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Retroactive Effect of Judicial Decisions

RECENT CASES

COURTS

RETROACTIVE EFFECT OF JUDICIAL DECISIONS

As a general proposition judicial decisions are said to enunciate the law as it has always existed. Hence decisions have retroactive effect in all but a few types of civil cases. Recognition by judges that the decision in a given case will affect not only the rights of the parties before them and the rights of future litigants but that it will also operate retroactively to affect legal relations already crystallized is doubtless a factor which influences that decision. Thus the United States Supreme Court in a problem of current importance,[1] has refused to overrule a long-standing interpretation of the due process clause of the Fourteenth Amendment, quite possibly because of the effect that any new interpretation would have on the system of law administration which the states have built up.[2] In a recent case the Supreme Court of Indiana has parted with theory and refused to give a decision retroactive effect. In its effort to avoid the confusion which would attend retroactivity,[3] it is probable that the court has created a new source of confusion to plague the Indiana Bar.

The city officials of Indianapolis were required by the "Second Skip Election Law"[4] to serve a year in office in

1. Justices Black, Douglas, Murphy and Rutledge, dissenting in Adamson v. California, 332 U. S. 46, 68, 123 (1947), expressed their belief that the first ten amendments to the Constitution of the United States should be read into the Fourteenth Amendment. These same four justices reaffirmed their position dissenting in Bute v. Illinois, 333 U. S. 640, 677 (1948).
2. See Mr. Justice Frankfurter, concurring in Adamson v. California, 332 U. S. 46, 59, 64 (1947): "Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of 12 for every case involving a claim above $20."
3. "To give it [the case of *In re* Todd, 208 Ind. 168, 193 N. E. 865 (1935)] that effect [retroactive operation] would introduce a commanding element of uncertainty amounting to utter chaos and confusion as to what the fundamental law of the state now is and what it has been during the ninety-six years past, since the adoption of the present constitution. It is never the intention of courts to produce such an uncertainty and we do not believe such an intention should be read into the In re Todd opinion." Swank v. Tyndall, 78 N. E.2d 535, 540-541 (Ind. 1948).
4. IND. STAT. ANN. (Burns Supp. 1945) § 29-4312.

addition to their regular 4-year terms. The common council of Indianapolis increased the officials' salaries for the entire year.[5] Plaintiff taxpayers sued on behalf of all city and county taxpayers to recover these increases in salaries. The officials' demurrer to the complaint was sustained. The taxpayers appealed, asserting that an Indiana statute forbade salary increases "during the term for which such officer was elected;"[6] and that Article XV, Section 2 of the Indiana Constitution by virtue of an amendment proposed and voted upon in 1926 also forbade the increase.[7] Although the Governor in 1926 issued a proclamation that the proposed amendment had not passed, the taxpayers argued that it had become effective under the ruling of In re *Todd*, a case decided in 1945, which changes the standard used in determining whether a proposed amendment has been adopted.[8] The Indiana Supreme Court rejected the taxpayers' contentions, holding that the statute was not applicable and that In re *Todd* did not operate retroactively to validate the proposed 1926 amendment. *Swank v. Tyndall*, 78 N. E.2d 535 (Ind. 1948).

The court's holding that the statute was not applicable was based on the reasoning that the extra year served by

5. IND. STAT. ANN. (Burns Supp. 1945) § 48-1223, amending IND. STAT. ANN. (Burns 1933) § 48-1223, allowed the common councils of cities having a population of over 250,000 to increase the salaries of their city officials to a prescribed amount.

6. IND. STAT. ANN. (Burns 1933) § 49-1103 provides: "The salary of any officer elected to any elective township, city, county or state office in the state of Indiana, shall not be increased during the term for which such officer was *elected*, and this act shall be construed to be a part of any law enacted for the change or increase of any such salaries." (Emphasis added).

7. IND. CONST. Art. XV, § 2 provides: "When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office, the tenure of which shall be longer than four (4) years." The amendment submitted to the electorate on November 2, 1926 would have changed the period at the end of the section to a comma and added the following: "nor shall the term of office or salary of any officer fixed by this Constitution or by law be increased during the term for which such officer was elected or appointed."

8. IND. CONST. Art. XVI, § 1 provides that as part of the process to be followed in amending the constitution the proposed amendment shall be submitted "to the electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of the Constitution." The *Todd* case altered the interpretation which had previously been given to the quoted language.

the officials was not a part of their elective term. The officials were entitled to hold over for the additional year under Article XV, Section 3 of the Indiana Constitution,[9] which adds to each term of an office created by law an additional tenure of office—until the official's successor is elected and qualified. The hold-over provision of Article XV, Section 3 cannot be considered to add to the elective term, however; for Article XV, Section 2 prohibits elective terms of over four years.[10] Article XV, Section 3 only provides for a "contingent, defeasible term."[11] Thus the defendant officials were not serving in their "elective" terms when their salaries were increased, and, as the statute has reference only to elective terms, it was not applicable.

The court's disposition of the question of whether the proposed 1926 amendment has become a part of the Indiana Constitution led it to consider the general problem: Do judicial decisions, and more specifically, decisions construing the constitution, operate retroactively? In 1926 the long-recognized rule was that a proposed amendment had to receive a majority of the votes of all voters going to the polls in order to become effective. According to this standard the proposed 1926 amendment did not become effective, since many voters going to the polls did not vote at all on the amendment and it therefore failed to receive the approval of a majority of those voting. Of those who did vote upon the amendment a majroity favored its adoption. In 1935, In re *Todd*[12] changed the long-recognized rule, and held that a proposed amendment must receive only a majority of the votes cast *for or against the amendment* in order to become effective. According to this standard the proposed 1926 amendment would have become effective.[13] The taxpayers

9. IND. CONST. Art. XV, § 3: "Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

10. See note 7 *supra; see* Swank v. Tyndall, 78 N. E.2d 535, 538, 539 (Ind. 1948), and cases there cited; *cf.* State *ex rel.* Fares v. Karger, 77 N. E.2d 746 (Ind. 1948), noted in 24 IND. L. J. 111 (1948).

11. State *ex rel.* Carson v. Harrison, 113 Ind. 434, 16 N. E. 384 (1887).

12. 208 Ind. 168, 193 N. E. 865 (1935).

13. The proposed amendment to Article XV, § 2 was submitted to the voters at the general election on November 2, 1926. The total number of votes cast in favor of the amendment was 182,456; the

in the *Swank* case argued that the rule announced in the *Todd* case was retroactive in application and that the proposed 1926 amendment had thereby been effected. The court refused to adopt the taxpayers' position, but the opinion is likely to create confusion in the application and content of a fundamental doctrine of the Indiana law.

That fundamental doctrine is the well known rule of the common law regarding the retroactive effect of a decision which changes an existing rule of law: "If it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a decision was bad law, but that it was not law. . . ."[14] Under this view, an overruling decision must operate retrospectively, for the overruled decision was, in effect, non-existent. The harsh results of this so-called "Declaratory Theory" soon led the courts to establish an exception to the rule. It is stated that contracts made or property acquired in reliance[15] upon the overruled decision will not be affected by the overruling decision.[16] The effect of establishing this exception is to admit that the Declaratory Theory does not conform to fact, *i.e.*, although the theory is that an overruled decision was never law, the fact is that if a person relied upon it to acquire property or enter into contracts, it operates just as if it had been law. This classical paradox has given rise to a realistic view opposed to the Declaratory Theory. The more realistic theory, advocated by several eminent writers,[17] is that judges do in fact "make

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total number of votes cast against the amendment was 177,748, and the total number of votes cast at the general election was 1,952,994. Legislative Bureau Pamphlet entitled "Constitution of the State of Indiana and of the United States," issued June, 1947, p. 30, n.56.

14. 1 BL. COMM. ★69-70.

15. Although the courts have required that there be reliance upon the overruled decision, as a practical matter there is very little substance to this part of the rule. If the contracts were made or the property acquired during the time when the overruled decision was still "good law" the courts have assumed an element of reliance. See cases cited notes 16, 24 *infra*. *But cf.* Thompson v. Henry, 153 Ind. 56, 54 N. E. 109 (1899), where the court refused to apply the exception because the conveyance of certain property was not known to have been completed during the existence of the overruled decision.

16. Gross v. Board of Comm'rs., 158 Ind. 531, 64 N. E. 25 (1902); Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331 (1894); Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358 (1892).

17. See GRAY, THE NATURE AND SOURCES OF THE LAW 219-222, 235 236; Holmes, J. dissenting in Kuhn v. Fairmount Coal Co., 215 U. S. 349, 370, 371 (1909); Note, 17 COL. L. REV. 595, n.8 (1917).

law," or at least that a judicial decision is law until it is overruled, and that consequently *no* overruling decisions should be applied retrospectively.

The court in the instant case discusses the Declaratory Theory with its contract-property rights exception and states that this is the prevailing rule and the view followed by Indiana. However, the court emphasizes that some advocates of the Declaratory Theory contend that the exception should not be limited to contract and property rights, but that all rights, including the right to rely on the announced decisions of a court, should be protected.[18]

The concurring opinion, conscious of the break with theory,[19] attempts to bring the case within limits of precedent by explaining that the right protected is the right to have a vote counted "under the law as then announced." Whether this judicial struggle leaves the theory unscathed can best be determined by an examination of the decisions which enunciate the Declaratory Theory.

The Declaratory Theory has been a part of Indiana law for at least seventy-five years.[20] While at first no exception to the rule was recognized,[21] the case of *Hasket v. Maxey*,[22] following the lead of several United States Supreme Court cases,[23] excepted vested personal contract and property rights. The *Hasket* case has been followed without variation until the case under discussion.[24]

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18. See Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COL. L. REV. 230, 251 (1918).

19. O'Malley, J. "From such viewpoint I can see that the *broadening of the exception* will do much to create certainty in the basic law, a thing to be desired. Reason and necessity seem to press for a *slight enlargement of the exception* to that rule." (Emphasis added) Swank v. Tyndall, 78 N. E.2d. 535, 545, 546 (Ind. 1948).

20. Sumner v. Beeler, 50 Ind. 341 (1875).

21. Hibbits v. Jack, 97 Ind. 570 (1884).

22. 134 Ind. 182, 38 N. E. 358 (1892).

23. Anderson v. Santa Auna, 116 U. S. 361 (1885); Taylor v. Ypsilanti, 105 U. S. 72 (1881); Douglass v. County of Pike, 101 U. S. 677 (1879); Alcott v. Supervisor, 16 Wall. 578 (U. S. 1872); Havemeyer v. Iowa Company, 3 Wall. 294 (U. S. 1865); Gelpcke v. Dubuque, 1 Wall. 175 (U. S. 1863); Insurance Co. v. Debolt, 16 How. 415 (U. S. 1853).

24. Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331 (1894); Town of Hardinsburg v. Cravens, 148 Ind. 1, 47 N. E. 153 (1897); Center School Township v. State, 150 Ind. 168, 49 N. E. 961 (1898); Byrum v. Henderson, 151 Ind. 102, 51 N. E. 94 (1898); Addison School Township v. City of Shelbyville, 21 Ind. App. 707, 52 N. E.

Quite obviously the *Swank* case has, on its facts, broken with precedent. Whatever right it may be that the court was protecting when it refused retroactive application to the *Todd* case, it is not the sort of right involved in past cases in which exceptions to the Declaratory Theory have been found. As respects civil suits, "vested right" has been applied in the past exclusively to denote contract rights and rights relative to the ordinary subject matter of property. Such vested rights arise between individuals, or between an individual and a proprietary agency of the state, where the parties enter into legal relations relying on a judicial decision as governing some phase of their relationship. Not only would the "right" which the concurring opinion discovers not fit this definition, but it must be conceded that there was in the *Swank* case no right requiring the application of the exception to the Declaratory Theory. This is the basis of the dissent,[25] and the *Todd* case confirms that reasoning.[26] It follows that the majority has in fact, if not in words, disregarded the Declaratory Theory in deciding the case.[27]

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105 (1898); Gross v. Board of Comm'rs., 158 Ind. 531, 64. N. E. 25 (1902); Ruf v. Mueller, 49 Ind. App. 7, 96 N. E. 612 (1911).

25. Young and Starr, JJ., dissenting in instant case at 545: "In the case before us no vested property or contract rights are involved and no reason for not applying the general rule appears."

26. "When the overruling of a previous decision involves only a question of *public interest* in no way affecting private interests the rule of stare decisis does not control. . . . Consequently we feel no hesitancy in considering the merits of the constitutional question presented." *In re* Todd, 208 Ind. 168, 172, 193 N. E. 865, 866 (1935).

27. The court could have avoided the retroactivity issue altogether if it had so desired. In a similar Indiana case it was assumed that the proposed 1926 amendment *was* in force, and the court held that salaries fixed by an administrative board were not within the scope of the amendment. Benton County Council v. State *ex rel* Sparks, 224 Ind. 114, 35 N. E.2d 308 (1945). See also Board of Comm'rs. v. Crowe, 214 Ind. 437, 15 N. E.2d 1016 (1938), where the court assumed the 1926 amendment to be in force. The reasoning of the *Benton County* case, which construed the proposed 1926 amendment narrowly, applies equally to the facts of the *Swank* case where the officials' salaries were increased by the common council, an administrative board. Under that reasoning the proposed 1926 amendment, even if in force, would not change the result of the *Swank* case.

Even without such narrow interpretation of the meaning of the proposed 1926 amendment ,it would probaly not affect the additional term given by the "Second Skip Election Law," IND. STAT. ANN. (Burns Supp. 1945) § 29-4312, as applied to the instant case. Both the proposed 1926 amendment and the statute considered by the court prohibited salary increases during the

It is clear that the majority felt the court was committed to the Declaratory Theory, and so used a familiar legal device: it expanded the concept of what vested rights are included within the exception to the Declaratory Theory and paid lip service to precedent, at the same time avoiding the result which the Declaratory Theory would dictate. The considerations which moved the court to indulge in this legal contortion are a matter of conjecture. Probably it was not solely for the purposes of the particular case, for even if the amendment had been accepted as in effect the result need not have been different.[28] To validate the proposed 1926 amendment would entail the validation of three other proposed amendments[29] which received a majority of the votes cast for or against them, but not of all votes cast at the election at which they were submitted. Perhaps the court felt that the validation of all these amendments would result in litigation and confused administration of the law.[30]

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term for which an officer was elected. Presumably the court would apply the same reasoning (see *supra*, 3rd paragraph this note) to both situations. Thus, the result of the case would not have been different had the Declaratory Theory been applied in all of its original vigor.

28. See note 7 *supra*.

29. The three proposed amendments to the Indiana Constitution which received a majority of the votes cast for or against them but did not receive a majority of the votes cast at the general election were:
    (1) A proposal to amend Article VII, § 1, to provide that the Supreme Court should consist of not less than five nor more than eleven members, submitted in 1900. Total number of votes cast for the amendment, 314,710; total number of votes cast against the amendment, 178,960; and total number of votes cast at the general election, 664,094.
    (2) A proposal to amend Article XIV, § 2 to provide for a classification of townships, counties, towns, and cities for the purpose of registration, submitted in 1926. Total number of votes cast for the amendment, 198,579; total number of votes cast against the amendment, 184,684; and total number of votes cast at the general election, 1,052,994.
    (3) A proposal to amend Article X by providing that the legislature could levy an income tax, submitted in 1926 and again in 1932. Total number of votes cast for the amendment in 1926 was 239,734; total number of votes cast against the amendment, 212,224; and total number of votes cast at the general election, 1,052,994. In 1932 the total number of votes cast for the amendment was 701,045; total number of votes cast against the amendment, 209,076; and total number of votes cast at the general election, 1,600,484. Legislative Bureau Pamphlet entitled "Constitution of the State of Indiana and of the United States," issued June, 1949, pp. 20, n.39, 31, n.58, 26, n.47.

30. *Cf.* Brief for Appellants, pp. 43, 44, Swank v. Tyndall, 78 N. E.2d 535 (Ind. 1948), asserting that all these amendments have been

Actually, it is difficult to conceive of any administrative or legal difficulties which might arise from the validation of the four proposed amendments. The proposed 1926 amendment would, it appears, do no more than reiterate the statute forbidding salary increases during an official's regular term of office. The other three proposed amendments are merely permissive; giving the legislature power to levy an income tax, redistrict the state for registration, and increase the number of judges on the Supreme Court. The legislature could avoid administrative difficulty by non-exercise or careful exercise of their powers. Thus, any policy considerations behind the present decision are, at best, highly elusive.

Although the *Swank* case serves as a "reminder that a decision overruling a constitutional precedent may be made prospective if circumstances warrant,"[31] it also warns that if a court truly wishes to avoid confusion in the law the proper time for it to designate an overruling decision as prospective only is when making such decision.[32] That the court's jurisprudential excursion into a discussion of the Declaratory Theory will create confusion in Indiana doctrine seems inevitable.

Indeed, as the *Swank* case dissenters point out,[33] the *Swank* and the *Todd* decisions seem irreconcilably at odds since the same "right," *viz.*, the "right" of voters to have their votes given effect under the existing interpretation of the constitution, was before the court in each case.[34] Al-

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considered effective since In re *Todd*, that the legislature has acted under its authority, and that confusion and litigation will result if they are declared ineffective.

31. Frank, *The United States Supreme Court: 1947-48*, 16 U. OF CHI. L. REV. 1, 21 (1948).

32. Mr. Justice Cardozo, Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 364 (1932): "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." To do so is not a denial of due process protected by the Fourteenth Amendment.

33. Starr and Young, JJ., dissenting in instant case at 543: "It seems to us that it cannot be held that the amendment involved in the case before us failed (it having received a majority of the votes cast for and against it) without overruling the *In re Todd* case, which we are unwilling to do."

34. The *Todd* case (1935) involved a so-called "Lawyer Amendment" to the constitution which had been submitted at the general election of 1932 and received a majority of the votes cast for or against it but not a majority of the votes cast at the election. This amendment allowed the Supreme Court to prescribe rules for admittance to the bar. Previously "good moral character"

though the *Todd* case permitted retroactive application and did not protect the "right," the *Swank* case denied retroactive application and granted the protection. Yet the majority in the *Swank* case expressly allowed the *Todd* decision to stand.[35] Confusion must follow too from allowing the Declaratory Theory to remain, in name, as a principle of Indiana law while creating an exception so large and ill-defined that accurate prediction of future decisions becomes impossible and the principle becomes, in truth, no longer controlling. Either rigid adherence to the Declaratory Theory as it has long been understood, or complete abandonment of it would have satisfied the need for reasonable certainty in the law. If the Supreme Court feels that the time has come to reject as unreal a theory founded upon Blackstonian concepts of law, a frank decision to that effect seems preferable to a resort to the vagueness of words.[36]

INTERPRETATION AND CONSTRUCTION

EFFECT OF STATUTORY LIMITATION OF TERM OF OFFICE CREATED BY LEGISLATURE

Hessler, the trustee-elect of Center Township, Vanderburgh County, Indiana, died before qualifying and taking the oath of office. Karger, the incumbent trustee, had served in office for eight consecutive years. The statutes provide that "no person shall be eligible to hold the office of township trustee for more than eight years in any period of twelve years."[1] The Board of County Commissioners passed a resolution finding Karger ineligible to continue in office because he had served the statutory maximum. The Board proceeded to find that a vacancy existed and appointed Fares to the office.[2] Upon the refusal of Karger to sur-

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and the ability to vote were the only qualifications. The court in the *Todd* case held that the "Lawyer Amendment" had been passed. Certainly the voters had the right to have their votes counted in accordance with the existing law in the *Todd* case if they had that right in the *Swank* case.

35. Swank v. Tyndall, 78 N. E.2d 535, 541 (Ind. 1948).

36. A subsequent case indicates that the *Swank* case will be used merely to exemplify the Declaratory Theory. State v. Burch, 80 N. E.2d 294 (Ind. 1948).

1. IND. STAT. ANN. (Burns Repl. 1943) § 65-101.

2. IND. STAT. ANN. (Burns Repl. 1943) § 65-106 provides that all vacancies in the office of township trustee "shall" be filled by