applied to offices created, and the terms of which are fixed by our State Constitution. Lake County Election Board v. State, *ex rel. Eyecare, 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
fill the unoccupied term of the mayor that all persons so filling vacancies in elective city offices shall hold only during the unexpired term of any such office.

It is provided by the Constitution of our State, Section 3, Article 15:

"Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified." (Our emphasis.)

This rule applies to municipal officers.

The question then arises as to when his successor shall be elected. Before such election can be had there must be found statutory authority therefor. It was held in Official Opinion No. 79, rendered December 31, 1947, as well as in the cases cited therein, that no vacancy occurred in the office of mayor; that the rule is that where a person is in the possession of an office, under a constitutional or statutory provision like that found in our Constitution, and a successor is duly elected, but dies before he qualifies, no vacancy occurs, since one of the contingencies upon which the incumbent's term of office is to expire has not taken place, namely, the qualification of a successor.

We are not dealing, therefore, in the instant case with an incumbent who derived his office by appointment or election as a result of a "vacancy," but he is holding over pursuant to the Constitution.

Here I believe it is advisable to quote from the case of State, ex rel. v. Ives, supra:

"* * * While it is settled by the decisions of this court that some of the provisions of the Constitution relate solely to the state government, yet, under language as broad as this, referring to any officer who holds office under any law passed after the adoption of the Constitution, it is clear that the reference is broad enough to include municipal officers, and it is our opinion that the provision does extend to them."
In State, ex rel. Reese v. Bogard (1891), 128 Ind. 480, it was held:

"An officer, after his term of office has expired, while holding until his successor is elected and qualified, is not usually designated as holding a 'term' of the office, but as holding over."

State, ex rel. v. Ives, supra, page 21, further provides:

"After the expiration of the term fixed by the General Assembly, the tenure, or title, of the officer is not under or by virtue of legislative authority, but by the continuing and superior authority of the Constitution. * * * The effect of the constitutional provision is to add 'an additional, contingent and defeasible term to the original fixed term, and excludes the possibility of a vacancy, and consequently, the power of appointment, except in case of death, resignation, ineligibility, or the like.' * * *"

State, ex rel. Carson v. Harrison, supra, further provides:

"Whatever the rule of the common law may have been, it is quite certain that where, by the Constitution or law, officers are elected for a term, and until their successors are elected and qualified, they are thereby authorized to continue to hold and exercise their offices until they are superseded by the election of other persons in their places. * * *

"* * *

"This right to hold over continues until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his selection, or which by law is entitled to elect a successor. * * *"

The letter from J. H. Burgess, City Councilman of the City of Noblesville, cites Section 29-4801, being the Acts of 1945, Chapter 208, Section 187, page 680, as his authority that the city election for the office of mayor should be held this year. Such section provides:

"A general election shall be held on the first Tuesday after the first Monday in November in even-numbered
years, at which election, all existing vacancies in office, and all offices the terms of which shall have expired or which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law.” (Our emphasis.)

The contention of the councilman is that the present incumbent’s term has expired and he is holding office as a holdover. The question, therefore, is, has the “term of office” expired?

The Acts of 1945, Chapter 229, Sections 1 and 2 thereof, as amended by the Acts of 1947, Chapter 29, Section 1, page 85, specifically provide that city elections shall be held on the first Tuesday after the first Monday in November, 1947, and that thereafter, the elections for the elective officers of all such cities shall be held on the first Tuesday after the first Monday of November of every fourth year, and that city primaries shall be held on the first Tuesday after the first Monday in May, 1947, and on the first Tuesday after the first Monday in May every four years thereafter. This act affirmatively shows that the legislature intended that city officers not be elected at a general election.

Section 4 of said act, page 1074, provides:

“The several city officials to be elected under the provisions of this act shall take office at twelve o’clock noon on the first day of January, 1948, and thereafter such city officers shall take office at twelve o’clock noon on the first day of January next following their election. Such officers shall serve for four years and until their successors are elected and qualified.”

It has been held by our Supreme Court that the “term of office” refers to the office itself and not to the incumbent and is not enlarged or varied by changing the date when a person shall be elected to fill such office. Russell v. State (1908), 171 Ind. 623, 87 N. E. 13; State, ex rel. v. Wells (1895), 144 Ind. 231, 43 N. E. 133.

Therefore, Section 187 of Chapter 208 does not give statutory authority to elect a city official at the general election to be held in 1948. The only statutory authority for holding an election of a city officer is Chapter 299 of the Acts of 1945,

It is my opinion that as a result of Section 4 of the Acts of 1945 and of Sections 1 and 2 of said act, as amended by the Acts of 1947, supra, the present term of the office of the mayor of the city of Noblesville began at 12:00 noon on the first day of January, 1948, and will not expire until 12:00 noon on the first day of January, 1952, and, therefore, the term of said office will not expire before the next general election; and that Section 29-4801 does not apply in the instant case; and that the position of the city councilman is untenable.

It is my opinion, therefore, that no election shall be held this year for the office of mayor of the city of Noblesville, but that the present incumbent shall hold over until his successor is elected and qualified, subject to the laws pertaining to regular city elections, supra, herein.

OFFICIAL OPINION NO. 18

March 8, 1948.

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

Dear Sir:

I have your letter of February 10th in which my views are requested as to whether a voter may vote on the question of the payment of a soldiers' bonus without voting on the other questions submitted. The act involved is Chapter 152 of the Acts of 1947.

Section 1 of this act is as follows:

"At the general election to be held on the first Tuesday after the first Monday in November, 1948, there shall be submitted to the electors of the State of Indiana for the information and guidance of the members of the Eighty-sixth General Assembly the following questions: Do you favor the payment of a state soldier's bonus for veterans of World War II?"