Me. Const. Art I § 9

Bail Conditions
Legislature / Revenue Raising Bill
Me. Const. Art IV, Pt 3rd § 9

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Honorable Peter J. Curran
House of Representatives
State House
Augusta, Maine

Re: L.D. 493. AN ACT to Assess a Surcharge on Fines and Penalties for the Operation of the Maine Criminal Justice Academy.

Dear Representative Curran:

This responds to your request for advice regarding L.D. 493. In preparing this opinion we have addressed the intiial question you raised and an additional constitutional problem which the Committee may wish to consider in its deliberations on L.D. 493.

FACTS:

L.D. 493, which has been introduced in the State Senate, provides for the creation of a Criminal Justice Training Fund to be expended for the costs of the operation of the Maine Criminal Justice Academy. The bill further provides that in addition to the fine imposed for a criminal or traffic offense, the defendant shall be required to pay a specified amount of money to be deposited into the Fund.

The first sentence of the fourth paragraph of L.D. 493 requires that a person who posts bail for a criminal or traffic offense "shall also deposit a sufficient amount to include the assessment prescribed in this section for forfeited bail."

QUESTIONS:

1. Is L.D. 493 a "bill for raising a revenue," which, pursuant to Article IV, Part Third, Section 9, of the Maine Constitution, must originate in the House of Representatives?

2. Does the requirement that an arrested person deposit, in addition to bail, an amount equal to the penalty assessment set out in L.D. 493 violate the prohibition against excessive bail contained in Article I, Section 9, of the Maine Constitution?

ANSWERS:

1. L.D. 492 is not a bill for raising revenue under Article IV, Part Third, Section 9, of the Maine Constitution. Accordingly, it may originate in the Senate.

2. The requirement that an amount equal to the penalty assessment be deposited in addition to bail is violative of Article I, Section 9, of the Maine Constitution.

DISCUSSION:

ANSWER 1.

I. General Discussion of the Case Law.

Article IV, Part Third, Section 9, of the Maine Constitution reads as follows:

> Section 9. Bills, orders or resolutions, may originate in either House, and may be altered, amended or rejected in the other; but all bills for raising a revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other cases: provided, that they shall not, under color of amendment, introduce any new matter, which does not relate to raising a revenue.

The resolution of the pending question turns upon the meaning of the phrase "bills for raising a revenue." As will become apparent, the requirement that such bills originate in the "lower house" is not limited to Maine; numerous other jurisdictions have constitutional provisions with identical or similar language. See, e.g., U. S. Const. Art. I, § 7. For purposes of convenience, these will hereinafter be referred to as revenue raising provisions.

It is well settled that a bill does not become a revenue measure simply because one consequence of its enactment will be to produce revenue for the State. Opinion of the Justices, 133 Me. 537, 539 (1935); J. Story, Commentaries on the Constitution of the United States, §880 (5th ed. 1891). A contrary interpretation would severely limit the authority of the Senate. For example, under such an interpretation, most penal laws would have to originate in the House of Representatives, insofar as those statutes authorize fines which eventually result in money for the public coffers.

Although the law is clear that the production of revenue does not in itself render a bill a revenue raising measure, there is far less certainty as to the precise definition of that concept. In fact, the United States Supreme Court has alluded to the difficulty of formulating such a definition.

> What bills belong to that class [bills for raising revenue] is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897).

Accordingly, it is necessary to examine the precedent to determine how the courts have applied §9 of the Maine Constitution and similar provisions.

The clear thrust of the case law is that revenue raising provisions should be interpreted very narrowly. As stated by the Supreme Court of New Hampshire, "[t]his limited and strict construction of the constitutional requirement that money bills or bills for raising revenue shall originate in the lower house is supported by the overwhelming weight of authority." Opinion of the Justices, 150 A.2d 813, 815 (N.H. 1959).[1] As a result, most court decisions have limited the requirement to bills which levy taxes in the strict sense of the word. Annot., 4 A.L.R.2d 973, 975 (1949); see also United States v. Norton, 91 U.S. 566, 569 (1875). This approach is revealed not only by the language of the courts but also by their decisions. In only a very few instances has the argument that a law was unconstitutionally introduced in the upper house prevailed. See Annot., 4 A.L.R. 2d 973, 975 (1949).

The extent to which the courts have restricted the scope of revenue raising provisions is reflected in a recent opinion

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1. It has been suggested that the narrow interpretation of this constitutional requirement may stem from the fact that, with the advent of popularly elected upper houses, the traditional reason for the requirement has disappeared. Mikell v. School Dist. of Philadelphia, 58 A.2d 339, 341 (Pa. 1948).

of the Supreme Court of Vermont. That case, Andrews v. Lathrop, 315 A.2d 860 (Vt. 1974), involved a challenge to Vermont's Land Gains Tax, which imposed a special levy on the gain derived from the sale or exchange of land held by the transferror for less than six years. Although the case was decided on other grounds, the court did address the question of whether the act was a revenue bill. Its language on that issue is worthy of note.

> The lower court here found that the whole bill "had its primary purpose to provide tax relief to certain taxpayers" and further that the primary purpose of the taxing provision was to raise revenue specifically to fund the tax relief program. The bill was not, therefore, a revenue bill within the meaning of Chapter II, Article 6 of the Vermont Constitution. 315 A.2d at 866.

The Andrews opinion leaves no doubt that the court recognized that the challenged law included what could only be classified as a tax. Nonetheless, it decided that since the money was sought for a specific objective, it was that objective, and not the raising of revenue, that constituted the primary purpose of the bill. This was the case, even though the objective amounted simply to a desire to lessen the burden on another group of taxpayers.

Similar reasoning is found in Beeland Wholesale Co. v. Kaufman, 174 So. 516 (Ala. 1937), which upheld the constitutionality of Alabama's "Unemployment Compensation Law." Briefly stated, that act required certain employers and employees to make regular contributions to a fund to be paid to employees when and if they lost their jobs. While acknowledging that the law levied a tax on employers, the Alabama Supreme Court held that "when an act has for its main purpose provision for the general welfare by enacting a scheme within the state's police power, it is not one to raise revenue, though it does so an an incident to such scheme." 174 So. at 525.

Bills which clearly fall outside the ambit of the revenue raising provision are those which, in addition to generating funds for the State, have a regulatory purpose. Thus, the Supreme Judicial Court of Maine has held that a bill to increase the fees for fishing and hunting licenses could constitutionally originate in the Senate.

> We . . . advise that the primary object of the bill submitted to us being regulatory, it is not, within the meaning of the Constitution, one for "revenue" which should have originated in the House of Representatives. Opinion of the Justices, 133 Me. 537, 539 (1935).

It should be emphasized that the sole effect of the bill in question was to increase the cost of, and the revenue to be derived from, the sale of licenses. Nevertheless, the Court

apparently concluded that since the overall statutory scheme, to be amended by the bill, had a regulatory purpose, that purpose applied to the bill as well.

The only other Maine decision to interpret section 9 dealt with a law which levied a tax on quahogs purchased from the primary producers by shellfish dealers. State v. Lasky, 156 Me. 419 (1960). In that case, previously existing statutes were repealed and reenacted with new section numbers as part of "An Act to Correct Errors and Inconsistencies in the Public Laws," which originated in the Senate. Since the sole intent and consequence of the repeal and reenactment was to correct the section numbers in the original act, the Court held that it was not a bill to raise revenue.

The Court did state by way of dictum that the original act, which had been introduced in the House of Representatives, was a bill to raise revenue under the Constitution. It based this conclusion on its finding that the purpose of the tax was "not to regulate the shellfish dealers, but to privide funds for the benefit of the . . . State." 156 Me. at 424.

Despite the difficulty of articulating a comprehensive definition of "bills for raising a revenue," the position of the majority of the Courts on this issue is relatively clear. If a bill can be found to have some legitimate purpose, independent of generating revenue, it is generally held not to be constitutionally defective by reason of having originated in the upper house. It is in this framework, which emerges from the case law, that L.D. 493 must be considered.

II. Application of the Case Law to L.D. 493

L.D. 493 is in essence an addition to a previously enacted statutory scheme which provides for the establishment and operation of the Maine Criminal Justice Academy. See 25 M.R.S.A. c. 341. Accordingly, its purpose must be ascertained in the overall context of that scheme. As the cases demonstrate, the crucial question is whether the proposed legislation serves some valid State purpose, apart from simply raising revenue to meet general governmental expenses. See Morgan v. Murray, 328 P.2d 644, 648-9 (Mont. 1958). If this question can be answered in the affirmative, the Maine Constitution would not require that the bill originate in the House of Representatives.

One of the primary functions of the State is to enforce its laws and thereby maintain the public order. As part of the exercise of its police powers, the State clearly has the authority to develop a means for the training of those persons charged with enforcement responsibilities. In light of the precedent, it is reasonable to characterize L.D. 493 as a new facet of a broader statutory scheme designed to accomplish that objective. Given the clear purposes of the overall scheme, L.D. 493 can justifiably be viewed as part of the valid exercise of the

State's police power and not as a "bill for raising a revenue."

The above conclusion receives indirect support from another line of cases which hold that bills imposing a special financial burden in return for special benefits are not revenue measures. United States ex rel. Michels v. James, 26 F. Cas. 577, 578 (No. 15, 464) (C.C.S.D. N.Y. 1875); Morgan v. Murray, supra. This argument has been invoked in the license fee cases, on the theory that it is common for a regulatory scheme to make the beneficiaries pay for the costs. See Annot., 4 A.L.A.2d 973, 982 (1949). L.D. 493 adopts an analogous philosophy, in that it incorporates into the State's method of enforcing its criminal and traffic laws a procedure thereby violators are required to pay an additional amount of the expense of enforcement. The fact that violators of the criminal and traffic laws do not receive a special benefit from those laws seems irrelevant. The principle is the same, insofar as the persons at whom the regulatory scheme is directed, and whose conduct makes the scheme necessary, are subjected to a special financial burder of underwriting a part of the costs of the scheme.

Finally, it would not be unreasonable for the Legislature to conclude that the imposition of a penalty assessment may serve as an additional deterrent to potential violators of the State's criminal and traffic laws. Under this rationale, the penalty assessment bill has a legitimate police power objective, similar to that underlying fine and forfeiture provisions.

For the reasons stated above, L.D. 493 is not a bill for raising a revenue, and thus, may constitutionally originate in the Senate.

ANSWER 2.

The first sentence of the fourth paragraph of L.D. 493 reads as follows:

> When any deposit of bail is made for an offense to which this section applies, the person making such deposit shall also deposit a sufficient amount to include the assessment prescribed in this section for forfeited bail.

It is extremely important to note that the above language was taken verbatim from the California penalty assessment statute, Cal. Penal Code § 13521 (West. Supp. 1977). The California Supreme Court has expressly held that facet of its statute to be unconstitutional. McDermott v. Superior Court of City and County of San Francisco, 493 P.2d 1161 (Cal., 1972).

The decision of the California Court was premised on the principle that the only legitimate purpose of bail is to insure the attendance of the defendant in court. The same principle is inherent in the prohibition against excessive bail in the Maine Constitution.

> Nothing more than reasonable security for his appearance should be required of an appellant seeking a trial by jury. State v. Gurney, 37 Me. 156, 161 (1853).
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> The language of the constitution is that "excessive bail shall not be required." Every condition beyond what is necessary to secure the prosecution of the appeal must be regarded as objectionable. State v. Gurney, supra at 163.

The notion that bail may be validly imposed only to assure the appearance of the person in court has also been adopted by the Maine Legislature. 15 M.R.S.A. §942.

The combined language of 15 M.R.S.A. §942 and L.D. 493 indicates that the penalty assessment deposit would be in addition to the amount which the judge or bail commissioner determined to be necessary to secure the appearance of the accused. See McDermott v. Superior Court of City and County of San Francisco, supra at 1163. It cannot realistically be argued that the assessment would merely be a part of the bail, insofar as L.D. 493 prescribes that the person "shall also deposit a sufficient amount to include the assessment..." Accordingly, the penalty assessment deposit does not fall within the scope of the constitutionally permissible use of bail.

The California statute differs from L.D. 493, in that the former involves considerably larger sums of money. Under Cal. Penal §13521, the penalty assessment amounts to 25% of the fine or bail, whereas under the proposed Maine legislation, the assessment would never exceed $17. Despite the greater severity of the California law, this difference is seemingly without constitutional significance. Any excess, no matter how small, over the amount required to insure the defendant's presence in court, would presumably constitute excessive bail.

> The purpose of bail is to insure the attendance of the defendant in court and his obedience to the court's orders and judgments, and there should be no suggestion of revenue to the government or punishment of the defendant or his surety. McDermott v. Superior Court of City and County of San Francisco, supra, at 1163.

Accordingly, the relatively small penalty assessments prescribed by L.D. 493 do not obviate the constitutional problem.

One other feature of the McDermott opinion merits discussion. According to the court, the penalty assessment deposit scheme might be constitutional in those instances in which what is technically denominated "bail" is really a mechanism for the payment of a fine without a court appearance. Commenting upon a minor traffic offense

involving "bail" in the amount of $5 (and a penalty assessment of $1), the court stated that "[b]ail for traffic law offenses is, generally, in effect a fine and is employed more for the purpose of punishment and judicial convenience than insuring that the trial will take place," 403 P.2d at 1163. The Court made it clear, however, that the constitutional infirmity exists for more serious criminal cases.

In light of the above discussion, it is arguable that the deposit provision of L.D. 492 would be constitutional whenever bail is intended simply as a convenient means of collecting a fine. For the vast majority of criminal cases, however, McDermott leaves no doubt that the procedure constitutes excessive bail. Since that case is directly on point and since there is no other precedent on this particular question, it can only be concluded that the requirement that the person deposit, in addition to bail, an amount equal to the penalty assessment is unconstitutional. See Note, Excessive Bail and California Penal Code Section 13521, 23 Hastings L.J. 697 (1972).

It should be emphasized that this opinion pertains solely to that aspect of L.D. 493 which deals with bail. The problem could be avoided either by eliminating the deposit requirement or by modifying it so as to bring it into conformity with the Maine Constitution.

I hope this information is helpful.

Sincerely,

JOSEPH E. BRENNAN
Attorney General

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