nite conclusions may be drawn as a result of the decision in the principal case. The first is that, where matters are contested in a special appearance relating to jurisdiction, both of the person and of the subject matter,[41] and the court makes a specific ruling on these matters, they become *res judicata* for the purpose of future litigation in foreign courts. If this first conclusion be sound, and the decision in the principal case is not construed as having been founded on a general appearance of the defendant spouse, then there has been a definite extension of the doctrine of *Haddock* v. *Haddock*. That extension consists of permitting one spouse to obtain a divorce in a state wherein the other is neither domiciled, residenced, nor personally served, even though that state is not the matrimonial domicile,[42] if it be found that the plaintiff in such an action established such a separate domicile as a result of the fault of the other; and such a decree, when rendered, will be entitled to full faith and credit. How this matter of fault will be determined seems to be an open question. It is submitted that the only method by which it may be finally adjudicated is by an appeal to the United States Supreme Court in those instances in which a divorce is subsequently sought by the other spouse at his or her domicile and in which the decree of the first court is denied full faith and credit. Since such an appeal is not a question of right,[43] it may well be that the extension of the *Haddock* case will not have great practical significance. The result may be, as indicated by Professor Strahorn,[44] that in the future the court will pick and choose the cases by granting or denying *certiorari*.

CHARLES A. REYNARD.

CONSTITUTIONAL LAW

FINALITY OF LEGISLATIVE RECORDS

On July 22, 1936, the General Assembly of the State of Ohio voted to take a five minute recess and thereupon disbanded to their respective homes. On December 8, 1936, the General Assembly convened and adopted a motion that entries be made in the respective journals of the House and the Senate to show the convening in session of

[41] In stating that the extension covers both jurisdiction of the person and subject matter, it must be remembered that the court has only committed itself to this doctrine with respect to actions for divorce, and may not hold to the same views in other types of actions. See notes 9 and 9a, *supra*.

[42] The term "matrimonial domicile" is here used in the same sense as defined in note 31, *supra*.

[43] 28 U.S.C.A. (Judicial Code) sec. 344; FOSTER, "FEDERAL PRACTICE," 6th ed., sec. 692c.

[44] Strahorn, *supra*, note 40.

each house twice a week from July 22 until December 8, 1936. Such entries were incorporated into the journals of the House and of the Senate, so that it would appear that 40 sessions of the Assembly had been held when, in fact, no such sessions had occurred. Thereafter the clerks of the respective Houses certified to the auditor of state the members' allowance for mileage to and from said 40 purported sessions. This involved $21,507 for the members of the House and $5,557 for those of the Senate. Arnett Harbage, a taxpayer, brought suit against the auditor of state, president of the senate, speaker of the house, and the clerks of both Houses to enjoin the payment of said mileage allowances to the House and to recover back those already paid to the Senate. On the hearing for the permanent injunction, Judge Reynolds of the Franklin County Court of Common Pleas held for the plaintiff. *Harbage v. Tracy et al.*, 9 Ohio Ops. 276, 24 Ohio L.Ab. 553 (1937).

General Code section 50 provides: " . . . Each member shall receive the legal rate of railroad transportation each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session."

General Code section 54 says: "The president of the senate and the speaker of the house of representatives shall ascertain the number of days' attendance of each member and officer of the respective houses during the session, the number of miles of travel of each member to and from the seat of government and certify such attendance and mileage, and the amount due therefor, to the auditor of state."

The defendants' first defense was weakly based on the foregoing statutes, urging that they provided for the payment of the mileage allowance for each week of the term of the assembly as part of the members' compensation whether or not the body was in actual session. This belief was professed in the face of two opinions of the attorney-general of Ohio advising that the assembly must be "actually sitting and transacting business" in order for the mileage allowances to be paid.[1] The latter of these in 1934 was in answer to a direct inquiry on the subject from the speaker of the house.[2] Judge Reynolds held that, although the statutes are compensatory in that the members are paid mileage each week whether or not they go back and forth, in order for the allowances to accrue the assembly must actually be in session.

The defendants' principal defense, however, was reliance on a long

[1] 1919 O.A.G., V. I, p. 587; 1934 O.A.G. 2927.

[2] These opinions in no way considered the matter involved in these defendants' principal defense since there had been no entries made in the journals as to non-existent sessions.

established doctrine of constitutional law—the official journals of the legislature, as required to be kept by the Constitution, import absolute verity and form conclusive proof of the proceedings themselves. Such journals are not subject to judicial contradiction or attack, and the recitals therein, when made by the authority of the legislature, are to be taken as true and cannot be contradicted by other evidence. The result of the application of this doctrine was, in the words of the court, that the defendants tried to show that they "are entitled to compensation whether earned or not, and that the Legislature was in session even though it was not."

The court disposed of this defense in the following words: "It is well settled that the validity of any legislative enactment cannot be questioned by attacking the correctness of the journal record of the proceedings of either branch of the legislative body. Here the question is raised relative to a ministerial act. There is nothing sacred about such acts, and no reason of public policy, such as that relating to legislative acts, which would seem to inhibit an examination of the correctness of such acts. Since the questioning of the journal records in no way reflects upon legislative enactments but is confined purely to the ministerial acts of certain officers as provided by G.C. Sec. 54, the court holds that for such purposes the records may be questioned, and if the duties prescribed by statute have not been properly carried out, the true facts may be shown."

The application of the doctrine of the finality of legislative records to the facts of the principal case is novel and raises many interesting questions as to the purpose, effect, and extent of the rule.

The background of the policy and purpose of the rule is the doctrine —Separation of Powers. The court in *Taylor* v. *Beckham*[3] declared: "The ground of all the decisions is that the judiciary have no power to sit in judgment upon the motives of an independent branch of the government, or to deny legal effect to the record of its action solemnly made by it pursuant to the Constitution. If this were allowed, it would soon follow that the independence of the Legislature would be destroyed altogether." To dispute the verity of the senate journal would be to violate both the letter and the spirit of the Constitution; to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the legislature.[4] It is necessary that the will of the legislature shall not be overturned and defeated and the rights of the people embarrassed every

[3] 108 Ky. 278, 56 S.W. 177, 21 Ky. L. 1735, 49 L.R.A. 258 (1900). Writ of error dismissed—178 U.S. 548, 44 L.Ed. 1187 (1900).

[4] *Wise* v. *Bigger, Clerk*, 79 Va. 269 (1884).

time a zealous litigant or a crackpot discovers a mere failure in legislative procedure in fact although the journal of the body imports its occurrence.

In *Fox* v. *Harris*,[5] where plaintiff sought to *mandamus* the clerks of the senate and of the house to omit allegedly false material from the records, it was held: "Courts have no power to interfere in any manner with the proceedings of either of the legislative branches or with the action of their respective clerks in making up the journals of their proceedings as long as they are acting in obedience to the will of those bodies." *In Re House of Representatives*[6] and *McCullough* v. *The State*,[7] it was announced that the journals are conclusive evidence of the facts which appear on their face and the power to determine the correctness of the journal is solely in the legislative body keeping it, which is also the only tribunal by which it can be changed and corrected.

In *Taylor* v. *Beckham*,[8] the doctrine of the finality of legislative records was applied where the validity of journal entries, as to the presence of certain members during a vote in the hearing of a gubernatorial election contest, was attacked on charges of fraud and conspiracy between clerks and members. The court was without jurisdiction to go behind the record made by the legislature under the constitution. Again the doctrine was conclusive in *Auditor General* v. *The Board of Supervisors*[9] in passing upon the question whether or not a quorum was present when certain legislative action was taken. Parol evidence was inadmissible to alter or contradict the journal. The rule was also final in the determination of the two-thirds vote required to repass a vetoed bill in *Wise* v. *Bigger, Clerk*.[10]

In *State* v. *Dixie Finance Co.*,[11] evidence contradicting the recitals of the senate journal as to the date of the return of an unsigned bill by the governor was excluded. The court in *Amos* v. *Moseley*[12] applied the doctrine as to the taking of yeas and nays and the counting of them. So did the court in *Earnest* v. *Sargent, Auditor*[13] as to whether or not a bill passed before the expiration of the constitutional limitation on the session length; and the date of adjournment as shown by the journal is not contradicted or rendered uncertain by record evidence therein of the transaction of a large amount of business within a short period of time.[14]

[5] 79 W. Va. 419, 91 S.E. 209 (1917).
[6] 45 R.I. 289, 120 Atl. 868 (1923).
[7] 11 Ind. 424 (1858).
[8] See note 3, *supra*.
[9] 89 Mich. 552, 51 N.W. 483 (1891).
[10] See note 4, *supra*.
[11] 152 Tenn. 306, 278 S.W. 59 (1925).
[12] 74 Fla. 555, 77 So. 619, L.R.A. 1918C 482 (1917).
[13] 20 N.M. 427, 150 Pac. 1018 (1915).
[14] *Capito* v. *Topping*, 65 W.Va. 587, 64 S.E. 845, 22 L.R.A. (N.S.) 1089 (1909).

State ex rel. Landis v. *Thompson*[15] furnishes a good example of a court riding on a legal merry-go-round while applying the doctrine. Here the legislature stopped the clocks and caused the journals to be falsified by including bills passed within the next eight hours as having been passed prior to noon, May 31, 1935. There was a 60-day constitutional limitation on the session length. After elaborate statement of the rule as to conclusiveness of legislative records, the court held the records could be impeached since the records were not directed to be made by the legislature for it was constitutionally no longer a legislature at the time the directions were made as it had exceeded its 60-day life. Since the latter fact could not be determined except by impeachment of the journal records first, the inconsistency of this decision makes for no valuable precedent.

"Where the evidence furnished by the journals is ambiguous or contradictory . . . , recourse may be had to other competent evidence to show the actual facts." *State ex rel. Crocker* v. *Junkin*.[16] Extrinsic evidence was also admitted in *State* v. *Mason* [17] to show that, through an improper exercise of judgment on the part of a public official or state agent or representative, intrinsic error exists and that the journals have not been made the actual repository of the proceedings of the assembly. Although in uttering these words the court in that case was definitely vague as to their meaning or scope, yet it is rather evident that they were to be interpreted in the light of the facts—an unauthorized alteration by the clerk. Otherwise the court "will not assume to contradict or impeach the journal upon any charge of fraud or mistake; nor will it pass upon a disputed question of fact as to what proceedings were taken."[18]

In *Milwaukee County* v. *Isenring*, [19] it was held, "While such journals are controlling as regards to what the legislature does in respect to the passage of a bill, they are not necessarily so as to the contents of a statute. On the latter subject courts may look to the enrolled bill, and to any other legitimate evidence within their reach." Although there are very few cases directly dealing with this phase, most of the reported cases (in states where the doctrine of the conclusiveness of enrolled bills is not applied) make no distinction between procedure and contents of statutes, but lay down the broad rule as in *In Re House of Representatives, supra*, "The journals are conclusive evidence of the *facts which appear on their face* . . ." This would seem to better carry out the policy of the rule.

[15] 121 Fla. 561, 164 So. 192 (1935).
[16] 79 Neb. 532, 113 N.W. 256 (1907).
[17] 43 La. Ann. 590, 9 So. 776 (1891).
[18] *In Re Opinion of the Justices, supra*, note 6.
[19] 109 Wis. 9, 85 N.W. 131, 53 L.R.A. 635 (1909).

It is a controverted question as to how much effect the usual constitutional provision for the keeping of the legislative journals has on the application of the rule of finality of legislative records. Article II, Section 9 of the Ohio Constitution provides: "Each house shall keep a correct journal of its proceedings, which shall be published." The state constitutions often require certain enumerated steps to be taken and entered in the journal, as the counting of yeas and nays, three readings of a bill of appropriation or of a general character, *etc.* It was held in *Rash* v. *Allen*[20] that where the constitution requires certain legislative steps to be entered in the journals, then these journals are the best evidence as to those steps *and if not entered, they did not take place.* The usual rule, as stated in *State* v. *Frank*,[21] is that where certain procedural steps are not mentioned in the journal, they will be presumed to have taken place. This presumption of the validity of legislative action exists unless the journals definitely show the contrary.

A doctrine closely related to the rules of finality of legislative records is that of the conclusiveness of enrolled bills prevalent in many states. This doctrine does not pertain to legislative functions and duties as a whole, but confines the inquisition as to the validity of statutes to the enrolled bill.[22] Jurisdictions following this doctrine feel that even the legislative journals are too apt to be incorrect, and, pressed by the need for the sanctity of statutes, exclude the journals (as well as any other evidence) in determining the procedural constitutionality of such statutes. The courts are limited to the evidence existing on the face of the enrolled bill. A great number of states do not take this stand, and allow the courts to go behind the enrolled bill and look at the journal records. Among the latter is Ohio.[23]

Wilson v. *Markley*[24] stated that since North Carolina had the doctrine of the conclusiveness of enrolled bills, the legislative journals were competent evidence as to statutes only for the purpose of ascertaining whether or not a law had been passed in accordance with Article II, Section 14 of the constitution specifically requiring the entry of yeas and

[20] 1 Boyce 444 (Del.), 76 Atl. 370 (1910).

[21] 60 Neb. 327, 83 N.W. 74 (1900). *See, Miller* v. *State,* 3 Ohio St. 475 (1854), and *Pim* v. *Nicholson,* 6 Ohio St. 176 (1856), holding certain constitutional requirements directory and not mandatory, thus their absence from the journal record creating no invalidity.

[22] See note 23 L.R.A. 340; 40 L.R.A. (N.S.) 1.

[23] *State ex rel. Herron* v. *Smith*, 44 Ohio St. 348, 7 N.E. 447, 12 N.E. 829 (1886); *Ritzman* v. *Campbell,* 93 Ohio St. 246, 112 N.E. 591, L.R.A. 1916E, 1251 (1916); *Fordyce* v. *Godman, Aud.,* 20 Ohio St. 1 (1870). For list of states holding each way see *Ritzman* v. *Campbell, supra,* p. 254. See 1 Cooley's CONSTITUTIONAL LIMITATIONS 277, n. 2 and 3.

[24] 133 N.C. 616, 45 S.E. 1023 (1903); In accord: *The People* v. *Leddy,* 53 Colo. 109, 123 Pac. 824 (1912).

nays on second and third readings of certain types of bills. *Amos* v. *Moseley*[25] likewise limits the competence of the journal records to those entries specifically required to be kept by the constitution.

On the other hand, jurisdictions which do not follow the doctrine of the conclusiveness of enrolled bills do not distinguish between the entries specifically required by the constitution and any other entries or facts placed in the journal. Nor does the usual constitutional provision for the keeping of a legislative journal *per se* create the finality of the records, nor does it *per se* limit the available evidence of the true facts to the journal. Rather, the courts which quote such provisions seem to do so merely for the purpose of establishing the legislative journal as an official record in contrast to the ancient English concept of the legislative journal—not an official record, but a mere "remembrance of the proceedings." In *Rohrbacher* v. *Mayor of Jackson*[26] it was held that legislative journals are not records importing absolute verity unless made to do so by constitutional or statutory provisions, which had not been done in that state at that time. The court followed the old English idea of such journals not being official records. Article IV, Section 55 of the present constitution of Mississippi now provides that a legislative journal will be kept, the proceedings will be published, and yeas and nays will be entered.

Outside of the official status conferred by the constitutions, the true force behind the doctrine of the conclusiveness of legislative journals seems to be imbedded in public policy. "The resultant evil (curtailment of the governor's time to consider a bill) might be slight as compared with that of altering the probative force and character of legislative records and making the proof of legislative action depend upon uncertain oral evidence. Long, long centuries ago, these considerations of public policy led to the adoption of the rule giving verity and unimpeachability to legislative records. This has become a rule of evidence." So says the West Virginia court in *Capito* v. *Topping*.[27]

The Supreme Court of Ohio in *State ex rel. Herron* v. *Smith*[28] said: "Imperative reasons of public policy require that the authenticity of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired today upon the faith of what has been declared to be law shall not be destroyed tomorrow, by facts resting only in the memory of individuals."

[25] 74 Fla. 555, 77 So. 619, L.R.A. 1918C 482 (1917).
[26] 51 Miss. 735 (1875).
[27] See note 14, *supra*.
[28] See note 23, *supra*.

From the court in *White* v. *Hinton*[29] came, "On these records reliance is had by the bench, the bar, and the public, of necessity and right. Resort cannot be had to the recollection of individuals to show what the law is or is not. The evil would be much less than the unsettling of the evidentiary foundation of all statutory law, and the weakening of the public faith in all existing legislative enactments, which would result from throwing open the records of legislative action to impeachment by parol testimony whenever the interest or caprice of individuals may prompt them to such a course."[30]

In *Morgan* v. *Buffington*,[31] the court announced that the mileage certificate signed by the speaker of the house was not conclusive upon the auditor and that he could inquire into the truth of the facts, or contest the legality of the conclusions stated in the certificate. However, the court neither stated nor intimated that the auditor could go behind the legislative journals as to the truth of such facts.

The doctrine of the conclusiveness of the journal was accepted in 5 Ohio 358 by our Supreme Court in *State* v. *Moffitt* (1832). There the senate journal showed that Lemuel Moffitt had been elected as a judge, while the house journal stated Samuel Moffitt had been elected. When it was attempted to show "Samuel" was a mistake and both houses had meant to elect Lemuel, the court excluded such evidence and stated that the journal recital was final and could not be impeached. The general doctrine that the journal imports absolute verity and that the court will judicially notice said journal was accepted and set out in *State ex rel. Herron* v. *Smith, supra*, where there was a question of seating members without the necessary quorum whereafter said members then voted to pass the bill presently challenged.

In *Harbage* v. *Tracy, et al., supra*, Judge Reynolds had a fact set-up where the use of the apparently applicable rule of finality of legislative records would have had a distasteful and unjustifiable result. "While there is much abuse of the privilege and position of public office, we still cling to the ideal, at least, that a public office is a public trust, and it should be so regarded, . . ." The court further portrayed his consternation over such a result by saying, "Public policy surely requires that there be some method of attacking the records if and when those records work to the detriment of the public weal."

The court's striving for a just result, added to the absence of decisions dealing with the present, or a similar, fact situation, led Judge Reynolds to avoid the application of the doctrine by finding that the

[29] 3 Wyo. 753, 30 Pac. 953, 17 L.R.A. 66 (1892).
[30] See 22 C.J., Evidence, secs. 1421 to 1427.
[31] 21 Mo. 549 (1855).

"questioning of the journal records in no way reflects on legislative enactments but is confined purely to the ministerial acts of certain officers," and that the doctrine does not apply to ministerial acts.

While the result of the court's decision is commendable, the basis of the decision is open to criticism. In avoiding the application of the rule,[32] the court resorted to a play on words. There is no magic about the word, "ministerial." An official action is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes the time, manner, and occasion of its performance with such certainty that nothing remains for judgment or discretion.[33] Such a definition fits many or most of the duties of the state officers enforcing and executing the laws and statutes of the state. If Judge Reynolds's reasoning were sound, a litigant could, by enjoining or mandamusing the ministerial officer, go back of the legislative journals for the true facts relating to the law the officer is enforcing, and thus defeat and overturn the will of the legislature and embarrass the rights of the people every time he discovered a mere failure of legislative procedure. Adoption of the "ministerial" reasoning would but violate the doctrine of the separation of powers and would destroy the public policy which the rule of the finality of legislative records effects.

After extensive search, the writer regrets the inability to find case records dealing with a fact situation comparable to the one here involved, or any cases approximating the conclusion which is about to be reached. So without precedent to forbid it or to support it, a theory is advanced. It seems probable that Judge Reynolds was possessed of the same theory, but used an unfortunate choice of language in its presentation.

The result reached in *Harbage* v. *Tracy* can be approached on another tack. The purpose of the present rule is to preserve the independence of the legislature and to protect the public by stabilizing its rights by thwarting attempts to defeat legislative enactments and functions on the discovery of mere procedural error on the part of the legislative body. Many are the decisions setting out these dual policies promoted by the doctrine of finality of legislative records—separation of powers and avoidance of confusion of the laws. The rule has usually been applied without limitations in those states declining the doctrine of enrolled bills. But in each of these cases the courts were confronted by an attempt to question the recitals of the journals in reference to the validity of an actual statute or legislative duty which was part of the

[32] For the application of the rule to local legislative records, see 98 A.L.R. 1229 (1935); 13 Ohio St. 406 (1862); (records of county commissioners). For the application of a like rule to executive records, see 3 O.S.L.J. 259, 277 (1937).

[33] 2 Words and Phrases (4th Series) 689.

inviolate function of the legislature and which affected the right or duties of the citizens of the state. They pronounced the rule with that in mind. Such application was carrying out the purpose and policy of the rule.

In the *Harbage* case, no such situation prevails. Impeachment of the journals will not interfere with the legislature in its official duties nor will it confuse the rights of the public. In applying the doctrine to the present facts certain questions should be asked. Does the legislature's appropriation of unearned mileage allowance to itself constitute a situation similar to the decided cases? Will the questioning of the journal records in this case violate the separation of powers? Does it upset the rights and duties of the people by disclosing a mere procedural defect? These questions must be answered in the negative. Every rule of law should have a reason and a purpose and these should be kept in mind. Otherwise, by blind application, the court becomes a legal mechanic and not a referee dispensing justice. Allowance of parol testimony to show the actual facts here will not violate either of the policies giving rhyme and reason to the rule.

Here is a case which falls without the rule and the latter should not be mouthed by courts divorced from the purpose and policy which created it. Here is not a respected and impeccable legislative action, but here is merely a legislative "steal"—a recompense for doing nothing.

At this writing, *Harbage* v. *Tracy* is still in the throes of controversy in the court of common pleas, but if the case be appealed, it will be hoped the superior courts will abstain from a mechanical adherence to a rule which has no relation to the facts at hand.

JAMES M. GORMAN

EQUITY

THE FUSION OF LAW AND EQUITY — VENDOR AND PURCHASER

The Supreme Court of Ohio has recently considered the question whether a vendor in an executory contract of sale containing dependent covenants may, after tender of deed and deposit thereof in court, maintain an action at law on such executory contract for the unpaid purchase price. The court repudiated the holdin gof the Court of Appeals for the Ninth District[1] on this point of law, although it affirmed the decision because the tender was not good in fact.[2]

The two traditional remedies available to the vendor, upon default

[1] *Fairlawn Heights Co.* v. *Theis*, 27 Ohio L. Abs. 19 (1938).
[2] *Fairlawn Heights Co.* v. *Theis*, 133 Ohio St. 387, 14 N.E. (2d) 1 (1938).