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The injustice is clear when one considers that a contrary ruling placing the time of resignation at an earlier date would in no way affect the validity of the past acts of the incumbent in either office, including decisions of the board dependent upon his vote, but would only deny him the right to receive or retain the salary derived from his other lucrative office since that earlier date. The incumbent would have held the other office under color of title and would therefore have been an officer *de facto*. The acts of a *de facto* officer are binding on third parties, but such officers do not have any right to the emoluments of the office. *State ex rel. Worrell v. Carr*, 129 Ind. 44, 28 N.E. 88 (1891); *Edington v. Board of Comm'rs*, 105 Ind. App. 156, 13 N.E. 2d 895 (1938).

In answer to your specific question, it is my opinion that the simultaneous serving as a member of the Board of Trustees of the Attica Consolidated School Corporation and as the Fountain County Highway Supervisor would now violate the constitutional prohibition against holding two lucrative offices.

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OFFICIAL OPINION NO. 40

November 28, 1967

**ELECTIONS—COUNTY OFFICERS—Effect Where Elected  
Candidates Dies Before Qualifying for Office—  
When Next Election May Be Held.**

Opinion Requested by Hon. Wayne Timmons, Clerk, White Circuit Court.

I am in receipt of your recent inquiry as to who should occupy the office of Clerk of the White Circuit Court subse-

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quent to December 31, 1967, in view of certain specified facts.

The pertinent facts set out in your letter may be summarized as follows :

1. You were first elected to your present office in 1958, and assumed that office January 1, 1960. You were re-elected in 1962, and commenced your second term January 1, 1964.
2. Your present term of office expires December 31, 1967, at which time you will have served as Clerk of the White Circuit Court for eight consecutive years.
3. An election to determine your successor was held November 8, 1966, and one Walter D. McColly received the highest number of votes cast. Mr. McColly was duly declared the winner of the election and was to assume office January 1, 1968.
4. On April 13, 1967, Mr. McColly died. At that time he had not taken his oath of office, filed his bond or otherwise qualified himself for office.

In connection with the above circumstances you ask six specific questions :

1. Does the election of a successor Clerk of the Circuit Court who dies before qualifying for office prevent the incumbent Clerk from holding over after the expiration of his four-year elected term?
2. If the answer to the first question is No, can a Clerk who is finishing his second elected term, his eighth consecutive elected year in office hold over?
3. If the answer to the second question is Yes, for what length of time does the incumbent Clerk hold over?
4. If the answer to either of the first two questions indicates that the incumbent Clerk does not hold over, does this make the tenure of the office of Clerk of the Circuit Court subject to appointment?

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5. If there is a vacancy, who is authorized to fill said vacancy?
6. If there is a vacancy, what is the term of a person appointed to fill that vacancy?

Two constitutional provisions are involved in your questions:

Article 6, Section 2, 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, Recorder, Treasurer, Coroner and Surveyor shall continue in office four years; and no person shall be eligible to the office of Clerk, Auditor, Recorder, Treasurer or Coroner more than eight years in any period of twelve years: Provided, That the Treasurer of each county re-elected at the general election in 1952 shall continue in office until January 1, 1957 and shall not be eligible for re-election to the office of County Treasurer at the general election in 1956.”

Article 15, Section 3, 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.”

1. Your first question constitutes the subject matter of my Opinion No. 14, issued to Robert O’Neal, Superintendent of State Police, on May 15, 1967, and appearing at p. 77, *supra*. That opinion concerned a different office, Justice of the Peace, but the reasoning and authorities cited therein apply equally to the office of Clerk of the Circuit Court. The conclusion in that opinion was that an incumbent who is otherwise eligible holds over at the end of his term if a successor is not both

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elected and qualified; election without subsequent qualification does not terminate the right of an eligible incumbent to remain in office.

2. Your question concerning the eligibility of a clerk who has served eight consecutive elected years in office to hold over when his elected successor dies before qualifying was the exact question involved in *Gosman v. State ex rel. Schumacher*, 106 Ind. 203, 6 N.E. 349 (1886). The Court distinguished "tenure of office" from "eligibility to office" and concluded that the hold over provision did not apply in the case of an incumbent otherwise ineligible as a result of having served eight consecutive elected years.

In reaching that conclusion the court said (at page 206 of 106 Ind.):

"These conclusions follow from a consideration of section 3, and upon the assumption that the person claiming the right to hold over in any case is at the time eligible to continue in the office. The section referred to affects the tenure of office; it has no relation to the qualifications or eligibility of the officer. Other sections provide who shall be eligible to the office of clerk, and prescribe the conditions upon which one, eligible to be elected, may become disqualified from continuing in the office. . . .

"It can not be supposed that the provision regulating the tenure of the office was intended to affect in any degree the other provisions which relate to eligibility to hold the office. Section 2, article 6, imposes an absolute disability to continue in the office of clerk for a longer period than eight consecutive years. . . . The result is that eight years of continuous holding renders the clerk incapable of holding longer. The only exception to this is created by section 11, article 2, the effect of which is to provide that service under a *pro tempore* appointment shall not be reckoned in the eight years. . . .

"The incapacity affects the right of the officer to hold over, precisely as it affects the right to hold the

office at any other period. He can not look to the provision regulating the tenure of office to determine his eligibility to hold; on the contrary, in determining the right of tenure, regard must be had for those provisions which prescribe the conditions of eligibility. Whenever the conditions which destroy his capacity to hold arise, his tenure is at an end. This is so for the reason that his tenure, or right to continue in the office, is dependent at all times on his eligibility or capacity to hold.

“It might as well be held that the removal of the clerk to a distant county, notwithstanding the requirement that he shall reside in the county in which he was elected, had no effect upon his right to hold over, or that the right to continue in office until his successor was elected and qualified was not affected by the acceptance of another lucrative office, as to hold that the ineligibility resulting from eight years continuous holding had no application to his right to hold over.”

In line with, and upon the authority of, the *Gosman* opinion the Indiana Supreme Court, in *Aikman v. State ex rel. Wadsworth*, 152 Ind. 567, 53 N.E. 836 (1899), held that while Acts 1897, p. 288, effectively delayed the right of a county treasurer elected to take office to January 1 next following the expiration of the term of the incumbent, the incumbent who was finishing his second term on August 5th did not have the right to hold over until the term of his elected successor began. The Court held that the office would be vacant, and should be filled by appointment, between the expiration of the term of the incumbent and the beginning of the term of the elected successor.

The principle set out in *Gosman* has been held not to apply to offices where the length of service disqualification is imposed by statute. See *State ex rel. Reese v. Bogard*, 128 Ind. 480, 27 N.E. 1113 (1891); *State ex rel. Fares v. Karger*, 226 Ind. 48, 77 N.E. 2d 746 (1948). However, the principle has never been modified in relation to those offices, such as clerk of the circuit court, where the disqualification is imposed by the Constitution.

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3. Since the answer to your second question is in the negative your third question need not be answered at this time.

4. Your fourth question is also answered by the *Gosman* opinion. On page 208 of 106 Ind. the court said:

“In the case of *State, ex rel., v. Jones*, 19 Ind. 356, it was said: ‘Where it appears, *prima facie*, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect according to the forms of law, a person, to fill such office.’”

Your ineligibility to hold the office of clerk after December 31, 1967, and the lack of right in anyone else to claim that office are events that, *prima facie*, would subject that office to a judicial declaration of vacancy. Therefore, that office can be filled by appointment on January 1, 1968.

5. Your fifth question is the specific question decided by the Indiana Supreme Court in *State ex rel. McClure v. Marion Super. Ct.*, 239 Ind. 472, 158 N.E. 2d 264 (1959). In that case the court held that the Clerk of the Circuit Court is an officer of the circuit rather than of the county, and that the Governor is to fill vacancies in that office in view of 1 R.S. 1852, ch. 115, § 2, the same being Burns § 49-404, which provides:

“Whenever any vacancy occurs in any circuit or district office commissioned by the governor, he may fill such vacancy until filled by a qualified successor.”

Thus, the Governor should appoint your successor.

6. The question of how long the person appointed to fill the vacancy created by your ineligibility should hold office may be broken down into two questions:

A. When will the next election be held to elect his successor?

B. When will the successor so elected take office?

Question A is answered by 2 R.S. 1852, ch. 5, § 1, Burns § 49-2701, which reads as follows:

“At the general election immediately preceding the expiration of the term of the present incumbent, and every four [4] years thereafter, in each county, there shall be elected a clerk of the circuit court, who shall hold his office during such term, and who shall give bond.”

This is obviously an implementation of Article 6, section 2, Constitution of Indiana, which reads as follows (omitting only provisions for other offices):

“There shall be elected, in each county by the voters thereof, at the time of holding general elections, a Clerk of the Circuit Court. . . . The Clerk . . . shall continue in office four years, and no person shall be eligible to the office of Clerk . . . more than eight years in any period of twelve years. . . .”

*Marion County Election Bd. v. O'Brien*, 241 Ind. 36, 49, 169 N.E. 2d 287, 293, held that this section of the Constitution provided a “normal cycle of four years for the election of Clerk of the Circuit Court,” and that the Constitution did not require the election of a clerk, even to fill a vacancy, more often.

The facts previously recited show that the “normal cycle of four years for the election of Clerks of the [White] Circuit Court” calls for an election in 1970. Therefore, there being no statutory requirement for an earlier election, the next election of a clerk in White County in 1970, is indicated. Continuance in office until that time of an appointee will not deprive the people of White County of their constitutional right to elect the Clerk of the White Circuit Court. *Marion Co. Election Board v. O'Brien, supra*, [241 Ind. at 49, at 293 of 169 N.E. 2d.]

That case relied on Acts 1929, ch. 18, § 1, Burns § 49-2702, in holding that, in a case in which a clerk had been appointed in 1958 to fill a vacancy created by the death of an elected clerk who had commenced his first term January 1, 1958, an

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election to choose his successor should not be held in 1960, but should be held in 1962. That statute reads:

“Whenever there has been or shall be a vacancy in the office of clerk of the circuit court of any county of this state, and when such vacancy shall have been or shall be filled by appointment, the person who is appointed to fill such vacancy shall hold office until the end of the term for which the predecessor of such appointee, whose unexpired term said appointee is serving, shall have been elected, and such appointee shall, without election, serve the full unexpired term of such predecessor.”

The facts in your case differ from *O'Brien, supra*, in that the clerk appointed to fill the vacancy which will occur when you become ineligible will not be filling an “unexpired term” of years. You, as his predecessor, will have already served your term of four years, but you will not yet have served that part of your term covered by the phrase “and until his successor shall have been elected and qualified” (Art. 15, § 3, Ind. Const.). In *State v. Harrison*, 113 Ind. 434, 441, 16 N.E. 384, 387 (1888), that part of the term is spoken of as “an additional contingent term [added to] the original fixed term.” The decision then quotes with approval from *People v. Whitman*, 10 Cal. 38, a part thereof reading as follows:

“. . . “The term of the office is fixed at two years, certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years. . . .”

In your case, of course, the contingency has happened and your term now extends “until . . . [your] successor shall have been elected and qualified.” When you reach the point of having served eight years you will then become ineligible to continue in office but your ineligibility does not end your term. It merely creates a vacancy. *Aikman v. State ex rel. Wadsworth, supra*. Therefore, Burns § 49-2702 (quoted above) would seem to have the same application to the time of an election of a successor for the appointee who serves

out your unexpired term as it had in *O'Brien* on the time for holding an election to choose a successor to the appointee serving the unexpired term of the deceased clerk in that case.

It is my opinion that the next election of a Clerk of the White Circuit Court should be held November 3, 1970.

On its face Acts 1929, ch. 59, § 1, Burns § 49-207, appears to answer the question of when the clerk elected in 1970 should take office. It 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.”

However, in *Enmeier v. Blaize*, 203 Ind. 475, 481, 181 N.E. 1, 3 (1932), the Supreme Court declared the statute above to be in contravention of Art. 6, § 2, and Art. 15, § 3, Indiana Constitution, insofar as it relates to the office of the Clerk of the Circuit Court. The question in that case was when a clerk elected in 1930 (in conformity with the normal four-year cycle for that county) would take office. The incumbent clerk's second term was to expire February 25, 1932, so that the clerk-elect would not take office until January 1, 1933, by the terms of that statute. Since the incumbent clerk would not be eligible to hold over after his second term expired, there would be a vacancy from February 25, 1932 to January 1, 1933. The court said :

“Appellant was elected to office at the general election in November, 1930. If the Legislature had power to postpone the time for the beginning of his term of office from February 25, 1932 to January 1, 1933, there was no necessity to hold an election for this office at the general election in November, 1930, but an election to select a successor to the incumbent in office might have been postponed from the general election in November, 1930, to the general election in

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November, 1932. But the incumbent appellee was elected at the general election in November, 1926, and, to comply with regularity in election of clerks of the circuit court in the election of appellee's successor, such successor should be elected at the general election four years thereafter, to wit: at the general election in November, 1930. To elect such successor at the November election 1930 was a right of the people reserved by them in their Constitution. This right of the people may not be taken from them or abridged, either directly or indirectly, by any agency or department of government. The term of office of the incumbent appellee, having its beginning February 25, 1928, such term ends by operation of constitutional law four years thereafter, to wit: on February 25, 1932. This office is to be administered by an officer who shall be elected by the voters. Again, the spirit of the Constitution is not to permit or establish vacancies in elective offices, which vacancies may be filled by officers appointed, or officers holding over after the expiration of the officer's term, except as provided by the Constitution itself, or by a vacancy which occurs during the term of incumbent in office by death, resignation or removal. The act now under consideration did not postpone or intimate a postponement of the election of a legally elected successor to appellee. The general election in November, 1930 was the proper election to vote for and elect a successor to appellee. The incumbent in office, the appellee, could hold this office only for the given term of four years, and, after the expiration of his term of office, he could hold the office (if he could hold it at all, see *Gosman v. State, ex rel.* [1885], 106 Ind. 203, 6 N.E. 349; and *Carson v. McPhetridge* [1816], 15 Ind. 327) only 'until his successor shall have been elected and qualified.' The General Assembly did not in this act abridge or take from the voters the right to vote for and elect a successor in office to the appellee at the general election in November, 1930, if we grant the power in the General Assembly to do so.

“It is plain from these sections of the Constitution cited that the Legislature is not only barred from depriving an official, elected by the voters, from taking and assuming an office upon the termination of the term of office of his predecessor, but also that the Legislature may not forbid the voters from voting at a general election, next previous to the expiration of the term of office of the officer in question, for an officer provided by the Constitution, and which officer shall be elected by the voters. *Gemmer v. State* (1904), 163 Ind. 150, 71 N.E. 478, 66 L.R.A. 82; *Russell v. State* (1909), 171 Ind. 623, 87 N.E. 13. See *Robinson v. Moser* (1932), *ante* 66, 179 N.E. 270.

“It is, therefore, held that ch. 59, Acts 1929, *supra*, in so far as it relates to the officer, designated as the ‘clerk of the circuit court,’ is in contravention of § 2 of Art. 6 and of § 3 of Art. 15 of the Constitution of Indiana. . . .”

It must be noted that the statute was not declared void but merely that “. . . in so far as it relates to . . . ‘clerk of the circuit court,’ is in contravention of . . . the Constitution. . . .” And in my opinion a further qualification should be read into that declaration, namely, “in the circumstances of the case.” That, of course, is what the court had in mind. Which is to say, the holding is to be understood as though it read: “It is, therefore, held that ch. 59, Acts 1929, *supra*, insofar as it relates to the officer, designated as the ‘clerk of the circuit court’ [in the circumstances of this case], is in cantravention of § 2 of Art. 6 and § 3 of Art. 15 of the Constitution of Indiana.” If that case had been one in which the incumbent clerk’s term expired December 15, 1930, the reasons stated for holding the statute unconstitutional as to circuit court clerks would have no relevancy, except for the short vacancy of sixteen days between December 15 and January 1. Even an expiration of February 25, 1931, delaying the clerk-elect’s induction until January 1, 1932, would not have carried it past the next election and would hardly have been reason for defeating the statute’s purpose of rendering the dates of expiration of county offices uniform. (See dissenting opinion 203 Ind. at 484.)

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In the case at bar there would appear to be no constitutional barrier to making the term of the clerk elected in 1970 commence January 1, 1971. To do so would not cut short the term of an incumbent. The term of the then incumbent will have expired with the election and qualification of his successor. The delay (beyond the earliest day following the election upon which all vote counting, canvassing, tabulating and certifying has been completed and the certificate of election and commission can be issued) would not create a new vacancy and would not interrupt the normal cycle of elections of Clerks in White County. To do otherwise might in fact eventually result in a vacancy or a breaking of the four year cycle. General elections are held the first Tuesday after the first Monday in November (Constitution, Art. 2, § 4); that is, somewhere between November 2 and November 8. If, for example, a clerk-elect were to take office for his second term on November 4 of the year 1984, his constitutional disqualification would occur at midnight, November 3, 1988. If the 1988 general election was scheduled for November 7, a vacancy would occur. Further, since section 187 of the Election Code (Burns § 29-4801) provides that at the general election which would be held in 1986 "all offices the terms of which shall have expired or which will expire before the next general election thereafter, shall be filled," the successor to the clerk in the above hypothetical example might in fact have to be elected in 1986, two years after the election of the incumbent. Thus, the Constitution would be better served by establishing a fixed date somewhat removed from the date of election for the commencement of the clerk-elect's term of office. That is, January 1, 1971.

Since the statute (Burns § 49-207) has not been declared void for all purposes and is still a part of the law of the State, I believe it is constitutional and proper to apply it in this case, notwithstanding the broader than necessary language of *Enmeier v. Blaize, supra*, seeming to prohibit its application to circuit court clerks.

The next election of a Clerk of the White Circuit Court should be held November 3, 1970, and the candidate then elected should take office January 1, 1971; thus, the person appointed to succeed you should serve until January 1, 1971.

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In summarization of the foregoing answers, it is my opinion that should a clerk-elect die subsequent to election but prior to qualification the incumbent clerk, if he is eligible to hold that office, will continue in office until his successor is both elected and qualified. If the incumbent is not eligible the office may be deemed vacant as of the date he becomes ineligible and the Governor may appoint an eligible person to fill that vacancy. Completion of eight successive elected years in office, two elected terms, renders an individual ineligible to hold the office of clerk during the ninth year and thus, if his successor has not been elected and qualified a vacancy in that office will occur. Clerks are to be elected in each county at four year intervals and there should be no elections to that office other than in accord with that interval. If a person has been appointed to fill a vacancy in the office occasioned by the ineligibility of an incumbent to hold over, the person elected to that office at the next election held in accord with the four year interval should assume office the first day of January first following his election.

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OFFICIAL OPINION NO. 41

November 28, 1967

**SCHOOLS—TAXATION—Maximum Tax Levy for School Corporation General Fund.**

Opinion Requested by Mr. Larry R. Mohr, Chairman, State Board of Tax Commissioners.

You have requested my Official Opinion interpreting section 3 of the Acts of 1967, ch. 328 (hereinafter referred to as the "General Fund Act"), Burns § 28-2429b. This section reads as follows: