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Council v. Commonwealth - Nunc Pro Tunc Order in Virginia

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tional.[20] With this in mind, it does not seem unreasonable to conclude that, if the special interest groups secure the enactment of "fair trade" legislation, the court must give considerable weight to the legislative decision as to what is in the best interest of the public. The fact that the greatest theoretical benefit from these laws runs to the small, local businessman,[21] of whom there are many, certainly would lend plausibility to such a decision on the part of the legislature.

To summarize, it would appear that the principal case did not conclusively decide the future status of "fair trade" in Virginia; that enactment of replacement legislation is quite possible and that, if enacted, there is only a prospect that the courts will find it to be unconsitutional as violative of Article I, Section 1 of the Constitution of Virginia.[22]

F. V. E.

COUNCIL v. COMMONWEALTH— NUNC PRO TUNC ORDERS IN VIRGINIA

What began in England over six-hundred years ago[1] as a simple correction of a one-letter or one syllable error, judgment *nunc pro tunc,* has evolved into a modern-day tool of unforseen possibility of both justice and injustice. Virginia, by its decision in *Council* v. *Commonwealth,*[2] has joined the states who are firmly committed to the course of adding to the tangled mass of progeny the rule has begotten since its inception in the days of Edward III.

[20] Almond v. Gilmer, 188 Va. 822, 51 S.E.2d 272 (1949); City of Newport News v. Elizabeth City County, 189 Va. 825, 55 S.E.2d 56 (1949); Sanitation Comm. v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955).

[21] Where effective the agreements fix the resale price at a level at which the smaller, less efficient seller can make a comfortable profit and, at the same time, the efficient, large volume seller is precluded from gaining a competitive advantage by reducing his price.

[22] "Equality and rights of men.—That men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

[1] 14 Edw. III, Chap. 6.

[2] 198 Va. 288, 94 S.E.2d 245 (1956).

The philosophy of judgments *nunc pro tunc* crystallized early in the Commonwealth of Virginia and has been repeated verbatim for over a hundred years although no two cases extant are exactly alike in subject matter. With the instant case the court reassessed its stand and decided, but not without dissent, to abandon its old common law minority rule[3] and to embark upon the majority and federal rule.[4] Not only did the court revolutionize its stand, but it adopted the majority rule in its most liberal form.[5]

Virginia's first cited case[6] on the matter dates back to 1795, although it was nearly a century later that her first case[7] of real importance on the subject arose. By 1919, however, the court's philosophy had reached a definite crystallization point, and, until the instant case arose, *Cox* v. *Hagan*[8] was the leading case of the state.[9]

The minority rule which was formerly considered the common law and Virginia rule stated that a *nunc pro tunc* order cannot be entered in the absence of something in the record to show that the order should be made.[10]

But in *Council* v. *Commonwealth* the court states:

> Irrespective of our holdings we feel that in the furtherance of the administration of justice we should now adopt the majority rule as the law of this jurisdiction.[11]

The court then held in a five-two decision that an inadvertent omission of the name of the twelfth juror from an order of conviction for rape could be corrected by a *nunc pro tunc* order, thus affirming the trial court. Said order was based upon a clerk's personal unofficial minute book which listed all twelve jurors whereas the record listed only eleven. The correction was made more than four years after the original judgment.[12]

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[3] The classification referred to is that of the Virginia court.

[4] *Ibid.*

[5] This means that competent oral evidence would be admissible.

[6] Gordon v. Fraizer, 2 Wash. 130, 10 A.L.R. at 534 (1795).

[7] Shadrack's Adm'r. v. Woolfolk & Als., 32 Gratt. 707 (1880).

[8] 125 Va. 656, 100 S.E. 666 (1919).

[9] Freeman, *Judgments,* Vol. 1 (5th ed.) at 672.

[10] People v. Rosenwald, 266 Ill. 548 at 554, 107 N.E. 854 at 856 (1915).

[11] 198 Va. at 292, 94 S.E.2d at 248.

[12] In one case a *nunc pro tunc* order was successfully used fifty-five years after judgment. Rogers v. Bigstaff's Exr., 176 Ky. 413, 195 S.W. 777 (1917).

Actually, the rules on the use of *nunc pro tunc* orders are not as simple, nor as clear-cut as one might think from reading the unusually well-documented case of *Council* v. *Commonwealth.* A rough classification is permissible as a tool of understanding, but in actual practice the rules seem to splinter into innumerable ramifications. There is literally a labyrinth of case material on the issue,[13] yet many facets of the problem have not been passed upon judicially.

In its narrowest sense the problem presented in *Council* v. *Commonwealth* is: What constitutes sufficient evidence for entrance of a *nunc pro tunc* order? The prior rule in Virginia was that the evidence had to be in the record per se, nothing short of this was sufficient. The court itself cited five previous Virginia cases[14] which voice the earlier rule:

> [Courts can make] amendments in their records only in cases in which they can be safely made, and that amendments cannot be made upon the individual recollection of the judge, or upon proof *aliunde.* [Emphasis added.][15]

Apparently Virginia formerly held the strictest view of any minority state in that *no* evidence outside the record itself was sufficient.

The same result could have been reached in the instant case by the use of the more liberal minority rule,[16] but the court elected[17] to make a clean sweep and take a definitive stand with the majority group.

In passing it might be noted that the editorial staff of *American Jurisprudence* discuss the major possibilities of the various

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[13] In 10 A.L.R. at 526 the editors state: In compiling and discussing the cases concerned with correcting clerical errors in judgments the range is so wide, the distinctions so fine, and the conflict of opinion so great, that one cannot afford to ignore or omit aught found upon the subject, however slight in value, which illuminates and exemplifies the actions of the courts in rectifying such mistakes.

[14] Burch v. White, 3 Rand (24 Va.) 104 (1824); Commonwealth v. Cawood, 2 Va.Cas. (4 Va.) 527 (1826); Powell v. Commonwealth, 11 Gratt. (52 Va.) 822 (1854); Barnes v. Commonwealth, 92 Va. 794, 23 S.E. 784 (1895); Teasley v. Commonwealth, 188 Va. 376, 49 S.E.2d 604 (1948).

[15] Barnes v. Commonwealth, *supra* at 800, 23 S.E. 784 at 786.

[16] The more liberal minority rule permits use of "quasi record proofs".

[17] The Attorney General asked that the court adopt the more liberal minority rule and no more.

views on the admission or non-admission of evidence extrinsic to the record,[18] but they do not categorize the views into the limited classification used by the Virginia court. The Virginia court did not indicate the sources of its classification. It is interesting to note that Freeman feels that the "minority view" is the weight of authority.[19] However, he classifies the issue as one of the "greatest importance and difficulty" in the total field of decrees *nunc pro tunc*.[20]

The dissenting judges[21] in *Council* v. *Commonwealth* felt that the majority were opening the door for possible fraud and misuse, and that what was "certain and definite" under the former rule would be of nebulous force in the future.[22]

It is the writer's opinion that Virginia has not abandoned her philosophy concerning *nunc pro tunc* judgments expressed in the numerous pre-1956 cases, but merely shifted the emphasis of the evidence rule involved in such judgments. While the case is not as sensational upon a careful analysis as it seems upon first reading, (being one of degree only), nevertheless the door has been opened for a flood of litigation upon the sufficiency of evidence in a type of case which has had no new litigation upon that point in Virginia for over 130 years. It would seem that in a case of the type colloquially ascribed as one in which "hard facts make poor law" the court saw fit to discard historical trappings for what they considered a more realistic twentieth century approach founded on "common sense" reasoning. It is respectfully submitted, however, that by so doing the courts discarded a rule which would fit all cases for a freer rule necessitating re-evaluation in every new factual presentation. The origin of orders *nuc pro tunc* was to further the cause of actual justice. Paradoxically it would seem that the rule expounded in *Council* v. *Commonwealth* fulfills and advances this historic purpose while at the same time it expresses a retrogression to uncertainty of application.

J. L. D.

[18] 30 Am.Jur. at 882.

[19] Freeman, *op. cit. supra,* at 235.

[20] *Id.* at 242.

[21] Justices Buchanan and Miller.

[22] Council v. Commonwealth, *supra,* at 295, 94 S.E. 2d at 251.