of the two houses may not be impeached.

In the light of these decisions, it would seem to be a fair conclusion that the general rule of not permitting the legislative journal to be impeached still exists, but an exception will be made if manifest fraud is made known to the court.

SUMMARY

One may well inquire as to the grounds upon which the Ohio Courts have accepted the enrolled bill theory in preference to the others. The court, in the *Ritzman* case²⁶ stated that practical considerations made this the only wise rule. At the end of every legislative term literally hundreds of bills are passed and presented to the enrolling clerks who are compelled to work under exhausting pressure. Under these circumstances there are bound to be some discrepancies between the bills which are passed and the bills as they are actually enrolled. To look behind the enrolled bill would result in the invalidating of a great many statutes and it is doubtful if any useful public purpose would be served.

As to the second view, holding the journal conclusive if it affirmatively shows the omission of a step, it appears to be an unworkable solution. The journal will seldom if ever affirmatively indicate an omission.²⁷

The third approach permitting evidence from the journal and any other reliable source to impeach the enrolled bill, is the most liberal view and while not the law in Ohio, it is gaining favor.²⁸

To hold the journal conclusive, and the bill valid only if the requisite steps are shown to have been taken on its face is the most unworkable of all the theories. This fact was recognized by the court in the *Miller* case,²⁹ in which the court said:

If a strict, literal compliance with every constitutional requirement, however, minute, is necessary to the validity of a law, and the courts are bound to hold that nothing was done but what appears in the legislative journal, it is easy to demonstrate that not a single statute enacted since the constitution took effect can be upheld.

²⁵ *Harbage v. Tracy*, *supra*, at 162.

²⁶ *Ritzman v. Campbell*, *supra*.

²⁷ Ohio cases *supra*, will for the most part bear this out, except as to the requirement that the statute must have received the majority of votes set forth by the constitution.

²⁸ *SUTHERLAND*, *supra*, § 1402.

²⁹ *Miller v. State*, *supra*, at 481.

On final analysis, it seems that the Ohio courts have accepted the most workable solution available, admitting that human beings do err, and have made the theory flexible enough to permit exceptions when sound reason demands.

In dividing the constitutional limitations into directory and mandatory classifications, the courts have done so on their own authority, there being nothing in the constitution to indicate any difference. It appears that the courts have made directory those limitations which are not inherently essential to the validity of a bill, and have at the same time maintained the dignity of the constitution, by putting the legislators on their honor. To those who would argue that the constitution ought to be followed to the letter, it might be said that the realistic approach of the courts gives the words of the constitution a workable interpretation and is therefore preferable.

Over all, the law of Ohio concerning these problems generally is comparatively clear and definite. The decisions have created a workable framework which permit legislator and practitioner alike to understand and cope with legislative procedure in Ohio.