Opinion No. 58-196

September 25, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General By. Hilton A. Dickson Jr., Assistant Attorney General

TO: Mrs. Natalie S. Buck, Secretary of State, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. "Would it be proper for the Enrolling and Engrossing Committee to withdraw the present Senate Joint Resolution No. 2, filed with the Secretary of State, and replace it with a corrected Enrolled and Engrossed Resolution? If so which officers of the House and Senate should sign this corrected resolution?

2. "Can the Secretary of State, on her initiative, correct obvious error in the present Senate Joint Resolution No. 2 - with or without the signature of the presiding officers of both houses?"

3. "Does this error void said Senate Joint Resolution No. 2 and if so should it be deleted from the ballot - and if so should all the other resolutions be re-numbered?"

4. "Should said Senate Joint Resolution No. 2 be placed on the ballot in its present form, subject to later court action if it passes?"

CONCLUSIONS

1. See opinion.

2. Yes.

3. See opinion.

4. See opinion.

OPINION

ANALYSIS

With reference to the information furnished this office concerning the questions above stated, it appears that Constitutional Amendment No. 1 (S.J.R. 2, Laws 1957), was originally prepared so as to refer by the title thereto to Article 7, Section 1 of the Constitution, but by Section 1 of the resolution conflicting reference was made to

Section 2 of the constitutional provision. Prior to delivery of the several copies of the resolution to the Senate for introduction, the erroneous citation in Section 1 was corrected so that constitutional references, stated in both the title and Section 1 of the resolution, were consistently cited as "Article 7 Section 1". The original bill, as introduced and as is filed with the Secretary of State, shows the correction considered as do the printed versions used by the House and Senate Committees and on the floors upon passage.

Subsequent to passage of the resolution, the resolution was returned to the Senate for enrolling and engrossing. It was at this point, apparently, that the proof-reader or typist working from one of the original erroneous copies, caused to be erased the correct citation as appeared in the enrolled and engrossed resolution and inserted "Section 2", a citation never considered nor acted upon by the Legislature.

Considering briefly the resolution in substance, it would, if approved by the voters, authorize legislation providing for absentee voting. The added and amending language is stated as:

"The legislature may enact laws providing for the voting of qualified electors absent from their places of residence on the day of an election."

The title of the considered resolution is drawn as follows:

"PROPOSING TO AMEND ARTICLE 7, SECTION 1 OF THE CONSTITUTION OF NEW MEXICO TO ALLOW ABENTEE VOTING."

Section 1, however, inconsistently provides that:

"It is proposed to amend Article 7, Section 2 of the constitution of New Mexico to read:"

Looking to the constitutional provisions concerned, we find that Article 7, Section 1 provides for the qualifications of voters while Section 2 deals with qualifications for holding office in the State. Obviously, the language of the resolution is referring to voter qualifications only. A substitution of the proposed provision for Section 2 of Article 7 would bring into existence two inconsistent voter qualification provisions and eliminate the existing requirements for office holding. Such a result was unquestionably not intended by the Legislature. The error, as has brought forth the request for this opinion is patent from the face of the enrolled and engrossed resolution and requires only a clerical or typographical correction.

This office is not unmindful of Article IV, Section 20, which specifically provides:

"Immediately after the passage of any bill or resolution, it shall be enrolled and enrossed, and read publicly in full in each house, and thereupon shall be signed by the presiding officers of each house in open session, and the fact of such reading and signing shall be entered on the journal. No interlineation or erasure in a signed bill, shall

be effective, unless certified thereon in express terms by the presiding officer of each house quoting the words interlined or erased nor unless the fact of the making of such interlineation or erasure be publicly announced in each house and entered on the journal."

The enrolled and engrossed bill doctrine as provided for by the aforequoted provision, was announced as a rule in Kelley v. Marron, 21 N.M. 239, 153 P. 262, 270, and subsequently followed in Smith v. Lucero, 23 N.M. 411, 168 P. 709; State v. Hall, 23 N.M. 422, 168 P. 715; and Thompson v. Saunders, 52 N.M. 1, 189 P. 2d 87. From the latter authority, the Court said:

"This brings the case squarely within the rule announced in Kelley v. Marron, 21 N.M. 239, 153 P. 262, 270, where this court committed itself to the 'enrolled and engrossed bill' doctrine, that is to say that an enrolled and engrossed bill, properly authenticated, approved by the Governor, and deposited with the Secretary of State as a part of the records of that office, is conclusive as to the regularity of its enactment. and that the courts cannot look beyond the duly authenticated bill to the journals to ascertain whether constitutional requirements have been complied with in its enactment."

In the instant situation, however, there is no question put as concerns the regularity of the considered resolution's enactment nor whether constitutional requirements have been complied with. The error here to be corrected is patent on the face of the resolution and requires no search behind the enrolled and engrossed copy filed with the Secretary of State.

While no square authority is found among the decided cases in this State, the Court did, however, allow a change of "or" to "of" in New Mexico Glycerin Co. v. Gallegos, 48 N.M. 65, 145 P. 2d 995. It was pointed out by the Court, giving consideration to the state income tax law, that:

"The word 'or' in subsection (b) of Sec. 76-1231, which reads 'or products, goods, wares and merchandise, etc.,' is patently a typographical error and should read 'of,' otherwise the whole section which provides the manner of allocating or apportioning the income derived from business within and without the state would be meaningless."

Certainly in the instant situation a meaningless law would be voted upon if the patent error is not changed so as to permit publication of the proposed resolution as enacted by the Legislature.

Other states having adopted the "Engrossed Bill Rule" have permitted the correction of clerical errors so as to give meaning and effect to legislative efforts. In Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E. 2d 390, it was said:

"'Courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words. * * * A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the

purpose, design and policy of the lawmakers. * * * It is also an old and well-established rule that words ought to be subservient to the intent and not the intent to the words.' Greenville Baseball Inc. v. Bearden, Sheriff, et al., 200 S.C. 363, 20 S.E. 2d 813, 815. 'While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning, this, as all all other rules, is subject to the prime object of ascertaining and giving effect to the legislative intention.' State ex rel. Walker v. Sawyer, 104 S.C. 342, 88 S.E. 894, 895. Numerous cases will be found in which clerical errors have been corrected by the courts pursuant to this principle. As stated by that eminent jurist, Justice Woods, in Stackhouse v. County Board of Commissioners for Dillon County, 86 S.C. 419, 68 S.E. 561, 562:

'This rule has been followed in many cases in this and other jurisdictions. In Waring v. Cheraw etc. Ry. Co., 16 S.C. 416 the word "hereinafter" was read "hereinbefore", when the use of the former would have destroyed the manifest purpose of the statute. In Kitchen v. Southern Ry. Co., 68 S.C. 554, 48 S.E. 4, (1 Ann Cas. 747,) the word "of" was construed to mean "or", in order to give full effect to the meaning of Lord Cambell's Act. In Baldwin v. Travis County, 44 Tex. Civ. App. 149, 88 S.W. 480, the word "taxed" was substituted for "attached", the court holding that the use of the latter word "appears to be improper and inapt, in that it does not appear to definitely express or convey the meaning evidently intended by the Legislature." In California Loan (& Trust) Co. v. Weis 118 Cal. 489, 50 P. 697, it was held that the word "July," which was evidently intended, should be read instead of "June," which had been used in the act under consideration. In re Frey, 128 Pa. 593, 18 A. (478) 479, the word "city" was inserted instead of "county," when the court was of opinion that "the section is senseless and absurd as it is written, while the purpose of the Legislature is perfectly obvious and certain."'

In Worthington v. District Court, 37 Nev. 212, the Nevada Court, when confronted with an erroneous reference to an amended statute held that:

"As the act of 1913 reenacts at length, in compliance with section 17, article 4, the language designated as section 22 in the act of 1875, it must have been the intention to amend that section, and no other. But if it be conceded for the argument that the act of 1875 was a new act which repealed section 22, and that the act of 1913 ought to have specified that section 1, instead of section 22, was amended it would still be clearly apparent that there was only a mistake in this reference to the section and that the one reenacted at length, and none other, was intended to be amended. As often held, the intention of the legislature should govern, and clerical mistakes should be disregarded."

And in Meier v. Superior Court, 67 Cal. App. 135, the California Court even permitted correcting of a legislative error pointing out that:

"It appears very clear, however, that the legislature must have inadvertently and unintentionally used the word 'actions' in the section in the place of the word 'appeals.' This proposition would seem to be supportable, not alone upon a consideration of the unreasonableness of the section or the preposterous consequences following literally the application thereof as it now stands, but also by a consideration of the section in its

entirety and also the title of the act adding it to the code. The first part of the section, it will be noted, does not expressly refer to the dismissal of appeals. It will further be perceived that the latter part of the section contains two provisos, at least one if not both of which refer to the dismissal of appeals and not to the dismissal of actions. It would seem to be obviously true that, if the legislature, in enacting the section, had intended, **ex industria,** thus to authorize the dismissal of the actions, because of default on the part of the appealing party to bring the same to trial within the prescribed time limit, it would have carried that intention through the entire section in language so clear as not to leave the matter in doubt. This it failed to do, as the two provisos referred to plainly demonstrate. Again, when we look to the title of the act adding section 981a to the code to ascertain the subject matter thereof, we find that it refers solely to the dismissal of appeals in such actions, and does not refer to or mention 'dismissal of actions.'"

Accordingly, it is our opinion that the Secretary of State may correct the obvious error in Senate Joint Resolution No. 2 and that such may be done without the additional signatures of the presiding officers of both houses. However, it is pointed out that this opinion does not purport to establish precedent discretionary authority in the office of the Secretary of State for making changes or corrections in enrolled and engrossed legislative enactments which changes have not been previously called to the attention of the Attorney General's Office for a determination of the nature of the alleged errors. The conclusions reached in this opinion are based strictly upon the understandings of fact as stated earlier in this analysis.

In view of the conclusions reached, it is felt that questions one, three and four need not be answered at this time.