Each of the foregoing answers are further predicated upon the assumption that any such bonds so issued will be issued under statutes which do not make such bonds a lien upon the particular real estate located in the township but are issued under statutes now in effect which, as far as I can determine, merely make such bonds an obligation of the civil township or the school township.

OFFICIAL OPINION NO. 16

February 28, 1948.

Mr. Edwin Steers, Sr.,
State Election Board,
108 East Washington Building,
Indianapolis, Indiana.

Dear Sir:

I acknowledge receipt of your request for an official opinion as follows:

“We are handing you herewith copy of letter which we have received from Robert S. Black, Clerk of the Fountain Circuit Court at Covington, Indiana, in which he makes inquiry as to how long a party may serve under an appointment to fill a vacancy caused by the resignation of a duly elected county treasurer. You will note that the county treasurer in Fountain County does not take office until one year following the election, and the question is whether or not the party appointed to fill the vacancy will serve until one year after the new treasurer is elected, or just until the new treasurer is elected and qualified.”

The office of the county treasurer was created by the Constitution and the term fixed at two years and until his successor is elected and qualified. Section 2, Article 6 and Section 3, Article 15 of the Constitution of Indiana; Scott v. State, ex rel. (1898), 151 Ind. 556, 52 N. E. 163, and cases cited.

The Constitution fixes the length of the term of the office but not when it shall commence. Same is fixed by statute,
however. Section 49-3101 of Burns', 1933, same being the Acts of 1852, Chapter 112, Section 1, page 499; Acts 1865, Chapter 16, Section 1, page 62; 1919, Chapter 118, Section 1, page 576, provides that:

"The term of office of the county treasurer shall commence at the expiration of the term of the present incumbent; * * *." (Our emphasis.)

And Section 49-3102, Burns', same being the Acts of 1897, Chapter 185, Section 1, page 288, provides:

"The term of county treasurer shall begin on the first day of January next following the term of the present incumbent." (Our emphasis.)

The Act of 1897, Section 49-3102, Burns, supra, providing that the office of county treasurer shall begin on the first day of January next following the term of the present incumbent, was declared valid in the case of Scott v. State, ex rel. (1898), 151 Ind. 556. Therein it was held that while the legislature has no power to extend or curtail the term of a constitutional officer, it has power to fix the time when the newly elected constitutional officer shall begin; that if incidentally the term of the incumbent is extended thereby, it is by virtue of Section 3 of Article 15 of the Constitution, which provides that "such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

And in the case of Weaver v. State (1898), 152 Ind. 479, 53 N. E. 450, it was held that as a result of the Acts of 1897, supra, being Section 49-3102, Burns', and the provisions of the Constitution, the terms of all county treasurers elected by the people commence with the first day of January, and the terms of all, whether elected at a general election or appointed to fill a vacancy, expire with the 31st day of December. Both the reasoning and holding in these two cases were approved and followed in the case of State, ex rel. Middleton v. Scott Circuit Court (1938), 214 Ind. 648, 17 N. E. (2) 464, same being the last expression of our Supreme Court in regard to the act and statute in question.

The reasoning in the Scott case has oftentimes been seriously questioned by our Supreme Court and as a result there have followed many confusing and apparently conflicting opinions.
However, the court in the last-mentioned case, State, *ex rel.* Middleton v. Scott Circuit Court, *supra*, has in most clear, concise and understandable language clarified the various theretofore opinions.

In view of this clarification, I deem it advisable to briefly set forth the facts and the question therein presented. That case involved the office of judge in the circuit court, but the question presented was in many respects similar to, if not identical with, the one that now confronts us. Therein the Honorable Frank Gardner at the general election of 1936 was elected to the 6th Judicial Circuit. He qualified and held the office until February, 1937, when he died. Thereafter on the 10th day of March, 1937, the respondent was appointed by the Governor to fill the vacancy. He qualified and assumed the office of judge of the 6th Judicial Circuit.

At the election of November, 1938, the respondent was a candidate to succeed himself and the relator was also a candidate for the office of judge of the 6th Judicial Circuit. The relator was elected and qualified. On the 21st day of November, 1938, he demanded that the respondent surrender the office of judge, which demand was refused. The relator sought a writ of prohibition from the Supreme Court to prohibit respondent from continuing to act as judge. The sole question presented was whether a judge of a circuit court holding office by virtue of an appointment to fill a vacancy shall surrender his office immediately upon the election and qualification of a successor and demand being made for the office, or continue in office until the 1st day of January following the election, as provided by Chapter 10, Section 1 of the Acts of 1929, same being Section 4-3220, Burns', 1933.

Said statute in substance provides that the terms of office of every person hereafter elected, or of any judge of any circuit court, shall begin on the first day of January next succeeding his election and that the terms of office of all persons who have been elected or appointed to any such judgeship shall expire on December 31st next succeeding the election of their respective successors. The relator's position therein was that the section was unconstitutional in that it attempted to enlarge and extend the term of the constitutional office beyond the express constitutional provision and that, therefore, the term of the respondent had terminated and, consequently, he, the relator, was entitled to the office.
Approving the holding and reasoning of Scott v. State, ex rel., supra, the writ of prohibition was denied, the court holding that the legislature has power to postpone the time of commencement of the term of a constitutional officer provided it does not reduce the length of the term and does not postpone the time of election of a successor; that the Constitution forbids the legislature from postponing the election of a constitutional officer beyond the regular election next preceding the expiration of the constitutional term that notwithstanding constitutional provision that a judge appointed by the Governor to fill a vacancy shall serve until "a successor shall have been elected and qualified," the beginning of such successor's term is by statute postponed until the first day of January succeeding his election; that a statute fixing the beginning of terms of judges on the first day of January next succeeding their elections where, as here, it does not curtail the constitutional term of the incumbent is not unconstitutional, but a valid and effective exercise of the legislative prerogative.

It follows, therefore, that the Acts of 1897, Chapter 185, Section 1, page 288, same being Section 49-3102, Burns', is constitutional and valid and that the term of county treasurer shall begin on the first day of January next following the term of the present incumbent.

Article 6, Section 9 of the Indiana Constitution provides:

"Vacancies in county, township, and town offices, shall be filled in such manner as may be prescribed by law."

Therefore, a vacancy in the office of county treasurer shall be filled in the manner provided by statute.

Section 49-405, Burns' 1933, enacted in 1852, provides:

"The board of county commissioners shall fill all (other) vacancies in county or township offices, except such township or other offices the vacancies in which are otherwise provided for; and such appointments shall expire when a successor is elected and qualified, who shall be elected at the next general or township election, as the case may be, proper to elect such officers." (Our emphasis.)
Article 6, Section 2 of the Indiana Constitution provides in part:

“There shall be elected, in each county by the voters thereof, at the time of holding general elections, * * * Treasurer * * *.”

The general election proper to elect an officer to fill a vacancy in the office of treasurer of a county is the general election provided for by law—Section 29-701, Burns’ 1933, which ordains:

“A general election shall be held on the first Tuesday after the first Monday in November in the year 1882, and biennially thereafter on the same day, at which election, all existing vacancies in office, and all offices the terms of which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law.”

In this case the vacancy by resignation occurred on January ___, 1948. It was filled by appointment of the Board of Commissioners. This being an office created by and the term of which is fixed by the State Constitution, the appointee can only be a pro tempore official.

See: Lake County Election Board v. State, ex rel. Eyears (1946), 224 Ind. 465, 68 N. E. (2) 787.

It is my opinion, therefore, that as a result of the Acts of 1897, Chapter 185, Section 49-3102, Burns’, supra, the term of office of the present incumbent shall expire with the 31st day of December, 1948, providing, of course, that a successor is duly elected and qualified at the coming election, as provided by Section 49-405, Burns’, supra.

Section 49-409, Burns’, 1933, being 1 R. S. 1852, Chapter 115, Section 7, page 512, provides:

“Every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof.”

This statute applies with full force and effect to all offices created by the General Assembly, but it has been held to be unconstitutional and void in so far as it is thought to be
applied to offices created, and the terms of which are fixed by our State Constitution. Lake County Election Board v. State, ex rel. Eyead, supra, and cases therein cited.

OFFICIAL OPINION NO. 17
February 28, 1948.

Mr. Edwin Steers, Sr.,
State Election Board,
108 East Washington Street,
Indianapolis, Indiana.

Dear Sir:

I have your letter of February 10, 1948 attaching a copy of a letter received from a member of the city council of the city of Noblesville, Indiana, wherein he asks whether or not there shall be an election this year for the office of mayor of such city. You request that I answer same by an official opinion.

The facts of the case are set out in Official Opinion No. 79 rendered December 31, 1947. Briefly they are that the gentleman who was elected mayor of the city of Noblesville at the past election died Sunday, December 21, and although elected, he did not qualify as required by law. It was my holding in said opinion that the present mayor of the city of Noblesville holds over and will retain said office until his successor shall have been elected and qualified. The following authorities were cited in support thereof. State, ex rel. v. Ives (1906), 167 Ind. 13, 19, 78 N. E. 225; Kimberlin v. State, ex rel. Tow (1891), 130 Ind. 120, 124, 29 N. E. 773; State, ex rel. Reese v. Bogard (1891), 128 Ind. 480, 27 N. E. 1113; State, ex rel. Carson v. Harrison (1887), 113 Ind. 434, 439, 16 N. E. 384; McGuirk v. State (1929), 201 Ind. 650, 169 N. E. 521.

Section 48-1246, Burns', being the Acts of 1905, Chapter 129, Section 46, page 219; Acts 1909, Chapter 188, Section 2, page 454, provides in substance that in cities not having a city controller (such is the fact here) the common council shall designate one of its members to act as mayor pro tempore until a special meeting of the council, to be held not less than ten days nor more than fifteen days thereafter, at which special meeting, the council shall elect a suitable person to