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It is arguable that the issuance of such an order would not have been merely an abuse of power or discretion, but would have been in excess of the judge's power and, hence, beyond his jurisdiction. If so, this would have been a proper basis for issuing a writ of prohibition.[13]

WILLIAM E. LOVE.

CONSTITUTIONAL LAW

Enrolled Bill Rule. In two recent decisions, *Derby Club v. Beckett*[1] and *Roehl v. Public Utility District*,[2] four members of the Supreme Court have written opinions which challenge the validity of the enrolled bill rule. In the *Derby Club* case, the 1951 act which purported to license the operation of bottle clubs[3] was attacked on the ground that it was enacted in violation of Art. II, § 38 of the state constitution.[4] The defendants demurred, but relied on the enrolled bill rule in their argument on appeal. The majority of the court held the statute unconstitutional on other grounds, but two concurring opinions were filed, representing the views of four judges, in which the position was taken that the court should abandon the enrolled bill rule. In the *Roehl* case, the statute giving the Public Utility District authority to acquire substantially all of the electric utility properties of Puget Sound Power & Light[5] was alleged to be invalid, also under Article II, § 38. In support of their contention, the plaintiffs introduced certified copies of several House bills and the legislative journal. Having the enrolled bill rule thus directly raised in issue, the majority wrote an extensive opinion adhering to the long line of Washington authority upholding the enrolled bill rule. The same judges that spoke against the enrolled bill rule in the *Derby Club* case expressed their dissent in this case.[6]

discovery). RCW 4.56.120 (6) authorizes the court to grant a nonsuit when a defendant fails to comply with an order of the court (presumably an order affecting pre-trial or trial pleading or procedure), but there is no comparable statutory authority authorizing a default judgment when a defendant refuses to obey an order. However, Rule 37(d) does permit a court to grant a default judgment for the defendant's failure to comply with an order involving discovery.

[13] While the court did not decide the case on the propriety of the sanction which the trial judge intended to impose, it did question the propriety of such an order which would change the "status quo" between the parties prior to a trial on the merits.

[1] 41 Wn.2d 869, 252 P.2d 259 (1953).

[2] 143 Wash. Dec. 198, 261 P.2d 92 (1953).

[3] RCW 66.24.480.

[4] "No amendment to any bill shall be allowed which shall change the scope and object of the bill." WASH. CONST. ART. II, § 38.

[5] RCW 80.40.054.

[6] One of the judges who joined in the opinions against the enrolled bill rule in the previous case voted with the majority in this case, so the decision was six to three. However, in his concurring opinion, he stated that he still was not in favor of the rule.

The enrolled bill rule, as set forth in the leading Washington case, *State* ex rel. *Reed v. Jones*,[7] is that the enrolled bill on file in the office of the secretary of state, which is duly signed by the presiding officers of both houses,[8] and otherwise appears fair upon its face, is conclusive evidence of the regularity of all proceedings necessary for its proper enactment in conformity with the constitutional provisions. The effect of the rule is that the court will not consider evidence of the legislative history of the bill, as revealed in the legislative journals or elsewhere, to rebut the presumption of enactment in accordance with the constitutional requisites. The rule has been applied to preclude allegations that the bill in question was not properly repassed after the governor's veto,[9] that the bill was passed by the legislature subsequent to the expiration of the sixty-day period to which sessions of the legislature are limited by the state constitution,[10] and that an amendment changed the scope and object of the bill.[11] An investigation of the antecedent history of the passage of a bill will not be made except as may be necessary in case of ambiguity in the bill when the legislative intent must be determined.[12]

Although the enrolled bill rule has been adopted in many other jurisdictions, including the federal,[13] there is much authority to the contrary. It has, in fact, been suggested that the modern tendency is to abandon the conclusive presumption of the enrolled bill rule and to give weight to the legislative history of the bill as recorded in the official journals.[14] The rule is attacked on three grounds: (1) that the enrollment is not a record and that the primary source of information as to the constitutional passage of a bill is to be found in the legislative journals;[15] (2) that there is danger of error and fraud in the enrollment procedure;[16] and (3) that the doctrine prevents the enforcement of the constitutional provisions relating to the passage of bills.[17]

Such arguments have been forcibly answered by the authorities in

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[7] 6 Wash. 452, 34 Pac. 201 (1893). Wigmore states that the opinion is "perhaps the best on the subject." 4 WIGMORE, EVIDENCE § 1350 (3d ed. 1940).

[8] The authentication of bills and their enrollment with the secretary of state is required by WASH. CONST. ART. II, § 32 and ART. III, § 17.

[9] State *ex rel.* Dunbar v. State Board of Equalization, 140 Wash. 433, 249 Pac. 996 (1926).

[10] Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016 (1935).

[11] State *ex rel.* Bugge v. Martin, 38 Wn.2d 834, 232 P.2d 833 (1951).

[12] Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 104 P.2d 478 (1940).

[13] Field v. Clark, 143 U.S. 649 (1892).

[14] 1 SUTHERLAND, STATUTORY CONSTRUCTION, §§ 1402, 1405 (3d ed. 1943).

[15] Fowler v. Pierce, 2 Cal. 165 (1852).

[16] Bull v. King, 205 Minn. 427, 286 N.W. 311 (1939).

[17] State v. McClelland, 18 Neb. 236, 25 N.W. 77 (1885).

favor of the enrolled bill rule. First, the claim that the legislative journals are the "true" record is not sustained in legal theory:

> The enrollment is only somebody's certificate and copy, because the effective legal act of enactment is the dealing of the legislature with the original document, e.g., the "viva voce" vote. The legislature has not dealt by vote with the enrolled document; the latter therefore can only be a certificate and copy of the transactions representing the enactment. The enrollment is thus not a record in the sense of a judicial record, i.e., *the* act done in writing.
>
> Furthermore, it is clear that the legislative journals are not the original enactment, for the "viva voce" is not given upon them. They are but official statements of what has been done at a prior time, although the House may have heard them read and approved them as correct. Thus the question whether an enrolled copy shall be conclusive as against the journal is only a question whether an official report and copy of one degree of solemnity and trustworthiness is to be preferred against another of a less degree.[18]

Second, the courts have taken judicial recognition of the hurry and looseness by which the legislative journals are compiled;[19]

> There is required not a single guarantee to their accuracy or to their truth; no one need vouch for them, and it is not enjoined that they should be either approved, copied or recorded.[20]

Since it is the general rule in the jurisdictions allowing the admission of the journal entries that the courts will not take other testimony besides the journal,[21] there is the danger that errors in the journal will be allowed to rebut the constitutionality of passage. The third and principal argument against the enrolled bill rule is that of constitutional necessity. It is drawn from the analogy of the judicial review of the constitutionality of legislation, that is, if the courts will inquire into the substance of the bill as to its constitutionality, they should also see that the constitutional requisites relating to the procedure have not been infringed.[22] It is answered that this argument rests on the fallacy that the judiciary is the sole enforcer of the constitution. Under the separation of powers doctrine, the courts should not reach out beyond their constitutional sphere to questions which, by constitutional direction, belong to the other departments of the government:[23]

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[18] 4 WIGMORE, EVIDENCE § 1350 (3d ed. 1940).
[19] State *ex rel.* Reed v. Jones, 6 Wash. 452, 34 Pac. 201 (1893).
[20] Pangborn v. Young, 32 N.J.L. 29 (1866).
[21] 82 C.J.S. Statutes, § 85 (1953).
[22] Price v. City of Moundsville, 43 W.Va. 523, 27 S.E. 218 (1897).
[23] Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595 (1915).

Upon principle, then, in view of the division into departments under our form of government, each of equal authority, one department cannot rightfully go behind the final record certified to it or to the public from either of the other departments. And the judicial department is no more justified in going behind the final act of the legislature to see if it has obeyed every mandatory provision of the constitution than has the legislature to go back of the final record made by the courts to see whether or not they have complied with all the constitutional requirements.[24]

Another reason given in support of the conclusive presumption rule is that if the enrolled bill were not conclusively presumed to be valid, it would be impossible to ascertain rights and duties arising under a statute until the courts have determined that all the steps required by the constitution to properly enact it have been observed by the legislature:

The confusion as to rights and duties growing out of such a state of uncertainty as to what the statute law of the state is may well appall one who even superficially contemplates the same.[25]

This "argument of convenience" has been conceded to be persuasive even to those authorities which deny the separation of powers argument.

There are three opposing doctrines held among the jurisdictions denying the conclusive presumption rule. The most generally accepted is the extrinsic evidence rule[26] which accords the enrolled bill a *prima facie* presumption of validity, but permits attack by any clear, satisfactory and convincing evidence in the journals establishing that the constitutional requirements which the court deems mandatory have not been met.[27] Another variation is the affirmative contradiction rule: Validity will be given to the enrolled bill unless there affirmatively appears in the journals a statement that there has not been compliance with one or more of the constitutional requirements.[28] A view favored by only a very few courts is the journal entry rule: If constitutional compliance with the mandatory provisions are not set forth in the record of the journals, there is a conclusive presumption that the proper proceedings were not followed and thus the presumption is conclusively

[24] State *ex rel.* Reed v. Jones, 6 Wash. 452 at 464, 34 Pac. 201 at 205 (1893).
[25] State *ex rel.* Reed v. Jones, 6 Wash. 452 at 457, 34 Pac. 201 at 202 (1893).
[26] The terminology adopted here is that in 1 SUTHERLAND, STATUTORY CONSTRUCTION, § 1402 (3d ed. 1943). While the courts as yet have not uniformly adopted these terms, it appears that their use is gaining recognition.
[27] *E.g.*, State *ex rel.* Attorney-General v. Mead, 71 Mo. 266 (1879); People *ex rel.* Monville v. Leddy, 53 Colo. 109, 123 Pac. 824 (1912).
[28] *E g.*, Young v. Galloway, 177 Ore. 617, 164 P.2d 427 (1945); State *ex rel.* Laseke v. Friche, 126 Neb. 736, 254 N.W. 409 (1934).

against the validity of the act.[29] The ramifications and merits of these various doctrines cannot be considered in the limited scope of this article.

Although neither the *Derby Club* case nor the *Roehl* case have effected any change in the Washington law as to the enrolled bill rule, the cases are significant in that they reveal that four judges of the Supreme Court have rejected the reasoning in *State* ex rel. *Reed v. Jones*. Since the dissenting judges have not, in any of their opinions, affirmatively advocated a substitute for the enrolled bill rule, it is impossible to predict which doctrine would exist if their viewpoint should prevail in some future case.

Right to Trial by Jury in Contempt Proceedings. The case of *State v. Boren*,[30] clarifies the law in respect to the defendant's right to trial by jury under Washington's two contempt statutes, RCW 7.20.010 and RCW 9.23.010. The defendant was charged with contempt of court by an information alleging that he had wilfully disobeyed a mandate of the superior court. In pursuance to a previous decision of the Supreme Court,[31] a decree had been entered permanently enjoining the defendant from practicing dentistry in this state without a license. In the present action, the defendant was adjudged guilty of the contempt charged. On appeal, he assigned as error the failure of the trial court to accord him a jury trial. The Supreme Court held for the defendant on this assignment of error and remanded the cause with instructions to grant the defendant a jury trial.

RCW 7.20.010, *et seq.*, defines contempt of court and provides for the procedure to be followed in trying persons charged. The statute is considered to embody the elements of common law contempt. The general rule, which is followed by the Washington court, is that the defendant in a contempt proceeding is not entitled to a trial by jury.[32] The power of the court to punish summarily for contempt is deemed to be inherent as an "essential auxiliary to the due administration of justice."[33] It has been said that the object of this power might be defeated if a jury trial were allowed.[34] This summary jurisdiction has been the subject of criticism by writers, but is zealously championed by the courts themselves.

[29] *E.g.*, Neiberger v. McCullough, 253 Ill. 312, 97 N.E. 660 (1912); McClellan v. Stein, 229 Mich. 203, 201 N.W. 209 (1924).
[30] 42 Wn.2d 155, 253 P.2d 939 (1953).
[31] State v. Boren, 36 Wn.2d 552, 219 P.2d 939 (1950).
[32] 50 C.J.S., Juries § 78 (1947).
[33] 17 C.J.S., Contempt § 43 (a) (1939).
[34] COOLEY, CONSTITUTIONAL LIMITATIONS 389 n. 2 (6th Ed., 1871).

RCW 9.23.010 lists eight kinds of contempts that are misdemeanors. It is the holding of the court in the principal case that a person charged under this statute has a constitutional right to trial by jury, as he is charged with a crime.[35] The holding in this case in no way infringes on the power of the court to proceed summarily under RCW 7.20.010. While the statutes overlap, so that one act may be a contempt of court under RCW 7.20.010 and also a misdemeanor under RCW 9.23.010,[36] the procedural rights of the defendant depend upon whether he is charged by affidavit, under RCW 7.20.010, or by indictment or information, under RCW 9.23.010.

Since the latter statute became a part of the criminal code in 1909,[37] there has been much confusion in the decisions, due to the court's failure to clearly distinguish between the two statutes. Perhaps a good deal of the confusion has been due to the fact that contempts of court are generally classified as "civil" or "criminal." Civil contempts are wrongs for which the law awards reparation to the injured party. In the vast majority of cases, civil contempts are the result of a failure of a party to a civil suit to comply with an order of the court made for the benefit of the other party. Criminal contempts are acts done in disrespect to the court or to its process, or which obstruct the administration of justice or tend to bring the court into disrespect. The primary purpose of the prosecution for criminal contempts is to vindicate the authority of the court. Since both in substance and in purpose criminal contempts are analogous to ordinary criminal offenses, the courts often refer to contempt proceedings as "quasi-criminal."[38] In both civil and criminal contempt proceedings, the trial is by the court and the defendant is subject to imprisonment or fine, or both, at the discretion of the court.[39] The purpose of RCW 9.23.010 is not to segregate criminal contempts from those over which the court has summary jurisdiction, but rather to impose additional punishment for those acts which, from a public policy standpoint, should not go unpunished, in the event that the court should waive the contempt.[40]

The semantic confusion, between contempts which are misdemeanors

[35] WASH. CONST. ART. I, § 22.

[36] No question as to double jeopardy has yet arisen. RCW 7.20.120 provides: "Persons proceeded against according to the provisions of this chapter are also liable to indictment or the filing of an information for the same misconduct, if it is an indictable offense, but the court before which a conviction is had on the indictment or information in passing sentence shall take into consideration the punishment before inflicted."

[37] L. 1909, C. 249, § 120.

[38] C. H. THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934).

[39] J. C. FOX, HISTORY OF CONTEMPT OF COURT (1937).

[40] See People *ex rel.* Sherwin v. Mead, 92 N.Y. 415 (1883).

and criminal contempts, is apparent in the case of *State* ex rel. *Dailey v. Dailey*,[41] where the court stated:

> Constitution Art. I, § 22, providing for trial by jury in all criminal cases does not apply to a prosecution for criminal contempt under . . . [RCW 9.23.010].[42]

The court in the *Boren* case was able to distinguish the result in the *Dailey* case on the ground that the proceeding was initiated by affidavit, and therefore, came under RCW 7.20.010. The quoted statement is thus dicta. In *Blanchard v. Golden Age Brewing Co.*,[43] the court approvingly quoted the language of the *Dailey* case and discussed the legislature's lack of power to interfere in the court's inherent right to punish for contempt. However, this must also be treated as dicta, as the proceeding was clearly under RCW 7.20.010. In *State v. Buddress*,[44] another action under RCW 7.20.010, the court erroneously referred to RCW 9.23.010 as defining the elements of contempt of court, which it does not do.

Only two cases have previously arisen under RCW 9.23.010. In *State v. Angevine*,[45] the defendant was charged by an information based on § 7 of the statute—"Publication of a false or grossly inaccurate report of [the court's] proceedings"—and was convicted after having had a trial by jury. The concurring judge in that case made mention of the distinction between the two contempt statutes. In the other case arising under RCW 9.23.010, no question as to the right of trial by jury was before the court, as the appeal was from an order dismissing the prosecution.[46]

JOAN SMITH

Appeal—Proceeding in Forma Pauperis Within Discretion of Court. In an appeal from a judgment denying a writ of *habeas corpus*, it was held, in In re *Mason v. Cranor*, 42 Wn.2d 610, 257 P.2d 211 (1953), that the constitutional right of an accused to an appeal does not include, even in a capital case, the right for an impecunious defendant to require the county to defray the cost of the appellate record. Such allowance is within the discretion of the trial court.

Right to Compel Attendance of Witnesses. In a petition for a writ of *habeas corpus*, the defendant, in In re *Johnson v. Cranor*, 143 Wash. Dec. 184, 260 P.2d 873 (1953), claimed that the subpoenas issued in his behalf were defective in that they directed his

[41] 164 Wash. 140, 2 P.2d 79 (1931).
[42] *Id.* at 145, 2 P.2d at 81.
[43] 188 Wash. 396, 63 P.2d 397 (1936).
[44] 63 Wash. 26, 114 Pac. 879 (1911).
[45] 104 Wash. 679, 177 Pac. 701 (1919).
[46] State v. Lew, 25 Wn.2d 854, 172 P.2d 289 (1946).

witnesses to appear on the day following the trial and that therefore he was convicted without the benefit of testimony from his requested witnesses. The Supreme Court referred the petition to the Superior Court to determine the facts, stating that if the allegations were true, the defendant had been denied his constitutional rights unless he had in some way waived those rights.

CONTRACTS

Implied Contracts—Expectation of Payment. *Kerr v. King County*[1] was a case arising on a claim for payment made by employees who, under an unenforceable contract, worked overtime on emergencies upon expectancy of time off with pay later, but who were discharged before such compensation took place. Recovery was denied.

The contemplation of the court seems to oscillate between contracts implied in law and contracts implied in fact, and from the denial of recovery it is to be deduced they found neither. The reasoning seems to be confused but it appears that the court is disallowing an implied in law contract on the authority of *Chandler v. Washington Toll Bridge Authority*[2] in which the recipient of the benefits already had an entitlement thereto as a third party donee beneficiary of a collateral contract thus, although the donee was enriched, the enrichment was not unjust. In the *Kerr* case, however, there is nothing in the facts or opinion to indicate how, or to what, the recipient was already entitled and the enrichment seems to be made not unjust by the fiat of the court.

The implied-in-fact contract is disallowed on even stranger grounds. By reference to an imposing list of cases involving implied contracts between municipalities and employees or contractors, it is held that expectations to pay and be paid are essential to recovery. This of course is in keeping with the principal announced in *Strong & MacDonald v. King County*[3] that "municipalities are bound by the same standard of right and wrong that the law imposes upon individuals, and it is neither equitable nor just that a municipality should have the benefit of the property and labor of another without compensating that other therefore." The expectation of payment is necessary in the implied-in-law contract in order to repel the idea of a gift or gratuitous service;[4] in the implied-in-fact contract it is an integral part of the mental processes making up the intent to contract.[5] In the *Kerr* opinion, however, the

[1] 42 Wn.2d 845, 259 P.2d 394 (1953).
[2] 17 Wn.2d 591, 137 P.2d 97 (1943).
[3] 147 Wash. 678, 267 Pac. 436 (1928).
[4] 58 Am. Jur. 517 (note 4); Gross v. Cadwell, 4 Wash. 670, 30 Pac. 1052 (1892); noted 54 A.L.R. 550 (1928).
[5] Ross v. Raymer, 32 Wn.2d 128, 201 P.2d 129 (1948) and cases cited.