Opinion No. 64-40

March 25, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Clay Buchanan, Legislative Council, Santa Fe, New Mexico

QUESTION

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Does the Supreme Court of New Mexico look behind an enrolled and engrossed bill which has been signed by the presiding officers of each house and approved by the governor to determine whether the bill was actually passed and signed in conformity with constitutional requirements? That is, will it look to the journal of either house, or perhaps to other evidence outside the record, in making such determination?

CONCLUSION

Generally speaking, no, but see summarization at the conclusion of this opinion.

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ANALYSIS

In answering your questions, we can only examine the New Mexico cases on this general subject and advise what our Supreme Court has held and said in the past. While stare decisis is a fundamental principle in our system of jurisprudence, we cannot be so presumptuous as to state what our Supreme Court would hold under a given set of circumstances.

The first case after the adoption of our State constitution involving the questions here presented was **Earnest v. Sargent,** 20 N.M. 427.

The basic issue involved was whether a certain bill had or had not passed within the constitutional time limit. The bill in question had passed on the last day of the session and under Article IV, Section 14, adjournment of the legislature at twelve o'clock noon on that day was mandatory.

Those arguing against the validity of the enactment contended that the bill did not actually pass until 12:40 p.m., on the sixtieth (and thus the last) day of the legislative session. The Court did look behind the enrolled and engrossed bill to the Senate journal, stating:

"We have examined the journal, and find no evidence therein of any kind or character to corroborate this proposed proof, but, on the contrary, the journal shows that all the proceedings were concluded before the close of the sixtieth day of the session, including the passage of House Bill No. 294, by a two-thirds yea and nay vote, the objections of the governor thereto notwithstanding."

The Court went on to say that even if it was admitted, for the sake of argument, that House Bill 294 did not pass over the governor's veto until sometime after noon on the sixtieth day of the session, "the consequences of allowing proof of that fact to contradict the journal would be so far-reaching and disastrous as not to be countenanced or tolerated."

The Court went on to note that the time shown on various watches is not uniform, that it is a matter of common knowledge that legislatures sometimes do continue their sessions beyond the time fixed for adjournment, and that the legislative body has the power and right to determine for itself when the moment of time has arrived for adjournment and to make its journal conform to what it determines to be that moment of time.

Thus the Court concluded that when the legislature writes in its journal that all business has been completed before the moment of time for adjournment had arrived "it shall not be contradicted by the evidence of witnesses."

The Court did leave an area of the total question open to subsequent determination, stating:

"It may be that an exception to this rule might be found upon a gross and flagrant violation of the constitutional restriction as to the length of the legislative session, but we have no such case before us here."

The Court pointed out that the validity of the bill was attacked because it purportedly was passed forty minutes too late. Even if true, the Court said, this shows that the legislature was attempting to finish its business and there was no willful or fraudulent purpose to unduly extend the session beyond the constitutional restriction.

The next, and perhaps the most definitive, case dealing with this problem area was **Kelley v. Marron,** 21 N.M. 239, wherein the validity of certain bills was challenged on the ground that Article IV, Section 20 had not been complied with. This is the Section which requires that:

"Immediately after the passage of any bill or resolution, it shall be enrolled and engrossed, and read publicly in full in each house, and thereupon shall be signed by the presiding officer of each house in open session, and the fact of such reading and signing shall be entered on the journal."

The bills in question were signed by the respective officers of each house, and the fact of such signing appeared in the journals. However, it did not appear from the journals that the bills were read in full in each house after being enrolled and engrossed.

At the outset the Court noted that there is an irreconcilable conflict among the decisions in the various states upon such questions. The Court classified the various decisions as follows: (1) Those holding that the enrolled act, duly signed by the presiding officers of each house and approved by the governor and lodged with the secretary of state is conclusive and cannot be shown to be invalid by reference to the journals. (2) Those which hold that the enrolled act, thus signed, approved and deposited with the secretary of state is not conclusive, but that the legislative journals can be examined to see whether the act has been constitutionally passed. These decisions hold that the failure of the journal to **affirmatively show** that a constitutional provision was complied with is equivalent to a statement that it was not, and hence is fatal to the bill. (3) Those which hold that the duly enrolled, engrossed and approved act is not conclusive and that the journals may be examined for certain purpose. These decisions hold that the act is invalidated only when the journals affirmatively show that the act has **not** been constitutionally passed. (4) Those decisions based on the peculiar language of the particular constitutional provision involved. An example would be a decision which held that a failure of the journal to show compliance with a constitutional requirement would not invalidate the act unless the constitution directs that such compliance must be entered in the journal.

One Supreme Court said that public policy, reason and logic all support the first proposition above, namely, that the Court will not look behind the properly authenticated bill to the journal for the purpose of ascertaining whether all the constitutional provisions relative to enactment have been complied with. The Court pointed out that the other alternatives cause uncertainty in that endless litigation would ensue before it could be definitely known whether a given act had been constitutionally enacted.

Remembering that in the case of **Earnest v. Sargent,** supra, resort has been made to the journal, the Court distinguished the situation there present on the ground that since the **Sargent** case involved a determination as to whether the bill had been passed over the governor's veto, it was necessary to ascertain whether the act had received the required concurrence of two-thirds of the members present and voting in each house. The Court pointed out that neither the constitution nor the statutes make any provision for the certification of a bill passed over the veto of the governor, and consequently the Court was **compelled** to examine the journal for proof of passage of the act.

In the case of **Smith v. Lucero,** 23 N.M. 411, the issue was whether a House Resolution proposing a constitutional amendment had received the requisite number of votes. The journal indicated that it had not. On the other hand the resolution had been enrolled and engrossed, authenticated and filed with the secretary of state. In discussing the preference which is to be given to the two apparently opposing proofs the Court said:

"It will be sufficient to say that in view of the policy established by the constitutional convention as appears in the articles set out above, the enrolled and engrossed resolution is to be given controlling force in the determination of this matter."

It was argued that the decision in the **Kelley-Marron** case went too far and that the rule should be as follows: Where the journal fails to show a compliance with the procedural requirements, the enrolled and engrossed bill or resolution must prevail, but where the journal **affirmatively shows a departure** from constitutional requirements, the enrolled and engrossed bill or resolution is to be declared invalid. The Court in answer, simply said it would continue to follow the doctrine enunciated in the **Kelley-Marron** case.

In the case of **State v. Hall,** 23 N.M. 422, the validity of a bill was challenged on the ground that it had been introduced after the constitutional deadline then provided in Article IV, Section 19. The Court again held that the question was foreclosed by the Kelley-Marron decision.

The most recent New Mexico case dealing with the questions here involved is **Thompson v. Saunders,** 52 N.M. 1 (1948) wherein the validity of an act was challenged on the ground that the enrolled and engrossed bill was not read publicly in each house and signed by the presiding officers in open session. The trial court found and the Supreme Court agreed, that the enrolled and engrossed bill had been duly signed by the officers of each house, approved by the governor and deposited with the secretary of state within the authorized time limit. It also agreed with the trial court that the Senate journal did not show that the bill was either read in full or that it was signed in open session. Having so determined, the Court noted that this brought the case squarely within the Kelley-Marron rule.

Even so, it was urged upon the Court that it should look to the journal to ascertain whether the bill had been **signed** and **certified** as required by the constitution. In answer to this contention the Court said:

"If, as in Smith v. Lucero, supra, where the journal affirmatively showed that a proposition did not receive the required majority, it was held that we could not look beyond the enrolled and engrossed bill, by what reason may mere silence of the journal be permitted to impeach it? We fail to appreciate the distinction. In any event, the question is foreclosed by the decisions of this court."

The Court, in discussing decisions from other jurisdictions, did mention another facet of the general question here involved, and at least tacitly indicated that such may be the doctrine in this jurisdiction. This principle is that even where the enrolled and engrossed bill doctrine is applied, such enrolled and engrossed bill must not **itself** establish or show noncompliance with constitutional requirements. This could be the case in some instances. For example, the enacting clause required by Article IV, Section 15, might be omitted from the enrolled and engrossed bill. Or there might be interlineations or erasures on the enrolled and engrossed bill which have not been properly certified as required by Article IV, Section 20.

In summary, our research discloses as follows:

1. As a basic general rule in this jurisdiction the enrolled and engrossed bill, signed by the proper officers of each house, approved by the governor and filed in the office of the secretary of state is the best evidence of its regularity and authenticity and is **conclusive** that all constitutional procedural requirements have been complied with in its enactment.

2. Since there is no provision for certification of a bill which is passed over a gubernatorial veto, use probably may be made of the journal to determine whether the bill received the required two-thirds vote. **Earnest v. Sargent,** supra; **Kelley v. Marron,** supra.

3. The general rule enunciated under number one above probably does not apply when the enrolled and engrossed bill **itself** manifests that certain constitutional requirements have not been complied with.

4. It may be, as stated in **Earnest v. Sargent,** supra, that an obvious, gross and flagrant violation of the constitutional mandate as to when the legislative session must adjourn would create an exception to the general rule enunciated under number one above, even to the extent of hearing the testimony of witnesses. However, in order for such an exception to be made, if indeed it can be at all, it would have to be shown that there was a "willful or fraudulent purpose on its (legislature's) part to unduly extend the session beyond the constitutional restriction." **Earnest v. Sargent,** supra.

In concluding this opinion, we wish to make it clear that this office has never advised the legislature that it could not "stop the clock" or that if it did, bills enacted thereafter would be invalid. We have advised only that in some jurisdictions the Courts have so held.

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