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Effect of Statutory Limitation of Term of Office Created by Legislature

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

render his office, Fares brought an action in the nature of a *quo warranto*. The Indiana Supreme Court held that Karger is entitled to the office although he has served eight years. The statutory limitation to eight years means only that an incumbent, here Karger, is ineligible for subsequent *election* to the office, but he is entitled to continue in office as a hold-over. In reaching this result, the court relied upon a provision of the Indiana Constitution, which provides: "Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer . . . 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."[3] *State* ex rel. *Fares v. Karger*, 77 N. E.2d 746 (Ind. 1948).

Faced with a fact situation to which a constitutional provision creating hold-over tenure and an apparently conflicting statute prohibiting tenure beyond eight years seemed equally applicable, the court had several courses of action. It might have refused to reconcile the two provisions and have held the statute ineffective because it conflicted with the constitution. It might have construed the constitution and the statute together and, by limiting the broad language of the constitution, have held that that language was applicable only to situations where an incumbent was not otherwise rendered ineligible to continue in office, and hence that it was inapplicable here. Or by limiting the meaning of the statutory words "eligible to the office" to mean "eligible to *election* to the office," the court might have held the statute inapplicable here, since Karger was not to continue in office by virtue of an election. The court chose the last of these possibilities, limited the statute's meaning and gave broad effect to words of the constitution. A township trustee, it held, is entitled as a matter of right to hold over until his successor is elected and qualified, even though that trus-

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the Board of Commissioners of the county, and the appointee shall servie until his successor is elected and qualified. The section further provides that it shall be the duty of the County Auditor to call a special session of the board without delay to fill a vacancy if the board is not in session at the time the vacancy occurs.

3. IND. CONST. Art. IX, § 3.

tee would not be eligible for re-election under the terms of the statute which creates the office.

The present case, in permitting hold-over tenure by an officeholder whose office was created and whose tenure was limited by statute, has given new life to a long-standing distinction in Indiana law, a distinction some commentators have thought dead.[4] For, while the constitution permits holding over in an office created by statute, in an office created by the constitution no holding over is allowed after the maximum term specified by the constitution has been served. In 1885, the Indiana Supreme Court held in the case of *Gosman v. State* ex rel. *Schumacher*[5] that a circuit court clerk whose office was created and whose tenure was limited by a constitutional provision was absolutely ineligible to hold office beyond the maximum period specified by that constitutional provision. The constitutional provision with regard to hold-over tenure was gven no effect.[6] In 1891 in *State* ex rel. *Reese v. Bogard*[7] the court held that a township trustee, whose office was created and whose maximum tenure was limited *by statute*, was eligible to hold over when his successor had failed to qualify. The court stated that "It was the purpose of the Legislature to prevent an elector from holding by *election* a new and additional term of four years

4. Robert C. Brown, *Indianapolis Mayoralty Cases*, 4 IND. L. J. 194 (1928), stated that "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 . . . ." In the note citing authority for this proposition Mr. Brown states that the "Gosman case (decided in 1885) is hard to reconcile with this doctrine but is of doubtful authority now." He then cites the *Bogard* case which was decided in 1891. He failed to inform the reader that when the question of a constitutional limitation was again brought before the court in Aikman v. State *ex rel.* Wadsworth, 152 Ind. 836, 53 N. E. 563 (1899), the *Gosman* case was followed despite the decision of the *Bogard* case involving a statutory office and limitation. The *Aikman* case involved the constitutionally-created office of County Treasurer.

5. 106 Ind. 203, 6 N. E. 349 (1885).

6. The same result was reached in the later case of Aikman v. State *ex. rel.* Wadsworth, 152 Ind. 836, 53 N. E. 563 (1889), which involved the constitutional office of County Treasurer. *Cf.* Scott v. State *ex. rel.* Gibbs, 151 Ind. 556, 52 N. E. 563 (1889), where under the same circumstances as the *Aikman* case an incumbent Treasurer who had not served for four consecutive years was permitted to hold over.

7. 128 Ind. 480, 27 N. E. 1113 (1891).

after having held the office for two consecutive terms."[8] It gave full effect, as in the instant case, to the hold-over provision of the constitution and allowed the incumbent to remain in office. Although this distinction between offices created and defined by the constitution and those created and defined by statute carries with it the authority of long acceptance, it is desirable to re-examine it in an attempt to determine whether it also carries the greater authority of some foundation in fact or reason.

The framers of our constitution evidently felt that the public interest would best be served by limiting the number of consecutive years that one person could hold certain designated offices. Therefore, the constitution in certain instances where it creates an office, definitely limits the period which one man may serve.[9] The General Assembly when creating offices, follows this practice.[10] Statutes which create and limit their tenure use language identical to that found in the constitution in limiting tenure in office: "No person shall be eligible to the office of . . . more than . . . years in any period of . . . years."[11] This identity of wording is a strong argument that the same policy considerations which guided the framers of the constitution were influential with the legislators and prompted the General Assembly to place limitations on statutory offices. If the legislature used the identical words for identical reasons, it surely intended that an identical interpretation be placed on the statutory limitations as is placed on constitutional ones.[12]

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8. *Id.* at 482, 27 N. E. at 1114.
9. See, *e.g.*, Art. V., § 1, creating and limiting the tenure of the office of Governor; Art. VI, § 1, creating, and limiting the tenure of office of, the offices of Secretary, Auditor, and Treasurer of State.
10. The General Assembly is granted the authority by the constitution to create additional offices. IND. CONST. Art. VI, § 3. Might it not also be argued that the power to create also carries with it an implied power to place limitations on an office and that such limitations have the same efficacy as if the office and the limitation had been provided for in the constitution?
11. IND. CONST. Art. VI, § 2; IND. STAT. ANN. (Burns Repl. 1943) § 65-101.
12. The statutory limitation involved in the *Bogard* case was passed after the decision in the *Gosman* case. It may be justifiably assumed that when the General Assembly used the identical wording of Art XV, § 3 of the constitution (which had been interpreted in the *Gosman* case as creating an absolute ineligibility to hold over) that body intended the statute to be interpreted in the same manner.

The foregoing argument for uniform interpretation is based upon an intent of the legislators as disclosed by the language of the statutes themselves. Examination of the words of the constitution too discloses that its framers must have intended that limitations imposed by the constitution and by statutes be given the same meaning. The constitutional provision in providing for holding over reads: "Whenever it is provided in this constitution, *or in any law which may be hereafter passed,* that any officer . . . etc."[13] It seems unnecessary to spell out an intent that the provision be applied uniformly to offices created by the constitution and to those created by statute. Yet it is this very provision which has been applied differently by the court, and which is responsible for the present distinction between statutory and constitutional offices.

It is at least arguable that the constitutional provision[14] creating hold-over terms means that an incumbent may hold over only if he is *eligible to hold office* according to the terms of eligibility set out by the authority creating the office. Under this interpretation it may be said that one can hold over in an office only if he has not served the maximum period permitted, and this should be true with equal force whether that maximum is defined by the constitution or by statute. In allowing the authority creating an office to fix the requirements for eligibility to it, this interpretation is entirely consonant with the language and the spirit of the constitutional provision under discussion. In sum, the language, both of the Constitution and of the relevant statutes, seems to demand that there be a single interpretation of this section of the constitution. So much for legislative intent.

Consideration of constitutional and statutory offices reveals no significant factual basis for distinguishing rationally between the two.

The court in the instant case, in holding that the constitution gave Karger a right to continue in office despite the limit imposed by the statute which created his office, relied for its authority on numerous cases which state that the constitutional hold-over provision adds an "additional,

13. IND. CONST. Art. XV, § 3.
14. *Ibid.*

contingent and defeasible term to the original fixed term." But the cases cited by the court did not deal with the problem of an incumbent who had served for the maximum number of years permitted by either a statute or the constitution.[15] Granting it was correct to hold that the constitution permitted a hold-over, in those prior cases, they are not authority for an application of the same reasoning to this entirely different fact situation; *viz.*, where the incumbent Karger had served the maximum number of years permitted by statute.

If the constitutional and statutory limitations on the number of years that one may serve in office, whatever authority created that office, ought to be uniformly interpreted in relation to the constitutional section dealing with holding over in office, which of the two present interpretations should prevail? If the "statutory office rule" is the one adopted, the whole policy against protracted, and consequently inefficient, office-holding will be overridden. The ineptness of this rule is further demonstrated by its effect in operation: it permits an incumbent office-holder who would be ineligible for another term even though elected *by the people he is to serve*, to be eligible to hold over because his successor has failed to qualify.

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15. State *ex. rel.* Jett v. Ives, 167 Ind. 13, 78 N. E. 225 (1906) dealt with the holding over of a city councilman—an office having no maximum limitation. Nor was there a maximum limitation on the term of the member of a school board whose right to hold over was litigated in Koerner v. State *ex rel.* Judy, 148 Ind. 158, 47 N. E. 323 (1897).

In State *ex rel.* Carson v. Harrison, 113 Ind. 434, 16 N. E. 384 (1888) the officer was to be elected by the General Assembly. The General Assembly having failed to elect a new officer at the prescribed time, the court held that the incumbent could hold over under Art. XV, § 3 of the constitution. There was no vacancy for the Governor to fill. This case would seem to stand for the proposition that the expiration of a term of office does not in itself create a vacancy that may be filled by the appointing authority.

In State *ex rel.* Harrsion v. Menaugh, 151 Ind. 260, 51 N. E. 117 (1898) a "skip-election law" necessarily prevented a successor to the incumbent from being elected. It was contended that the law in effect gave the incumbent a 6-year term, which violated Art. XV, § 2 of the constitution, which prohibits the Legislature from creating any office the term of which is longer than four years. In this case as well as in the case of Spencer v. Knight, 177 Ind. 564, 98 N. E. 342 (1912) it was held that a "skip-election law" held over under Art. XV, § 3 of the constitution. In neither case was the question of the incumbent's ineligibility because of having served for the maximum period raised.

But, if the interpretation that has been placed on cases involving constitutional offices is adopted, what would seem to be the true intent of the drafters of the constitution and the statutes will be given expression. The words "eligible to the office," seem to mean precisely that, *i.e.*, "eligible to hold office." Construction of "eligible to the office" to mean "eligible *by election* to the office," which is the construction adopted in the *Bogard* and in the instant cases, is strained and seems unwarranted. Under the literal and ordinary interpretation of the words, when an incumbent had served for the maximum period, and his successor had failed to qualify, a vacancy would exist to be filled by the appointing authority.[16]

LABOR LAW

AVAILABILITY OF LABOR INJUNCTION WHERE EMPLOYER FAILS TO COMPLY WITH REQUIREMENTS OF INDIANA ANTI-INJUNCTION ACT

A consent election[1] held by the National Labor Relations Board determined Local No. 309, CIO, United Furniture Workers of America, as the majority representative of the employees of the Smith Cabinet Manufacturing Co. The Smith Co. refused to recognize Local No. 309 until it had been certified as the majority representative by the NLRB.[2] The refusal led to picketing with accompanying violence.[3] The Company petitioned the Daviess County Cir-

16. See note 2 *supra*.

1. The consent election involved in the instant case was held a few days prior to the effective date (August 22, 1947) of those sections of the Taft-Hartley Act making the filing of certain information pre-requisite to the availability of services of the NLRB—including the holding of elections—to labor unions, but no official certification had been made before the Sections became effective.

2. The NLRB could not officially certify Local No. 309 because the union refused to comply with filing requirements. No investigation of a question concerning the representation of employees, raised by a labor organization, can be entertained by the Board unless certain information concerning the organization has been filed and kept up to date by annual reports, and the officers of the organization have filed non-communist affidavits. 61 STAT. 143, 29 U. S. C. A. § 159 f, g, h (Supp. 1947).

3. State police were called in to restore order. It is interesting to note in this connection the case of Local No. 309, United Furniture Workers of America, CIO v. Gates, 75 F. Supp. 620 (N. D. Ind. 1948). State police were attending union meetings held in