In the proceeding before the State Board of Tax Commissioners that board had the power to cancel taxes or deny a cancellation and, in accord with the last decision cited, the unauthorized portion of the order (which conditioned the cancellation upon certain payments of taxes) exceeds the authority of the board but the remainder of the order may stand without such unauthorized portion.

Therefore, I am of the opinion that the imposition of a condition upon the exercise of its power was beyond the authority of the board, and to the extent that this order thus exceeds the authority of the board, it is void.

I am also of the opinion that to the extent that this order cancels the taxes, or proportion of taxes set forth in it, it is valid and is unaffected by the time limit contained in the invalid condition.

OFFICIAL OPINION NO. 26

April 6, 1945.

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

My Dear Governor:

This will acknowledge receipt of your letter, which is as follows:

> "I would like an opinion from your office clarifying the extent of my authority toward ending commissions which I make, providing the one commission did not prove satisfactory.
>
> "Most of the commissions from this office read for a certain term of years and at the pleasure of the Governor. It is this type commission that I am particularly interested in, and want to know just how broad my authority is."

I assume that the commissions referred to in your letter will substantially follow the language of the statute relative to the particular appointment in question. The Indiana Statutes have different provisions as to different officers. Roughly,

the statutes providing for the appointment of officers may be divided into four general types or classifications for the purposes of this opinion:

1. The statute creates the office, provides that the officer be appointed by the Governor, but fixes no term.

2. The statute creates the office, provides for the appointment of the officer by the Governor and provides that the officer shall serve at the pleasure of the Governor for a term of four (4) (or some other number) years, or not to exceed four (4) years or similar language.

3. The statute creates the office, provides for the appointment of the officer by the Governor, the officer to serve for a term of four (4) (or some other number) years.

4. The statute creates the office, provides for the appointment of the officer by the Governor, the officer to serve for a term of four (4) (or some other number) years, and with an express provision in the statute that the officer can only be removed for cause or specified causes.

Judicial officers are excluded from consideration in this opinion, as are, also, those officers whose term is fixed by the Constitution. Questions relating to judicial removal of an officer are also excluded, and the opinion is limited to the removal of an officer by the appointing official in the first three (3) classes outlined above.

(1) An example of the first type of statute is found in clause (b) of Section 5 of Senate Enrolled Act 241, passed by the last session of the General Assembly. This clause provides:

> "The Governor of the State of Indiana, shall appoint the superintendents or heads, who shall have immediate charge of the administration of the following named institutions;"

here follows a list of eleven (11) institutions. This Act does not fix any term for such officers, and repeals all laws or parts of laws which establish any duration or term of such officers.

Section 2 of Article 15 of the Indiana Constitution is as follows:

> *"Duration of office—Increase of salary.*—When the duration of any office is not provided for by this Con-

stitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office, the tenure of which shall be longer than four (4) years, nor shall the term of office or salary of any officer fixed by this constitution or by law be increased during the term for which such officer was elected or appointed." (As amended November 2, 1926.)

In the case of State, *ex rel.* Manlove v. Curtis, 180 Ind. 191, at page 192 the court said:

> "The general rule is conceded to be that 'where the term of office is not fixed by law, the officer or officers, by whom a person was appointed to a particular office, may remove him at pleasure, and without notice, charges, or reasons assigned.' Throop, Public Officers Section 354. See, also, Mechem, Public Officers Sections 445, 454. Furthermore, it is stated in article 15, Section 2, of our State Constitution that 'When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment.' "

In the case of Klink v. State, *ex rel.* Budd, 207 Ind. 628, at page 633, the court said:

> "* * * But the power to remove an officer when the duration of the office is not provided for by the Constitution cannot be limited by the Legislature, since the Constitution provides that 'such office shall be held during the pleasure of the authority making the appointment.' It is true that the constitutional provision permits the duration to be declared by law, but it provides that the tenure shall not be longer than four years, * * *."

See also:

Kirkpatrick v. City of Greensburg, 47 N. E. (2d) 153, 113 Ind. App. 402;

State, *ex rel.* O'Donnell v. Flickinger, 211 Ind. 361, 367.

In an opinion of the Attorney General in 1933, page 581, on page 582, this language is used:

> "Referring now to your first question, the statute authorizing the appointment of local probation officers does not fix any specific term. Under the provisions of section 2 of Article 15 of the Indiana Constitution, therefore, such officer holds his office during the pleasure of the authority making the appointment. In my opinion, the term of a probation officer appointed by a judge would expire with that judge's term of office."

It is my opinion that where the term of office is not fixed by law, the Governor, as the appointing official, may remove such officer at pleasure and without notice, charges or assigning reasons.

(2) An example of the second classification is contained in Section 5 of House Enrolled Act 442, which Act, referring to the members of the Department of Financial Institutions, says:

> "* * * Said members shall be appointed by the Governor and shall serve at his pleasure and for a term of not more than four (4) years * * *."

Similar language, with a somewhat different wording, is used in Senate Enrolled Act 117, Section 2 of which Act says:

> "The Governor shall, upon the taking effect of this Act, appoint a director of Division of Procurement and Supply, who shall serve at the will and pleasure of the Governor for a term of four (4) years."

It is a general rule that the power to appoint carries with it the power to remove. (This rule is recognized and made a part of our constitution as Section 2 of Article 15, *supra.*)

In the case of State, *ex rel.* Nagle v. Sullivan, 98 Montana 425, the court said:

> "The power to appoint carries with it, as an incident, in the absence of constitutional or statutory restraint, the power to remove (Touart v. State, 173 Ala. 453, 56 So. 211; Cameron v. Parker, 2 Okl. 277, 38 P. 14; Sponogle v. Curnow, 136 Cal. 580, 69 P. 255; Sanders

> v. Belue, 78 S. C. 171, 58 S. E. 762), but provision for appointment for a fixed term constitutes such restraint, and, in the absence of any provision for summary removal, one appointed for a fixed term can be removed only for cause (23 Am. & Eng. Ency. of Law 437), and cases cited from many jurisdictions."

The question arising under statutes exemplified by the two (2) illustrations above present the question, as to whether the naming by the statute of a term of years in connection with provision for service at the will and pleasure of the Governor, is a restraint on summary removal. The rule, both on principle and authority, seems to be that fixity of term is a mere circumstance indicating the legislative intent, which may be overthrown either by definite language in the statute or other indicia of intent. Numerous cases may be cited where the term of the officer was fixed and other provisions of the statute authorized removal by the appointing official or indicated intent that the officer was subject to removal, in which it was held that the term of years was conditioned and depended upon the exercise by the appointing official of the power to remove.

In the case of City of Madison v. Korbly, 32 Ind. 74, 77, the statute involved provided for appointment of certain officials for a term of two (2) years, and for removal at the pleasure of the appointing body. It was held that this statute did not fix the term of office at two (2) years absolutely, but for that term only at the pleasure of the council (appointing body).

In the case of Myers v. U. S., 272 U. S. 52, the statute provided that postmasters of certain classes shall be appointed and may be removed by the President by and with advice and consent of the Senate, and shall hold their offices for four (4) years, unless sooner removed or suspended according to law. In a very long opinion by Chief Justice Taft it was held that the President could remove before the term was expired and without the advice or consent of the Senate. This case is cited in the case of Tucker v. State, 218 Ind. 614, in both the majority and minority opinions. See pages 641 and 707.

In Townsend v. Curtis, 83 Maryland 331, the statute provided the insurance commissioner shall be appointed by the Governor, Treasurer and Controller "for the term of four

years * * * and shall hold his office during the term for which he is appointed * * * unless sooner removed by the Governor, Treasurer and Controller", held the Governor, Treasurer and Controller could remove without cause; that the statute manifested intention not to limit the Governor, Treasurer and Controller to any cause but left it to their discretion.

Section 2 of Article 15 of the Constitution of Kansas was the same as the Indiana Constitution. A Kansas statute provided that the executive council should elect a railroad commissioner "to continue in office for the term of three years from said date." The statute also provided the executive council might remove such commissioner, held the statute made the term three (3) years, subject to the discretion of the executive council, who might remove at any time. See also:

Touart v. State, *ex rel.* Callaghan, 173 Ala. 453, 461;
State v. Ledwith, 14 Fla. 220, 224;
Gray v. McLendon, 134 Ga. 224, 234;
Scott v. City of Waterloo, 190 Iowa 467;
State v. Mitchell, 50 Kans. 289;
South v. Sinking Fund Comrs., 86 Ky. 186, 189;
London v. City of Franklin, 118 Ky. 105, 109;
Johnson v. Laffoon, 257 Ky. 156, 168;
Bailen v. Board of Assessors, 241 Mass. 411, 414;
Attorney General v. Donahue, 169 Mass. 18;
State, *ex rel.* Barker v. Crandall, 269 Mo. 44, 52;
State, *ex rel.* Sweeney v. Stevens, 46 N. J. Law 344;
People, *ex rel.* Gere v. Whitlock, 92 N. Y. 191, 198;
State, *ex rel.* McReavy v. Burke, 8 Washington 412, 422.

It is my opinion that those officers falling within the second classification herein outlined and who are appointed under statutes, like the examples above given, do not receive a term of office fixed at the number of years stated absolutely, but receive a term for said number of years, subject to and conditioned upon the exercise of the discretion or will of the Gov-

ernor and dependent upon the exercise by the Governor of his power to remove at pleasure. In such cases, it is my opinion that the Governor may remove the appointed officer at his pleasure and without notice, charges or assigning reasons.

(3) This classification involves statutes where the term is fixed at a given number of years, with no language either providing for the service or removal at will or pleasure of the Governor, and no language showing any intent that they be removed at pleasure. An example of this is House Enrolled Act No. 390, which was an Act creating a council for the licensing of hospitals. Said Act contains this language:

> "* * * All subsequent appointments shall be for four years, except that in case of a vacancy the appointee shall serve for the remainder of the unexpired term."

As shown by the quotation, *supra,* of Section 2, Article 15 of the Constitution, provision is there made for the duration of an office to be declared by law. Ordinarily, when the statute definitely fixes the term of the office (not to exceed four years) with no provision, express or implied for the officer to serve or be removed at pleasure by the appointing officer, he cannot be summarily removed.

In the case of Roth v. State, *ex rel.,* 158 Ind. 242, the court referred to a California case, pointing out that the California Constitution was similar to ours, and said, at page 266:

> "* * * The court held that the word 'duration', as employed in the constitution, 'signified extent, limit, or time', and that, when the tenure of an office was not fixed by law, it could be held only during the pleasure of the appointing power. We have fully recognized this rule in the case at bar, but hold that under the provisions of the charter the duration of relators' terms were fixed or declared by law, and hence the board was deprived of the right to dismiss them at its mere will or pleasure. * * *"

In Shira v. State, *ex rel.,* 187 Ind. 441, the court, at page 444 says:

> "* * * Their term of office is thus a fixed tenure within the meaning of the law (Roth v. State, *ex rel.*

> (1901), 158 Ind. 242, 264, 63 N. E. 460), and as a general proposition they are not subject to be dismissed from the service except for cause, and then after a hearing on proper notice. * * *"

There are many cases involving the question of removal of officers by the appointing power where the statute provides for an appointment for a fixed term but in most of them there is also either language in the statute providing or indicating that removal may be made at pleasure or that removal is to be for cause and the cases are not numerous where there is solely a provision for a fixed term and no other provision. However, the expressions in the texts and in the opinions of courts on removal at pleasure or as an incident of the right of appointment exclude cases where the appointment is for a fixed term and there are no other provisions. In 43 Am. Jur., at page 31 it is said:

> "When the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provision, the general rule is that the power of removal is incident to the power to appoint. * * *
>
> "But the power of removal is not incident to the power of appointment where the extent of the term of office is fixed by the statute. * * *"

In Bruce v. Matlock, 86 Ark. 555, at page 560, the court said:

> "The members of the board having been appointed for a fixed term, and as the statute does not confer upon the governor the power of removal, the power does not exist."

A number of cases of similar effect are collected in Holder v. Anderson, 160 Georgia 433. See also:

> State, *ex rel.* Nagle v. Sullivan, 98 Mont. 425, *supra:*
> Davis v. Filler, 47 W. Va. 414, 416.

It is my opinion that where the statute fixes the term and there is no provision that it continue at pleasure or that the

officer is removable at pleasure, or such an intention cannot be inferred from language used, then such officer cannot be removed except for cause.

(4) Your opinion request apparently does not involve cases where the statute expressly provides that the officer can only be removed for cause. An example of such an Act is House Enrolled Act No. 361, the State Police Code, passed by the last session of the General Assembly, which expressly provides that members of the Board can only be removed for cause. I, therefore, do not cover statutes of this type in this opinion. However, in this connection see:

Shira v. State, *ex rel.*, 187 Ind. 441, 444;
Bannerman v. Boyle, 160 Cal. 197, 205;
Lucas v. Futrall, 84 Ark. 540, 551;
Jacques v. Little, 51 Kans. 262;
Harrington v. Smith, 114 Kans. 262;
Howard v. Bell Co. Board of Education, 247 Ky. 586;
Hagerty v. Shewd, 75 N. H. 393.

I trust this will give you the information desired by you to enable you to apply the same to any specific commission which you may have in mind.

OFFICIAL OPINION NO. 27

April 7, 1945.

Hon. Joseph McCord, Director
Department of Financial Institutions,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of March 9th in which you make the following inquiry:

> "The question has arisen, in this department, as to whether we have the right under the provisions of Section 63 of the Indiana Financial Institutions Act, to approve claims by attorneys for fees on account of serv-