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CONSTITUTIONAL LAW—EXTENDING TERM OF PROSECUTING ATTORNEY— The appellant was elected prosecutor for the Johnson-Brown judicial district at the 1928 election, but his term of office did not commence until January 1, 1930. By Acts 1929, page 49, it was provided that all terms of prosecutors should commence on the first of January immediately following the regular biennial election, and that in judicial districts where the term of the prosecutor elected at the 1928 election did not expire until December, 1931, there should be no election for prosecutor in such district at the 1930 election. Appellee obtained nomination and election at the 1930 election, regardless of the provisions of such act. Appellant brought this action

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[8] *Scott Mining etc. Co. v. Shultz*, 67 Kans. 605, 73 Pac. 903 (1903); *Hans v. Shipiro*, 168 N. C. 24, 84 S. E. 33 (1915); *In re Wright-Dana Hardware Co.*, 211 Fed. 908 (1914); *Northcut v. State*, 60 Tex. Cr. 259, 131 S. W. 1128 (1910); *Anderson v. Pacific Bank*, *supra*, note 4.

[9] *Philadelphia Lamp Co. v. Del. Mar. Supply Co.*, 5 Boyce (Del.) 81, 90 Atl. 595 (1914); *Engel v. Scott*, 60 Minn. 39, 61 N. E. 825 (1895).

[10] *Hospes v. N. W. Mfg. Co.*, 48 Minn. 174, 50 N. W. 1117 (1892); *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691 (1901); *Wallace v. Wainwright*, 87 Pa. St. 263 (1878).

[11] *Bedford, etc. R. R. Co. v. Rainbolt*, 99 Ind. 551 (1885).

[12] *Union Traction Co. v. Berry, Adm.*, 188 Ind. 514, 121 N. E. 655 (1919); *Pittsburgh, C. C. & St. L. R. R. v. Stephens*, 86 Ind. App. 251, 157 N. E. 58 (1927).

under the declaratory judgment act to determine which one of the parties had the right to the office. The trial court held for the appellee, elected at the 1930 election, holding the 1929 act unconstitutional. *Held*, the act of 1929 extending term is unconstitutional.[1]

There were two majority opinions which, upon careful reading, seem to base their decision upon the same principle, and differ only upon interpretation of authority, statutes, and constitutional provisions used to justify the use of the basic principle, *viz.*, that the voters have a right or privilege to vote for prosecuting attorneys at general elections. Any distinction between the two opinions as to the use of this principle seems to be based more on differences of the form of language than upon material differences in substance. There was a dissenting opinion, well reasoned, but unfortunately the majority of the authorities cited had to do with offices of legislative creation, and not of constitutional origin, so that the authortiy for the decision was quite slender, and it might have been a stronger opinion had it rejected much of its authority and relied on its reasoning.

The cases of *Gemmer v. State*,[2] *Russell v. State ex rel. Crowder*,[3] used in Judge Treanor's opinion, and *Scott v. State ex rel. Gibbs*,[4] used in the dissenting opinion are governed at least in part by Art. 6, Sec. 2, of the Indiana Constitution, which has no application in the principal case, except as reasoning based in part on other considerations. The case of *State ex rel Custer v. Schortemeier*[6] (vacancy of circuit judge), *State ex rel. Gibson v. Friedley*[7] (tenure of office fixed by the Constitution), *Moser v. Long*[8] (Legislature cannot abolish or abridge term of constitutional office), are not, as used in the majority opinions, exactly in point on the question at issue. Most of the cases[9] used in the dissenting opinion concern offices of legislative creation, and for this reason, it might be argued that they are not in point. The case of *Wilson v. Clark*,[10] held that while the legislature cannot extend or abridge the terms of constitutional offices, nor postpone elections so long a time as to deprive them of their elective character, the postponement for one year is not deemed to be an unreasonable nor unnecessary time, nor to indicate a legislative design to make the office appointive, rather than elective, when done for the proper purpose. This case cited under similar provisions of the Kansas Constitution seems the most nearly in point of any of the cases cited.

The question seems not to be: Was the legislature given the power to do this; but more accurately: is there any prohibition in the Constitution denying it such power so that it cannot do this? Article 7, Sec. 11, provides: "There shall be elected, in each judicial circuit, by the voters

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[1] *Robinson v. Moser*, Supreme Court of Indiana, December 31, 1931, 179 N. E. 270.

[2] 163 Ind. 150.

[3] 171 Ind. 623.

[4] 151 Ind. 556.

[6] 197 Ind. 507.

[7] 135 Ind. 119.

[8] 64 Ind. 189.

[9] *State ex rel. Harrison v. Menaugh*, 151 Ind. 260; *Spencer v. Knight*, 177 Ind. 564; *Weaver v. State ex rel. Sims*, 152 Ind. 479; *State ex rel. Wilson v. Wells*, 144 Ind. 232; *State ex rel. Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 776; *State ex rel. Attorney General v. McGovney*, 92 Mo. 428, 3 S. W. 867.

[10] 63 Kans. 505, 65 Pac. 705.

thereof, a Prosecuting Attorney, who shall hold his office for two years." In the "Schedule," Sec. 6, it is provided: "The first general election under this Constitution shall be held in the year one thousand eight hundred and fifty-two," and in Sec. 9, "The first election for * * * prosecuting attorney * * * under this Constitution shall be held at the general election in the year one thousand eight hundred and fifty-two * * *." These latter two sections, by their very terms, and by the nature of the "Schedule" in which they appear were for the purpose of starting the new government in smooth operation. Any protection to be derived from it ceased when that purpose was attained. This leaves Art. 7, Sec. 11 operative as to prosecuting attorneys. Is this provision self-executing? It seems obvious that it is not. Therefore, it would require legislative action, providing for elections, after the first election provided for in the schedule. Suppose that the legislature repealed the election laws, and refused to provide for any elections for prosecuting attorneys. Under what authority could elections for such office be held? The courts could not mandate the legislature to provide for such election. There is no express provision in the Constitution to take care of such a situation, unless it would be Article 15, Sec. 3, that "such officer shall hold his office for such term *and* until his successor shall have been elected and qualified," or under Article 5, Sec. 18, which provides that in case of a vacancy, the "Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified." But would not this be questionable under the express terms of Article 7, Sec. 11, which provides that "there shall be elected * * * a prosecuting attorney * * *." Neither of these possibilities would provide for an election. The question of what could be done if the legislature refused to provide for such an election still remains (except for the solution of electing, at the proper time, a new and more tractable legislature). There remains then, but one other solution, and upon this the court in effect acted, although apparently overlooking it. The voter may be protected under due process. This involves the extension of the protection of due process to political rights and privileges, which is a marked extension of the principles of Constitutional law. Did the court consider Article 1, Sec. 12, that "* * * every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law"?

The writer had difficulty in following what appeared to be an argument in the majority opinions for the implication, as a part of the Constitution, that prosecuting attorneys must be elected at a general election for a two year term, yet if there was such a provision in the Constitution, though implied, it would seem that any law providing for the skipping of such election would be contrary to the Constitution, and could be declared void. Apparently, however, the court, in the majority opinions, did not ground the decision on this point, but, after elaborating to some extent on such a possibility, sidled away from it, and enunciated as the basic principle for the decision the right or privilege of the voter to vote for such officer at such election, which, in fact, moves the decision into the field of due process.

While it is admitted that if this law had been upheld, it would have made it possible for each succeeding legislature of different political faith,

or profession of faith, to have juggled the term to suit its "best" interests, the question is not whether this is desirable, but whether or not there is anything to prevent it within the terms of the Indiana Constitution. It seems, therefore, that with the exception of the due process interpretation, the law in question here was not unconstitutional, under the decision as set out in the principal case, and that to take care of the vacancy created, Article 15, Sec. 3, should have been applied. L. H. W.

CONSTITUTIONAL LAW—TAXATION—Wisconsin attempted to tax plaintiff's income on the basis of the combined total of his income and that of his wife. *Held*, unconstitutional, contrary to due process.[1] The state law provided that in computing income tax, the income tax of married persons shall be computed on the combined average taxable income of husband and wife.[2] Taxes levied shall be payable by such husband, or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation. The assessor asserted against the plaintiff, a tax computed on the combined total of his and his wife's income as shown by separate returns, treating the aggregate as the income of the husband. The amount so ascertained and assessed exceeded the sum of taxes which would have been due had their taxable incomes been separately assessed. This resulted from the fact that the statute in question provides for surtaxes graduated according to the amount of the taxpayer's net income. The greater the income, the higher the tax paid. Plaintiff paid the tax under protest, and seeks to recover so much thereof as was in excess of the tax computed on his own separate income. He asserted that the statute, as applied to him, violated the Fourteenth Amendment. The Supreme Court of Wisconsin overruled this contention,[3] and plaintiff appealed. The United States Supreme Court held that since the state had taken from the marriage status, except in its purely social aspects, all the elements which differentiated the status of the married person from that of the single person, a mere difference in social relations does not so alter the taxable status of one receiving income as to justify a different measure for the tax. Therefore, the classification was arbitrary, discriminatory, and a denial of due process.

By the law of Wisconsin,[4] a wife's property is her own—and she may convey, devise or bequeath same as though she were unmarried. Since in law and in fact, her income is her separate property, the question is whether the state has the power by an income tax law to measure the husband's tax—not by his own income—but, in part, by that of another. Any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process.[5] That which is not income cannot be made such by calling it income.[6] Although the Wisconsin court sustained the statute in question[7] on the ground that the provisions under attack are necessary to prevent

[1] *Hoeper v. Tax Com. of Wisconsin,* 52 Sp. Ct. Rep. 120 (1931).
[2] Wisconsin Statutes, 1929, No. 71.05, subd. 2 (d), and No. 71.09, subd. 4 (c).
[3] *Hoeper v. Tax Commission,* 202 Wis. 493 (1930).
[4] *Wisconsin Statutes,* 1929, No. 246.01-.05.
[5] *Knowlton v. Moore,* 178 U. S. 41, 77.
[6] *Nichols v. Collidge,* 274 U. S. 531.
[7] *Hoeper v. Tax Commission,* 202 Wis. 493 (1930).