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In Re Todd and Constitutional Amendment

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COMMENT

In Re Todd[1] *and Constitutional Amendment*

I

Article 16, Section 1 of the Indiana Constitution provides that after the proposed amendment or amendments have been agreed upon by a majority of each House of two successive General Assemblies, "then it shall be the duty of the General Assembly to submit such amendment or amendments 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 General Assembly of 1931 enacted the following: "The Supreme Court of the state shall have exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules as it may prescribe." [2] Under this statute the court prescribed regulations requiring an applicant to take an examination to determine his professional fitness. Petitioner, Lemuel Todd, insisted that under Article 7, Section 21 of the Constitution of Indiana,[3] both the statute and rules of the court are invalid. However, the Supreme Court held that Section 21, Article 7, had been stricken from the Constitution by amendment at the general election of 1932. At this general election the vote on the amendment was 439,949 in favor of the adoption and 236,613 against adoption. The majority in favor of adoption, however, was less than half of the number of voters who voted for candidates at the general election.

The Indiana Supreme Court in this case then removed the greatest obstruction to the amendability of the Constitution of Indiana and overruled three former decisions announcing a principle of law which was not legally unsound but which made an amendment to the Constitution of Indiana a practical impossibility. Due in main to the interpretation placed by the Supreme Court in these three former decisions on the section of the Con-

1 (1935), 193 N. E. 865 (Ind.).

2 Acts of Indiana (1931), Ch. 64, p. 150.

3 Article 7, Section 21. "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."

stitution providing for amendment, only three proposed amendments or groups of amendments have been ratified by the electors.

Just what constitutes a "majority of said electors" within the meaning of Section 1 of Article 16 has been the subject of much debate; and the same is true everywhere in the construction of like provisions, both in statutes and constitutions.

There are three possible interpretations, each of which has been sanctioned by courts in various states. First, "the majority of said electors" might have been interpreted to mean more than half of those persons in the state possessing the legal qualifications to vote.[4] This, it would seem, is the plainest meaning of the words, but to adopt such an interpretation would be to place an unsurmountable barrier in the way of securing an amendment to the Constitution. Not only would there be the problem of ascertaining the number of legally qualified voters in the state, even in the light of present registration laws; but if such an interpretation were given this ambiguous clause, that great class of voters who fail to exercise their privilege at the polls would have to be considered in determining whether or not a majority of the electors had voted in favor of the ratification. Not voting at all would have the effect of voting against the proposed amendment.

Nevertheless, this was the construction put on the words by the majority of the Supreme Court in State v. Swift,[5] the first case in Indiana involving the interpretation of this section of the Constitution. Here the question before the court was whether or not a proposed amendment changing the qualifications for voters had become a part of the Constitution. The returns of the election showed that a majority of the votes cast on the proposed amendment were in favor of ratification, but that this number fell short of a majority of those voting at the general election at which the proposal was submitted. Two of the members of the court, Justices Howk and Worden, believed that it required a majority of the electors of the state to ratify a proposed amendment, but that the number of persons voting at the general election would be taken as the number of electors of the state. This is clearly indulging in a legal fiction of the most flagrant sort. Mr. Justice Biddle, writing the opinion of the majority, said that a "majority of said electors" meant a majority of the legally qualified voters of the state, and that the number of electors was a "fact which the courts must ascertain, without averment or proof," and "for this purpose a court may look to the archives of the state, to the official returns of general state elections, to legislative action, and to the proclamations of the executive." Justice Biddle, however, did concur with Justices Howk and Worden in that the proposal in question had not become a part of the Constitution, since, as it did not receive a majority of the votes cast at the general election, it did not receive the affirmative vote of a majority of the electors of the state.[6]

The position taken by Justices Worden and Howk in State v. Swift[7] was approved in In re Denny,[8] twenty-one years later. Mr. Justice Baker,

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[4] School District v. Oellien (1908), 209 Mo. 464, 108 S. W. 529; State v. Willis (1913), 47 Mont. 548, 133 Pac. 962; State v. Lancaster County Commissioners (1877), 6 Neb. 474.

[5] (1880), 69 Ind. 505.

[6] Mr. Justice Scott and Mr. Justice Niblack wrote separate dissenting opinions which will be discussed in connection with the third possible construction of the phrase in question.

[7] (1880), 69 Ind. 505.

[8] (1901), 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722. Here there was submitted to the electors at a general election a proposal to amend Article 7, Section 21 of the Constitution. 655,965 votes were cast for the various candidates at the general election. For the amendment 240,031 votes were cast, while 144,072 votes were cast against it.

in the course of his discussion, said: "It is universally held that, in the absence of a provision for registration, the number of persons who possess the qualifications entitling them to vote at a given election is determined by the election itself . . . so the question becomes one, not of constitutional construction, but one of evidence. The court will take judicial knowledge of the returns made to the Secretary of the State of the number of votes cast at the general election and the number cast for and against the amendment submitted at the general election." [9]

In re Boswell,[10] the third Indiana Supreme Court decision interpreting Section 1 of Article 16, followed the majority opinion in State v. Swift[11] and In re Denny,[12] this time, however, by a unanimous decision. The Supreme Court still insisted that it took a majority of all the electors of the state to ratify a proposed amendment, but resorted to the fiction that that number was determined by the returns of the general election.[13]

The second possible construction that might be placed on the words "majority of said electors" is that the requirement for such majority is satisfied if more than half of the persons voting at the general election at which the proposed amendment is submitted vote in favor of its ratification.[14] This is, in practice, the position that the Indiana Supreme Court has taken, in spite of the language to the effect that it requires a majority of all the electors of the state to ratify an amendment to the Constitution, since it has adopted the rule that the number of electors in the state is to be determined by the number voting at the general election.

This interpretation has the least support in logic and leads to many impractical results. Article 16, Section 1 of the Constitution does not require that the amendment be submitted at a general election, but leaves it a matter to be decided by the General Assembly when and how the proposed amendment shall be submitted for popular vote. As the Supreme Court in In re Todd[15] points out, "In short we have a theoretical rule of constitutional law which the General Assembly can suspend, for all practical purposes, by submitting single amendments at special elections." The vote at the special election would naturally be much smaller than the vote at the general election, and hence it is a fact that a proposed amendment can become a part of the Constitution by virtue of an affirmative vote smaller than the negative vote the proposal would have received at a general election. This is exactly what happened at the general election of 1880, followed by a special election in 1881. It is submitted that no rule of law which is so easily flaunted can be sound political policy, particularly when so evading it is a decided financial burden on the state.

The third construction to be placed upon "majority of said electors" is that it means a majority of the votes cast for and against the proposition

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[9] Jordan, J., dissented, taking substantially the same view adopted by Justices Scott and Niblack in State v. Swift (1880), 69 Ind. 505.

[10] (1913), 179 Ind. 292, 100 N. E. 833. In this case a proposal to amend Article 7, Section 21 was submitted at a general election, at which 627,133 votes were cast for the various political officers. 60,357 votes were cast in favor of the proposed amendment, and 18,494 votes were cast against it. It was held that the proposal was not ratified.

[11] (1880), 69 Ind. 505.

[12] (1901), 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722.

[13] For a more complete discussion of State v. Swift (1880), 69 Ind. 505; In re Denny (1901), 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722; and In re Boswell (1913), 179 Ind. 292, 100 N. E. 833, see Richman (1934), A "Majority of Electors" Means a Majority of Those Voting on the Question, 9 Ind. L. J. 403.

[14] Tecumseh National Bank v. Saunders (1912), 51 Neb. 801, 71 N. W. 799; State v. Brooks (1909), 17 Wyo. 344, 99 Pac. 874, 22 L. R. A. (N. S.) 478.

[15] (1935), 193 N. E. 865 (Ind.) Fansler, C. J., dissented on the ground that the question was well settled in Indiana.

submitted,[16] and this is the view adopted by the court in In re Todd.[17] Such an interpretation obviously disposes of all the evils which follow either of the other constructions. This, too, has been the position taken by the dissenting members of the court in State vs. Swift[18] and In re Denny.[19]

The Supreme Court, however, was not without some precedent in Indiana for the position it took in the principal case. In 1884, the question of the interpretation of the same words was presented to the court, this time, however, in connection with a statute.[20] Dailey, J., speaking for a unanimous court, said that there were four general principles which would apply to the interpretation of this and like provisions: "First, where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result of those who do vote, even though those voting do not constitute a majority of those entitled to vote.

"Second, where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at 'such election,' a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question.

"Third, where at a general election, a proposition is submitted to the voters, the result of the votes on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary.

"Fourth, where a legislative body provides that a proposition shall be submitted to the voters; that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote, and that a 'majority of the votes given' shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved."

These four propositions are approved in In re Todd,[21] Justice Treanor, in writing the opinion, saying: "Since there is an absence of any language which requires a majority of all 'persons possessed of legal qualifications entitling them to vote' or a majority of all votes cast at a general election, we believe that the submission clause falls within the first and third propositions of Judge Dailey."

This interpretation has met with some criticism by those who contend that such a construction permits the Constitution to be amended too easily by too small a portion of the electors of the state, but on the other hand it is often held that those who do not exercise their privilege to vote are deemed to have consented to the result of those voting. It is further submitted that this contention bears no weight in Indiana where the same result as that criticized may be reached by submitting the proposition at a special election. It seems clear that the third construction is supported by logic and practical convenience.

II

All the problems concerned in the principal case are not settled, however, by ascertaining whether or not the result reached was desirable from a practical and theoretical standpoint. As is usually the case when a court

16 Green v. State Board of Canvassers (1896), 5 Ida. 130, 47 Pac. 209; Louisville & Nashville R. Co. v. County Court (1854), 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.
17 (1935), 193 N. E. 865 (Ind.).
18 (1880), 69 Ind. 505.
19 (1901), 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722.
20 City of South Bend v. Lewis (1894), 138 Ind. 512, 37 N. E. 986.
21 (1935), 193 N. E. 865 (Ind.).

overrules preceding cases, the state of the law is somewhat in confusion. This is no less true in Indiana, and since the time the decision was rendered, several suggestions have been made as to the effect of the decision.

The difficulty arises from the common-law rule that a court's decision has not only the effect of stating what the law is and will be, but that it has also a retroactive effect.[22] Applied retroactively, the rule of the principal case would add four amendments[23] to the Constitution of Indiana which were not involved in the suit of In re Todd,[24] and which have heretofore been considered as having been rejected by the voters. The amendments in question received the vote of a majority of the electors voting on the proposal, as required by the rule of In re Todd,[25] but did not receive a majority of the votes cast at the general election at which they were submitted, as required by the rule of the overruled cases of State vs. Swift,[26] In re Denny,[27] and In re Boswell.[28] Whether or not, then, the decision should be given retroactive operation is a question of no little importance.

The retroactive rule, or, as it is sometimes called, the declaratory theory, is "that the judges do not make the law but only apply it, and that judicial decisions are not laws in and of themselves in the same sense that legislative enactments are law, but are only evidence of the law. The evidence is always rebuttable, and it is rebutted when the courts later change the rule. When a pre-existing rule is changed, the new rule becomes the better evidence of the law, not only prospectively, as to all transactions arising in the future, but it also has been given a retrospective operation embracing jural relations created prior to the overruling decision, but after the decision overruled. Put more concisely, though less accurately, the result is the same as if the older rule had never been the law."[29]

Naturally such a rule, strictly and uniformly applied, would lead to many harsh results, particularly where the parties have relied upon the prior decision in entering upon the relations which are now being questioned by the court. Because of the retrospective effect of overruling precedent, all courts

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22 Kavanaugh v. Rabior (1932), 222 Mich. 68, 192 N. W. 623; People ex rel. Rice v. Graves (1934), 273 N. Y. S. 582; Jackson v. Harris (1930), 43 Fed. (2d) 513; Pearson v. Orcutt (1920), 107 Kan. 305, 191 Pac. 286; Allen v. Allen (1892), 95 Cal. 184, 30 Pac. 213.

23 The general assembly of 1897 adopted a proposal to amend Sec. 1 of Article 7 to provide that the Supreme Court should consist of not less than five nor more than eleven members. This was agreed to by the general assembly of 1899 and submitted to the voters at the general election of 1900. The total vote for political officers cast at the general election was 664,094. 314,710 votes were cast for ratification of the proposal, and 178,960 votes were cast for rejection.

(2) A proposal to amend Section 2 of Article 15 was submitted at the general election of 1926, at which 1,052,994 votes were cast. 182,456 votes were for ratification, and 177,748 votes against it.

(3) A proposal to amend Section 2 of Article 14 to provide for a classification of townships, counties, towns and cities for purposes of registration was submitted to the electors at the general election of 1926. 198,579 votes were cast for the proposal and 184,684 against it.

(4) A proposal to amend Article 10 by providing that the legislature could levy an income tax was submitted to the voters at the general election of 1926. There were 239,734 votes cast in favor of the proposal, while 212,224 votes were cast against it. Believing that the amendment had failed, the legislature resubmitted the proposal at the general election of 1932, at which time 701,045 votes were cast for ratification and 209,076 for rejection. 1,600,484 votes were cast at the general election of 1932.

24 (1935), 193 N. E. 865 (Ind.).

25 (1935), 193 N. E. 865 (Ind.).

26 (1880), 69 Ind. 505.

27 (1901), 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722.

28 (1913), 179 Ind. 292, 100 N. E. 833.

29 Kocourek and Koven, (1935) Renovation of the Common Law Through Stare Decisis, 29 Ill. L. Rev. 971.

have been extremely hesitant to overrule property and contract cases, where, it is easily seen, the application of the declaratory theory would lead to inestimable unjust results. For the same reason there has been much agitation recently to abandon the rule entirely.[30] Not only has this doctrine received criticism by legal writers, but it has been expressly repudiated by some courts where hardship would be worked upon the parties. Thus in criminal cases,[31] and in cases involving property and contract rights[32] the courts in a few states have said that the rule of the overruling case would be accorded prospective effect only.

Although there have been no cases which involve the effect of overruling a decision holding that a proposed amendment has not become a part of the Constitution, there are cases which involve an analogous situation, namely, the effect of overruling a case involving the constitutionality of a statute. Here, as in the cases involving the common law, the general rule may be stated that the overruled case is considered as never having been the law unless the parties have acquired rights or liabilities on the faith of the first decision, in which situation the overruling case is given only prospective effect.[33]

The only question remaining, then, is whether or not the holding in In re Todd[34] should be given retroactive effect so as to add to the Constitution of Indiana the four amendments. It is hard to conceive of a situation in which parties could have acquired liabilities or rights on the faith of any of the three cases overruled, especially since none of the amendments which would become a part of the Constitution by operation of the retroactive effect of In re Todd[35] contain self-executing provisions. As the Supreme Court in the Todd case said, "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. . . . The overruling of those cases will not produce uncertainty in titles, or introduce doubt and confusion in questions of property or contracts. Under such circumstances, it is the duty of the court to correct its own errors, and the doctrine of stare decisis cannot be successfully invoked to perpetuate them. And this is especially true when a constitutional question is involved."

An application of the declaratory theory to In re Todd[36] would lead to a somewhat curious result in Indiana, in that the so-called "lawyers amendment" would be considered as having been a part of the Constitution since 1880. In 1900 and 1912, Section 21 of Article 7 was amended to read exactly as it had read before the amendments of 1900 and 1912 were ratified. In re Denny[37] and In re Boswell[38] can not be considered as res adjudicata on the question of whether the amendment became a part of the Constitution, as res adjudicata applies only when the same parties are before the court;

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30 Kocourek and Koven, (1935) Renovation of the Common Law Through Stare Decisis, 29 Ill. L. Rev. 971; Aumann, (1932) Judicial Law Making and Stare Decisis, 21 Ky. L. J. 156.

31 State v. O'Neal (1910), 147 La. 513, 126 N. W. 454; State v. Longino (1915), 109 Miss. 125, 67 So. 902; State v. Bell (1904), 136 N. C. 674, 49 S. E. 163.

32 Donahue v. Russel (1933), 264 Mich. 217, 249 N. W. 830; Bagby v. Martin (1926), 118 Okla. 244, 247 Pac. 404; Scown v. Czarneski (1914), 264 Ill. 305, 106 N. E. 276; Wilkins v. Wallace (1926), 192 N. C. 156, 134 S. E. 401; (1934) 21 Va. L. Rev. 235.

33 For a complete discussion of the effect of such a decision, see Field, (1926) Effect of Unconstitutional Statutes, 1 Ind. L. J. 1.

34 (1935), 193 N. E. 865 ((Ind.).

35 (1935), 193 N. E. 865 (Ind.).

36 (1935), 193 N. E. 865 (Ind.).

37 (1901), 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722.

38 (1913), 179 Ind. 292, 100 N. E. 833.

but those cases can be considered as precedent for that proposition only. The amendment which was the subject of the litigation in State vs. Swift[39] was re-submitted at a special election in 1881, and was ratified by an affirmative vote smaller than the negative vote had been at the general election the year before.[40]

When the validity of a constitutional amendment is to be considered, Section 2 of Article 16 is not to be overlooked. This section provides: "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of said amendments separately; and while an amendment or amendments which shall have been agreed upon by one General Assembly shall be awaiting the action of a succeeding General Assembly, or of the electors, no additional amendment or amendments shall be proposed." Whether this section means that no amendment or amendments to the Constitution shall be submitted while another amendment or amendments are pending, or that no amendment shall be submitted while another amendment to the same section is pending, has not been settled by the Supreme Court. The question is not presented by the Todd case, however, as the lawyer amendment, as were the other four amendments, was submitted when no amendment or amendments at all were pending, either in the General Assembly or for vote by the electors.

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