

to the history of the State of Indiana, and to promote the study of Indiana history in cooperation with the Indiana Historical Society and any other like organization, and to promote the development of the State Historical Museum and the collection of archeological material."

(Acts 1925, ch. 58, p. 190, Sec. 12, Burns' 1933, Secs. 63-802, 63-812.) I do not think that this provision of the 1925 law took away from the Department of Conservation its authority over the State Museum. The administrative construction of the statute is unanimously against that view. However, there is a close relation between the work of the Historical Society and the collection and preservation of the relics of pioneer life in the State Museum, but I believe that the Legislature simply intended that the Historical Bureau should cooperate in the development of the museum so that it might reflect in the exhibits the early history of Indiana.

As to the state battle flags now on the fourth floor of the Capitol, which you say were placed in the custody of the state geologist in 1891, this arrangement was changed in 1915. The Legislature put the care and responsibility for the flags under the Battle Flag Commission, (Acts 1915, ch. 8, Burns' 1933, Secs. 59-901 to 59-905).

OFFICIAL OPINION NO. 24

April 2, 1945.

Hon. Ralph F. Gates, Governor,
State of Indiana,
State House
Indianapolis, Indiana.

Dear Governor:

I have your letter of March 27th in regard to the tenure of office of the present members of the State Athletic Commission. Your letter is in part as follows:

"In reviewing the law, it seems that at its inception, members were to be appointed for one, two and three year periods, in order that the membership of this Commission would be staggered.

"I note from the record of appointments in this office that all three present members were appointed on July 26th, 1944, for a term of three years by Governor Schricker.

"I am hereby requesting your office for an opinion advising me as to whether or not the present members are legally holding their commissions."

The State Athletic Commission was created by Chapter 93 of the Acts of 1931. Section 1 of that Act (63-201 Burns' 1943 Replacement) reads as follows:

"There is hereby created an athletic commission to be known as the State Athletic Commission, consisting of three (3) persons to be appointed by the governor. Upon the taking effect of this act, the governor shall appoint one of said commissioners for a period of one (1) year, one for a period of two (2) years, and one for a period of three (3) years; and upon the expiration of the terms of such respective commissioners, the governor shall appoint their successors, each to serve for a term of three (3) years, and all to serve until their successors are appointed and qualified. The members of the commission shall each be paid a per diem compensation not to exceed ten dollars (\$10.00) for each day engaged in the discharge of his duties, and all necessary traveling and hotel expenses expended outside the city of Indianapolis."

That Act contained no emergency clause and was in effect on June 30, 1931. The first permanent appointments were made on that date and the three appointees to the commission were to serve one (1), two (2) and three (3) years respectively. It is well established that where a term is fixed by statute or by the Constitution, the beginning of the term is fixed by the first appointment thereto and the cycle of successive terms is fixed as of that date. As stated in *State v. Amos*, 133 So. (Fla.) 623 (1931), at page 625:

"* * * Unless otherwise duly provided where an office is created, the term begins when the office is first filled. * * *"

See also *State v. Young*, 68 So. (La.) 241 (1915), p. 243; *Brown v. Quintilian*, 184 A. (Conn.) 382, p. 385.

At the time of the original appointments and pursuant to the statute, one appointee held a one (1) year term, one appointee a two (2) year term and one appointee a three (3) year term. Thereafter appointments were made for three (3) years. Thus, since the terms were fixed as of June 30th, each year the term of one commissioner would end on that date. Since tenure of office and the term fixed by law are not necessarily coincident, subsequent executive action and failure to appoint on June 30th would not change the date of actual beginning of the cycle of the terms.

The records in the office of the Governor and Secretary of State also show that the last appointment was made June 30, 1933. The term of that commissioner would have expired on June 30, 1936. No subsequent appointments appear and I am informed that no appointments were made until July 26, 1941. Each of the appointments made at that time were for full three (3) year terms. Subsequently on July 26, 1944, appointments were made for three (3) year terms. I deem it unnecessary to decide for the purpose of this opinion whether the last commissioners appointed prior to July 26, 1941, had abandoned their offices or whether in point of law they may be said to have held over until their successors were appointed and qualified. In either event the cycle of the terms having been established, a vacancy in any of the offices would not change that cycle, nor would a holding over change the date of beginning of the term. A similar question arose in *State v. Amos*, *supra*, and the court said:

“* * * The provision of section 14, article 16, that an officer shall continue in office after the expiration of his official term until a successor is qualified, is intended to prevent a hiatus, *State, ex rel. v. Murphy* (In re Com'rs of Duval County), 32 Fla. 138, 161, 13 So. 705; In re Advisory Opinion, 65 Fla. 434, 62 So. 363, 50 L. R. A. (N. S.) 365; 22 R. C. L. 550, and does not affect the cycle of the term fixed by law which ends at the expiration of the statutory term periodically whether the incumbent or another is the successor; otherwise the organic limitation as to terms may be violated by an officer holding over for a length of time

after his term has expired and then being commissioned for a full term from the date of the commission and not from the end of the previous term as the Constitution contemplates. See *State v. Young*, 137 La. 102, 68 So. 241."

And whether there was a vacancy or a holding over, the fact remains that only one term terminated in 1941. On June 30th of that year it was within the power of the Governor to make an appointment for three (3) years to fill that term. If there were no commissioners in office at the time of making that appointment it was within his power to appoint two more commissioners to fill unexpired terms: one of which would terminate June 30, 1942, and one of which would terminate June 30, 1943. Likewise, one appointment for a three (3) year term was available on June 30, 1944, and any other appointments made in 1944 must have been for unexpired terms ending in 1945 and 1946. It is my opinion that the legislative intent to provide a continuous commission based upon staggered terms having been clear, and those terms having been fixed by the original appointments, it is not within the power of the executive to defeat the legislative intent or to change the cycle of terms.

The language in *Heyward v. Long*, 183 S. E. 145 (S. C.), 114 A. L. R. 1130 (1935), at page 1143, is appropriate to this situation:

"We quote again with approval from the opinion of the Attorney-General: 'The original set-up of the Highway Commission into three groups, to enter and to depart at stated periods in regular rotation, is a fundamental feature of the Highway law, intended to be a continuing and perpetual practice of this Commission until changed by the General Assembly, and this succession of entry and departure by the class of Commissioners cannot, in my opinion, be legally interfered with nor deranged by delayed appointments. These filling of vacancies in unexpired terms is incidental to the preservation of an existing term of office and hence must be so conducted and carried out as not to derange, but to preserve the purpose of succession and regular rotation so clearly intended and directed in section 5867 of the Code.'

“Clearly it follows that such orderly rotation, in order to create a continuing body, could not be carried out if the commissioner appointed to fill a vacancy were to hold a full term of four years from the date of his appointment, regardless of the date of said appointment.”

Your problem is additionally complicated by the fact that at the time of the appointments in 1941 and 1944 there was no designation of which commissioners were appointed for unexpired terms or were appointed for flat three (3) year terms. A similar situation arose in *Lease v. Clark*, 55 Kan. 621 (1895). In that case nominations for office were made which did not specify the terms of the nominees. The court said, at page 626:

“* * * If the nominating message to the senate had specifically and clearly fixed the terms and tenure of the several persons nominated, it might have been controlling, and, if there were no other evidence of the intention of the Governor in that respect than the arrangement or sequence of the names in the message, it might be sufficient to determine the terms and succession of the several appointees. * * *”

In that case the court said that resort to the records in the office of the Governor might be had to determine the intent in making the nominations. It was there found that the Governor's record showed the respective terms for which the nominations were made.

The records in the office of the governor (deleting names) show the appointments to the Indiana Athletic Commission as follows:

July 26, 1941	A		3 years
”	B		3 years
”	C		3 years
December 22, 1941	D	succeeding C	until July 26, 1944
”	E	succeeding B	until July 26, 1944
July 26, 1944	A		3 years
”	E		3 years
”	D		3 years

Copies of the commissions issued give no indication of which commissioners were appointed for unexpired terms and which was appointed for a full three year term in 1941 or 1944.

The only apparent intent from that record, giving due consideration to the order of names, is that the Governor intended all appointments to be for full three-year terms.

In similar situations, where the officers were elected and not appointed, the courts have said that where it is impossible to ascertain the various terms of the officers elected, the election is void.

In *State v. Moore*, 64 Pac. (2d) (Ariz.) 809 (1937) an election was held for two tax commissioners, one to be elected for a full six year term and the other for the unexpired portion (four years) of a six year term. No designation of the terms was made on the ballot and it was impossible to tell which officer had been elected for either term. The court there said at page 816:

“* * * It is therefore impossible to determine by the certificates of election issued, by the returns in the office of the Secretary of State, nor even by a count of the ballots themselves (were such a thing now possible), who was elected for the one term and who for the other. And the authorities are generally to the effect that, when such a situation exists, the election must be held void on account of uncertainty, *for any conclusion as to who was elected for either term would and could only be the result of the rankest surmise and speculation.* * * * Indeed, so far as we are aware, the only cases which even appear to take the contrary view, such as *Gilbert v. Lucas*, 139 Ky. 552, 107 S. W. 751, and *Hobbs v. Upington*, 121 Ky. 170, 89 S. W. 128, are based on the theory that, when several officers are to be chosen at one election for terms of different length, *if the candidates agree among themselves as to which shall hold the long and which the short term, they will be estopped in any contest between them from repudiating their agreement.* These cases might be worth consideration were the dispute here between the defendants Moore and Luke as to which was chosen for the four and which for the six year term, but, as

we have said, this is not such a case, * * *.”
 (First emphasis ours.)

See also *Edes v. Haley, et al.*, 162 Pac. 50 (Wash.), (1917).

Likewise, in this situation we are not concerned with a dispute between rival claimants to any particular terms of office. Here the chief concern is that of the state in preserving the continuity of office as originally provided by the legislature and fixed by the first appointments to the Indiana Athletic Commission.

Since three full term appointments to the Indiana Athletic Commission could not have been made in 1944 it is apparent that two of the commissioners are either holding over, serving unexpired terms or the offices are vacant. It does not seem to me that it is material to determine which of those contingencies is applicable since any determination of the application of a term to a particular commissioner is sheer conjecture. Based upon the analogous election cases, I am of the opinion that none of the commissioners is holding a commission for any fixed and determinable term and whatever his actual status as a de facto or de jure officer may be, he is subject to replacement upon proper appointment and qualification of commissioners for the appropriate statutory terms.

OFFICIAL OPINION NO. 25

April 5, 1945.

State Board of Tax Commissioners,
 State House,
 Indianapolis, Indiana.

Gentlemen:

I acknowledge receipt of your letter of March 16th, reading as follows:

“I am requesting a ruling in regard to an order issued by the State Board of Tax Commissioners April 28, 1943, File No. 4838, Order No. 4515.

“This order was issued in accordance with Enrolled House Act No. 261 in force March 10, 1943. I also