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Quo-Warranto-By Private Persons as Relators to Oust Others From Public Office-De Facto Officers

Quo-Warranto—By Private Persons as Relators to Oust Others From Public Office—De Facto Officers. This is an action by the appellees, relators, in quo-warranto, against the appellants, seeking to oust the appellants as members of a township advisory board. The facts alleged in the complaint are that the relators were duly elected and qualified members of said board until the general election of November, 1930, when appellant Rule and two others were elected to said board; and that none of those so elected were freeholders of said township at the time of the election and that the two members other than Rule resigned and the appellants Aiken and Lane, who were freeholders, were appointed by the other members of the board as provided by statute when a vacancy occurs. The lower court found that the relators held over and that appellants had no right or title to the office by reason of the fact that none of the persons elected in November, 1930, were freeholders, and that not being freeholders they could not resign and appoint freeholders, thereby creating an advisory board with the statutory qualifications. Appellant's demurrers to the complaint and reply were overruled and they excepted. Held, that the trial court erred in overruling the appellants' demurrers and that the relators did not hold over.[1]

Quo-warranto proceedings deal mainly with the right of the incumbent to the office and do not determine the rights of any other claimant thereto. Such proceedings may be instituted by a private person for a public office,[2] but he must show a personal interest distinct from that held by other individual members of the general public.[3] While at common law it was generally held that the prosecuting attorney was the only person entitled to bring such an action, it is now proper, by statute, for a private individual to institute a quo-warranto suit for the purpose of determining his right to an office.[4]

The relators here are the former members of a township advisory board and have served their full turn. Their claim is that their successors in office are not properly qualified, none of them being freeholders as expressly provided by statute,[5] and that the relators therefore held over in their offices as provided by statute and by the Indiana Constitution.[6] The appellants contend that they are de facto officers, at least, and that for this reason the relators are disabled from maintaining this suit.

As here presented, the focal point of the problem seems to be whether or not the relators, as private individuals, have a sufficient special interest to enable them to maintain an information in the nature of quo-warranto to oust the appellants from office. It is usually stated that the relator in quo-warranto can recover only on the strength of his own title and not on the

[1] Rule v. State ex rel. Dickinson (1935), 194 N. E. 151.

[2] Yonkey v. State (1866), 27 Ind. 236; Modlin v. State (1911), 94 N. E. 826, 175 Ind. 511; State v. Adams (1879), 65 Ind. 393; State v. Gallagher (1882), 81 Ind. 558; Wells v. State (1910), 94 N. E. 321, 175 Ind. 380; Reynolds v. State (1878), 61 Ind. 392; State v. Hall (1917), 165 Pac. 757, 53 Mont. 595.

[3] Modlin v. State (1911), 94 N. E. 826, 175 Ind. 511; Burns Annotated Indiana Statutes (1926), Sec. 1208; McGuirk v. State (1930), 169 N. E. 521, 201 Ind. 650; People v. Barber (1919), 24 N. E. 594, 289 Ill. 556; State v. Smith (1869), 32 Ind. 213; State v. Dudley (1903), 68 N. E. 826, 161 Ind. 431; State v. Reardon (1903), 68 N. E. 169, 161 Ind. 249; State v. Ireland (1891), 29 N. E. 396, 130 Ind. 77; State v. Slack (1928), 162 N. E. 670, 200 Ind. 241.

[4] People v. Franklin County Building Ass'n (1928), 161 N. E. 56, 329 Ill. 582; Burns Annotated Indiana Statutes (1926), Sec. 1208; Garrett v. Cowart (1919), 101 S. E. 186, 149 Ga. 557; State v. The Maccabees (1924), 142 N. E. 888, 109 Ohio St. 454.

[5] Burns Annotated Indiana Statutes (1926), Sec. 12062.

[6] Burns Annotated Indiana Statutes (1926), Sec. 12062; Constitution of the State of Indiana, Article 15, Sec. 3; Gosman v. State (1885), 6 N. E. 349, 106 Ind. 203; Holds that a person who has held his office for the full successive term cannot hold over at the end of that term. Compare—State v. Bogard (1891), 27 N. E. 1113, 128 Ind. 480.

weakness of the defendant's.[7] This statement of the law is somewhat confusing. It is not altogether clear that such a rule of law is necessary, for if the relator shows only the weakness of the defendant's title he fails, irrespective of the fact of proving his interest in maintaining the action. The reason behind this conclusion is that the relator is bound to show a special interest and apparently that interest must be title, or the facts which would constitute title, otherwise his interest is no greater than that of any other member of the community. The decisions in this state as to what constitutes a sufficient interest are not by any means in agreement.[8]

A general attempt at co-ordinating these cases leaves the impression that the relator in quo-warranto must allege and prove his own title to the office in question. Thus if the relator shows a sufficient interest in maintaining the action he also shows title, and conversely if he shows his title to the office he has shown a sufficient interest. The statutes and cases support the proposition that the information must contain a plain statement of the facts which constitute the grounds of the proceeding and necessarily the relator's interest.[9] In Reynolds v. State,[10] the court held, "The plain statement of the facts must be such as would show, if sustained by the evidence, the relator's right and title to the office in controversy against the defendant."

It is apparent that the relator's interest or title depends entirely upon their holding over in their offices, which in turn depends upon there being a vacancy in the offices, for the words of the statute provide that the term of the office shall be "for four years from the day following election and until their successors are elected and qualified." In no other manner can the relators continue to hold their offices; they have not been re-elected and the offices cannot be filled by appointment. Unless the relators can show that they held over, they cannot prove either interest or title.[11]

The court correctly decided that there was no vacancy here and that the relators failed to show either title or interest for the reason that the appellants were de facto officers. Appellants were properly elected and were in fact performing the duties of the township board. These facts along with the additional fact that a certificate of election was issued to them are sufficient to constituted the appellants de facto officers.[12] In McQuirk v. State,[13] it was held, "That one claiming office and in possession of it, performing duties under the color of election or appointment, is an officer de facto." An office which is filled by a de facto officer is obviously not a vacant office, certainly with respect to a private individual, and will withstand any but a

[7] Relender v. State (1898), 49 N. E. 30, 149 Ind. 283; State v. Slack (1928), 162 N. E. 670, 200 Ind. 241; Burns Annotated Indiana Statutes (1926), Sec. 1208.

[8] Yonkey v. State (1866), 27 Ind. 236; State v. Adams (1879), 65 Ind. 393; State v. Peterson (1881), 74 Ind. 174; State v. Gallagher (1882), 81 Ind. 558; State v. Crowe (1898), 50 N. E. 471, 150 Ind. 455; State v. Slack (1928), 162 N. E. 670, 200 Ind. 241; Jones v. State (1899), 55 N. E. 229, 153 Ind. 440; Reynolds v. State (1878), 61 Ind. 392; Bishop v. State (1897), 48 N. E. 1038, 149 Ind. 223; State v. Ireland (1891), 29 N. E. 396, 130 Ind. 77; State v. Bell (1907), 82 N. E. 69, 169 Ind. 61; McGuirk v. State (1930), 169 N. E. 521, 201 Ind. 650.

[9] Burns Annotated Indiana Statutes (1926), Sec. 1211; Jones v. State (1899), 55 N. E. 229, 153 Ind. 440.

[10] Reynolds v. State (1878), 61 Ind. 392.

[11] State v. Harrison (1888), 16 N. E. 384, 113 Ind. 434; People v. Edwards (1892), 28 Pac. 831, 93 Cal. 153.

[12] Reynolds v. State (1878), 61 Ind. 392; State v. Shay (1884), 101 Ind. 36; Hoy v. State (1907), 81 N. E. 509, 168 Ind. 506; State v. Thornburg (1912), 97 N. E. 534, 177 Ind. 178; Williams v. Bell (1915), 110 N. E. 753, 184 Ind. 156; McGuirk v. State (1930), 169 N. E. 521, 201 Ind. 650; City of Terre Haute v. Burns (1917), 116 N. E. 604, 69 Ind. App. 7; Commonwealth v. Wotton (1909), 87 N. E. 202, 201 Mass. 81.

[13] McGuirk v. State (1930), 169 N. E. 521, 201 Ind. 650.

direct attack.[14] Quo-warranto is a direct attack, but it is of no avail here for the reason that these offices were not vacant and consequently the relator did not have sufficient interest to maintain the suit. It thus becomes immaterial whether the appellants were officers de facto or de jure, for in either case the offices were not vacant.

If it is admitted that the fact of the newly elected members of the board not being freeholders, as required by statute, prevented them from being de jure officers, or from appointing others as de jure officers, then the proper procedure to oust them from office would have been an information in the nature of quo-warranto brought by the state on the relation of the prosecuting attorney, and not by a private person who could show no interest that was not possessed in an equal degree by other members of the township.

J. O. M.

Wills—Term "Children" as Including Adopted Children. Will directed that nephews and nieces take property after death of testator's widow and that "children" of any beneficiary predeceasing widow should take parent's share. A nephew, who died after death of widow, had adopted two children, one before and one after making of testator's will, on advice of testator, who knew that nephew and nephew's wife could not have natural children. Held, such grandnephew and grandniece by adoption are entitled to take under will, since presumption that testator who, in will, provides for own "child" or "children," includes adopted child, while testator who provides for "child" or "children" of another does not include adopted child of other person, is rebutted by extraneous circumstances.[1]

Evidence heard by the trial court conclusively established that Thomas G. H. Porter, adoptive father to appellant children, was the nephew of testator and died after the death of testator's wife. The Appellate Court sets out this fact in its opinion. Obviously then, since the will made provision for the grandnephews or grandnieces only in the instance of their parent predeceasing testator's widow, the adopted children here should not have taken under the will, but rather by descent. A condition precedent to the grandnephews or grandnieces taking under the will was not fulfilled. The nephew, Thomas G. H. Porter, being alive at the time of the death of the widow of the testator should have taken under the express terms of the will. His adopted children then, on his death, would take by descent under the terms of the Indiana statute conferring on the adopted child the right of inheritance from the adopting person.[2] The court in the instant case, however, entirely disregards this condition precedent to provision for the appellants, as it permits them to take under the will. Proceeding on the mistaken assumption that the will in fact provided for the "children" of Thomas G. H. Porter the court devotes its attention to the interpretation of this provision without regard to the unsatisfied condition of the nephew predeceasing testator's widow. The opinion of the court in this matter, however, merits some comment.

The primary meaning of "children" is the immediate legitimate offspring of the person indicated as parent.[3] The word "child" or "children" used in a

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14 Commonwealth v. Wotton (1909), 87 N. E. 202, 201 Mass. 81.

1 Beck et al. v. Dickinson et al. (1935), 192 N. E. 899.

2 Burns Indiana Statutes (1933), Sec. 3-109.

3 Pugh v. Pugh (1886), 105 Ind. 552, 5 N. E. 673; Duncan v. De Yampert (1913), 182 Ala. 528, 62 So. 673; Toucher v. Hawkins (1924), 158 Ga. 482, 123 S. E. 618; Arnold v. Alden (1898), 173 Ill. 229, 50 N. E. 704; Mullaney v. Monahan (1919), 232 Mass. 279, 122 N. E. 387; Wylie v. Lockwood (1881), 86 N. Y. 291; In re List's Estates (1925), 283 Pa. 255, 129 Atl. 64.