Legislation and Regulation
Law 6209 - Section 15 (Brandeis)
Spring 2025

Supplementary Materials

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WHITELEY, APPELLANT; CHAPPELL, RESPONDENT
[1868] 4. Q.B. 147

. . . By [the statute] 14 & 15 Vict. c. 105, s. 3, if any person, pending or after the election of any guardian [of the poor], shall wilfully, fraudulently, and with intent to affect the result of such election . . . "personate any person entitled to vote at such election," he is made liable on conviction to imprisonment for not exceeding three months.

The appellant was charged with having personated one J. Marston, a person entitled to vote at an election of guardians for the township of Bradford; and it was proved that Marston was duly qualified as a ratepayer on the rate book to have voted at the election, but that he had died before the election. The appellant delivered to the person appointed to collect the voting papers a voting paper apparently duly signed by Marston.

The magistrate convicted the appellant.

The question for the Court was, whether the appellant was rightly convicted.

Mellish, Q.C. . . ., for the appellant. A dead person cannot be said to be "a person entitled to vote," and the appellant therefore could not be guilty of personation under 14 & 15 Vict. c. 105, s. 3. Very possibly he was within the spirit, but he was not within the letter, of the enactment, and in order to bring a person within a penal enactment, both must concur. . . .

Russell on Crimes . . . [in discussing] a former statute [that made] it a misdemeanor to personate "a person entitled or supposed to be entitled to any prize money[,]" . . . [cited] *Brown's Case* . . ., in which it was held that the personation must be of some person prima facie entitled to prize money.

In the Parliamentary Registration Act (6 Vict. c. 18), s. 83, the words are "any person who shall knowingly personate . . . any person whose name appears on the register of voters, whether such person be alive or dead," but under the present enactment the person must be entitled, that is, could have voted himself.

Crompton, for the respondent. *Brown's Case* . . . is, in effect, overruled by the later cases of *Rex v. Martin* and *Rex v. Cramp* . . ., in which the judges decided that the offence of personating a person "supposed to be entitled" could be committed, although the person, to the knowledge or belief of the authorities, was dead. Those cases are directly in point. The gist of the offence is the fraudulently voting under another's name; the mischief is the same, whether the supposed voter be alive or dead; and the Court will put a liberal construction on such an enactment. . . .

Mellish, Q.C., in reply. "Supposed to be entitled" must have been held by the judges in the cases cited to mean supposed by the person personating.

LUSH, J. I do not think we can, without straining them, bring the case within the words of the enactment. The legislature has not used words wide enough to make the personation of a dead person an offence. The words "a person entitled to vote" can only mean, without a forced construction, a person who is entitled to vote at the time at which the personation takes place; in the present case, therefore, I feel bound to say the offence has not been committed. In the cases of *Rex v. Martin,* and *Rex v. Cramp* . . . the judges gave no reasons for their decision; they probably held that "supposed to be entitled" meant supposed by the person personating.

HANNEN, J. I regret that we are obliged to come to the conclusion that the offence charged was not proved; but it would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases.

HAYES, J., concurred.

Judgment for the appellant.

Notes and Questions

1. This case is from the court of Queen's Bench, in England, and concerns § 3 of 14 & 15 Vict. c. 105, a statute passed by the British Parliament in 1851. The full text of § 3 was:

> If any Person, pending or after the Election of any Guardian or Guardians, shall wilfully, fraudulently, and with Intent to affect the Result of such Election, commit any of the Acts following; that is to say, fabricate in whole or in part, alter, deface, destroy, abstract, or purloin any Nomination or Voting Paper used therein; or personate any Person entitled to vote at such Election; or falsely assume to act in the Name or on the Behalf of any Person so entitled to vote; or interrupt the Distribution or Collection of the Voting Papers; or distribute or collect the same under a false Pretence of being lawfully authorized to do so; every such Person so offending shall for every such Offence be liable, upon Conviction thereof before any Two Justices, to be imprisoned in the Common Gaol or House of Correction for any Period not exceeding Three Months, with or without Hard Labour.

2. What is the relevant text of the statute? What is the meaning of that text? Does the text of the statute cover what the appellant did?

3. What did the legislators who wrote or voted for the statute likely intend it to mean? Would they have intended the statute to cover what the appellant did?

4. What purpose does the statute serve? Would that purpose be best served by interpreting the statute to cover, or not to cover, what the appellant did?

5. Should what the appellant did be legal or illegal? Is a holding that the statute does not cover what the appellant did good or bad policy?

6. Which of the above considerations (the statutory text, the likely intent of the legislators, the purpose of the statute, policy considerations) should be most important to a court that has to determine what a statute means? How would you have ruled in this case?

THE PINE TAR CASE

KANSAS CITY ROYALS v. NEW YORK YANKEES

Decision of Lee MacPhail, President, American League
July 28, 1983

With two out in the ninth inning of the game of July 24th, Kansas City at New York, George Brett hit a home run with a man on to put the Royals ahead by a score of 5-4. Manager Martin objected, claiming that the pine tar on Brett's bat extended beyond the permissible 18 inches from the handle. Plate umpire Tim McClelland conferred with crew chief Joe Brinkman and with umpires Nick Bremigan and Drew Coble. The portion of the bat covered with pine tar was measured and found to be well over 18 inches. Brett was therefore called out ending the game and giving New York a 4-3 victory.

The umpires cite Official Playing Rule 6.06(a) which states "that a batter is out for illegal action when he hits an illegally batted ball." They state that Rule 1.10(b) provides that a ball hit with a bat "treated with any material (including pine tar) ... which extends past the 18 inch limitation ... shall cause the bat to be removed from the game;" and is therefore an illegally batted ball. They ruled that since the bat used by Brett was illegal under Rule 1.10(b) and since Rule 6.06(a) provides that a batter hitting an illegally batted ball is out, Brett must therefore be called out and the home run nullified.

Decision

It is the position of this office that the umpires' interpretation, while technically defensible, is not in accord with the intent or spirit of the rules and that the rules do not provide that a hitter be called out for excessive use of pine tar. The rules provide instead that the bat be removed from the game. The protest of the Kansas City club is therefore upheld and the home run by Brett is permitted to stand. The score of the game becomes 5-4 Kansas City with Kansas City at bat and two out in the top of the ninth inning. The game becomes a Suspended Game at that point and must be completed before the close of the season if practicable or at the close of the season if it should affect the first place position in either division.

The reasoning of this office in reaching the above decision is as follows:

(1) Official Playing Rule 6.06(a) states that a batter is out for illegal action when "he hits an illegally batted ball." An "illegally batted ball" is defined in the rules as including one hit with a bat which does not conform to Official Playing Rule 1.10.

(2) Rule 1.10 outlines several requirements affecting the legality of a bat. One of these is that "the bat handle, for not more than 18 inches from the end may be covered or treated with any material (including pine tar) to improve the grip...," but that no such material shall improve the reaction or distance factor of the bat. Rule 1.10 specifically provides that if the pine tar extends past the 18 inch limitation, the bat shall be removed from the game. If it was intended that this infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game. . . .

(3) It is more logical to infer that the second part of the definition of an illegal batted ball,

that pertaining to a bat which does not conform to Rule 1.10, is meant to refer to bats covered under Rule 6.06(d), which have been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball. . . .

(4) It is the conviction of the League President that the intent of the above rules is to declare a batter out and to inflict discipline upon him for use of an illegal bat, which has been "altered or tampered with to improve the distance factor or cause an unusual reaction on the baseball." (It has not been seriously contended that the pine tar on Brett's bat did either). It is not the intent of the rules to declare batters out or discipline them for improper use of pine tar. (The provision restricting the distance pine tar can extend up the barrel of the bat was primarily intended to keep from spoiling the ball and requiring new balls to be constantly brought into the game.) Conversations with several members of the Rules Committee reinforce this belief. The provision to prevent this is specifically spelled out in Rule 1.10 (i.e., remove the bat from the game).

(5) As stated, it has not been the usual practice in the Major Leagues to call batters out for using a bat with excessive pine tar. . . . [President MacPhail discussed two prior incidents concerning excessive pine tar on bats.]

Conclusions

A. Protest is allowed based on the League's decision with respect to the proper interpretation of the rules involved. It is the League's position that that meaning and intent is to discipline and declare out batters using bats that have been tampered with to increase distance potential, but not to treat pine tar excesses in the same manner. Instead, the use of bats with pine tar extending beyond 18 inches should simply be prohibited. The opposing team has the right to call the infraction to the umpire's attention and ask that the bat be changed or cleaned up.

B. Although Manager Martin and his staff should be commended for their alertness, it is the strong conviction of the League that games should be won and lost on the playing field -- not though technicalities of the rules -- and that every reasonable effort consistent with the spirit of the rules should be made to so provide.

C. Although the umpires are being overruled, it is not in my opinion the fault of the umpires involved, but rather is the fault of the Official Playing Rules, which in some areas are unclear and unprecise. (The rules, which must cover many complicated situations, have been in effect for many years and have been amended repeatedly. At times, however, other rules affecting related situations have not been brought into conformity.) The responsibility for this, and the responsibility perhaps for the lack of clear, uniform instructions to the umpires on the interpretation of the rules must rest with those of us in administrative positions in baseball, including myself.

Notes and Questions

1. President MacPhail's decision involved several rules of Major League Baseball. In 1983, these rules provided:

> 1.10. . . . (b) The bat handle, for not more than 18 inches from the end, may be covered or treated with any material (including pine tar) to improve the grip. Any

such material, including pine tar, which extends past the 18 inch limitation, in the umpire's judgment, shall cause the bat to be removed from the game. No such material shall improve the reaction or distance factor of the bat.

2.00: . . . [A]n illegally batted ball is [among other things] . . . one hit with a bat which does not conform to rule 1.10. . . .

6.06 (a). [A] batter is out for illegal action when . . . he hits an illegally batted ball. . . .

(d). [A player using a bat that] has been . . . tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball . . . . [is not only to be] called out, [but also to] be ejected from the game and may be subject to additional penalties . . . .

2. The Pine Tar Case led to "a tremendous popular debate about the spirit and letter of the law. The arguments constituted perhaps the most widespread *popular* legal debate in American history." Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's Nomos and Narrative*, 96 Yale L.J. 1836, 1855 (1987); *see also* Jonathan R. Siegel, *What Appeals in Sports Teach Us About Appeals in Courts*, 15 Harv. J. Sports & Ent. L. 245 (2024).

3. Consider different possible indicators of the meaning of the relevant baseball rules:

a. What is the text of the relevant rules? What does that text mean? According to the text of the rules, was Brett out?

b. What did the drafters of the relevant rules likely intend them to mean? Would they have intended that Brett be called out?

c. What purposes do the relevant rules serve? Would these purposes be best served by determining that Brett was out?

Which of these considerations should be most important in interpreting the rules? How would you have ruled in the Pine Tar Case?

4. President MacPhail ordered that the Pine Tar game be concluded on August 18, 1983. The continuation of the game was almost scuttled by a lawsuit brought by ticket holders who had attended the first part of the game on July 24 and who alleged they had a right to see the conclusion of the game without paying the $2.50 admission charge announced by the Yankees. A New York State trial court enjoined the game from proceeding, but an appellate judge vacated the injunction and ruled, "play ball." In the end, the Yankees allowed prior ticket holders in for free.

As the game resumed, the Yankee pitcher threw first to first base and then to second base, and the Yankees claimed that Brett should still be ruled out on the ground that he had not touched those bases after hitting his homer on July 24. However, both the first and second base umpires signaled "safe." Yankee Manager Billy Martin pointed out that the first base umpire hadn't even

been at the game on July 24 and questioned how that umpire could know whether Brett had touched first base. The second base umpire then produced an affidavit signed by all the umpires from the July 24 game attesting that Brett had touched all the bases on July 24.

The continuation of the game finally proceeded. It lasted just 9 minutes, 41 seconds, since all four remaining batters (one from Kansas City and three from New York) made immediate outs. The Yankees therefore lost, 5-4.

Additional excerpt from Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*:

Of all the criticisms leveled against textualism, the most mindless is that it is "formalistic" The answer to that is, *of course it's formalistc*! The rule of law is *about* form. If, for example, a citizen performs an act—let us say the sale of certain technology to a foreign country—which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent that sale. Before the wish becomes binding law, it must be embodied in a bill that passes both houses and is signed by the President. . . . A statute . . . has a claim to our attention simply because Article I, section 7 of the Constitution provides that since it has been passed by the prescribed majority . . . it is a law.

Excerpt from John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

[In this article, Prof. Manning responds to an argument that other scholars make in support of the power of federal courts to use methods other than textualism to interpret statutes. The argument is that (1) the Constitution assigns the federal courts the "judicial Power"; (2) the Framers and ratifiers of the Constitution would have understood the judicial power to be the power exercised by courts in England at the time the Constitution was ratified; and (3) at that time, English courts exercised the power to interpret statutes in accordance with a doctrine known as "the equity of the statute." As Manning notes:

> Under the authority of that doctrine, English judges had often extended statutes beyond their plain terms in order to make them more coherent expressions of purpose, and cut back others to avoid inequitable results that did not serve the statutory purpose. At least some of the Founders assumed that this English practice would apply to the federal judiciary. And some early American judges took that assumption to heart, explicitly engaging in equitable interpretation. This "equity of the statute" jurisprudence is invoked to offer an alternative (and more convincing) basis for interpretive methods that are substantially similar or equivalent to strong purposivism.

Manning's response to this argument follows below.]

Textualists often rely on the formal claim that bicameralism and presentment mandate textualism because the enacted text alone has survived the legislative process requirement of Article I, Section 7. In formal terms, however, invoking the requirements of bicameralism and presentment provides us merely with a rule of recognition, telling us only which texts to interpret as enacted law. The process alone does not tell us how to interpret the law thus enacted. Two considerations highlight this point. First, textualists themselves often interpret statutes using sources (dictionaries, common law cases, canons of interpretation) that have not cleared the formal process of

bicameralism and presentment. Hence, that constitutional process, standing alone, cannot tell us whether to include or exclude particular tools of construction. Second, the process of atextual, purposive interpretation is not intrinsically incompatible with an exclusive reliance on the text. Rather, courts often derive a specific provision's background purpose from the tenor or structure of the statute as a whole; yet the latter source has surely cleared the hurdle of bicameralism and presentment. If textualists object to using background statutory purpose to shift the level of generality of one or more clear and specific statutory provisions, then the basis for that objection must come from beyond the formal requirements of Article I, Section 7.

Even when one consults the purposes implicit in bicameralism and presentment, much of the evidence speaks inconclusively as to the appropriate interpretive method. Few constitutional theories have gained more traction than the idea that our government is structured "to break and control" what Madison referred to as "the violence of faction." . . . [T]he objective to control factions is surely manifest in the design of the legislative power. . . . [M]any other founding-era writings emphasized that by dividing the legislative power among independent bodies, bicameralism and presentment would make it more difficult for any group actuated by self-interest to capture the legislative process. And, quite apart from any concern with factions, some influential Founders understood bicameralism and presentment as a device to promote caution and deliberation in the lawmaking process—to restrain the momentary passions that sometimes infect the political system. Although such considerations might reasonably suggest that judges should scrupulously enforce the precise outcomes of this carefully designed deliberative process, the same considerations might also support interpretative rules designed to reinforce the underlying values that the process seeks to advance. That is to say, one might argue that judges should interpret legislation to resist the seemingly unprincipled compromises struck by interest groups (factions) and, instead, to give statutes the coherence that one would expect from a well-functioning deliberative process. If the latter view is accepted, then it would support the aims of the equity of the statute—for example, the impulse to treat like cases alike, notwithstanding the limited reach of a statutory text, or to exclude a harsh result that falls within the text but does not materially advance the statute's purpose.

If, however, one examines more closely the precise means by which bicameralism and presentment protect the legislative process from capture by factions, the process seems to cut decidedly in favor of respecting the lines of legislative compromise. . . . [B]ecause the members of each house of a bicameral legislature represent different constituencies, bicameralism effectively adopts a supermajority requirement. By raising decision costs, this arrangement makes it more difficult for factions (what we would call interest groups) to pass legislation to secure private advantage. This understanding of the process fits tightly with the Madisonian concern that the majority would invade the rights of the minority in an unchecked republican government.

The particular brand of bicameralism established by the U.S. Constitution, moreover, explicitly amplifies the protection and power of a clearly identifiable national minority—the residents of the smaller states. Although various considerations might explain bicameralism in general, American bicameralism clearly reflects the federalism interests that account for the states' equal representation in the Senate. The compromise that produced that arrangement of course was an essential element of the constitutional structure; indeed, it is the one part of the design that Article V purports to place beyond even the amendment process. Although often associated with the

protection of states qua states, the more immediate effect of equal representation is to assign the inhabitants of the small states disproportionate power, relative to their populations, to defeat legislation that promotes the interests of the larger states at their expense. Bicameralism and presentment thus disclose an unmistakable emphasis—to give minorities, in general, and the minority consisting of small-state residents, in particular, exceptional power to block legislation as a means of defense against self-interested majorities.

Assigning a minority this exceptional power makes it more crucial for interpreters to respect the lines of legislative compromise. The minority's power to veto legislation carries with it the lesser power to insist, as the price of assent, upon less than what the bill's proponents ideally would desire—and, perhaps, less than what a reasonable person would view as a fully coherent approach to the mischief sought to be remedied. A resulting compromise, for example, might not reach all phases of a perceived mischief or might not grant the most effective remedy for the mischief actually addressed. If the legislative process is designed to give minorities an exaggerated right to insist upon compromise, that basic objective would be undermined if judges claimed equitable powers to transform a clear, detailed statute into more coherent expression of policy or, indeed, to provide a more effective remedy than the explicit one prescribed by Congress. Interpreting statutes to be more coherent and just expressions of legislative purpose, then, risks evasion of a constitutionally ordained purpose—to give minorities a disproportionate say in the legislative process.

At the same time, the broad judicial lawmaking power implicit in the equity of the statute would potentially undermine the federalism objectives of bicameralism and presentment. The extraordinary protection that small states enjoy by virtue of disproportionate representation in the Senate would be undermined if courts, in the name of the equity of the statute, could tinker with the output of that carefully wrought legislative process. In contrast with the Senate, the federal courts do not represent the states and are designed to be immune from ordinary political processes. And there is no reason to expect equitable interpretation to replicate the protections secured by the legislative process. One surely cannot tell whether judges would invoke the equity of the statute in a way that would systematically undercut, rather than enhance, the particular federalism interests sought to be protected by bicameralism and presentment. But this uncertainty itself suggests that the most reliable way to protect those interests is to adhere closely to a constitutional process that was carefully designed to serve them.