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LEGISLATION

AMENDATORY ACT EFFECTIVE AFTER LAPSE OF ORIGINAL STATUTE HELD VALID

In 1941 the General Assembly of Indiana attempted to amend the already twice-amended Milk Control Law of 1935. The amendatory act was passed and approved by the Governor while the original law was in force and valid. But the Indiana Constitution expressly provides that a statute, even after being validly passed and approved, does not become effective until it has been published and circulated in the counties of the state by authority, unless it contains an emergency clause. IND. CONST. ART. IV, § 28. The present statute contained no emergency clause, and the Governor did not proclaim its publication until after the original act had expired. *Held*, the amendatory act was valid upon its passage and approval, and became effective upon its publication and proclamation by the Governor. *Milk Control Board v. Pursifull*, 36 N.E. (2d) 850 (Ind. 1941).

The rule is well settled in Indiana that an act seeking to amend a non-existent statute is invalid. *Draper v. Falley*, 33 Ind. 465 (1870); *Kramer v. Beebe*, 186 Ind. 349, 115 N.E. 83 (1917); *Ross v. Chambers*, 214 Ind. 223, 14 N.E. (2d) 1012 (1938). But the court in the instant case pointed out that in previous cases involving such amendments, the legislative machinery had not been put in motion while the original act was in existence. The original act had, on the contrary, been previously repealed or judicially declared invalid before the amendment was attempted. *Straus Bros. Co. v. Fisher*, 200 Ind. 307, 163 N.E. 205 (1928). The court realistically distinguished a case almost in point. *Metsker v. Whitsell*, 181 Ind. 126, 103 N.E. 1078 (1914). That case, which concerned the validity of the first of two amendatory acts passed at the same session of the General Assembly, held that it was invalid because the act passed second in point of time contained an emergency clause and became effective immediately. Therefore, by the time that the first act was to take effect, the original statute had been amended out of existence by the second act. The court also based its decision upon the rule that as between two inconsistent acts passed by the same legislature, the one passed subsequently will prevail. The court in the principal case declared that

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[13] *In re* Bell, 339 Pa. 443, 15 A. (2d) 350 (1940); *In re* Yonah Building & Loan Ass'n., 133 Pa. Super. 538, 540, 3 A. (2d) 49, 53 (1938). This latter case is clearly analogous to the *Fuzy* case, *supra*, note 12. More than five years had elapsed between the notice of withdrawal and the insolvency of the association. The court said that the association undoubtedly thought itself solvent during the intervening period, but if it was in fact insolvent then it was the duty of the association to show that the association was actually insolvent. See also, Gilbert v. Beacon Hill Credit Union, 287 Mass. 493, 192 N.E. 25 (1934).

since the last-named rule was sufficient to support the holding in *Metsker v. Whitsell, supra,* the case could be distinguished. The fact that the court rather arbitrarily decided that the former ground rather than the latter was *dicta* indicates the fineness of the distinction. Moreover, it indicates a disposition by the court to shift from a conceptual application of the rule to a realistic one.

If the court had literally applied the Indiana rule that an act which amends a non-existent statute is invalid, it would have placed itself in the absurd position of holding that a statute which is validly passed and approved but which is not formally published and proclaimed until eight days after the original act expires is totally ineffective.

The root of the difficulty is the Indiana rule, which is a minority position. The decisions of the federal courts on this point have consistently been *contra. Columbia Wire Co. v. Boyce,* 104 Fed. 172 (C.C.A. 7th, 1900); *see City of Beatrice v. Masslich,* 108 Fed. 743, 746 (C.C.A. 8th, 1901). Although the decisions in the state courts are in conflict, the definite weight of authority opposes the Indiana rule. *Fenolio v. Sebastian Bridge Dist.,* 133 Ark. 380, 200 S.W. 501 (1917); *Attorney General ex rel. Burbank v. Stryker,* 141 Mich. 437, 104 N.W. 737 (1905). The majority rule applies to statutes that have been declared unconstitutional as well as to those that have been repealed. JONES, STATUTE LAW MAKING (1923) 185.