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The Indianapolis Mayoralty Cases

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COMMENTS

THE INDIANAPOLIS MAYORALTY CASES

The Supreme Court of Indiana has decided two cases growing out of the recent dispute concerning the office of mayor in the City of Indianapolis. These cases are State ex rel. Holmes v. Slack, 162 N. E. 665, and State ex rel. Hogue v. Slack, 162 N. E. 670. In each case, the relator, claiming that he was the rightful mayor of Indianapolis as against Slack, the defendant, who was then and still is holding that office, brought an information in the nature of quo warranto,[1] in an attempt to oust Slack.

Both cases arose out of substantially the same facts. These are, briefly, as follows: John L. Duvall was nominated for mayor of Indianapolis on the Republican ticket in 1925, and was elected to that office at the election in November of that year. He duly qualified for, and entered upon office on January 4, 1926, at the expiration of the term of the former mayor, Samuel L. Shank, who voluntarily relinquished the office. Duvall, as mayor, appointed William C. Buser to act as controller in succession to Joseph L. Hogue, who was the appointee of Shank, and who also voluntarily relinquished his office at the same time. It may be noted that Hogue is the relator in the second of the above cases.

In August, 1927, Duvall appointed Claude Johnson as city comptroller to succeed Buser, and Buser surrendered the office to Johnson, who had qualified.

In the meantime Duvall had been indicted for a violation of the Corrupt Practices Act[2] and was convicted on September 22, 1927. This, of course, made Duvall ineligible for the office but he continued to hold it until October 27th, when he resigned. In the meantime he had appointed as city comptroller "one Maude E. Duvall" who, the court might well have taken judicial notice, is his wife. Upon the resignation of Duvall as mayor, Mrs. Duvall took possession of the office and performed its duties, but apparently her only official act was to appoint Ira M. Holmes (the relator in the first case) to the office of comptroller. Holmes qualified the same day, whereupon Mrs. Duvall resigned as mayor, and Holmes claimed the office. In the meantime the city council had adopted a resolution declaring Duvall's inability to act as mayor since his conviction on September 22, 1927, thus

[1] Provided for in Burns' Annotated Statutes, 1926, Secs. 1208-1223, inc. Note especially Secs. 1208, 1209, 1211 and 1212.

[2] Burns' Annotated Statutes, 1926, Secs. 7661-7675, inc.

invalidating all his appointments from that time; also declaring the office of mayor vacant, and electing Claude E. Negley as temporary mayor until the council should hold a special meeting for the election of a mayor to serve Duvall's unexpired term.[3] Negley ousted Holmes from the mayor's office and continued to act as mayor until November 8th when the defendant, L. Ert Slack, was elected to serve the unexpired term of Duvall. Slack qualified and has since been acting as mayor.

In the first case, Holmes claimed the right to the office of mayor of Indianapolis under the provisions of Section 10276 of Burns' Annotated Statutes of 1926, which provides that in case of a vacancy in the office of mayor the city comptroller shall act as mayor, but shall appoint another person to act as city comptroller during this time. It is further provided, however, "In the event of the death, resignation or disability of the city comptroller, * * * the common council shall designate one of its members to act as mayor pro tempore until a special meeting of the council, to be held not less than ten days nor more than fifteen days thereafter, at which special meeting, the council shall elect a suitable person to fill out the unexpired term of the mayor. * * *"

Holmes' contention was, of course, that he had been properly appointed comptroller by Mrs. Duvall, the then mayor of the city, and became entitled to the office of mayor upon her resignation. As the court pointed out, this would mean that the succession of new comptrollers and mayors might continue indefinitely.

It is clear that the only possible remedy for the relator was to proceed by an information in the nature of quo warranto, this being the only remedy when the title to an office is in dispute.[4] On the other hand, by the express provisions of the statutes and because of the inherent nature of the proceedings, it is essential that the relator show that he is himself entitled to the office.[5] It is different, of course, if the proceeding is brought by a prose-

[3] As provided in Sec. 10276, Burns' Annotated Statutes 1926, hereinafter referred to.

[4] *Carmel, etc. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476 (1898). But mandamus proceedings may be used to oust an official holding over when his successor has a certificate of election so that there is no real dispute as to the office. *Couch v. State ex rel. Brown*, 169 Ind. 269, 82 N. E. 457 (1907).

[5] *State ex rel. Davis v. Smith*, 32 Ind. 213 (1869); *Reynolds v. State ex rel. Titus*, 61 Ind. 392 (1878); *State ex rel. Ault v. Long*, 91 Ind. 351 (1883); *State ex rel. Strass v. Tancey*, 161 Ind. 491, 69 N. E. 155 (1903);

cuting attorney merely for the purpose of ousting a person who holds the office illegally[6], but if the action is brought by one other than the prosecuting attorney he can obtain relief only upon showing that he is himself entitled to the office.[7] Accordingly the court did not consider whether or not the defendant Slack was entitled to the office; the only question was whether the relator Holmes showed good title to it.

It was held that he did not. In the first place, the statutory provision was not, as the relator seemed to think, that a city comptroller should become mayor upon a vacancy in the office; it was only that he should "act as mayor." This is quite a different thing; for example, a mere right to act as an officer does not give one such title to the office as is essential to maintain this sort of proceeding.[8] Furthermore, the relator's construction of the statute entirely ignored the provision above quoted. If the relator was correct, there would never be any opportunity for the common council to designate a mayor, since the acting mayor would himself appoint a comptroller who would be next in line for the office of mayor. It is apparent, therefore, that the statute means that the comptroller shall step into the office of mayor, in case of a vacancy, only as an acting mayor, and appoint only an acting comptroller who is not eligible to succeed to the office of mayor. It resulted that the relator Holmes was not entitled to the office of mayor, and the proceeding was dismissed.

Hogue, the relator in the second case, was made a co-defendant with Slack in the first case but no relief was given against him, since Holmes showed no right. In the second case, however Hogue's own rights came into question. The facts are, of course, essentially the same as in the previous case, and Hogue's theory was that he was at all times the rightful city comptroller and

State ex rel. Keifer v. Wheatley, 160 Ind. 183, 66 N. E. 684 (1903); *State ex rel. Clawson v. Bell*, 169 Ind. 61, 82 N. E. 69 (1907). This is specifically provided by Sec. 1212, Burns Annotated Statutes 1926.

[6] *Chambers v. State ex rel. Barnard*, 127 Ind. 365, 26 N. E. 893 (1890); *Relender v. State ex rel. Utz*, 149 Ind. 283, 49 N. E. 30 (1898). The distinction is pointed out by Throop on Public Officers, Sec. 781, as lying in the different purposes of the two proceedings; the action by the prosecuting attorney being primarily for the purpose of ousting a usurper, while the action if brought by anyone else is for the purpose of putting the relator into office. In the latter case it is, of course, essential that he show himself entitled to the office. See also *Reynolds v. State ex rel. Titus*, *supra*, note 5 for a discussion of the same distinction.

[7] See cases cited in note 5, *supra*.

[8] *State ex rel. Maxwell v. Dudley*, 161 Ind. 431, 68 N. E. 899 (1903).

was, therefore, entitled to the office of mayor upon Duvall's resignation, (Shank having in the meantime died) under the provisions of Section 10276 of Burns, already quoted. This claim was denied by the court, though with one judge dissenting.[9]

Of course, Hogue was under the same necessity of proving his own title to the office in order to maintain the suit.[10] This, however, he attempted to do in the manner already stated—that is, he claimed that he had never ceased to be the rightful comptroller of the city and was, therefore, entitled to act as mayor. He thus avoided the difficulty, which Holmes had, of ignoring any part of the statute. Hogue's claim thus rested solely upon the hypothesis that he was at all times the rightful city comptroller.[11]

To this hypothesis, however, there are two conclusive objections. Buser, the successor of Hogue as comptroller, had actually qualified and assumed the office, while Hogue himself had voluntarily withdrawn. It would appear, therefore, that Buser was entitled to the office, even though his right to it was contested.[12] The Indiana rule, which follows the weight of authority, is that there is no vacancy in an office until the person chosen as successor qualifies, even though the term of office of the incumbent is limited by statutory or constitutional provisions;[13] but if the successor qualifies, the incumbent has no right to hold over, even though the successor cannot take office.[14] Since Buser thus qualified, he was entitled to the office, and could have compelled Hogue to give it up, even if the latter had not done so voluntar-

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9 The dissenting opinion is reported in 163 N. E. 21.

10 See note 5, *supra*.

11 But even then Hogue seems to have no claim to the office of mayor; he can only be an acting mayor. *State ex rel. Maxwell v. Dudley*, *supra*, note 8.

12 Art. 15, Sec. 3 of the state constitution provides in effect that an officer may hold over until his successor is chosen and has qualified. But if the successor has qualified, the latter is entitled to the office even though his title to it is disputed. *DeArmand v. State ex rel. Campbell*, 40 Ind. 469 (1872); *Parmater v. State ex rel. Drake*, 102 Ind. 90, 3 N. E. 382 (1885). Contra, *State ex rel. Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802 (1891).

13 *State ex rel. Reese v. Bogard*, 128 Ind. 480, 27 N. E. 1113 (1891); *Kimberlin v. State ex rel. Tow*, 130 Ind. 120, 29 N. E. 773 (1891); *State ex rel. Culbert v. Linkhauer*, 142 Ind. 94, 41 N. E. 325 (1895). *Gosman v. State ex rel. Schumacker*, 106 Ind. 203, 6 N. E. 349 (1885) is hard to reconcile with this doctrine but is of doubtful authority now. See *State ex rel. Reese v. Bogard*, *supra*.

14 See cases cited in note 12, *supra;* see also *State ex rel. Elliott v. Bemenderfer*, 96 Ind. 374 (1884).

ily. In fact, Hogue did voluntarily retire and this in itself would seem to settle the controversy.[15]

Furthermore, Buser was a de jure officer. It may be conceded that Duvall was only a de facto officer, in view of his violation of the Corrupt Practices Act. It could hardly be contended, however, that he was a mere usurper of the office, for he had fully qualified and was acting as mayor without objections from anyone.[16] In fact, no one else was entitled to the office.[17] If it be admitted that Duvall was mayor de facto, the only question is whether a de facto officer can appoint a de jure officer. The distinct weight of authority is that he may.[18] The dissenting opinion is primarily an attack upon the soundness of this principle. It is said that the rule upholding the acts of de facto officers is solely to protect third persons and that it is unnecessary for this purpose that the appointing power of a de facto officer be sustained. Logically, it does seem absurd that a mere de facto officer can appoint a de jure officer, but the whole doctrine of de facto officers is illogical. The doctrine that the appointee of a de facto officer is entitled to the rights of a de jure officer is based solely upon convenience, and as such, seems justified. Such being the case, Buser was de jure comptroller of Indianapolis, and Hogue's term had expired. This shows, of course, that he had no claim to the office of mayor.

These decisions should settle the present title to the office of

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[15] See *McGee v. State ex rel. Axtell*, 103 Ind. 444, 3 N. E. 134 (1885). There are, it is true, authorities to the effect that a person who retires from office in favor of a successor who later proves to have been ineligible, may regain the office when this ineligibility appears. *State ex rel. Thayer v. Boyd*, 31 Neb. 628, 48 N. E. 739 (1891); *State ex rel. Truitt v. Levy Court*, 140 Atl. 642 (Delaware, 1927). But Hogue was certainly guilty of laches, as the court points out; besides he was seeking the office of mayor, not comptroller.

[16] *Hamlin v. Kassafer*, 15 Ore. 456, 15 Pac. 778 (1887). There is authority that a person constitutionally ineligible to an office is not a *de facto* officer (*Shelby v. Alcorn*, 36 Miss. 273 (1858)); but, assuming the soundness of this doctrine, it cannot apply to a mere statutory ineligibility, known only to the officer and his confederates, without doing away with the whole doctrine of *de facto* officers.

[17] Compare *Powers v. Commonwealth*, 110 Ky. 386, 61 S. W. 735 (1901).

[18] *People ex rel. Norfleet v. Staton*, 73 N. C. 546 (1875); *State ex rel. Herron v. Smith*, 44 Oh. St. 348, 7 N. E. 447 (1886); *Attorney-General ex rel. Fuller v. Parsell*, 99 Mich. 381, 58 N. W. 335 (1894); *Brinkerhoff v. Jersey City*, 64 N. J. L. 225, 46 Atl. 170 (1900); *Landes v. Walls*, 160 Ind. 216, 66 N. E. 279 (1903). Contra, *People ex rel. Steinert v. Anthony*, 6 Hun. (N. Y.) 142 (1875). See also Mechem on Public Officers, Sec. 328.

mayor in the metropolis of our state. Although they are not binding with respect to anyone else who may claim the office as against Slack,[19] yet so far as appears, no one now is claiming the office. Unfortunately, however, Duvall's appeal from his conviction under the Corrupt Practices Act remains to be decided by the Supreme Court, so that the state is not yet free from this rather unsavory legal and political episode.

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[19] *Modlin v. State ex rel. Townsend*, 175 Ind. 511, 94 N. E. 826 (1911).