

OFFICIAL OPINION NO. 35

April 5, 1946.

Hon. Edwin Steers, Member,
State Board of Election Commissioners,
Indianapolis, Indiana.

Dear Sir:

This is in answer to your request for an opinion. The problem you state is substantially as follows:

John Doe was elected county auditor in November, 1944, and took office January 1, 1946. In a short time, about ten days, he resigned and Richard Roe was appointed by the county commissioners to the vacancy left by John Doe. John Doe's term of office was four years and would terminate December 31, 1950. Does the term for which Richard Roe is entitled to hold office extend from the time he was appointed to December 31, 1950, or does it come to an end when a successor is elected and qualified who may be elected at the general election in 1946?

The office of county auditor is a constitutional one and the term is four years. Article 6, Section 2 of the Constitution of Indiana provides:

"There shall be elected, in each county by the voters thereof, at the time of holding general elections, a Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner, and Surveyor. The Clerk, Auditor, and Recorder, shall continue in office four years; and no person shall be eligible to the office of Clerk, Recorder or Auditor, more than eight years in any period of twelve years. * * *"

The statutory provisions which have some application to the question are as follows: the general election law, Acts of 1945, Article 21, Section 187, at page 799, and reads as follows:

"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."

The Acts of 1852, Chapter 8, Section 1, Burns' 49-3001, provides as follows:

"The county auditor shall hold his office for the term of four (4) years from the first Monday in March next succeeding his election, and until his successor is elected and qualified."

This section has been amended by the Acts of 1929, Chapter 59, Burns' 49-207, which reads as follows:

"The term of office of the county auditor, clerk of the circuit court, county sheriff, county recorder, prosecuting attorney, county assessor, county coroner, county surveyor and county commissioners, in each county in the state of Indiana, shall begin on the first day of January next following the term of office of the present incumbent."

The Acts of 1852, Chapter 115, Section 7, Burns' 1933, Section 49-409, is as follows:

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

The statutory provision for supplying a vacancy in the office of county auditor is provided by the laws of 1852, Chapter 115, Section 4, Burns' 49-405, and is as follows:

"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 appointment 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."

In my opinion this section is the controlling one in the problem you submit.

In *Douglass v. State ex rel.* (1869), 31 Ind. 429, the appellant claimed that he was entitled to hold the office of county recorder under an appointment from the county commissioners until the end of the term of his predecessor. He relied upon Section 1 of Chapter 8 of the Acts of 1852, quoted above. The court in deciding against appellant said:

“We do not think that section is applicable to the case before us. Conceding that it was the intention of the legislature by the provision quoted to fix the time of the commencement, as well as the duration of the term of office, yet it seems evident that it was intended to apply only to a regular succession of terms by election.

“The appellant was appointed auditor, upon the resignation of Miller, under section four of the act touching vacancies in office, and filling the same by appointment, approved May 13th, 1852 (1 G. & H. 671), which provides, that ‘the board of county commissioners shall fill all other vacancies in county and township offices, except,’ &c., ‘and such appointment 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.’

“It is evident that it was intended by this section that the officer elected should take the office as soon after his election as he should be qualified.”

In the case of *Beale v. The State ex rel. Gray* (1874), 49 Ind. 41, the facts were as follows: On the 4th day of September, 1874, a county treasurer vacated his office whose term had commenced on the 26th day of August, 1873 and would have continued until the 26th day of August, 1875, had it not been vacated. The county commissioners filled the office by appointment on the day it was vacated. At the regular election in October, 1874, a treasurer was elected who qualified, and the question in the case was whether the appointed treasurer was entitled to hold to the end of the term that had been vacated, or was he bound to surrender the office on the qualification of his successor who had been elected in October, 1874. The Supreme Court said the Constitution fixed the length,

but not the beginning of the term of an elected treasurer and that the Acts of 1852, Chapter 115, Section 4, provided that the board of county commissioners should fill all vacancies in county offices "not otherwise provided for, and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general election." The Supreme Court then held that the term of the appointed treasurer terminated on the election and qualification of the treasurer elected in 1874. The case of *Beale v. State* is referred to and followed in the case of *Weaver v. State ex rel.* (1899), 152 Ind. 479, where a county treasurer was elected at the general election in 1896. He took office and continued to act until October 11, 1897, when he was removed from office and another was appointed to fill the vacancy. It was there held that the various statutes construed along with Section 2, Article 6 of the Constitution made the person elected at the general election in 1898 entitled to the office on January 1, 1899.

It is in order to take into account the decisions which have considered the question as to the time when an elected official should take office. In *State ex rel. v. Schortemeier* (1926), 197 Ind. 507, the question in issue was the beginning of the term of a circuit judge elected to take the place of one appointed to fill a vacancy. It was held:

"When a circuit judge is appointed to fill a vacancy in the office, his term expires on the qualification of a successor elected at the next general election. Section 18, Art. 5 of the state Constitution (§ 102 Burns' 1926) is construed to mean that when a circuit judge is appointed to fill a vacancy in the office, a successor should be elected at the next general election and the appointee's term expires when the successor has qualified."

In *State ex rel. Middleton v. Scott Circuit Court* (1938), 214 Ind. 643, it was held that the legislature had power to postpone the commencement of the term of office of a constitutional officer provided it does not reduce the length of the term and does not postpone the election of a successor.

The court in that case concluded that the statute fixing the beginning of the terms of judges as the first day of January succeeding their election is valid where it does

not curtail the constitutional term of the incumbent officer. The court in that case cited *Robinson v. Moser* (1931), 203 Ind. 66, 77, where the court said:

“We accept as a correct statement of the law that the General Assembly can change the date of the beginning of the terms of constitutional offices and the General Assembly has at different times properly exercised this power. But we call attention to the following statement in *Russell v. State ex rel.*, *supra*, at p. 633: ‘The right to fix the commencement of the term and the right to deny an election are two very different things. The right to fix the commencement of the term must be so exercised as not to infringe upon the right of the voters every four years to furnish the person to fill the office; if it cannot be so exercised, it cannot be exercised at all.’”

The *Robinson* case held as stated in the syllabus with the decision,

“Statute postponing elections of successors to prosecuting attorneys having commission expiring in December, 1931, until general election of 1932, held unconstitutional (*Burns’ Ann. St. Supp.* 1929, § 11829; *Const.* art. 2, § 14, as amended in 1881; art 7. § 11; art. 18, subsds. 8, 9).

“*Burns’ Ann. St. Supp.* 1929, § 11829, postponing elections of successors to prosecuting attorneys having commission expiring in December, 1931, until general election of 1932, was unconstitutional, since *Const.* art. 2, § 14, as amended in 1881; art. 7, § 11; art. 18, subsds. 8, 9, guarantees to all voters of each judicial circuit the privilege of voting for candidates for prosecuting attorney at each biennial general election.”

In an official opinion of this office (1939 Opinions, page 243), the question presented was, was the length of term of one appointed to fill out the unexpired term of an assessor who died in February, 1939, after his election to the office of assessor in November, 1938. This office held that the one appointed to the office as assessor could hold to the end of

the unexpired term of his predecessor in office, and an opinion of the Attorney General from the opinions of 1923 and 1924, page 574 was referred to as an authority. It must be noted in this case that the township assessor was appointed under a special statute which is a part of the Tax Act of 1919, found in Burns' 1933 Statutes, Section 64-1001. The assessor was appointed by the county assessor subject to the approval of the State Board of Tax Commissioners and not by the county commissioners under the Acts of 1852 heretofore referred to.

Section 49-405 of Burns' 1933 Statutes set out in the forepart of this opinion is referred to in the opinion, and the opinion says:

“* * * * section 49-405 of Burns' Indiana Statutes Annotated (1933) provides that the Board of County Commissioners shall fill all other vacancies in county or township offices other than those provided for in the four preceding sections, except such township or other offices the vacancies in which are otherwise provided for. This section provided that the appointment by the Board of County Commissioners '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.' I have referred to this section because it specifically provides that the appointments made thereunder '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.' This provision, however, does not apply to township assessors under the present law for the obvious reason that the appointment of a township assessor to fill a vacancy is not made by the Board of County Commissioners.”

There are other opinions from this office on the question of length of term of one selected to fill a vacancy. In Opinions, 1923-1924, page 574, it was said that one appointed to a vacancy in a township assessor's office was entitled to hold office for the full term his predecessor was elected to fill. This opinion refers to the decision in *Carson v. State* (1896), 148 Ind. 348 as an authority. The Carson case involved the office

of a city treasurer. The regularly elected treasurer had died. Acting under the laws of 1869 concerning cities (Section 3050-R. S. 1881), the common council selected Carson to fill the vacancy in the treasurer's office. The court said the only statute that provided for the length of term for one selected to fill a vacancy was the Act of May 13, 1852. (Burns' 1933, 49-409) and that the language there authorized Carson to continue in office to the end of the term for which his predecessor was elected. Instead of using the word *appointed* or *selected* to fill a vacancy, the court evidently construes the words "shall be filled by the common council" to mean "elected" by the common council.

In the Opinions of 1927-1928, page 445, an opinion given to the Governor was as follows:

"Replying to your inquiry of November 13th, I advise that the law contemplates that one who is elected clerk of a circuit court to succeed one holding the office by appointment to fill a vacancy should qualify and take over the office immediately after his election."

It is an established rule that one appointed to a vacancy by the Governor holds only until his successor can be elected.

A review of the decisions appears to show that the state Constitution favors the selection of an officer by vote of the people at an election rather than by appointment. This idea is summarized in *Enmeier v. Blaize* (1932), 203 Ind. 475. The syllabus reads:

"The spirit of the Constitution is to avoid vacancies in elective offices, filling vacancies in such offices by appointment and holding over by officers after the expiration of their terms, except and until the successor shall have been elected and qualified. (Art. 15, § 3, of Constitution, § 232 Burns' 1926). p. 481."

In my opinion where a public officer is appointed to fill a vacancy by the county commissioners under the provisions of the Acts of 1852, Chapter 115, Section 4, as set out in Burns' 49-405 as was the case of the county auditor you inquire about, the party so appointed must surrender the office to the one elected at the 1946 General Election.