

1948

## Marcellus K. Snow v. Alvin Keddington : Brief of Plaintiff

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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MARCELLUS K. SNOW,

*Plaintiff*

vs.

ALVIN KEDDINGTON, County  
Clerk of Salt Lake County,

*Defendent*

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## Plaintiff's Brief

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CLERK, SUPREME COURT, UTAH

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# In the Supreme Court of the State of Utah

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MARCELLUS K. SNOW,

*Plaintiff*

vs,

ALVIN KEDDINGTON, County

Clerk of Salt Lake County,

*Defendent*

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## Plaintiff's Brief

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This action seeks an interpretation of the effects of the amendment of Section 10 of Article VIII of the State Constitution, which took effect January 1, 1947; and the validity and effect of a part of the legislative act passed March 13, 1947 amending Section 19-13-6 U. C. A. 1943. In brief, the State constitution, from its adoption in 1895 to January 1, 1947, provided in Section 10 of Article VII, as follows:

"A county attorney *shall be elected* by the qualified voters of each county who shall hold his office for a *term of two years.*"

Pursuant to said constitutional provision the legislature provided in the Revised Statutes of 1898 Sections 541 and 545, that among the county officers was a county attorney who should be elected biennially at the general election, and hold office for a term of two years. These statutes were continued in effect until 1947, appearing as Sections 19-13-2 and 19-13-6 U. C. A. 1943. The legislature, in 1945, proposed to amend Section 10 or Article VII of the constitution to read that a county attorney should be *elected* "for a term of *four* years." Such proposed amendment was submitted to voters at the general election in November 1946. It carried, and by its express terms became effective as a part of the constitution January 1, 1947. In the fall of 1946, Edward M. Morrissey, filed a declaration of candidacy for nomination as county attorney of Salt Lake county, was nominated for such office and was elected to such office at the general election in November, 1946, the same election at which the people voted on the above mentioned amendment to the constitution. He assumed the office of county attorney pursuant to law on January 6, 1947. The legislature on March 13, 1947, passed an act amending Section 19-13-6 U. C. A. 1943, to read:

"The *county attorney shall be elected* at the General Election held in *November 1950, and every four years thereafter. Incumbent County attorneys shall hold office*

*until successors are elected and qualified at the General Elections in November 1950"*

The further essential facts are that at the time Edward M. Morrissey was elected county attorney, the constitution and statutes both fixed the term of office at two years, such term, by express provisions of law beginning at noon, January 6, 1947 and ending at noon, January 3, 1949.

The plaintiff in this action, believing and contending that the office of county attorney is therefore open to election this fall, tendered and sought to file with the defendant a declaration of candidacy for the office of County Attorney of Salt Lake County, as required by law to become a candidate for election to that office at the general election in November 1948. Defendant, taking the view that the amendment to the constitution, and the statutory amendment, both set out above, continued the present incumbent in office two years after expiration of the term for which he was elected, refused to accept the declaration of candidacy and file the same. To determine the questions thus presented, this action was filed.

The solution or answers to these questions is found within the following legal propositions:

1. The length or term of an office is fixed by the law in effect at the time of election.

2. Public policy requires that the term of office be fixed before election.

3. The constitutional amendment does not change the existing term of office.

4. The legislative enactment attempting to continue incumbents in office by by-passing the 1948 general election is void.

We explore them in order.

1. THE ESTABLISHED RULE OF LAW IS THAT THE TERM OF OFFICE IS FIXED BY THE LAW IN EFFECT AT THE TIME OF THE ELECTION.

To hold otherwise is to destroy the elective character of public offices. The following cases definitely establish this rule of law:

Wingate vs. Flynn, 249 N. Y. S. 351, 139 Misc. 779, affirmed 250 N. Y. S. 917, 177 N. E. 195.

Board of Elections vs. State Ex Rel Schneider, 128 Ohio St. 273, 191 N. E. 115, 97 A. L. R. 1417.

If the elective character of public offices are to be preserved we must apply the provisions of the constitution which were in effect at the time the election was held. It is generally



accepted that the same rules which govern the construction and interpretation of statutes and written instruments generally apply to and control in the interpretations of written constitutions. *People vs. Fletcher*, 50 N. Y. 288; *Wingate vs. Flynn*, *supra*.

Constitutional provisions, like statutes, act prospectively and never retrospectively. 12 *Corpus Juris* 721; *McGrew vs. Industrial Commission*, 96 Utah 203, 85 Pac. (2nd) 608; *Wingate vs. Flynn*, *supra*. This principle is forcibly stated in *Wingate vs. Flynn* in 249 N. Y. S. at page 355 where the court held: "It is one of the canons of construction, applicable as well to constitutions as to statutes, that provisions prescribing power or giving authority are to be construed, in the absence of clear intention to the contrary, as conferring power or authority to be exercised in respect to the future, and not as to transactions already consummated." Supporting the statement, the *Wingate* case cites *People Ex rel. Eldred vs. Palmer*, 154 N. Y. 133, 139 N. E. 1084, 1085, from which they quote the law, as generally accepted by the courts, as the leading authority on the question: "As stated in *People Ex rel. Eldred vs. Palmer*, it would be contrary to all precedent that the voters should not be advised, before casting their votes, of the duration of the term of officers to be elected."

This clear statement of the law is followed by: "Public policy requires that the term of office of an elective officer shall be fixed before the election. *People Ex rel. Fowler vs. Bull*,

N. Y. 57, 7 Am. Rep. 302.”

In the instant case up to and including election day and six weeks thereafter, both the constitution and the statutes fixed the term of the county attorney at two years. At the time electors cast their ballots, the constitution and statutes limited the county attorney to a two year term of office. By law, therefore, the county attorney elected November 6, 1946, was elected for a term of office of two years and no more. To hold otherwise is to interfere with the right of the people to choose their elective officers. This right is basic and must be preserved. The physical act of casting a ballot means nothing, but the expression of the public will involved in that ballot means everything; and such expression must not be defeated, directly or indirectly. Courts should never construe or permit constitutional amendments to be so applied as to deprive the people of the right to select their officers by ballot. To do so is to destroy our present form of government. The question has been discussed by the courts of the nation on several occasions. In *People Ex rel. Davis vs. Gardner*, 45 N. Y. 812, affirming 59 Barb. 198, and quoted as excellent authority in *Wingate vs. Flynn*, *supra*, the defendant had been elected county judge at the general election held in November. The term of office as then fixed by the constitution was four years. At the same general election, the amended judiciary article of the constitution was ratified by the people fixing the term of this office at six years. The amendment took effect January 1, 1870, at which time the defendant also assumed office for another term pursuant to his election in November 1869. The court, in passing

upon the duration of the defendant's term of office, decided that the defendant held the office until the expiration of four years from the 31st day of December, 1869. In *People Ex rel. Clark vs. Norton*, 59 Barb. 169, the defendant was elected county judge at the general election in November 1869 and on January 1, 1870 took office. The same amendment referred to in *People Ex. rel Davis vs. Gardner* became effective January 1, 1870. The general term held: "That the defendant had been elected for the term of four years AND THAT THE PROVISIONS OF THE CONSTITUTION IN EFFECT AT THE TIME OF THE ELECTION DETERMINED THE LENGTH OF THE DEFENDANT'S TERM RATHER THAN THOSE WHICH WENT INTO EFFECT SIMULTANEOUSLY WITH DEFENDANT'S ASSUMING OFFICE.

On the date of Edward M. Morrissey's election, the voters of Salt Lake County were by constitutional provision to choose a county attorney for a term of two years. This term began January 6, 1947 and ends January 3, 1949. On January 1, 1947, for the first time, the constitution authorized the election by the voters of a county attorney for the term of four years. Prior to that date there was no authority for anyone to name a county attorney for a longer period than two years, and the constitutional amendment provided that the voters "shall *elect* a county attorney for a term of four years." It delegated no authority to the legislature to designate a county attorney for two years, four years, or any other period of time. He is to be elected by the people. Any vacancy in the office is to be filled by the County Commission. The amendment specifically states that

it is to take effect January 1, 1947, and therefore speaks only of elections held on or after that date. The wording is positive and definite, and not susceptible of more than one interpretation.

## 2. PUBLIC POLICY REQUIRES THAT THE TERM OF OFFICE BE FIXED BEFORE ELECTION.

The words of the constitution, at the time of the election of Morrissey, were: "A county attorney shall be elected . . . and shall hold his office for a term of two years." The clear import of this language is that the county attorney is to be chosen by the electors for a period of two years, and not for a period to be subsequently defined by the legislature. As said by the New York Court in *People Ex rel. Eldred vs. Palmer*, 154 New York 133, 47 N. E. 1084, 5, "It would be contrary to all precedent that the electors should not be advised, before casting their votes, of the duration of the term of the officers to be elected. The power attempted to be exercised by the legislature in this case, if sustained, would open the door to obvious abuses. It would practically confer upon the legislature the power to prescribe a long or short term, and lengthen or shorten the official life of an officer, who, by the constitution, is to be elected by the people, upon consideration wholly foreign to their true interests." In *People vs. Bull*, 46 N. Y. 57, 7 Am. Rep. 302, the court earlier considered this question and declared that if the term were not required to be fixed before election, the legislature, by its fiat, and without the concurrence of the

electors, could protect an incumbent in the possession of an office for a term for which he had never been elected. Certainly it is not a rational point to say that the people just elected a man to an office for a term to be thereafter fixed by the legislature, and subject to the changes of politics, social, economic, racial or religious convictions. It is a basic rule of construction and application of constitutions and statutes, of public policy, that unless the power is expressly given, power and authority is to be exercised in respect to the future, and not as to transactions already consummated or rights or privileges already granted. We turn again to the case of *People vs. Palmer*, *supra*, and quote: "It fixes the term at the only period which with certainty was included with the intention of the electors, and prevents any hiatus in the incumbency of county offices. *It enforces the public policy that the term of office of an elected officer shall be fixed before the election.* (Italics added.) It renders fixed and stable the terms of office, and prevents an exercise of legislative power in legislating an incumbent in or out of office upon partisan considerations." This view is most consistent with the principles of our elective system, and the uniform policy upon which the courts have acted. As far as we have been able to find all jurisdictions adhere to this as the rule of public policy. In *People vs. Foley*, N. Y. App., 43 N. E. 171, 73, the court recognized and declared this the public policy when it said: "It may, of course, enlarge the official term of town officers, but such action can operate only upon officers *thereafter* elected. Where the office is to be filled by one authority and the duration of the term is to be determined by another, the declaration of such duration must



go before the filling, so that each authority may have its legitimate exercise. *People vs. Crooks*, 53 N. Y. 648; *People vs. McKinney*, 52 N. Y. 374; *People vs. Bull*, 46 N. Y. 57."

It is common knowledge that the Declaration of Independence is a declaration of principles and policies which are important in our concept of government. Even the charges against King George are criticisms for denial of such principles. Among them is the right of the people to choose their officers—those who govern them. When the constitution was written it sought to incorporate a government founded upon the principles underlying the Declaration. The rights of the people to choose their officers and to vote, the right to a republican form of government, was zealously guarded.

As said by Justice Stephenson of Ohio in *Board of Elections vs. State Ex rel. Schneider*, 128 O. St. 273, 191 N. E. 115, 97 A. L. R. 1417:

"A republican form of government can only be preserved by securing to its electors the right to select their governors by ballot, for terms fixed in advance by the legislature [or constitution] of the state." Again on Page 1426 of the A. L. R. we read:

"We think the idea of our constitution is that the people shall choose a man to fit the established term, and not that the legislature shall establish a term to fit the man who has been chosen."

It seems to be plainly provided by our constitution that elections shall be provided so that before the current term of elective officers expires, the people may select the incumbent for the succeeding term.

The Montana court in *State vs. Levitz*, .... Mont. ...., 146 Pac. 932, declared that the general policy of our government . . . is that elections to office by the people, when it may be conveniently done, is the general rule, and that public officials should only obtain office otherwise when necessary to meet the requirements of public business until the people may act. In the words of the Gettysburg Address, this should be a government "of the *people*, by the *people*, and for the *people*." And in *Wingate, Surrogate, vs. Flynn*, 249 N. Y. S. 351, 139 Misc. 779; aff. 250 N. Y. S. 917; 223 App. Div. 789, 177 N. E. 195, 256 N. Y. 690, on page 355 of 249 N. Y. S. the court, after quoting from the case of *People vs. Palmer*, supra, says: "Public policy requires that the term of an elective officer shall be fixed before the election."

We submit that on the grounds of public policy it must be held that the term of Mr. Morrissey as county attorney expires January 3, 1949; and that the office of County Attorney of Salt Lake County is a public elective office to be voted on at the general election in November, 1948, and the writ of mandate should issue.

### 3. THE CONSTITUTIONAL AMENDMENT DOES NOT CHANGE THE EXISTING TERM OF OFFICE.

It acts only on future elections and future terms of office. It is not retroactive nor retrospective. Since it does not affect the existing term it cannot be held to authorize the legislature so to do.

McGrew vs. Indus. Com., 96 Ut. 191, 85 Pac (2nd) 608.  
 Dodkins vs. Reece, .... Tex ...., 17 S. W. (2nd) 81, 2, 34.  
 Board of Elections vs. Ohio, 128 Ohio St. 273, 191 N. E.  
 115, 97 A. L. R. 1417.

We see no room for doubt that the amendment had and has no effect on the term of office of an incumbent who was elected before the amendment became effective. But should it be contended that the amendment could be construed so as to affect the existing term, we have explored the authorities as to such possible construction.

Where duration or term of office is questioned, duration must be confined to the shortest term.

It is well settled that where the duration or term of office is a question of doubt or uncertainty, the interpretation should be followed which limits the office to the shortest term. Wright vs. Adams, 45 Tex. 134; Dobkins vs. Reece, 17 S. W. (2nd) 81; Chamski vs. Cowan, 288 Mich. 238, 284 N. W. 711, 22 R. C.L. 550; 43 Am. Jur. Paragraph 154. People Ex rel. Palmer, supra; Lowrie vs. Brennan, 283 Mich. 63, 276 N. W. 900.

In the case of Dobkins vs. Reece, supra, the court quotes



with approval the Wright vs. Adams case, *supra*, as follows:

"It is believed, moreover, to be a sound rule of construction, which holds that when the duration or term of office, which is filled by popular election, is a question of doubt or uncertainty; that the interpretation is to be followed which limits it to the shortest time, and returns to the people at the earliest period the power and authority to refill it."

Turning to Article VIII, Section 10 of our constitution which was in effect at the time Edward M. Morrissey was elected, we read:

"A County Attorney shall be elected by the qualified voters of each county who shall hold his office for a term of *two years*." (Italics added.)

The constitution thus created the office of county attorney and limited the term of the county attorney to two years. Certainly, he cannot be elected for two terms at the same election, *a fortiori*. Does the amendment automatically act upon the existing term and extend it two years? It does not so provide. Can it be construed to do so. The question is worthy of consideration requires the application of foregoing rule of law that of two possible modes of construing the constitution that one should be followed which fixes the term to the shortest period. Since there is a possible contention that the constitution is silent as to the effect of the amendment extending the term of office of the County Attorney to four years, as far as the November 6, 1946 election incumbent is concerned, and if weight is given this contention, then the court should apply the general

rule that "Other considerations being equal that construction of a doubtful provision of a statute or a constitution will be followed, which limits the term of office to the shortest time." Thoop's Public Officers, section 308, Mechem's Public Offices and Officers, Sec. 390. State Ex. rel. Birrell vs. Speak, 124 Ohio St. 636, 180 N. E. 264.

It must be conceded that the constitution provides that the county attorney shall be elected for a definite term. There is no provision defining or specifying any immediate effect of this amendment. (IT WOULD BE CONTRARY TO ALL PRECEDENT THAT THE ELECTORS SHOULD NOT BE ADVISED, BEFORE CASTING THEIR VOTES, OF THE DURATION OF THE TERM OF OFFICERS TO BE ELECTED.) State Ex rel. Birrell vs. Speak, supra, People Ex rel. Eldred vs. Palmer, supra. The constitution not having specifically spoken on what effect the amendment was to have on the term of office of the candidate elected prior to its effective date, by implication under the law provided that the minimum, or two year, period should be taken as the duration of the term. To be consistent with the sound principles of the elective system and in keeping with the uniform policy upon which the courts have acted in dealing with analogous conditions, we are required to so hold.

4. THE LEGISLATIVE ENACTMENT (THE 1947 AMENDMENT TO SECTION 19-13-6 U. C. A. 1943) IN SO FAR AS IT ATTEMPTS TO CONTINUE INCUMBENTS

## IN OFFICE BY BY-PASSING THE 1948 GENERAL ELECTION IS VOID:

(a) Because the term was fixed by the constitution. In the first point discussed in this brief we have shown that a term of office is controlled by the constitutional or statutory provisions in force at the time of election, and that both constitution and statute fixed the term of county attorney at two years from January 6, 1947. In addition to the authorities therein cited, we call the attention of the court to a further array of reasons and authorities to show the legislative effort to extend the term of office to be invalid. If the constitution fixes the duration of a term, the legislature may not change the term of office, either to lengthen or shorten it. 46 C. J. 967. *Pinkston vs. Watkins*, 186 Ky. 365, 216 S. W. 852, held such to be the rule even though a constitutional provision authorized the legislature to fix the time when one elected to office should enter on his duties. So too when a constitutional provision is enacted as to an office, the legislature cannot, by adopting a statute purporting to give effect to the constitutional provision, alter the term. *State vs. Young*, 139 La. 102, 68 S. 241. And even when the constitution authorizes the legislature to fix the term, it contemplates the exercise of such authority prior to an election. *People vs. Palmer*, 154 N. Y. 133, 47 N. E. 1084, 85; 46 C. J. 967; *Allison vs. Massey*, 108 Okla. 140, 235 Pac. 192.

A very illuminating case is *State vs. Plasters*, 74 Neb. 652, 105 N. W. 1092, 3 L. R.A. (N.S.) 887, 13 Ann. Cas. 154. That was a case somewhat similar to ours where the legislature

enacted a law to dispense with annual elections and hold general elections only every two years. Such was within the legislative power. But the legislature instead of providing that at the next annual election, the officers should be elected for a two year term, and biennially thereafter, provided that many officers whose terms expired that fall should hold over until the fall of the succeeding year when elections would be for two year terms. Practically the situation here. The Nebraska court in a well-reasoned and documented opinion voided the act. The court said: "The legislature has declared that 'A' who is now holding office, and whose term for which the people elected him will expire in January next, shall hold that office for another year. That is nothing else than providing by legislative enactment who shall be register of deeds in the respective counties from January 1906 to January 1907. This we think the legislature cannot do." Following this case in 13 Ann. Cas. is a NOTE which covers this subject well. It states the rule that even if the legislature has power to create the office, it cannot by an act passed for that purpose extend the term for which the incumbent was elected. Matter of Haase, 88 App. Div. (N. Y.) 242, 85 N. Y. S. 462, aff. 41 Misc. 114, 82 N. Y. S. 982; People vs. McKinney, 52 N. Y. 374; People vs. Foley, 148 N. Y. 677, 43 N. E. 171; People vs. Randall, 151 N. Y. 497, 45 N. E. 841; Matter of Burger, 21 Misc. 370, 47 N. Y. S. 292; State vs. Trewitt, 173 Tenn. 561, 82 So. 480; State vs. Kres, 88 Wis. 135, 59 N. W. 593.

People vs. McKinney, 52 N. Y. 374, overruled People vs. Batchelor, 22 N. Y. 128, which had held the legislature could

extend the term of a town officer.

Where the constitution provides a limit for the term of an office, the legislature cannot extend the term of the incumbent. *State vs. Brewster*, 44 Ohio St. 589, 9 N. E. 849; *Deweese vs. State*, 10 Ind. 343; *State vs. Harvey*, 4 Ohio Cir. Dec. 227, 8 Ohio Cir. Court 599.

In *Sipe vs. People*, 26 Colo. 127, 56 Pac. 571, it appears that after election of a city treasurer in 1897, who under the statute in effect at the time of his election would have held office for a term of one year, the governor approved an act of the legislature passed before the election, which made the term of the city treasurer two years. The court held that an election could not be held in 98 because the election law for it had been repealed and under the constitution the incumbent continued in office only because of the provision for holding over until election of a successor. In *Gammer vs. State*, 163 Ind. 150, 71 N. E. 478, 66 L. R. A. 82, it seems the term of office of County Treasurer as fixed by the constitution was two years. The legislature passed an act providing that as to officers whose term did not begin until January 1, 1903, no successors should be elected until 1906. This act was defended upon the theory that it merely fixed the time of commencement of the term. The court rejected the contention, saying that the power to fix commencement of terms was not intended to confer upon the legislature the power to postpone unnecessarily the election of a successor to an office and thereby create a condition enabling an incumbent to hold office after the expiration of his term.

An enlightning case early referred to in this case calls for further note here. Board of Elections vs. Ex Re Schneider Ohio, 128 Ohio St 273, 191 NE 115, 97 ALR 1417, involved county recorders under facts almost identical with those in this case. The court in an elaborate opinion voided the "term extending" part of the statute.

(b) The legislature was not authorized to prescribe the term of the county attorney. The people have spoken, and by the constitution established the office and fixed the term thereof, the legislature was powerless to legislate with respect thereto. Such is the law laid down in People vs. Bull 46 NY 57, 7 Am. Rtp 302, and the cases cited under topic (a) supra.

(c) We concede the right of the legislature to enact laws setting up machinery for the election of county attorneys, and to make the term conform to the constitutional amendment. There is authority for the claim that within the term fixed by the constitution, the legislature may fix the date of the beginning and the end of the term. But all those cases hold such acts must be done before the election, and cannot affect any officer or his term of office for which election was held before the legislature spoke. Alilson vs. Massey 108 Okla 140, 235 Pac 192; Treadwell vs. Colo Co. 62 Cal 140, 235 Pac 192, People vs. Palmer 154 NY 133, 47 NE 1084. 46 CJ 967.

We think it clear that as far as the statutory act involved, attempts to continue in office without election this year the incumbent county attorneys, the same is null and void.

We desire however as an aid to the court to call attention to a rule recognized by some courts, and to aid the court in an analysis of those cases, and their application of the rule they discuss. We refer to the sometimes stated rule that the legislature, to harmonize terms or elections of county officers, or to unify or eliminate elections when they become so numerous as to burden the public, may make changes in election laws, or change the beginning or ending date of a term, within constitutional limitations, even though it may have the effect of continuing an incumbent in office after the expiration of the term for which he was elected. We have no arguments with such statement nor the reasons upon which it is founded. But this case does not come within that rule as justified or applied by any of the decisions we have been able to find.

In the first place, the statutory enactment skipping the 1948 election and extending the two year term of the incumbent to four years was not made to harmonize or unify the terms of county officers. The statutes as they existed prior to 1947, and as they now exist provide that the election of county officers occurs every two years; some at one geenal election; and the election of other county officers occur in the next general election. Whether the county attorney runs with one group in elections or with the other group in the alternate elections he still runs in a year when there is a general election, at which other county officers are being elected. It has always been and still is the practice that two members of the County Commission and the county attorney are elected in the one election, while in the alternate election the county officers whose duties are



mostly ministerial are elected. Since the county attorney is the legal advisor and director of the county, his county duties are essentially tied up with, and an important part of the policy of making of the county. It seems most fitting, and consistent with our form of county government that he should then be elected at the same election as only the policy making part of the county government is elected; that the policy making body may more likely be harmonious, and approach its problems from familiarity with the public will on the issues that determined the election.

In the second place the act under attack did not unify, simplify, or eliminate any election. It is still necessary to hold its general election every even numbered year in the county for election of county officers.

Again the rule has never been recognized or applied where it would extend the incumbency beyond the first succeeding general election. *Hutchinson vs. Pitts*, 170 Ark. 245, 278 S. W. 639. The cases are reviewed and the rule stated in *Russell vs. State*, 171 Ind. 623, 631, 87 N. E. 13, from which we quote:

“One of two things must necessarily result; either that the Legislature might postpone the commencement of a term to such a term to such a time the commencement of a term would be abridged by the election of a successor, or the commencement of the term to be postponed beyond every second election to such a time as that the expiration of the term, unabridged, would pass a general election, and



thus such a condition arises as that successive Legislatures could pass every second election, and a portion of the time the office be filled by the action of the Legislature, or by appointment, and not by the voters; for example, if appellant's theory is right, that his term began January 1, 1905 and terminated January 1, 1909, when appellee's term would have begun, and extended to January 1913, then what is to prevent the Legislature in 1911 from postponing the commencement of the term of appellee's successor to January, 1914 expiring in 1918, thus passing the general election of 1914, and so on, each alternate term? It will thus be seen that it would put it in the power of the Legislature to ignore every second election, and fill the office a good portion of the time, though an election would intervene every alternate four years, at which an auditor might be elected.

"It then resolves itself into the question whether the Legislature is empowered under the Constitution to fix the time of commencement of the term of office of a county auditor when that result will be to postpone the expiration of the term beyond one or more general elections, and does it 'postpone unnecessarily the election of a successor to the office, and thereby create a condition authorizing the incumbency to hold over after expiration of his term'?

"Whether the voters are entitled to fill an office at any election depends upon the question as to whether the term

of an officer will expire, so that but for such election a vacancy will occur by limitation which is another way of stating the proposition that they are entitled to elect at the election next preceeding the expiration of the term. It is conceded by the appellant that Lang's term expired March 28, 1904: It must follow that appellant's term began with the expiration of his term, or we would not have the anomaly presented by the example put by us by which the Legislature could fill the office, or invoke appointive power, instead of the elective a good part of the time.

"The distinction between the cases cited by appellant — Scott v. State, 151 Ind. 567, 52 N. E. 163; Weaver v. the State, 152 Ind. 479, 53 N. E. 450; Aikman vs. State, 152 Ind. 567, 53 N. E. 836; State ex rel. McMullen vs. Harris, 152 Ind. 699, 52 N. E. 168 — and the case here presented is marked. *In none of those cases* did the fact of the postponement of the commencement of the term postpone its expiration, so that its expiration would be beyond the holding of a general election next preceding the expiration of the term." (Italics added.)

The court in State vs. Galusha, 74 Neb 188, 104 N. W. 197; and in Hensley vs. Plasters, 74 Neb. 652, 105 N. W. 1092, 3 L. R. A. (N.S.) 887, 3 Ann. Cas. 154, cited supra, review the authorities and show they all hold to the same effect. See also 46 C. J. 967. An annotation beginning on page 1437 to

1442 of 97 A. L. R. makes an extensive review of the cases. We commend it to the court.

We recapitulate:

1. The term of office is fixed by the law in effect at the time of election.
2. A person elected, is elected to the office, and for the term of office fixed by the constitution and statutes at time of election, and not for any other term.
3. Public policy requires that the term of office be fixed before election.
4. The constitutional amendment did not change the existing term of office of the county attorney.
5. The legislature was not authorized to prescribe or fix or change the term of office of the county attorney.
6. Any legislative rights to change term of office or tenure therein by changing date of beginning or ending of tenure must be exercised before election.
7. The legislative enactment here involved was not made to harmonize terms of county officers; to unify or

eliminate or simplify elections; it unreasonably prolongs the tenure in office of incumbents, and by carrying them over beyond the next general election amounts to a legislative appointment, and destroys the elective character of the office.

We respectfully submit that the term of office of the incumbent county attorney of Salt Lake County expires January 3, 1949; that the office of county attorney is a public elective office to which the incumbent after January 3, 1949, should be chosen by the electors at the general election in November, 1948; and that the Writ of Mandate prayed for in this action should issue.

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