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Continuances For Attorney-Legislators

CONTINUANCES FOR ATTORNEY-LEGISLATORS

As a matter of public policy certain privileges and immunities are granted to members of legislative bodies either by constitutions[1] or statutes.[2] Among the statutory privileges given in some jurisdictions is the right to have a case continued when one of the attorneys in the case is a member of the legislature and the case is to be heard during legislative session. Various reasons[3] have been given for such statutes, but the primary purpose seems to be to enable practicing attorneys to serve in the legislature. The desirability of the statutes must be balanced with the public policy in favor of speedy and certain administrations of justice, undelayed by the absence of attorneys.

The constitutionality of a statute granting a continuance to an attorney-legislator was questioned in the recent case of *Granai v. Witters, Longmoore, Akley & Brown.*[4] The petitioner sought a writ of prohibition from the Supreme Court of Vermont to restrain the hearing and disposition of two divorce suits pending in a trial court. The petitioner had appeared as attorney of record on May 2, 1963, when he requested a continuance of the hearings, which had been set for May 6. As ground for the continuance the petitioner relied on a Vermont statute,[5] which prohibited hearing or trying a civil case in which a member or official of the General Assembly is a party or attorney of record during a session of the General Assembly, unless the privilege is waived in writing[6] by the party or attorney. In the

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[1]E.g., Freedom from arrest: U.S. Const. art. I, § 6; Cal. Const. art. 4, § 11; Mich. Const. art. 5, § 8; N.J. Const. art. 4, § 4, par. 9; Protection of persons and estates: S.C. Const. art. 3, § 14; Provision for protest: Ala. Const. art. 4, § 55.

[2]E.g., Freedom from arrest or imprisonment: Ind. Ann. Stat. § 3-401 (1946); Ohio Rev. Code Ann. § 2331.11 (Baldwin 1958); Vt. Stat. Ann. tit. 12 § 3577 (1958); Privilege for words spoken or written: Va. Code Ann. § 30-9 (Repl. Vol. 1964); Privilege not to be disturbed or intimidated: Nev. Rev. Stat. § 218.540 (1961).

[3]Among the reasons given are (1) the desirability of having legislators give their undivided attention to legislative matters, Beckley v. Reclamation Bd., 48 Cal. 2d 710, 312 P.2d 1098 (1957); Brooks v. Pan. Am. Loan Co., 65 So. 2d 481 (Fla. 1953); State ex rel. Johnson v. Independent School Dist., 260 Minn. 237, 109 N.W.2d 596 (1961); (2) the desirability of having attorneys give full attention to their clients, Bottoms v. Superior Court, 82 Cal. App. 764, 256 Pac. 422 (Dist. Ct. App. 1927); (3) the prevention of miscarriage of justice where an attorney's presence is necessary for a fair and proper trial, Johnson v. Theodoron, 324 Ill. 543, 155 N.E. 481 (1927); Kyger v. Koerper, 355 Mo. 772, 774, 207 S.W.2d 46, 48 (1947); (4) the prevention of embarrassment and conflict to legislators in the performance of public and private duties, Hudgins v. Hall, 183 Va. 577, 32 S.E.2d 715 (1945); and (5) the protection of the business interests of attorneys, thereby encouraging them to serve in the legislature, State v. Myers, 352 Mo. 735, 179 S.W.2d 72 (1944).

[4]123 Vt. 468, 194 A.2d 391 (1963).

[5]Vt. Stat. Ann. tit 12 § 1902 (1958).

[6]There was no waiver of the privilege by the petitioner-legislator in this case.

Supreme Court the opposing party made a motion to dismiss on the ground that the statute denied the equal protection of the laws guaranteed by the Federal Constitution[7] and interfered with the prompt, impartial, administration of justice required of the courts under the Vermont Constitution.[8] The motion was granted.

In dismissing the petition for a writ of prohibition, the Supreme Court of Vermont listed the relevant constitutional guarantees which appeared in the Vermont Constitution:[9] (1) the separation of powers into legislative, executive and judicial departments;[10] (2) the restriction that the legislative department not infringe on any part of the constitution;[11] and (3) the mandate that the courts promptly and impartially administer justice.[12] The court emphasized that "To grant a continuance of cases is a discretionary matter on the part of the courts of this state."[13] It concluded that the statute was unconstitutional in that it infringed upon processes delegated to the judiciary, and by restricting the judicial processes, resulted in an unreasonable deprivation of rights guaranteed to litigants.

The fundamental rule running throughout the subject of continuances is that the granting or refusal of a continuance is a matter of judicial discretion.[14] However, the right to continuances is now largely regulated by statute. The general provisions of these statutes are the same, and follow the practices that have grown up independent of the legislation.[15] At common law, attendance on sessions of a legislative body was not a ground for granting continuances as a matter of right.[16] Consequently, legislatures have passed statutes making it a ground.[17] Under some statutes the granting is mandatory[18]

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[7]U.S. Const. amend. XIV, § 1.

[8]Vt. Const. ch. II, § 28.

[9]There was no occasion to pass upon the federal question in this case.

[10]Vt. Const. ch. II, § 5.

[11]Vt. Const. ch. II, § 6.

[12]Vt. Const. ch. I, art. 4; Vt. Const. ch. II, § 28.

[13]194 A.2d at 392.

[14]See cases collected at 12 Am. Jur. Continuances § 5, n.16 (1938).

[15]Annot., 74 Am. Dec. 141 (1886).

[16]Johnson v. Theodoron, 324 Ill. 543, 155 N.E. 481 (1927).

[17]Alaska Comp. Laws Ann. §§ 24-40-020, 24-40-030 (1962); Ark. Stat. § 27-1401 (1962); Cal. Civ. Proc. § 1054; Fla. Stat. Ann. § 54.08 (1941); Ga. Code Ann. § 81-1402 (1956); Ill. Ann. Stat. ch. 110, § 101.14 (Smith-Hurd 1956); Ind. Ann. Stat. § 2-1302 (Supp. 1963); Kan. Gen. Stat. Ann. § 46-125, 126, 127 (1948); La. Rev. Stat. § 13:4163 (1950); Md. Ann. Code art. 75, § 24 (1957); Minn. State. Ann. § 3.16 (1961); Miss. Code Ann. 1649.5 (Supp. 1962); Mo. Rev. Stat. § 510.120 (1959); Nev. Rev. Stat. § 1.310 (1961); Tex. Rev. Civ. Stat. art. 2168a (1948); Va. Code Ann. § 30-5 (Repl. Vol. 1964); W. Va. Code Ann. § 234a (1962); Wis. Stat. § 256.13 (1961).

[18]E.g., Fla. Stat. Ann. § 54.08 (1941); Tex. Rev. Civ. Stat. art. 2168a (1948); Va. Code Ann. § 30-5 (Repl. Vol. 1964).

while under others the courts are allowed some discretion.[19] In a few jurisdictions the courts have been faced with constitutional objections to these statutes.[20]

At least three jurisdictions hold that statutes giving an automatic continuance to attorney-legislators during sessions of the legislature are constitutional.[21] Texas appears to have taken the most extreme position in this area. In *King v. State*[22] the Court of Criminal Appeals of Texas[23] upheld the Texas statute[24] notwithstanding the fact that there was evidence supporting a finding of abuse of the privilege granted under the statute. The decision extends the holding of the Superior Court of Texas in *Mora v. Ferguson*,[25] in which the statute was upheld as against a contention that it added to the privileges and immunities given members of the Legislature by express constitutional provision. The language of the Texas statute is clear, "It is hereby declared to be the intention of the Legislature that the provisions of this section shall be deemed mandatory and not discretionary."[26] The court emphasized that such legislation was necessary to protect the practice of the lawyer, particularly when one considers the meager compensation paid legislators. To hold otherwise would be inconsistent with the public interest in having people from all walks of life serve in the legislature.

Virginia and Florida maintain that the mandatory continuance statues are consistent with the constitutional provision for separation of powers. In *Hudgins v. Hall*[27] the Supreme Court of Appeals of

[19]E.g., Ill. Ann. Stat. ch. 110, § 101.14 (Smith-Hurd 1956); Mo. Rev. Stat. § 510.120 (1959).

[20]McConnell v. State, 227 Ark. 988, 302 S.W.2d 805 (1957); Brooks v. Pan. Am. Loan Co., 65 So. 2d 481 (Fla. 1953); Johnson v. Theodoron, 324 Ill. 543, 155 N.E. 481 (1927); Kyger v. Koerper, 355 Mo. 772, 774, 207 S.W.2d 46, 48 (1947); Booze v. District Court, 365 P.2d 589 (Okla. Crim. App. 1961); Mora v. Ferguson, 145 Tex. 498, 199 S.W.2d 759 (1947); Hudgins v. Hall, 183 Va. 577, 32 S.E.2d 715 (1945).

[21]Texas, Virginia, Florida.

[22]160 Tex. Crim. 556, 273 S.W.2d 72 (1954).

[23]In regard to continuances for legislators, almost no distinction has been made, to date, between civil and criminal actions either in the cases or in the statutes. In light of the constitutional guarantee of a speedy trial it would seem that some distinction might be made between the two. It is interesting to note that Alaska has provided separate statutes for civil and criminal actions. The criminal statute has been worded—"is entitled to a reasonable continuance." Alaska Comp. Laws Ann. § 24-40-020 (1962). Compare with this Alaska Comp. Laws Ann. § 24-40-030 which is a civil statute.

[24]Tex. Rev. Civ. Stat. art. 216a (1948).

[25]145 Tex. 498, 199 S.W.2d 759 (1947).

[26]Supra note 24.

[27]183 Va. 577, 32 S.E.2d 715 (1945).

Virginia said, "The legislature is a co-ordinate branch of the State government. It may well determine what conditions will best enable its membership to perform their official duties and private responsibilities while engaged in public service."[28] In regard to the nature and purpose of the statute[29] the court said, "It is a peremptory statute, designed the prevent embarrassment and conflict to a member of the General Assembly in the performance of his public and private duties."[30]

As to the justification for legislative action the Supreme Court of Florida in *Brooks v. Pan Am. Loan Co.*[31] took the same position as the Virginia court. It further concluded that the automatic continuance statute[32] was not only reasonable but necessary to the proper functioning of the Legislature. Reasonableness is affected by the frequency and length of legislative sessions. In Florida the Legislature meets every two years for a sixty-day session.[33] The court also felt that continuances were necessary to protect legislators who are sole practitioners. In addition Florida has a constitutional provision which recognizes the power of the Legislature to enact laws "regulating the practice of courts of justice."[34]

The holding in the principal case is in accord with those in at least four jurisdictions,[35] which hold that statutes making it manda-

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[28]Hudgins v. Hall, 183 Va. 577, 584, 32 S.E.2d 715, 719 (1945).

[29]Va. Code Ann. § 30-5 (Repl. Vol. 1964). The right provided by this statute has been jealously guarded by the General Assembly of Virginia. For example, see Va. Code Ann. § 8-1.2 (Repl.. Vol. 1957). See also Hudgins v. Hall, supra note 27, for the history of the consideration the statute has received from the General Assembly.

[30]Hudgins v. Hall, 183 Va. 577, 583, 32 S.E.2d 715, 718 (1945).

[31]65 So. 2d 481 (Fla. 1953).

[32]Fla. Stat. Ann. § 54.08 (1941).

[33]Fla. Const. art. 3, § 2.

[34]Fla. Const. art 3, § 20. However, this does not seem to be particularly significant. In all eight jurisdictions which have raised the constitutional issue with respect to continuance for attorney-legislators the courts recognize the power of the legislature to enact statutes affecting pleading practice, and procedure. Letaw v. Smith, 233 Ark. 638, 268 S.W.2d 3 (1954); Petition of Florida State Bar Ass'n 155 Fla. 710, 21 So. 2d 605 (1954); Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 19 N.E.2d 363 (1939); Erwin v. Missouri & Kansas Tele. Co., 173 Mo. App. 508, 158 S.W. 913 (1913); Denton v. Hunt, 79 Okla. Crim. 166, 152 P.2d 698 (1944); Bar Ass'n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108 (Tex. Civ. App. 1943); State v. Ball, 123 Vt. 26, 179 A.2d 466 (1962); Seaboard Air Line Ry. v. Board of Supervisors, 197 Va. 130, 87 S.E.2d 799 (1955).

For a comprehensive treatment of the power of the judiciary to prescribe rules of pleadings, practice, or procedure and the effect of legislative action in this area, see Annot., 110 A.L.R. 22 (1937); Annot., 158 A.L.R. 705 (1945).

[35]Arkansas, Oklahoma, Illinois, and Missouri.

tory on the court to grant continuances to attorney-legislators are unconstitutional. This appears to be the modern trend.

Arkansas and Oklahoma took the position, as did Vermont, that mandatory continuance statutes destroy the principle of separation of powers. In *McConnell v. State*[36] the Supreme Court of Arkansas concluded that the following language of the statute was too extreme, "Proceedings shall be stayed in such pending suits without regard to when, where, how or why any member of the General Assembly or the aforesaid employees became employed or associated in the suit; and, without regard to the number of other attorneys that may also represent party litigants."[37] The court recognized the necessity of allowing lawyers to suspend their practice during legislative sessions, but concluded that the statute deprived the courts of the power to determine a judicial question.

Language similar to that in the Arkansas statute was used in an Oklahoma statute.[38] In *Booze v. District Court*[39] the Court of Criminal Appeals of Oklahoma held that the statute infringed on a matter which had been established in a long line of decisions as being in the sole discretion of the court. The court said that "when the evidence establishes that a motion for continuance is solely for the purpose of delay and not made in good faith, it should be denied."[40]

The statutes in Illinois[41] and Missouri[42] call for the granting of continuances when it appears by affidavit that the presence of the attorney-legislator is necessary for a fair and proper trial.[43] Both jurisdictions originally maintained that the affidavit need only state that the attorney was a member and in actual attendance at a legislative session, and that his presence was necessary for a fair and proper trial. Where the affidavit complied with the above statutory requirements, the court was precluded from making any determination of whether the presence of the attorney was in fact necessary for a fair and proper trial.[44] Both jurisdictions subsequently decided such a

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[36]227 Ark. 988, 302 S.W.2d 805 (1957).
[37]Ark. Stat. § 37-1401, (Repl. Vol. 1962).
[38]Okla. Stat. tit. 12, § 667 (1955).
[39]365 P.2d 589 (Okla. Crim. App. 1961).
[40]Id. at 593.
[41]Ill. Ann. Stat. ch. 110, § 101.14 (Smith-Hurd 1956).
[42]Mo. Rev. Stat. § 510.120 (1959).
[43]An earlier Texas Statute was worded substantially the same way. See Act of 1929, 41st Leg., ch. 7, § 1, at 17.
[44]Wicker v. Boynton, 93 Ill. 545 (1876); State v. Myers, 352 Mo. 735, 179 S.W.2d 72 (1944).

construction would make the statutes unconstitutional.[45] In *Johnson v. Theodoron*[46] the Supreme Court of Illinois said, "The Legislature does not have the power to declare what shall be conclusive evidence of a fact . . .' nor can it say that a court is bound to act in accordance with the opinion of a party to a suit, or of his attorney, expressed in the form of an affidavit."[47] The court recognized the right of the Legislature to establish by general law a cause for continuance, but the court qualified this right by stating that it was for judicial determination whether the cause existed in a particular case. The Missouri case of *Kyger v. Koerper*[48] is in accord with this reasoning.[49] The Supreme Court of Missouri further emphasized that such legislation would impose an unreasonable and unnecessary delay upon the administration of justice since that state has no limiting provision on the length of legislative sessions.[50]

It is submitted that the holding in the *Granai* case is consistent with the constitutional concept of separation of powers. The granting of a continuance clearly seems to be a matter for judicial discretion. The Supreme Court of Vermont appears to adhere to the better view in holding that the General Assembly in passing a statute which clearly precludes any judicial discretion in the granting of a continuance trespassed on the constitutional power of the judiciary. Nevertheless, the decision seems to discriminate against the lawyer practicing alone in favor of the firm, which can usually put a man into court. It would seem that the approach taken by Illinois and Missouri strikes a more desirable balance between the conflicting interests involved. The legislative branch should have the power to establish ground for

[45]Johnson v. Theodoron, 324 Ill. 543, 155 N.E. 481 (1927); Kyger v. Koerper. 355 Mo. 772, 774, 207 S.W.2d 46, 48 (1947).

[46]324 Ill. 543, 155 N.E. 481 (1927).

[47]Id. at 483.

[48]355 Mo. 772, 774, 207 S.W.2d 46, 48 (1947).

[49]This decision is supported and further explained in Todd v. Stokes, 358 Mo. 452, 215 S.W.2d 464 (1948).

[50]In State ex rel. Osborne v. Southern, 241 S.W.2d 94 (Kan. Ct. App. 1951), the Kansas City Court of Appeals held that it was mandatory on the court to grant a continuance where the application complied with the statute and further, that the trial court could only determine if the application did comply with the statute. In that case the application, supported by an affidavit, stated that the attorney-legislator was the relator's only counsel and that his attendance was necessary for a fair and proper trial. This decision would appear to be consistent with the holding in the Kyger case in that the application alleged *facts* which would support a finding that the presence of the attorney-legislator was necessary for a fair and proper trial.

a continuance, but the court should have discretion to determine from evidence before it whether cause exists in a particular case.

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ACCOMPLICES TO ABORTIONS

Many jurisdictions, either because of statutes or the result of judicial decisions, will not sustain the conviction of the actual perpetrator of a crime solely on the basis of the uncorroborated testimony of an accomplice.[1] In these jurisdictions, therefore, it is important to determine who is legally an accomplice.[2]

Richmond v. Commonwealth,[3] decided by the Kentucky Court of Appeals, raises the question in an abortion case. The girl's paramour was the only witness possessing any knowledge of the abortion, aside from the accused abortionist who did not testify. The boyfriend admitted responsibility for the girl's pregnancy. At the girl's request, he arranged for a meeting with the abortionist and took her to the designated meeting place. Following a brief private conversation between the accused and the boyfriend, they all drove to the accused's trailer for the operation. The boyfriend remained in an adjoining room during the operation, after which the girl paid the accused. This operation proved unsuccessful, so a week later a second operation was performed under similar circumstances. The girl, never regaining consciousness, died as a result of the second operation.

The trial court left to the jury the question of whether the boyfriend was an accomplice of the abortionist so that the uncorroborated testimony of the accomplice would not support a verdict of guilty. The jury convicted. Upon appeal, a majority of the Court of Appeals held that the boyfriend was an accomplice as a matter of law. Two judges dissented, being of the opinion that the rule requiring

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[1]Biegun v. State, 206 Ga. 618, 58 S.E.2d 149 (1950); Fitch v. Commonwealth, 291 Ky. 748, 165 S.W.2d 558 (1942); State v. Sweeny, 180 Minn. 450, 231 N.W. 225 (1930); see generally, 7 Wigmore, Evidence § 2056 n.10 (3d ed. 1940); Note, 54 Colum. L. Rev. 219, 233-237 (1954).

[2]If the famous Rosenberg treason case had been tried in a New York state court, where corroboration is required, a conviction would have been unlikely. Note, 54 Colum. L. Rev. 219, 234 (1954).

Where only a single witness is available to testify, the corroboration rule presents the court with an unfortunate dilemma of choosing between what may appear to be justice on one hand and the the state's legislative policy on the other.

[3]370 S.W.2d 399, 401 (Ky. 1963).