CONSTITUTIONAL LAW

POLITICAL AFFILIATION AS QUALIFICATION FOR OFFICE

An Indiana statute[1] provides for the appointment of a two man board of registration by the judge of the circuit court. One man from each of the two leading political parties is to be appointed upon the recommendation of the county chairman. The judge refused to appoint the Democratic chairman's nomination and an original action for mandamus was brought in the Indiana Supreme Court. The court held that the appointment was an administrative duty placed upon the judge, and the requirement to select from political parties was a direction to the "appointing officer." *State* ex rel *Buttz* v. *Marion Circuit Court,* 72 N.E.2d 225 (Ind. 1947).

The problem presented is one of statutory construction. The court must determine whether the intention of the legislature was to create a class—that is, whether the public has been divided into those having a specific qualification as a condition precedent to holding office and those who do not—or was it the legislature's intention to give advice to the appointing officers which he need not follow?

Although the court does not say that the county chairman is the appointing officer, they treat him as such,[2] thus making the statute apply directly to him. The statute amounts to a mandatory requirement that the chairman select from definite political parties.[3] It also seems clear that the chair-

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1. Ind. Acts 1945, c. 208 § 50, Ind. Stat. Ann. (Burns, Supp. 1945) § 29-3406. "In and for any county having a population of eighty thousand (80,000) . . . the judge of the circuit court in any such county shall appoint the two (2) members of said board of registration, one each from the two (2) political parties which cast the highest and the next highest number of votes for secretary of state in such county at the last preceding general election and who shall be legal voters of such county; such appointments shall be made within ten (10) days after the judge of the circuit court shall have received the respective written recommendations for said appointments from the two (2) county chairmen of the said two (2) political parties the judge shall appoint such nominees . . . ."
2. The generally accepted view is that mandamus will not issue for discretionary acts. State v. Gelb, 75 N.E.2d 151 (Ind. 1947); State v. Curtin, 217 Ind. 190, 27 N.E.2d 909 (1940). Thus to have mandamus issue the court had to find the judge bound by the chairman's recommendation, which in effect makes the county chairman the appointing officer.
3. Legislative intent normally controls the determination of whether a statute is directive or mandatory. Kryder v. State, 214 Ind.

men will select from their own parties.[4] Thus, even if the statute does not by its terms discriminate, the issue of classification is raised either by the statute's effect or by its administration.[5] Consequently the court should have considered and ruled clearly upon the question of classification.

Statutes imposing membership in a political party as qualification for office may be divided into two classes. The first class include statutes providing that no more than a certain number of a board shall be from the same political party. Courts have upheld this class as a limitation upon the board and usually have not considered classification.[6] The second class includes statutes directing selection from definite political parties. The courts have upheld this class as directive[7] and as reasonable classification.[8]

The statute in the principle case is of the second class.

419, 15 N.E.2d 387 (1938); Smith v. State, 202 Ind. 185, 172 N.E. 911 (1930). Since the Indiana General Assembly does not record committee activity, the question of legislative purpose must usually be gleaned from a "fair reading" of the statute. Though this alone appears te demand a mandatory construction it may be supported by other rules. The use of the verb "shall" supports a presumption of mandate. Lynn v. State, 207 Ind. 393, 193 N.E. 380 (1939); Board of Finance v. Peoples Nat. Bank, 44 Ind. App. 578, 89 N.E. 904 (1909). It is said when a statute directs action on the part of public officers and the public interest would require the action, the statute is mandatory. State v. Carmean, 138 Neb. 819, 295 N.W. 801 (1941); Elmer v. Comm'rs of Insurance, 304 Mass. 194, 23 N.E. 400 (1908). Presumably the people's interest in registration would be better protected by a bi-partisan board. See Sutherland, "Statutory Construction" (Horack 3d ed. 1943) c. 58.

4. County chairmen's practice of recommending for appointment only "good party workers" is so well known that a court might take judicial notice. Cf. Evans v. Reiser, 78 Utah 253, 2 P.2d 615 (1931) (that court may take judicial notice that persons appointed judges of elections are of well known political affiliations).

5. Yick Wo v. Hopkins, 118 U.S. 356 (1886) is the leading case in this field. It laid down the rule that where the administration or effect of a statute is to unfairly discriminate it will be set aside even though valid on its face. See Dobbins v. Los Angeles, 195 U.S. 223 (1904); Park Hill Development v. Evansville, 190 Ind. 432, 130 N.E. 645 (1921).

6. Connally v. Reading, 268 Mich. 224, 256 N.W. 432 (1934); Wilson v. McKelvey, 78 N.J.L. 621, 77 Atl. 94 (1910).

7. Jones v. Sargent, 145 Iowa 298, 124 N.W. 339 (1910) (This case might be distinguished from the principal case because the statute says appoint "so far as practical" from the two dominate parties); Commonwealth v. Plaisted, 148 Mass. 375, 19 N.E. 224 (1889) (This case might not be authority for a directive ruling since the court said "probably directive but in any event reasonable classification.").

8. Commonwealth v. Plaisted, 148 Mass. 375, 19 N.E. 224 (1889); Grinnell v. Hoffman, 116 Ill. 587, 5 N.E. 596 (1886).

Since the ruling that the statute is directive seems incorrect, and the statute can only be sustained either as directive or as reasonable classification, the court's result that the statute is valid should have been based upon classification. There is contra authority in Indiana to this result based upon classification—*Evansville* v. *State*,[9] *Holt* v. *Denny*[10] and *Harrel* v. *Sullivan*.[11] In all three cases the statutes were set aside under the "privileges and immunities" section of the Indiana Constitution.[12] However the language of the cases is not that of unreasonable classification but indicates the court felt that under the Indiana Constitution no qualifications or tests could be imposed for the purpose of holding office. Since there is no inherent right to hold office and the legislature may limit the ability to hold office,[13] these cases in fact rely on the doctrine of classification.[14] This interpretation avoids conflict with the decisions allowing limitations. The principal case appears to take the position that no test or qualification has been imposed; but if there has been, it is a reasonable one.[15]

Since the statute in the instant case either directly or indirectly imposes a qualification for office, the result should rest upon the dicta on classification, which leaves the case

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9. 118 Ind. 426, 21 N.E. 267 (1888).
10. 118 Ind. 499, 21 N.E. 274 (1888). This case and the Evansville case, n. 9 supra, arose under a statute requiring a board to appoint the members of the police and fire departments equally from the two leading political parties.
11. 220 Ind. 108, 40 N.E.2d 115 (1942). This case arose on a statute identical with the statute in the principal case.
12. Indiana Constitution Art. I § 23.
13. Mosely v. Board, 200 Ind. 515, 165 N.E. 241 (1929); Crampton v. O'Mara, 193 Ind. 551, 139 N.E. 360 (1923); 46 C.J. 936 (1923); Mechem, "Public Officers" (1890) §§ 64-68.
14. Also the "privileges and immunities" section of the Indiana Constitution is often compared to the 14th Amendment of the Federal Constitution and is usually stated to be a problem of discrimination; not whether *any* burden may be imposed. Shedd v. Automobile Ins. Co., 208 Ind. 621, 196 N.E. 227 (1935); Fountain Park v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927); Hammer v. State, 173 Ind. 199, 89 N.E. 850 (1909).
15. Another possible interpretation is that the court meant only that the officer appointed is not required to take an oath that he belongs to a particular party as in Grinnell v. Hoffman, 116 Ill. 587, 5 N.E. 596 (1886). But the court also cites Jones v. Sargent, 45 Iowa 298, 124 N.W. 339 (1910) where the statute required the appointment of two from the dominant party and one from the minority, and the court construed the statute as a direction and upheld the appointment of two from the minority and one from the dominant.

in direct conflict with the *Harrell* case. The statutes are identical, therefore they must be considered together.

Statutory classification is reasonable when the characteristics in the class established are germane to the purpose of the legislation.[16] The purpose of the classification is to provide personnel better fitted to secure improved registration of voters. Thus, if the characteristics of the class relate to the functions of the office the classification is reasonable. The class established consists of those holding membership in political parties. A member of a political party has a definite interest in protecting registration. The functions of the office deal with registration of voters and the protection of their interests. This is enough to sustain the classification.[17]

Though sustaining the classification necessitates overruling the *Harrell* case,[18] the result is sound. The statute by insuring a bi-partisan board better protects the voters against the possibility of registration fraud. The difficulty if not impossibility of securing a completely impartial board or official argues strongly for the bi-partisan board.

CONSTITUTIONAL LAW

COMMERCE CLAUSE STATE REGULATION OF FEDERAL WAREHOUSES

A dealer in grain brought a complaint before the Illinois Commerce Commission charging warehousemen, operating a public warehouse for the storage of grain in Illinois, with violations of Illinois warehouse laws.[1] The warehousemen had been licensed by the Secretary of Agriculture pursuant to

16. Board of Finance v. Hawkins, 207 Ind. 171, 191 N.E. 158 (1934); Fountain Park v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927); Hirth-Krause v. Cohen, 177 Ind. 1, 97 N.E. 1 (1912).

17. Cf. Tigner v. Texas, 310 U.S. 141 (1940) (held ". . . a difference in fact or opinion . . ." is sufficient to sustain a classification).

18. It does not follow that the Evansville or Holt cases need be overruled. There is no apparent relationship between the normal duties of the police and fire departments and an interest in political parties to sustain the classification in these two cases.

1. Illinois Public Utilities Act, Ill. Rev. Stat. (Smith-Hurd, 1945) c.111 ⅔, §§ 32, 33, 35, 36, 38, 41, 49, 49(a), and 50; Illinois Grain Warehouse Act, Ill. Rev. Stat. (Smith-Hurd, 1945) c.114, §§ 293-326(a). These sections relate to regulation of rates, discrimination, dual position of warehousemen, mixing of grain, rebates, unsafe elevators, abandonment of service, and the filing and publishing of rates. Petitioner also alleged violations of §§ 8a(3), 21, and 27 of the Public Utilities Act pertaining to certain aspects of financing and control of financial structures.