Opinion No. 80.

Constables—Salary—Statutes, Enactment of—Legislative Assembly, Examination of Journals.

HELD: Where the House Journal shows that amendments proposed by a Joint Committee on Conference were regularly adopted by a majority of the members of the House, and where the Senate Journal fails to disclose that the report of the committee on conference was ever submitted to that body, a law may not be attacked on the ground that is was irregularly passed, for the reason that the vote on the adoption of a conference committee report or on amendments adopted by another house is not a "vote on final passage" and courts may only examine the journals to determine whether the aye and no vote was recorded upon final passage. Chapter 152, Laws of 1935, providing for fees and salaries of constables is not vulnerable to attack upon that ground.

April 17, 1935.

Hon. Harry Meyer
State Senator
Butte, Montana

I have your letter of March 30, relative to Chapter 152, Laws of Montana, 1935.

We have been requested to render an opinion as to whether or not the provisions of this chapter, which provide for the payment of a salary to constables in townships having a certain population, apply to incumbent constables. We have prepared an opinion in which we held that under Article V, Section 31 of the Constitution of Montana, these provisions do not apply to incumbent constables. This opinion has not yet been issued however, but as soon as it has, I shall be glad to see that a copy of it goes forward to you.

As you requested in your letter of March 30, we have followed the history of this bill in both the Senate and House Journals.

The amendment to Section 4932, R. C. M. 1921, made in the bill as introduced, was as follows: "That constables in townships having a population of 10,000 people and not exceeding 20,000 people, shall each receive a salary of $900.00 per annum, payable monthly from the county treasury. Constables in townships having a population of more than 20,000 people shall each receive a salary of $1,500.00 per annum, payable monthly from the county treasury, and constables in such townships shall receive no other fees for civil suits or criminal actions except mileage in the performance of their duties. Any such fees received by the constables shall be turned over to the County Treasurer."

The bill passed the House without amendments and was referred to the Senate.

On February 20, the following report of the Committee of the Whole in the Senate was adopted: "That House Bill No. 76 be amended in Section 1 by striking out in line 42, the figures '10,000' and inserting in lieu thereof the figures '12,000'; and, as so amended, recommend said House Bill No. 76 be concurred in."

The bill as amended was then passed on third reading and sent back to the House and the House refused to concur in the Senate amendment; thereupon a Conference Committee was requested and appointed.

On March 1, 1935, we find the following entry in the House Journal:

"Mr. Speaker:

"We, your Committee on Conference of House Bill No. 76, beg leave to report as follows:

"Amend Section 1 by inserting in line 46, after the word 'townships', the following: 'where the population is twelve thousand (12,000) people and not more than thirty-five thousand (35,000)'. And as amended, do pass. Signed: Meyer, Campbell, Armstrong for the Senate. Conner, Gordon, Padbury for the House.

"On motion of Conner, duly seconded, report of the Conference Committee on Senate amendments to House Bill No. 76, was adopted by

the following vote: Ayes 68; noes 2; not voting 32."

The bill was thereupon enrolled and signed by the Speaker of the House and the President of the Senate, containing the Conference Committee amendment.

Our search of the journal and the history and title as shown on the enrolled bill, did not disclose that the Conference Committee's report was ever submitted to the Senate.

Whatever may be the rule when construing or interpreting a statute (see Nichols v. School District, 87 Mont. 181, 287 Pac. 624; Murray Hospital v. Angrove, 92 Mont. 101, 10 Pac. (2d) 577), our supreme court has said with emphasis: "It is therefore apparent that, when the constitutionality of an Act is questioned on the ground of irregularity of legislative action, the only purpose for which the courts may examine the journals of that body is to determine whether the ayes and noes vote was entered." (State ex rel. Woodward v. Moulton et al., 57 Mont. 414, 189 Pac. 59.)

The reason for this rule is that the requirement of Section 24, Article V of the Constitution of Montana is mandatory and not directory only. (Palatine Ins. Co. v. Northern Pac. Ry. Co., 34 Mont. 268.)

We then come to the question, does the Senate Journal show that on final passage of Chapter 152, supra, an aye and no vote was taken with the names of those voting entered therein? The question is not without its perplexities.

At page 93, Lewis' Sutherland Statutory Construction, Volume 1 (2d), it is said: "As to what is the 'final passage of a bill' within the meaning of the constitution, there is a difference of opinion. Some courts hold that the final passage of a bill is when it is first passed in each house, and that concurrence in subsequent amendments made by the other house, or in the report of a conference committee, may be made without a yea and nay vote, and without entering the result in the journals. Other courts hold that it is the last vote in each house which gives efficacy to the bill."

Again, at 59 C. J. 570, we read: "The vote on the appointment of a conference committee, or on the adoption of its report, or on the concurrence in amendments made by the other house, is not a voting on the final passage of the bill such as to require the taking of the yeas and nays as upon final passage, at least where the amendments are immaterial or are only of a trivial nature, such as correcting tautology. There is other authority, however, that the constitutional provision regulating the mode of voting on the final passage of bills is applicable to the concurrence in amendments made by the other house."

There is but one decision of the supreme court of this state in which this question has been considered. In Johnson v. City of Great Falls et al., 38 Mont. 369, 99 Pac. 1059, it was held: "After a bill has, on third reading, passed the house in which it originated, the vote being taken by ayes and noes and the names of those voting entered on the journal, as required by Section 24, Article V of the Constitution, and is amended in the other house of the legislative assembly, and then returned to the first for action on the amendments, it is not necessary that the vote on the adoption of the amendments thus made be again taken by ayes and noes and the names entered on the journal."

In the Johnson case the court adopted this statement from 26 American and English Encyclopedia of Law 544: "The final passage of a bill, within the meaning of such a provision, is the vote on which each house adopts the bill after it has passed its first and second readings and after it has been read again for the purpose of being put upon its passage, and where a bill has been passed in one house and amended and passed in the other, it is not necessary that the vote on the adoption of such amendment by the house in which it was first passed shall be taken by yeas and nays and entered on the journal."

Mr. Justice Holloway, speaking for the court, distinguished and refused to follow the leading Kentucky case of Norman v. Ky. Board of Managers, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556, wherein the following reasoning,

which appeals to us, is set forth: "It is true it has been held that the 'final passage' of a bill means when it first passes the body, and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yea and nay vote on the journal, does not apply to amendments or the report of conference committees. If so, then no matter how material the change, a majority vote of a quorum may pass the bill. The words 'final passage', as used in our constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may by reason of amendments 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."

There is a possibility that the case before us might be distinguished from the Johnson case, since it is apparent from the opinion itself that the court took notice of the house journal to show that the amendment was at least submitted to the consideration of the members of the house even though that journal did not show the aye and no vote thereon. In this case the journal of the Senate does not even show that the report of the committee on conference, or the amendment proposed by it, was ever submitted to the Senate.

However, in view of the position that has been taken by our supreme court, as well as the supreme courts of other states, and in view of the rule adopted by many courts that the entire silence of the journal respecting a concurrence will not render the act void (State ex rel. Bray v. Long, 21 Mont. 26, 52 Pac. 645; 59 C. J. 572; Section 51, Lewis' Sutherland Statutory Construction, Vol. I (2d) p. 85; 25 R. C. L. 885), it is doubtful if this could be shown and the validity of the act impeached for irregularity in its passage. (State ex rel. McTaggart v. Middleton, 94 Mont. 607.)

Your second question is whether or not, under the act, a constable in a township having a population of more than 35,000 is entitled to a salary of $1,500 per annum and to retain also the fees he collects pursuant to said act. The applicable part of Chapter 152, supra, as passed and approved, is as follows: "That Constables in townships having a population of twelve thousand (12,000) people and not exceeding twenty thousand (20,000) people, shall each receive a salary of $900.00 per annum, payable monthly from the County Treasury. Constables in townships having a population of more than twenty thousand (20,000) people shall each receive a salary of $1,500.00 per annum, payable monthly from the County Treasury, and Constables in such townships where the population is twelve thousand (12,000) people and not more than thirty-five thousand (35,000) people shall receive no other fees for civil suits or criminal actions except mileage in the performance of their duties. Any such fees received by the Constables shall be turned over to the County Treasurer."

Before replying to your question we shall briefly review the following rules of statutory interpretation as laid down by the supreme court of this state from time to time: While it is true that the first duty of the court is to give effect to the intention of the legislature (Section 10520, R. C. M. 1921; McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, 69 A. L. R. 866) the court must construe the law as it finds it (Great Northern Utilities Co. v. Public Service Commission et al., 88 Mont. 180, 293 Pac. 294; Montana Beer Retailers Protective Assn. et al. v. State Board of Equalization, 95 Mont. 30, 33 Pac. (2d) 563), and where the language of the statute is plain and unambiguous it may not resort to any rules of construction (State v. Cudahy Packing Company et al., 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State ex rel. Peck v. Anderson, 92 Mont. 298, 13 Pac. (2d) 231; Chicago, Milwaukee, St. P. & Pac. R. Co. v. Custer County, 96 Mont. 566, 32 Pac. (2d) 8). All parts of an act must be made operative (County of Hill v. County of Liberty, 62 Mont. 15, 203 Pac. 500), and each word, phrase, clause, sentence, paragraph and section in a statute must be given meaning or effect if it is possible (Stange

v. Esval, 67 Mont. 301, 215 Pac. 807; State ex rel. Thatcher v. Boyle, 62 Mont. 97, 204 Pac. 378; Campbell v. City of Helena, 92 Mont. 366, 16 Pac. (2d) 1; State ex rel. Snidow et al. v. State Board of Equalization, 93 Mont. 19, 17 Pac. (2d) 68). In doing this the fact that a literal construction of the act results in inequities is not determinative (Sullivan v. Anselmo Mining Corporation et al., 82 Mont. 543, 268 Pac. 495). And although the policy that motivates the passage of a statute is persuasive in some cases it is not decisive where the language of the act is free from doubt (Fergus Motor Co. v. Sorenson, 73 Mont. 122, 235 Pac. 422) as the letter of an unambiguous statute will not be disregarded under the pretext of pursuing its spirit (Cruse et al. v. Fischl, 55 Mont. 258, 175 Pac. 878; State v. State Highway Com. et al., 82 Mont. 382, 267 Pac. 499). In other words, our court holds that the supposed unexpressed intention of the legislature cannot override the clear import of the language it uses (Equitable Life Assur. Soc. of U. S. v. Hart, 55 Mont. 76, 173 Pac. 1062; State v. Anderson, supra). The court may not omit what has been inserted (State v. Certain Intoxicating Liquors, 71 Mont. 79, 227 Pac. 472).

Applying these rules, then, it will be seen from the act itself that so far as compensation is concerned the legislature has provided for four groups of constables:

1. Constables in townships having a population of less than 12,000 receive only the fees they collect, if any;
2. Those in townships having a population of 12,000 and not exceeding 20,000 shall receive a salary of $900 per annum and the fees they collect, if any, must be paid into the County Treasury;
3. Those in townships having a population of more than 20,000 and less than 35,000 shall receive a salary of $1,500 per annum and the fees they collect, if any, must be paid into the County Treasury;
4. Those in townships having a population of more than 35,000, who shall receive a salary of $1,500 per annum and who may also retain the fees they collect, if any, except that they may not be allowed more than $500 per annum in criminal cases.