

from the custody of the superintendent and would require a further sanity inquest before the person could again be involuntarily confined. The certificate of discharge filed with the court advises the court that the person has been discharged and, if the superintendent believes the person to be no longer mentally ill, causes the court to initiate a restoration hearing.

4. A person temporarily committed to a mental institution has not been adjudged as being mentally ill, and before any person can be given a regular commitment he must be adjudged mentally ill. A restoration hearing based on the superintendent's certificate of discharge and decided in favor of the patient is a judicial declaration that the patient is no longer mentally ill.

OFFICIAL OPINION NO. 55

December 30, 1966

**COUNTY OFFICERS—County Coroner—Vacancy in Office
—Time of Election of Successor of Appointed Coroner
—Length of Term of Elected Successor.**

Opinion Requested by the Indiana State Election Board.

You have requested an answer to the following questions:

- I. Does the person appointed to fill a vacancy in a coroner's office hold such office for the unexpired term of the coroner originally elected to the office, even though a general election intervenes before the end of the said unexpired term, or is it necessary to elect a successor to the appointee at that next general election following the creation of the vacancy?
- II. If a successor is to be elected at the next general election after the vacancy is created, what is the length of the term of the coroner so elected?

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I.

TIME OF ELECTION OF SUCCESSOR OF APPOINTED CORONER

The office of county coroner is created by Art. 6, § 2 of the Constitution of the State of Indiana :

“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. . . .” (As amended November 4, 1952.)

Section 9 of Art. 6 of the Indiana Constitution provides that

“Vacancies in county, township, and town offices, shall be filled in such manner as may be prescribed by law.”

Pursuant to that section of the Constitution, the General Assembly has declared, in 1 R.S. 1852, ch. 115, § 4, Burns IND. STAT. ANN., § 49-405, that

“The board of county commissioners shall fill all 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.*” (Emphasis added.)

Acts 1945, ch. 208, § 187, as found in Burns § 29-4801, 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.*" (Emphasis added.)

No separate provision has been made by statute for filling a vacancy in the office of coroner, therefore the statutes and constitutional provisions above govern the matter.

The Supreme Court has decided that the language "when a successor shall have been elected and qualified" used in Art. 5, § 18 of the Constitution in relationship to the filling of other types of vacancies means "the next succeeding election at which the proper statutory procedures for election can be followed," *State ex rel. Custer v. Schortemeier*, 197 Ind. 507, 151 N.E. 407 (1926). This interpretation was extended to the similar language used in that section of the 1852 Revised Statutes found in Burns § 49-405 and quoted above, in *Lake County Election Bd. v. State ex rel. Eyears*, 224 Ind. 465, 468, 68 N.E. 2d 787, 788 (1946), which involved a county auditor:

"The general election proper to elect an officer to fill a vacancy in the office of auditor of a county is the general election provided for by law—§ 29-701, Burns' 1933—and occurring next after such vacancy, if the vacancy occurred before the time required to give notice of such election. *Beal v. Ray* (1861), 17 Ind. 554; *Beal v. Morton* (1862), 18 Ind. 346."

The statute cited in the quotation as Burns § 29-701 may now be found in Burns § 29-4801, *supra*. The court based its decision upon the fact that the auditor, like the coroner, holds an office created by Art. 6, § 2 of the Constitution.

The *Eyears* case followed the interpretation of the Constitution announced in *Enmeier v. Blaize*, 203 Ind. 475, 481, 181 N.E. 1, 3 (1932):

"The spirit of the Constitution is to avoid vacancies in the office of clerk of a circuit court, as well as vacancies in the other offices named in its Art. 6, § 2; and to avoid, as far as possible, the necessity of filling vacancies in office by appointment; and also, to avoid the holding over by an elected officer, after the expiration

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of the term of office, except and until his successor shall have been elected and qualified.”

Following the rule and policy announced in these cases, it would be clear that when a person is appointed to fill a vacancy as coroner, his successor must be elected at the next general election occurring after the vacancy before which there is sufficient time to give notice of said election as required by statute. This conclusion was reached in 1956 O.A.G. 54, No. 13. As pointed out in that opinion, the *Eyears* case follows and is consistent with Indiana precedents in the case of officers whose offices and terms are created by the Constitution.

However, considerable doubt of the continued effectiveness of decisions prior to 1958 concerning the filling of vacancies in offices created by Art. 6, § 2 of the Constitution has been occasioned by three more recent decisions, *State ex rel. Thomas v. Williams*, 238 Ind. 407, 151 N.E. 2d 499 (1958); *Marion County Election Bd. v. O'Brien*, 241 Ind. 36, 169 N.E. 2d 287 (1960); and *Haggerty v. Marion County Election Bd.*, 245 Ind. 565, 201 N.E. 2d 274, 3 Ind. Dec. 739 (1964). The first and last cases concern sheriffs; the 1960 case concerns clerks of circuit courts. The two sheriff cases each resulted in a two to two decision, in the first case affirming a decision that an elected sheriff must replace one appointed. The second case affirmed a decision that an appointed sheriff serves the unexpired term of his predecessor, even past the next general election. The *O'Brien* case held that the General Assembly could allow an appointee to the office of clerk of the circuit court to serve the unexpired term of the person he replaced past the next succeeding general election, even though the office and its term are established by the Constitution. The court simply stated that all the previous cases concerning county officers are inapplicable, and distinguished the *Eyears* case on the grounds that the clerk is a circuit officer rather than a state or county officer.

It seems clear that the Court in the *O'Brien* case did not intend to overrule the cases concerning non-circuit officers, and the sheriff cases each offer a division of the Court rather than a decision. The rule, therefore, remains that a coroner

appointed by the Board of County Commissioners to fill a vacancy serves only until his successor, elected at the next general election for which there is time to give notice of election, is elected and qualified.

II.

LENGTH OF TERM OF ELECTED SUCCESSOR

Your second question asks the length of term of the successor elected to replace a coroner who was appointed to fill a vacancy.

The Constitution, Art. 6, § 2, specifies that the coroner shall continue in office for four (4) years. One so elected to an office the term of which is specified in the Constitution is elected to serve the constitutional term. One of the first interpretations of the 1851 Constitution declared that a constitutional term is mandatory for one elected to fill an office, and he cannot be limited to a shorter term by the Legislature, as 1 R.S. 1852, ch. 115, § 7, Burns § 49-409 attempted to do. *Governor v. Nelson*, 6 Ind. 496 (1855). The statute is unconstitutional insofar as it attempts to limit the term of such an elected successor to the unexpired term of the officer by whom the vacancy was originally created:

“Section 49-409, Burns’ 1933 . . . 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.’

“This statute applies with full force and effect to all offices created by the General Assembly, but it has been held to be unconstitutional and void in so far as it may be thought to apply to offices created, and the terms of which are fixed by our State Constitution. *The Governor v. Nelson* (1885), 6 Ind. 496; *The State ex rel. Hench v. Chapin* (1886), 110 Ind. 272, 277, 11 N.E. 317; *Carson v. State ex rel. Bath* (1896), 145 Ind. 348, 350, 44 N.E. 360.” *Lake County Election Bd. v. State ex rel. Eyears, supra*, 224 Ind. at 468, 68 N.E. 2d at 788.

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In accord, *State ex rel. Custer v. Schortemeier*, 197 Ind. 507, 151 N.E. 407 (1926). This rule was reaffirmed in its application to elected successors in the *O'Brien* case, *supra*.

Therefore, the coroner elected to succeed a coroner appointed to fill a vacancy in that office will have a four (4) year term.