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Eligibility to Office--As of What Time Determined

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ELIGIBILITY TO OFFICE—AS OF WHAT TIME DETERMINED.

ELIGIBILITY to office under our political system cannot be regarded as a natural right, and some rules or regulations are therefore obviously indispensable to determine what shall be the qualifications which shall be deemed necessary or sufficient. These rules are usually express and written ones, though in a few cases they have been deduced by inference from considerations of policy or propriety.

When the rules are express and written, they will often be made part of the fundamental law by being incorporated in the constitution, but they are also not infrequently left to be prescribed by legislative enactment. When so written and expressed, the rule frequently, if not usually, takes the form of a declaration that certain persons shall or shall not be deemed "eligible" to certain or all offices. Less frequently the declaration is that such persons shall or shall not be "qualified to hold" office. Where the language used is that the person shall or shall not be "eligible," the question at once arises whether this requirement relates to the capacity to be chosen to the office, or to the capacity to take and hold it. The difference in results is obvious and the question usually takes this form: Though a person at the time of the election may not have the qualifications, or may be subject to the disabilities, specified, may he lawfully enter upon and hold the office if his disabilities be removed before the time arrives for entering upon the office? This question arises so frequently and unfortunately has received such conflicting answers that a review of the considerations involved seems justifiable, if not desirable. In doing so, it may be advisable to deal first with those cases in which the rule of eligibility has been implied, and follow with a consideration of those in which the rule was expressly declared by constitution or statute.

I. WHERE THERE IS NO EXPRESS PROVISION—One of the earliest cases involving the question is that of *State, ex rel. Off,* v. *Smith.*[1] It appeared here that the relator and the defendant had been rival candidates for the office of sheriff at the election held in November, 1860. The defendant received the highest number of

(1) 14 Wis. 497.

votes, and next to him the relator had the highest number. The canvassers counted all the votes and gave to the defendant the certificate of election. He qualified and entered upon the performance of the duties of the office. The relator also qualified and claimed the office upon the ground that the defendant, at the time of the election, was, and still continued to be, an alien and therefore ineligible. Two questions were obviously involved: *First*, was the defendant eligible; and *second*, if defendant was not eligible, was the relator elected? The second question was disposed of in accordance with the general rule that the ineligibility of the leading candidate does not result in the election of the next highest, and the court proceeded to determine the other. There was found to be no express constitutional or statutory provision upon the subject of eligibility, though only citizens, or those who had declared their intention to become such, could vote. Reasoning from this requirement, the court declared, as had been previously asserted in Massachusetts, that it was—

"An unquestionable principle of sound national policy, that as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens."

The contrary argument, said the court, "leads to the enormous absurdity that a person who, by the organic law of the state, has not one voice among thousands in designating by whom an office shall be filled, may himself be elected to such office and enjoy its franchises and perform its duties. We entertain no doubt, upon the facts stated in the complaint, that the defendant was ineligible."

The question arose again in the same state in the case of *State* v. *Murray*.[1] In this case, the relator had been a candidate for the office of clerk of the board of supervisors, and had received a a majority of the votes cast. At the time of the election, he possessed all of the qualifications requisite for the office except that he was then an alien. After the election and before the time arrived for entering upon the duties of the office, the relator by naturalization became a citizen of the United States. In a controversy over the right to possession of the office, it was urged that inasmuch as the relator was not a citizen at the time of the election, he was not eligible to the office and that the requirement of eligibility referred to the time of election and not to the time when the officer's term began. The court, however, held that the implied requirement of citizenship referred to the capacity to hold the office and not to the capacity to be chosen to it. Referring to

(1) 28 Wis. 96; 9 Am. Rep. 489.

State v. *Smith*, *supra*, the court said that the obvious meaning of the decision in that case was that the person in question was ineligible to hold the office, and declared that the term "eligible" means to be qualified to hold the office as well as qualified to be elected to it. This holding has been adhered to in later cases in the same state, though Ryan, C. J. expressed his regret that the question had been so decided.[1]

The same question arose under similar circumstances in Iowa in the case of *State* v. *Van Beek*.[2] Here also there was no express requirement that the candidate should be a citizen of the United States, but the court held that such a requirement must be implied from the obvious conditions of our political system. The court cited and approved the Wisconsin cases above referred to and declared that —

"From these authorities it seems quite clear that when the disqualification of one elected to an office is against his holding the office and that disqualification is removed in time for him to take and hold it, he may rightfully do so."

"It is an eligible officer the law requires," said the court, "and any person who can qualify himself to take and hold the office is eligible to it at the time of election"; and again, "one who may be eligible at the time of qualifying is eligible to the office at the time of the election."

Robinson, Ch. J., dissented, holding that eligibility referred to the capacity to hold the office at the time of the election and not merely to the capacity to hold at the time of the commencement of the term.

II. WHERE THERE IS AN EXPRESS PROVISION, BUT IT REFERS TO "HOLDING" THE OFFICE—In some cases there will be found an express constitutional or statutory provision, in terms referring to the capacity to "hold" the office. Such cases obviously stand upon narrower ground, but as they raise the question whether capacity to hold necessarily involves capacity to be chosen, they are within the general subject now under consideration. The leading case upon this aspect is, perhaps, that of *Privett* v. *Bickford*, which arose in Kansas,[3] in 1881. In this case there was an express constitutional provision declaring that no person subject to certain disabilities should "hold office" in the state. At the time of election the person in question was subject to this disability, but before entering upon the term the disability had been removed, and it became necessary to determine whether the disability affected

1 State *v.* Trumpf (1880), 50 Wis. 103.
(2) 87 Iowa, 569; 54 N. W. R. 525; 43 Am. St. Rep. 97; 19 L. R. A. 622.
3 Privett *v.* Bickford, 26 Kan. 52; 40 Am. Rep. 301.

the capacity to be chosen or the capacity to hold. Speaking of the constitutional provision referred to, the court said:—

"This provision operates upon the capacity of the person to take office rather than as a disqualification to be elected to an office. The disqualification is to the holding of the office and not to the election. There is a marked distinction between a person who is ineligible or incapable of being elected and one who may hold the office. If a person may hold the office, he may be elected while he is under the disqualification, and if he becomes qualified after the election and before the holding, it is sufficient. In the one case, the disqualification strikes at the beginning of the matter:—that is, it prohibits the election of an ineligible candidate; in the other case the disqualification relates only to the holding of the office."

III. WHERE THERE IS AN EXPRESS PROVISION, BUT IT IN TERMS REFERS TO THE TIME OF ELECTION OR APPOINTMENT—In other cases there will be found an express provision which in terms refers to the time of the election or appointment. These cases stand, of course, upon clearly defined ground, but some questions arise which are material to this investigation. The constitution of the United States, for example, declares that no person shall be a representative or senator, "who shall not, *when elected*, be an inhabitant of that State in which he shall be chosen." The constitution of Kentucky provides that "No person shall be eligible as judge of the circuit court who is less than thirty-five years of age *when elected*," and the constitutions of the several states contain many such provisions, so clearly worded that no serious question is possible. In a case in Rhode Island[1] it appeared that the constitution provided that no person "holding an office of trust or profit under the United States shall be *appointed* an elector." Under this provision it was held that a person, who at the time of his appointment, held an office under the United States, was ineligible to appointment, and that he could not remove his disability by resigning his Federal office after his appointment. So in a Michigan case,[2] it was provided that "no person shall be eligible to the office of county commissioner of schools . . . who shall not have held a first grade certificate within two years next preceding the *time of his or her election*." Under this provision, it was held, as would seem obviously necessary, that it was not enough that the certificate was obtained after the election.

IV. WHERE THERE IS AN EXPRESS PROVISION, DECLARING SIMPLY THAT PERSONS SHALL OR SHALL NOT BE "ELIGIBLE"—

1 In re Corliss, 11 R. I. 638; 23 Am. Rep. 538.
2 People v. Howlett (1892), 94 Mich. 165; 53 N. W. Rep. 1100.

Passing now to the cases wherein there is an express constitutional or statutory provision that certain persons shall be deemed "eligible" or "ineligible," it becomes a question of real difficulty to determine whether the eligibility thus expressly required shall refer to the time of the election, or to the time of the assumption of the office. The leading case upon this branch of the subject is perhaps the case of *Smith* v. *Moore*,[1] decided by the supreme court of Indiana in 1883. The constitution of that state provided that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office." In this case the appellant was holding the office of justice of the peace by election for a term which expired November 29th, 1882. At an election held on the 7th of November, 1882, he was a candidate for the office of county treasurer for a term to commence on the 15th day of August, 1883, and he received a majority of the votes cast at the election. In a controversy respecting the title to the office, it became necessary to determine whether the word "eligible," as used in this constitutional provision, meant capable of being chosen or capable of holding. After an exhaustive review of the previous cases upon the same question in Indiana and in other states, the court held that the word "eligible," as used in this section of the constitution, meant legally qualified to hold, and that inasmuch as the appellant's term as justice of the peace expired before the commencement of his term as county treasurer, he was eligible to enter upon and perform the duties of the office. Elliott, J., dissented, holding that the term "eligible" referred to the capacity at the time of the election. The decision in *Smith* v. *Moore* has been followed in a number of later cases in the same state.[2]

The question presented itself in Kansas[3] in 1893. The statutes of that state provided that "no person holding any state, county, township or city office, or any employer, officer or stockholder in any railroad in which the county owns stock, shall be eligible to the officer of county commissioner." At an election held in November, 1892, the plaintiff was a candidate for the office of county commissioner. At that time, he was treasurer of his township, holding for a term which would expire before the term of county commissioner would begin. He received the highest number of votes

(1) 90 Ind., 294.
2 Brown *v.* Goben, 122 Ind. 113; Shuck *v.* State, 136 Ind. 63; Vogel *v.* State, 107 Ind. 374.
3 Demaree *v.* Scates, 50 Kan. 275, 32 Pac. R. 1123, 34 Am. St. Rep. 113, 20 L. R. A, 97.

and claimed to be entitled to the office of county commissioner. It was objected that, under this statutory provision, he was not eligible to be chosen and that it was not enough that the disability had been removed before his term of office as county commissioner would begin. The court, however, approved the Indiana cases above referred to and held that the word "eligible" should be construed as meaning "legally qualified to hold office, and that, as the party in this case became qualified after the election and before the holding, it was sufficient."

"If 'eligible' is to be construed as to the capacity of being chosen or elected," said the court, "the statute would be of no actual benefit. It would permit that to be done which it was evidently the purpose of the law makers to prevent. They did not desire a county commissioner to hold another office, or that he should be a stockholder in a railroad in which his county is interested. They evidently intended to prohibit a county commissioner, while holding that office, from being a state, county, township or city officer, and also intended to prohibit him, while holding such office, from being an employer, officer or stockholder in any railroad in which his county owned stock. This was the evil sought to be avoided by the statute. Therefore, to construe the word 'eligible' as meaning 'legally qualified to hold office,' seems to us to better subserve the spirit, as well as the letter, of the statute. Even if we should construe 'eligible' as 'electable,' or 'proper to be chosen,' or 'capable of being elected,' then, to carry out the purpose of the statute, as already stated, we must also give 'eligible' the additional definition of 'legally qualified,' or 'capable of holding office,' or of 'acting as a member,' because it will not comply with the spirit of the statute to rule that if a person is elected county commissioner, although eligible at the time of his election, he may after his election accept the other offices referred to in the statute, or become connected with a railroad in which the county owns stock. To give these two different definitions to the word 'eligible' in the same statute, and at the same time, would be an unusual construction."

Allen, J., dissented, approving the dissenting opinion of Elliott, J., in the case of *Smith* v. *Moore*, *supra*.

The Supreme Court of Kentucky had the question before it in 1895. The constitution provided that "no person shall be eligible to the office of clerk unless he shall have procured" a certain certificate. The person in question was a candidate for the office of clerk at an election in November, 1894, and received a majority of the votes. On the day of election he had not procured the certificate required, but he received it a few days after the election and before the term began for which he was a candidate, and it became material here also to determine whether the word "eligible" so used meant qualified to be chosen or qualified to hold. The Kentucky court approved the reasoning of the cases already referred to,

saying, "We think that the words in themselves as used in the constitution mean 'qualified for the office,' not at the time of the election but at the time when the office is to be first assumed."[1] The peculiar phraseology of the various constitutional provisions was, however, deemed very significant.

The question also arose in Illinois[2] under a statute declaring that "no person shall be eligible to the office of alderman * * * if he is in arrears in payment of any tax or liability due the city." The respondent here was a candidate for the office of alderman and received the requisite number of votes. At the time of his election he was in arrears in the payment of a small tax, which, however, he paid after election and before the assumption of the office. The Appellate Court held that the disqualification was as to the assumption of the office and not as to the election, and that inasmuch as the disability had been removed before he entered upon the office the officer's title was perfect.

The same rule prevails in the Congress of the United States, where, says Judge McCrary,[3] it has been the constant practice to admit persons to a seat who were ineligible at the date of their election but whose disabilities have been subsequently removed.

On the other hand, in a leading case in California,[4] a contrary conclusion was reached respecting the word "eligible." The constitution there provided that "no person holding any lucrative office under the United States shall be eligible to any civil office of profit in this state." The party in question was a candidate for the office of sheriff and received a majority of the votes. At the time of the election, however, he held the office of postmaster, but he resigned that office before the time for the assumption of the office of sheriff. It was urged that the word "eligible" referred to the capacity to hold the office and not to the capacity to be chosen, but the court said:—

"We think the plain meaning of the word quoted is the opposite of this construction. We do not see how the fact that he became capable of taking the office after they had exhausted their power can avail the appellant. If he was not eligible at the time the votes were cast for him, the election failed. We do not see how it can be argued that, by the act of the candidate, the votes which when cast were ineffective because not given for a qualified candidate, became effective to elect him to office."

1 Kirkpatrick *v.* Brownfield 97 Ky. 558, 53 Am. St. Rep. 422; 29 L. R. A. 703.
2 People *v.* Hamilton, 24 Ill. App. 609.
3 McCrary on Elections (4th ed.), 346.
4 Searcy *v.* Grow, 15 Cal. 118. Compare People *v.* Leonard, 73 Cal. 230.

The question also arose in Nevada in 1868, in the case of the *State* v. *Clarke*.[1] The constitution provided that "no person holding any lucrative office under the government of the United States shall be eligible to any civil office of profit in this state." The defendant was a candidate for the office of attorney-general at an election held on the 6th of November, 1866. At that time he held the office of United States District Attorney for the State of Nevada. On the 5th of November, 1866, he mailed a resignation of his office of district attorney. Two questions were involved in the case: first, whether the requirement of eligibility referred to the date of the election or to the date of entering upon the office, and second, as to when the resignation of the first office became effective. The court held that the word "eligible" meant capable of being chosen to the office, and that the defendant would not be eligible unless by the date of the election he had resigned his first office. On this point the court held that the resignation became effective at the time of mailing it, and therefore the defendant was eligible upon the date of election.

The same question arose in 1891 in Minnesota.[2] There the constitution provided in effect that, in order to be eligible to any office, the person in question must at least have declared his intention of becoming a citizen of the United States. The respondent was a candidate for the office of county attorney and received a majority of the votes. At the time of the election, however, he had not declared his intention to become a citizen of the United States, but he did declare such intention before the time arrived for the commencement of his term. He contended, as had been contended in certain of the other cases above referred to, that the requirement of eligibility should relate to the qualification to hold the office, and not merely to his qualification to be chosen. The court, however, said that the word "eligible" meant "electible," and that there was not sufficient reason why the proper and ordinary meaning should not be given to the word "eligible" in the constitution, as though it had read "no person shall be qualified to be elected." "This," said the court, "is the plain and natural construction of the language."

A series of cases[3] in Nebraska presented the question in a variety

1 State *v.* Clarke, 3 Nev., 566.

2 Taylor *v.* Sullivan, 45 Minn. 309; 47 N. W. R. 802; 22 Am. St. R. 729. Followed in State *v.* Streukens. 60 Minn. 325; 62 N. W. Rep., 259.

3 State *v.* McMillan, 23 Neb. 385; State *v.* Boyd, 31 Neb. 682; State *v.* Moores, 52 Neb. 707; 73 N. W. 299. See also Hill *v.* Territory, 2 Wash. Ter. 147; 7 Pac. Rep, 63.

of forms. The first case involved the query whether the six months period of residence within the state, required by the constitution, must be complete before the election in order to render the candidate eligible, or whether it was sufficient that it should be complete before he entered upon his term. The second involved that section of the constitution which declares that "No person shall be eligible to the officer of governor * * * who shall not have * * * been for two years next preceding his election a citizen of the United States," etc. The third arose over the provision of the constitution that "Any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the constitution or laws of this state," and involved the question whether one who was so in default at the time of his election might hold the office if he paid over the amount before the commencement of his term. In all of these cases, the requirement of eligibility was held to refer to the time of the election, the court saying:—

"The term 'eligible,' as employed in the constitution, should be given its plain and ordinary signification, and when so construed there is no escaping the conclusion that it means capable of being elected or chosen. Neither the framers of the constitution, nor the people in adopting it, intended to permit a person to be elected to a public office who, at the time, was disqualified from entering upon the duties thereof, and run the risk of the removal of the disability between the day of election and the commencement of the official term."

The question also arose in 1897 in the case of *People* v. *Purdy*,[1] decided by the Court of Appeals in New York. The statutes provided that "no county treasurer, superintendent of the poor, school commissioner, * * * shall be eligible to the office of supervisor of any town or ward in this state." The defendant was a candidate for the office of supervisor and received a majority of the votes cast. At that time he also held the office of trustee of a school district, but, upon his election as supervisor, he resigned his office as school trustee, and the question for determination was whether he was entitled to the office. The supreme court decided against his right and, after reviewing the cases upon the subject, said:—

"We conclude that the accurate and well recognized definition of 'eligible' is 'capable of election or appointment'; that the weight of judicial authority where the question has been directly presented supports this view, or at least

1 People *v.* Purdy, 21 N. Y. App. Div. 66.

is not sufficient to overthrow it; that judicial literature, while it affords some justification for the use of the term 'eligible' in either sense; i. e., as capable of being elected to office, or as capable of holding office, is certainly not so unanimous as to warrant us in the consideration of a statutory or constitutional provision in departing from the strict meaning of the term, in the absence of anything in the context showing that it was used in a broader sense."

The court of appeals[1] affirmed this decision for the reasons given in the opinion of the appellate division, saying moreover:—

"We have but one suggestion to add to what has been there so well stated. A public statute relating to the qualifications of public officers should never be so construed as to produce inconvenience or to promote a public mischief or to render the action of the voters at the election abortive. It should, in every case when the language will fairly permit, be given such a construction as to enable the electors to act intelligently, and to accomplish with as much certainty as practicable the purpose that they may have in view. If it be held that the disqualification of the statute applies only to the holding of the office, and not to the capacity of the candidate for election, then the electors can never know when voting for a school trustee for the office of supervisor, whether they will succeed in filling the office or not. Though the action of the electors may be unanimous, the result must depend upon the future action of the candidate himself. Unless he resigns as trustee, there has practically been no election, and the office is left vacant, though the people intended to fill it. The vote in such a case may be said to be conditioned upon the resignation of another office by the candidate voted for. He may refuse or fail to resign, and then the action of the voters is nugatory. The statutes for filling vacancies might not apply to such a case, since it cannot be said that the person who received the votes of the people ever filled the office or could fill it. It is simply a failure to elect any one to the place.

"The statute, we think, does not contemplate that a person who is disqualified to hold the office may, nevertheless, be lawfully elected upon the chance that subsequently he may, by his own act, or by the happening of some event, remove the disqualification, and thus become entitled to fill it. The better rule is that the electors, in making the choice, must be confined to the selection of such persons only as are not then under any legal disqualification to exercise its powers and perform its duties. The electors can then know that, when the choice is made and legally declared, the object for which the election was held has been accomplished, and that there is no legal obstruction in the way to prevent their will, as thus expressed, from becoming effective."

This reasoning is plausible, but it may be thought not to be entirely conclusive. It is true that there will then be "no legal obstruction in the way to prevent their will, as thus expressed, from becoming effective," but there may be practical difficulties in the way which are equally serious. Thus, though the candidate be in all respects eligible at the time of the election, there is no absolute

1 People v. Purdy, 154 N. Y. 439, 48 N. E. Rep. 821, 61 Am. St R. 624.

assurance that he will qualify for and accept the office. If he does not, the will of the electors may be as completely frustrated as if they had relied in vain upon the expectation that an ineligible candidate would remove his disability before the commencement of the term. It is true that, in some cases, the person chosen may be compelled to assume and perform the duties of the office,[1] but this, at best, must usually be an unsatisfactory proceeding.

There is force also in the argument of Elliott, J., in *Smith* v. *Moore*, *supra*, that the purpose of such a law as was there involved is to prevent the distractions and abuses which are likely to result where a person holding one office, and especially a judicial one, is at the same time actively conducting a campaign to secure another.

Much importance, moreover, must be attached to the particular language and context of the provision, and to its history, purpose and effect. Where, however, all of these aids fail, it is believed that sound practical construction requires rather an eligible officer than an eligible candidate, and therefore that the requirement of eligibility should relate to the time when the office is to be assumed rather than to the time when the officer is to be chosen.

Certainly where the disability is one which requires no act of the party to remove—as, for example, one which, like insufficient age, will cease by mere lapse of time before the office is to be assumed, this rule ought to be held applicable; and even in those cases in which some act of the party is requisite, if he performs the act and removes the disability, it is believed that the weight of authority and the greater public convenience unite in requiring that he be held eligible.

FLOYD R. MECHEM

1 See People *v.* Williams, 145 Ill. 573, 33 N. E. Rep. 849, 36 Am. St. Rep. 514.