3830.

COUNTY COMMISSIONERS—TENURE OF OFFICE UNDER SECTION 2395 G. C. (108 O. L. 300)—LONG AND SHORT TERMS—HELD, SECTION CONSTITUTIONAL.

*Upon the facts submitted, the Secretary of State would not be required to withhold commissions of the county commissioners elected at the November, 1922, election, under section 2395 G. C., as amended in 108 O. L., Part 2, Page 300. Upon the authority of State ex rel. Attorney General vs. Brown, 60 O. S. 499, a determination of the constitutionality of section 2395 G. C. in the present instance is unnecessary.*

COLUMBUS, OHIO, December 23, 1922.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department.

The main facts upon which your request is based are stated in the request of counsel for the interested parties quoted in your letter. Those facts, as stated by counsel, show that they represent a number of county commissioners in various counties

> "whose terms of office expired on the 3d Monday of August, 1921, and who were re-elected to their several offices in November, 1920, and pursuant to the provisions of section 2395 G. C., as amended in 108 O. L., Part 2, page 300, thereupon (were) commissioned for the so-called short term commencing on the third Monday of September, 1921, and ending on the first Monday of January, 1923 *** in raising and securing a determination as to the constitutionality of the law just referred to."

Section 2395 is as follows:

> "The board of county commissioners shall consist of three persons who shall be elected as follows: In the year 1920 three county commissioners shall be elected in each county. The two persons who receive the greatest number of votes shall hold their office from the third Monday of September, 1921 until the first Monday of January, 1925. The third one elected in 1920 shall hold office from the third Monday of September, 1921, to the first Monday of January, 1923. In November, 1922, and quadrennially thereafter, one commissioner shall be elected to take office on the first Monday of January following. In November 1924, and quadrennially thereafter two commissioners shall be elected to take office on the first Monday of January following. Thereafter such officers shall hold office for the term of four years and until their successors are elected and qualified."

At this point the features of this section may be noted. Making no reference to or provision for extension of existing terms, it operates entirely *in futuro*. Prior to this amendment the term of county commissioners was two years and all three were elected at the same time. The object of this statute is to change the term from two to four years and to provide against a complete change of personnel in the board by providing for the election of members at different elections.

To accomplish this purpose the act passed in 1919 provided for the election of three commissioners in 1920. The two commissioners receiving the highest number of votes were to have a term of three years and nine months, making their term end on the first Monday of January, 1925. Provision was made for the election of their successors in 1924 and quadrennially thereafter.

The third commissioner was to have a term of one year and nine months ending on the first Monday in January, 1923, with provision for the election of his successor in November, 1922, and quadrennially thereafter, for a term of four years. Every two years one or two commissioners are to be thereafter elected so that in November, 1924, two commissioners are to be elected for four years and in 1926 one commissioner for a like term. The opinion of counsel for these county commissioners that this law is unconstitutional is based upon these two propositions:

> "First: The General Assembly of Ohio was without constitutional authority to enact a law limiting the term of office of a county commissioner to less than two years or to provide a term for such office for other than an even number of years.
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> "Second: The General Assembly was without authority to enact a law wherein the tenure of office of a county commissioner depends upon the number of votes received by a candidate for such office and wherein the electors are not informed as to the particular office to which each candidate seeks to be elected."

There counsel point out that:

> "If the election under said law held in November, 1920, was invalid, it of necessity follows that the election under the same law held in November, 1922, was also invalid, because there is no means provided by the law for determining which member of any existing board of county commissioners should be succeeded by the successful candidate at such last election."
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> "On behalf of our clients we respectfully request that you decline to countersign or issue a commission to office to any person claiming his election in November, 1922, to the office of member of the board of county commissioners of any county of Ohio."

This quotation, with the further fact that these commissioners claim they are entitled to hold their respective offices until their successors are legally elected and qualified, is sufficient to show the question presented.

The constitutionality of section 2395 is challenged. The rules by which it must be judged are found in sections 1 and 2 of Article 17 of the Constitution. Section 1 is as follows:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the old numbered years."

Section 2, so far as pertinent, is as follows:

"The term of office of all elective county *** officers shall be such even number of years not exceeding four (4) years as may be so prescribed.

And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of *section* 1 of this article."

The object of section 1 was to separate state and county elections from other elections, such as municipal and township elections, by providing for the occurrence of the former in even numbered years and for the latter in odd or uneven numbered years. The object of section 2 was to make it possible for the terms of county officers to conform to the requirements of section 1 and to increase the three year maximum limitation which was prescribed in section 2, Article 10. Sections 1 and 2 of Article 17 were adopted in 1905 and impliedly repeal that part of section 2, Article 10, which relates to the maximum term of county officers.

The constitutional requirement as to county terms is that they are to be of even numbered years not to exceed four, which means that the terms must be either two or four year terms. The effect of this is the same as if the constitution had definitely provided that the terms should be not less than two years and not more than four years, whereas under section 2, Article 10, the only limitation was that the term should not exceed three years. In view of this could the legislature legally create a county term for one year and nine months, or for three years and nine months?

Old section 2, Article 10, only contained a maximum limitation. It also contained no provision for extending existing terms. It was well settled, however, under that section, that the legislature was without power to provide for an extended interval term for an incumbent of a county office between the day of the expiration of his term under a former statute and the beginning of the term of one elected to succeed him, which would make the old term of office of the former exceed the constitutional limitation. See *State ex rel.* vs. *Brewster,* 44 O. S., 589, and *State ex rel.* vs. *Heffner,* 59 O. S., 368. The first syllabus in the Brewster case definitely states the general rule:

"Where the term of an office is fixed and limited by the constitution, there is no power in the General Assembly to extend the term or tenure of such office beyond the time so limited."

In the Heffner case the Brewster case was followed and at page 399 Shauck, J., speaking for the court, said:

"The mandatory provision that the General Assembly shall provide by law for the election of county officers, is a clear denial of its power to provide for their appointment, and the requirement that such officers shall be elected on the day named negatives the view that they may be appointed by any authority."

In *State ex rel.* vs. *Hall,* 67 O. S., 303, 305, this rule was again affirmed, the court saying:

"Within the requirements of the constitution, county officers are to be elected by the electors of the state, and the General Assembly is without power to create an interval between the official terms of persons elected to such office. These propositions are sufficiently established by State ex rel. Heffner, 59 O. S., 368; State vs. Beal, 60 O. S., 208."

These cases quite firmly established the proposition that the legislature cannot provide for the appointment of county officers and cannot provide terms for such officers for a longer period than that fixed in the constitution itself. These cases were decided under section 10, Article 2, and before the adoption of sections 1 and 2 of Article 17. The Supreme Court has held that the legislature may not provide a term beyond the maximum fixed by the constitution. Is there any distinction in this respect between a maximum limitation and a minimum limitation? There would be no doubt that as to permanent terms it is beyond the power of the legislature to provide a term for less than the minimum of two years. Just how strictly the legislature would be held to the letter as to temporary terms during a transition period is not entirely clear. There is something in State vs. Mulhern, 74 O. S., 363, 373 that justifies this doubt. Concerning the power to extend terms to offset the change in section 1, Article 17, the court said:

> "It is apparent that the general assembly was undertaking to provide for an emergency. It had been given by the recent constitutional amendment what had been denied to it before, the power to extend existing terms, where necessary, *and possibly to the extent of exceeding, in a case of overweaning necessity, the constitutional limit.*"

Whether or not the legislature in fixing a temporary term of three years and nine months during the transition from two to four year terms and to prevent such a change of personnel violated this section in fixing a term of less than four even years is not quite so clear. The long term is within the maximum limit, but being a term of uneven years plus nine months, is not strictly speaking a term of even numbered years. Whether or not an election under this statute, where the electors vote for three candidates not having equal terms, but with no designation as to the respective terms of each, and under which the commissioner receiving the least votes takes the short term, is an election within the meaning of section 2 of Article 10, is also open to question.

The constitutionality of this statute thus tentatively considered, for reasons hereinafter apparent, need not be determined here. Because independent of that question, other considerations are believed to be controlling. Let us assume that the provision in the constitution for the extension of existing terms to cover the transition period is exclusive (Warrant for this is found in State ex rel. vs. Pattison, 73 O. S., 305) and that this provision for a temporary term of one year and nine months, for example, was unconstitutional. It was but a temporary provision and was executed and completely fulfilled when the election in 1922 was held. From and after that date the objectionable features as to length of term and manner of selecting the short term disappeared. From now on the term for all commissioners will be four years, which conforms to the constitution. This expiration of time with acquiescence in and complete fulfillment of the temporary provisions renders that part of the statute no longer operative as to the short term. Of course the three year and nine months term is not ended but those holding that term are not raising the question and they are only incidentally concerned. It is quite clearly settled that the courts will not pass upon the mere abstract question of unconstitutionality where no private right or public duty is involved. This statute in its permanent provisions, which are now, or soon will be, in full force and effect, so far as the short term is concerned, is quite consistent with the constitution. These commissioners contend that these temporary provisions being unconstitutional, the whole act is unconstitutional and that both the election of 1922 and in 1920 were of

no effect. Whether or not the temporary provisions if challenged in time would have been sustained or not, it is rather late to question now.

As a preface to this part of the discussion, it may be safely said that the courts in disposing of a case arising out of these facts would be controlled largely by consideration of sound public policy rather than the purely private rights or interests of a person claiming to hold an office. The court, as it did in the case of State vs. Mulhern, supra, would consider that general interest "reaching as it does to every county of the state, and affecting vitally the conduct of each county's business." In this state an officer has no right of property in his office in the sense that his term may not be abolished or abridged under certain limitations as to change of salary, etc. *State* vs. *Hawkins,* 37 O. S., 98. *Opinions of the Attorney General,* 1919, Vol. 1, page 128.

These commissioners could have raised the question during their first term which began in 1919 and ended in 1921. Instead of that they submitted their candidacy in 1920 for re-election under section 2395, as amended. Another opportunity for raising the question was presented at the 1922 election. Instead of that, and virtually waiving their right to complain, they were elected in 1920 under the amendment and have since held, filled and enjoyed the term for which they were elected.

The case of State ex rel. Attorney General vs. Brown, 60 O. S., 499, 510, is very similar in principle. In that case the law provided for the appointment of county commissioners to fill vacancies instead of the constitutional method of election. Such a provision was admittedly unconstitutional. See syllabus. Such method of appointment for the years 1895, 1896 and 1897 was not challenged and no action was brought to test the validity of the statute or to oust any one from office so appointed until all of such illegally filled vacancies had expired. At the time the act was challenged the transition period growing out of a change of terms in that case had ended and the offices had been filled by the constitutional method of election. In the present case, as previously pointed out, the temporary provisions as to the short term in section 2395 have been practically fulfilled and when those elected in 1922 begin their terms, the permanent provisions of the act will be in full force and effect with no constitutional objection thereto.

In the Brown case the court, after reviewing similar circumstances in that case, held that:

> "Had the question been properly made before these illegal vacancies and appointments had expired, there would have been some substance to the claim, something to act upon, somebody to oust from office. That has now all gone by, and the illegality growing out of the vacancies caused by this change of the statute no longer exists, *and the invalidity of the statutes should not be construed to extend beyond the illegality which caused it.* The illegal vacancies caused the invalidity of the statute while these vacancies existed, but the illegal vacancies have expired, they no longer operate to invalidate the statute."

The court further concluded that:

> "Sound policy requires that the statute shall now stand and operate the same as if no such illegal vacancies had resulted therefrom. Advantage must be taken of such a statute while the illegality is alive and doing harm and not after it is dead and wtihout operation to harm any one."

Without further quotation from this case, it may be said that while the situation there is not in all respects identical to the present case, inasmuch as those elected in 1922 have not yet taken their office, yet the facts are similar and the principle applies to the present case, and it is believed would strongly influence the court's disposition of a case growing out of these facts.

The administrative officers are justified in disregarding a law on the ground of unconstitutionality only where such course is based on soundest public policy where the propriety of such a course is quite clear and then only in unavoidable cases. In the judgment of this department reason and authority would not justify withholding these commissions.

Respectfully,
JOHN G. PRICE,
*Attorney-General.*

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3831.

APPROVAL, BONDS OF WADSWORTH TOWNSHIP RURAL SCHOOL DISTRICT, MEDINA COUNTY, $90,000, FOR ERECTION OF SCHOOL HOUSE.

COLUMBUS, OHIO, December 26, 1922.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

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3832.

STATUS, ABSTRACT OF TITLE, 60 ACRES OF LAND IN UNION TOWNSHIP, SCIOTO COUNTY, SURVEYS NUMBERS 15830 AND 15836 OF VIRGINIA MILITARY LANDS.

COLUMBUS, OHIO, December 28, 1922.

HON. L. J. TABER, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted an abstract certified by Josèph W. Mitchell, Abstracter, June 3, 1922, and inquired as to the status of the title of 60 acres of land in Union Township, Scioto County, in Surveys Numbers 15830 and 15836 of Virginia Military Lands, as disclosed by said abstract. The said premises are more fully described in said abstract and said deed enclosed herewith, to which reference is made for a complete description.

In an examination of this title it has been found that the title is in the name of James S. Thomas. However, it further appears that this title depends princi-