ACCOUNTS, STATE BOARD OF: Death of officer after election and before qualification—County Auditor and County Commissioner, whether incumbent holds over; time of election of successor and commencement and expiration of term.

January 3, 1936.

Hon. W. P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

I have at hand your letter of December 19th relative to situations that have arisen in one of the counties of this state because of the election in 1934 of a new county auditor and a new county commissioner, respectively, and the subsequent death of the elected official in each case before qualifying for his office. In each case the incumbent official was defeated for re-election, and his present term of office will expire December 31st, 1935. With respect to the office of county auditor, you submit the following questions:

1. Will the present auditor hold over?
2. When will election of county auditor be held?
3. When will the successful candidate be entitled to take office, and when will his term of office expire?

Article 6, Clause 2 of the Indiana Constitution, which provides for the election of a county auditor in each county of the state at the time of holding general elections, further provides that such auditor “shall continue in office four years.”

Article 15, Clause 3 of the Constitution provides:

“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.”

Section 49-405, Burns Annotated Statutes, Revision of 1933, provides for the filling of “vacancies” in county or town-
ship offices not otherwise provided for (which includes the office of county auditor) by appointment by the board of county commissioners, which 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 has been held by the Supreme Court of Indiana, however, that where a successor dies after his election but before qualifying, no "vacancy" occurs such as would authorize an appointment to fill the same, since under the provisions of the Constitution quoted above 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. Consequently the incumbent, unless otherwise disqualified, holds over "until his successor shall have been elected and qualified." As stated by the court: "The period between the expiration of the term fixed * * * and the time at which a successor shall be qualified to take the office is as much a part of the incumbent's term as the fixed statutory period."

Kimberlin v. State, ex rel. Tow, 130 Ind. 120;
State, ex rel. Culbert v. Linkhauer, 142 Ind. 94.

Your first question is answered in the affirmative.

The second question presents a matter of considerable difficulty, since there is no constitutional or statutory provision which expressly fixes the time for the subsequent election of a successor, where one previously elected has died before qualifying; nor have I been able to find any decision by the courts of the state directly in point.

Article 1, Clause 1 of our Constitution declares that "all power is inherent in the people." Article 6, Clause 2, supra, creates certain four-year and certain two-year constitutional county offices, and provides that the officials in question shall be elected "at the time of holding general elections." Article 2, Clause 14, provides that "all general elections shall be held on the first Tuesday after the first Monday in November," but does not fix the interval between elections, except as Article 6, Clause 2, supra, impliedly requires that such elections shall be held at least once every two years, by virtue of creating certain two-year elective offices. Section 29-701, Burns Annotated Statutes, Revision of 1933, however, provides as follows:
"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." (Acts 1881, Spec. Session, Chapter 47, Section 1.) (My italics.)

It seems obvious that the "terms" referred to in the foregoing provision were intended to be the definite terms of office fixed by the Constitution or by statute for the various offices, rather than the indefinite or defeasible terms represented by the fixed terms plus a possible "holding over" under the provisions of Article 15, Clause 3 of the Constitution, supra. The office of auditor in the county in question is an office the fixed term of which already has expired. Consequently, with reference to the regular general election to be held in November of 1936, it seems to me that it is an office "the term of which will expire before the next general election thereafter," within the meaning of Section 29-701, supra. Although the strict letter of such section does not expressly cover a case where the term of office has already expired, in my opinion the spirit and intent of the provision is to provide for a regular succession in office by election at the first opportunity thereafter, so as to avoid, insofar as is possible, the holding over of officers beyond their fixed constitutional or statutory terms of office.

There have been several cases before the Supreme Court of this State which, although not involving precisely this same state of facts, nevertheless have required interpretation of the spirit and policy of our Constitution with regard to the matter of the right of the electorate itself to fill constitutional elective offices at the first opportunity provided under our Constitution and statutes. Although some of these cases have to do with the filling of "vacancies" and, as pointed out above, the present case is not one of a "vacancy," strictly speaking, nevertheless the reasoning adopted by the court in such cases should apply with equal force where the regular elective term has expired, even though a "vacancy" has not resulted therefrom.
In the case of State, ex rel. Wilson v. Wells, 144 Ind. 231, the court made the following observation:

"The only safe rule within the requirements of the Constitution is, we think, that all vacancies in elective offices shall be filled at the election first ensuing after the expiration of the term for which the incumbent was elected, and at which provision is made for election to such offices." (My italics.)

In the case of Gemmer v. State, ex. rel., 163 Ind. 150, 160-161, the court said:

"The right of the voters of the state to fill the offices of clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner and surveyor at the general election next before the expiration of the term of the persons filling any of these offices is plainly conferred by Section 2, Article 6, supra. The office being constitutional and elective, the voters of the county are authorized to fill it at the first opportunity given under the Constitution. ** When the framers of the Constitution and the people who adopted it said in that instrument that 'there shall be elected in each county by the voters thereof, at the time of holding general elections,' the officers named, they could have meant nothing else than that the succession to these offices should be secured, without vacancies or unnecessary extensions of terms by holding over after the expiration of the constitutional terms, by the election by the voters of each county of successors to such officers, who would be ready to take the offices and discharge their duties immediately upon the expiration of the terms of the previous incumbents. The only natural and reasonable time for such selection would be at the general election next preceding the expiration of the term of the incumbent." (My italics.)

The case of State, ex rel. v. Schortemier, Sec'y., 197 Ind. 507, involved the office of judge of the circuit court. The Constitution provides that the judge shall hold office for six years "if he so long behave well" (Article 7, Clause 9), and that vacancy in such office shall be filled by appointment by the Governor which "shall expire when a successor shall have
been elected and qualified” (Article 5, Clause 18), but does not say at what time the election of a successor should be held. The court, in holding that the election of a successor should be held at the next general election after the occurrence of the vacancy, regardless of the fact that a period equal to the six-year term of office of judge had not intervened since the election of the predecessor, cited the fact that Article 1, Clause 1 of the Constitution declares that “all power is inherent in the people”; that the Constitution, by providing certain two-year offices, implied that general elections should be held at least once every two years; that the legislature had carried out this implication by providing for biennial elections; that the Constitution does not require that judges should be elected in any particular year, or that the term should begin or end at any specified time, as in the case of a Governor of the state, but only fixes the length of term for which he shall hold office. All of these reasons cited by the court in support of its decision are equally applicable to the office of county auditor, and to a case such as we now have under consideration where there is a holding over without an actual “vacancy” having occurred.

In the case of Enmeier v. Blaize, 203 Ind. 475, the court stated that the spirit of the provisions of Article 6, Clause 2 of our Constitution is to avoid vacancies in elective offices, the filling thereof by appointment, and “the holding over by an elective officer, after the expiration of the term of office, except and until his successor shall have been elected and qualified.” (My italics.) A very extensive and very able discussion of the spirit of the Constitution, to the same effect as the foregoing statements made by the Supreme Court, can be found in an official opinion rendered by one of my predecessors, the Hon. Louis T. Michener, to Charles F. Griffin, former Secretary of State. (Opinions of Attorney General, 1886-1888, p. 92.)

In answer to your second question, it is my opinion that the election of a county auditor in the case referred to in your inquiry should be held at the next general election in November, 1936.

The first part of your third question is answered by the language of Article 15, Clause 3 of the Constitution. The term of the present hold-over incumbent will expire, and the person elected at the next election as his successor will be en-
titled to take office, when such successor shall have "qualified" for the office by taking the proper oath and filing the required bond. Such successor's term of office will expire at the end of four years from the time of his election and qualification. (Governor v. Nelson, 6 Ind. 496.)

You have submitted similar questions with reference to the office of county commissioner, as follows:

4. Will the present commissioner hold over?

5. When will the election of a commissioner for that district be held?

6. When will the successful candidate be entitled to take office, and when will his term of office expire?

Your fourth question is answered by the same constitutional and statutory provisions as are cited above in answer to question one, regarding the holding over of the county auditor. Section 26-601, Burns Annotated Indiana Statutes, revision of 1933, provides in part as follows:

"Whenever a vacancy shall occur in the office of commissioner; or whenever a commissioner elect who has qualified shall die or resign before the commencement of the term for which he was elected, and no general election will occur between the time of such death or resignation and the beginning of such term, the commissioners in office at any time after the occurrence of such death or resignation so producing such vacancy or prospective vacancy, shall elect some person to fill such vacancy or prospective vacancy, from and after the time of commencement of such term, who shall serve for the remainder of the term, or for the entire term, as the case may be, for which the person so dying or resigning was originally elected or appointed; * * *." (My italics.)

The instant case, however, not being one in which a "vacancy" has occurred, nor one involving the death of a commissioner-elect who had qualified before dying, it can readily be seen that the provisions of Section 26-601, supra, are not applicable. Instead, the incumbent commissioner holds over under authority of Article 15, Clause 3 of the Constitution, as in the case of the auditor, even though the county com-
missioner be a statutory rather than a constitutional officer. Consequently your fourth question is answered in the affirmative.

The matter of when a successor to the incumbent commissioner should be elected presents a somewhat different question from that relating to the county auditor, the office of auditor being a constitutional office whereas the office of county commissioner is purely statutory. The latter office has been created by the Legislature under authority of Article 6, Clause 3 of the Constitution, which provides:

"Such other county and township officers as may be necessary, shall be elected, or appointed, in such manner as may be prescribed by law."

In view of the foregoing constitutional provision, the manner and time of election of county commissioners is left entirely to the Legislature, subject only to certain constitutional restrictions which do not affect the question under consideration. Much of the foregoing discussion of the spirit and intent of the Constitution with relation to the right of election by the people of constitutional county officers does not apply to the office of county commissioner, as Article 6, Clause 3, supra, expressly authorized the Legislature to provide for selection of such officers by appointment, rather than by election, if it so chose.

Section 26-603, Burns Annotated Statutes, Revision of 1933, provided for the election of the members of the first board of commissioners in each county and the terms of each, and provided further that "annually, thereafter, one commissioner shall be elected, and shall continue in office three years, and until his successor is elected and qualified." (1 R. S. 1852, Chap. 20, Sec. 3.) At the time this statute was first adopted we had annual elections. General elections now are held biennially, but the foregoing language is still retained in the statute.

There is no statutory provision expressly covering the matter of the time of election of a successor to an incumbent commissioner who holds over because of the death of his elected successor before qualifying, except the general election law hereinabove referred to, which provides that at the time of each biennial election "all offices the terms of which will expire before the next general election thereafter, shall
be filled, unless otherwise provided by law.’’ (Section 29-701, supra.) In my opinion the Legislature intended such provision to apply to all offices where the incumbent’s fixed term had expired prior to such biennial election, as well as to those which would expire between such election and next election ensuing thereafter. Consequently, it is my opinion that a successor to the incumbent county commissioner should be elected at the next general election in November, 1936.

If a successor to the hold-over member on the board of commissioners be elected, as indicated, at the next general election, then such successor would be entitled to the office immediately upon his election and qualification, under the provisions of Article 15, Clause 3 of the Constitution, supra. He would only hold office, however, until the expiration of the three-year term of office for which the decedent was originally elected. This is by reason of Section 26-604, Burns Annotated Statutes, Revision of 1933, which provides in part as follows:

“The terms of office of County commissioners shall be three years, * * * and the term of office of no two districts in the same county shall begin in the same year; and the year in which the term of office of each district shall begin shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county; * * *” (Sec. 1, Chap. 38, Acts 1885.)

It is the intention of the statute that the board of commissioners shall be so organized that one member shall retire each year, and the term of one commissioner-elect shall commence each year, so that there may at all times be at least two commissioners on the board of some experience. In order to preserve this regularity of succession, the terms of office of the commissioner from each district must commence and end regularly at periods of three years.

Parmater v. State, ex rel. Drake, 102 Ind. 90;
Parcel v. State, ex rel. Lowrey, 110 Ind. 122;
Bell v. State, ex rel. Summers, 129 Ind. 1.
In view of the foregoing, it will be seen that a full term commissioner from the district in question should be elected at the biennial election in 1938 and should begin his regular three-year term of office on January 1st, 1939. This is true whether or not a short-term commissioner be elected in 1936 to fill out the balance of the term for which the decedent was elected.

ADJUTANT GENERAL: Right of Governor to remove national guard officers. January 6, 1936.

Hon. Elmer F. Straub,
The Adjutant General,
State House,
Indianapolis, Indiana.

Dear Sir:

I acknowledge receipt of your request for an official opinion of date December 27, 1935, as follows:

"In accordance with 10004. (8539). Dismissal of Officers—105 Burns Annotated Indiana Statutes, 1926, as to whether or not the Governor of the State of Indiana has the authority to revoke a commission of a National Guard officer for negligence of duty, loss of interest, dilatoriness in making required returns and reports, failure to comply with instructions or frequent, unauthorized absence from meetings of Command, as provided in existing regulations."

By the terms of Section 114, Chapter 7, Title 32, U. S. C. A., as amended June 15, 1933, it is provided as follows:

"The appointments of officers and warrant officers of the national guard may be terminated or vacated in such manner as the several states, territories, or the District of Columbia shall provide by law."

By the terms of Section 10004, Burns Indiana Statutes, 1926 (Section 45-1208 Burns Revised Statutes 1933), it is provided that:

"45-1208 (10004). Dismissal of officers.—No commissioned officer shall be dismissed from the service