905.

APPROVAL, NOTES OF WAYNE TOWNSHIP RURAL SCHOOL DISTRICT, BELMONT COUNTY, OHIO—$2,763.00.

COLUMBUS, OHIO, June 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

906.

APPROVAL, NOTES OF HENRIETTA RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO—$1,160.00.

COLUMBUS, OHIO, June 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

907.

APPROVAL, NOTES OF SHAWNEE RURAL SCHOOL DISTRICT, ALLEN COUNTY, OHIO—$8,500.00.

COLUMBUS, OHIO, June 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

908.

APPROVAL, NOTES OF AMHERST VILLAGE SCHOOL DISTRICT, LORAIN COUNTY, OHIO—$7,000.00.

COLUMBUS, OHIO, June 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

909.

GENERAL ASSEMBLY—WITHOUT CONSTITUTIONAL AUTHORITY TO EXTEND TERM OF OFFICE OF INCUMBENTS OF ELECTIVE COUNTY OFFICES FROM TWO TO FOUR YEARS.

SYLLABUS:

The General Assembly is without constitutional power to extend the term of office of incumbents of elective county offices from two to four years.

COLUMBUS, OHIO, June 1, 1933.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of May thirty-first reads as follows:

> "Would it be possible for you to render your opinion before Saturday of this week, upon the following question:
>
> Has the General Assembly constitutional power to extend the term of office of present incumbents of elective county offices from two to four years?
>
> The question is pertinent in connection with legislation before me and the last day for my official action is Saturday."

Section 2 of Article XVII of the Constitution, provides inter alia:

> "The term of office of justices of the peace shall be such even number of years not exceeding four (4) years, as may be prescribed by the general assembly. The term of office of the members of the board of public works shall be such even number of years not exceeding six (6) years as may be so prescribed; and the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) 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."

Section 1 of Article XVII of the Constitution referred to in the foregoing portion of section 2 of this article provides that elections for county officers shall be held in November in the even numbered years.

It is first necessary to determine the extent of the power granted by Section 2, Articl XVII, supra, to the legislature to extend the term of incumbents holding elective offices. This grant of power to so extend existing terms has been consistently held to refer only to those terms in existence at the time of the adoption of these constitutional provisions, to wit, November 7, 1905.

In the case of *State* vs. *Pattison,* 73 O. S. 305, decided February 2, 1906, the third branch of the syllabus is as follows:

> "Said amendment is not retroactive. Terms of office existing at and before the adoption of the amendment are not restricted or abolished thereby; but existing terms of office may be extended by the general assembly so as to effect the purpose of section 1 of the amendment. The phrase 'existing terms of office' means the terms of office as defined in the constitution and acts of the general assembly as they existed at the time of the proposal of the amendment and of its adoption."

In the opinion of the court, after referring to the provision of Section 2, Article XVII, empowering the General Assembly to extend existing terms of office as to effect the purpose of Section 1 of that article, the court said at pp. 328 and 329:

> "The phrase 'existing terms of office' means the terms of office as defined in the constitution and the acts of the general assembly as

existing at the time of the proposal and adoption of the amendment. It could not refer only to the terms of those actually holding office at the time of the adoption of the amendment. Those were provided for by section 3 of the amendment. Nor could it apply to such as might be elected in accordance with section 1 of the amendment; for as to such officers the provisions of section 2 of the amendment were clearly intended to be self-executing; that is, when biennial elections shall be had, as provided in section 1, the provisions of section 2 will work out in harmony with section 1. It is not apparent that any necessity would ever arise for the extension of terms of office provided for in the amendment and therefore no power is conferred on the general assembly to extend such terms. The word 'existing' is referable only to the time of the adoption of the amendment. Hence we reach the conclusion that the general assembly is not empowered to extend terms defined by or created under the amendment which is now designated as article 17 of the constitution; but that such power is confined to such officers as were already elected at the time when the amendment became effective."

This principle as to the temporary effect of the authority contained in Article XVII, Section 2, to extend existing terms has been consistently adhered to by the Supreme Court. In *State* vs. *Metcalfe,* 80 O. S. 244, 260, the court said:

"It is especially noted that two of the features of article XVII are manifestly temporary only in operation; that in respect to the power of the general assembly to extend terms of office, and that which provides that elective officers holding office when the amendment is adopted shall continue to hold until their successors are elected and qualified; * * *."

Again, in *State, ex rel.* vs. *Cox,* 90 O. S. 219, 227, after referring to the clause of Section 2, Article XVII of the Constitution here under consideration, it is said:

"This was a temporary provision, and had reference to terms of officers elected at the time Article XVII became effective. It was not intended as a permanent provision of the constitution applicable to officers to be chosen after its adoption. This was the view of the matter taken by Judge Spear in *The State, ex rel.,* vs. *Metcalfe,* 80 Ohio St., 244, where he refers to this feature of Article XVII as manifestly temporary only in operation; and Judge Davis in *The State, ex rel.,* vs. *Pattison,* 73 Ohio St., 405, says that the power to extend terms as designated in Article XVII is confined to such officers as were already elected at the time when the amendment became effective."

In *State, ex rel.* vs. *Smith,* 107 O. S. 1, 4, 5, the court said:

"It is urged on behalf of the relator that the expression 'existing terms' is broad and comprehensive enough to include the case at bar. With this contention we cannot agree. We hold that it applies only to the terms then existing and not *in futuro.*"

There are no other provisions in the Constitution which authorize the General Assembly to extend the term of an incumbent holding elective office. The fact that the power conferred upon the General Assembly by Section 2, Article XVII was only temporary to effectuate a constitutional amendment, is persuasive in support of the view that the legislature is otherwise without such power. That is to say, the Constitution expressly authorizing the legislature to extend existing terms in a specific instance, leads to the conclusion that otherwise the legislature is without such power. This view is supported by the maxim *expressio unius est exclusio alterius.*

There have been a number of decisions of the Supreme Court with respect to the constitutionality of acts of the General Assembly changing terms of elective offices. There does not, however, appear to have been any decision with respect to the exact question which you present, that is to say, there has been no adjudication in Ohio upon the question of the power of the legislature to expressly extend the term of an elected officer beyond the term for which such officer was elected. A few of the decisions of the Supreme Court which are pertinent to this question should be commented upon.

The first and second branches of the syllabus of *State, ex rel. Kelly* vs. *Thrall,* 59 O. S. 368, are as follows:

> "1. The provisions of the 10th article of the constitution, requiring the general assembly to provide by law for the election of county officers, and that such officers shall be elected on the first Tuesday after the first Monday in November, disable the general assembly to provide by law for an interval between the official terms of a sheriff and one elected to succeed him.
>
> 2. The power conferred upon the general assembly by the 27th section of the second article of the constitution to provide for the filling of vacancies in office, refers to such vacancies as may occur fortuitously. It does not authorize the creation of an interval between the official terms of persons elected to the office of sheriff."

The several cases considered in rendering this decision involved an act of the General Assembly changing the beginning of the terms of sheriff and coroner from the first Monday of January next after their election to the first Monday of September next after their election. The amendment of the law did not expressly provide that the terms of incumbents should be extended. It is pertinent, however, to note that under the first branch of the syllabus of this case the General Assembly is without authority to provide by law for an interval between the expiration of an existing term of a county officer and the beginning of the term of an officer elected to succeed such officer. It would seem to follow that if the legislature may not provide for the appointment of a person to serve during such interval, then the legislature is similarly without authority to provide for the holding over of the incumbent without appointment.

To the same effect in principle is *State, ex rel. Attorney General* vs. *Beal,* 60 O. S. 208, the syllabus of which is as follows:

> "The act of April 19, 1898, 'To amend section 1267 of the Revised Statutes' (93 O. L., 125) postponing the beginning of the official terms of prosecuting attorneys from the first Monday in January to the first Monday in September, and the provision of the first section of the act

of April 26, 1898, (93 O. L., 261) to effect a like postponement as to the office of infirmary director, are void, being in violation of the tenth article of the constitution, which requires that county officers shall be elected, and not within the authority to provide for the filling of vacancies conferred upon the general assembly by the twenty-seventh section of the second article. *(State ex rel.* vs. *Heffner,* 59 Ohio St., 368, followed and approved.)"

In *State, ex rel.* vs. *Hall,* 67 O. S. 303, the first branch of the syllabus reads:

"The act of April 30, 1902 (95 O. L., 332), to amend Section 1240, Revised Statutes, is unconstitutional and wholly void, because by it the general assembly has attempted, (1) to exercise power not possessed by it to defer the commencement of the official terms of persons elected to the office of clerk of the court of common pleas to a date later than that fixed by the law in force when elected, and (2) to provide for vacancies in office which do not occur fortuitously."

This case is authority for the contention that the definite term of an elected officer may not be changed after such officer has been elected. It would seem to follow that if the legislature does not have the power to defer the commencement of the official term of a person elected to office to a date later than that fixed by law in force when he was elected, then the legislature is similarly without power to extend the termination of the term of a person elected to public office to a date later than that fixed by law in force when such person was elected.

The case of *State, ex rel.* vs. *Smith, supra,* should be commented upon. The syllabus is as follows:

"1. Section 2395, General Code, as enacted in 1919, providing for the election of county commissioners, is a valid and constitutional act.

2. That part of the act dealing with the transition from a two-year term to a four-year term, so far as it departs from the literal and full two years or four years, is a compliance with the constitutional provisions so far as reasonable and practicable, and by reason of the fact that it deals only with a temporary interval is not controlled or limited by the literal language of Sections 1 and 2, Article XVII of the Ohio Constitution, which must be so construed as to promote the public service."

In this case, the court considered the constitutionality of an act changing the term of members of the boards of county commissioners. The first election of such officers under the amendment of the law was to be for a term of three years and nine months and one year and nine months, occasioned by a change in the date of the commencement of the term of such officers. It was contended that the amendment of the law violated Sections 1 and 2 of Article XVII of the Constitution in that during this transition period these officers were elected for a term of less than two and four years. The court held that the statute was constitutional, pointing out that in so far as the terms of one year and nine months were concerned, the question at the time of the decision of the case was moot. In the opinion by Judge Wanamaker, at p. 5, the following language is used:

"The legislative right under this grant of power to make the change from two years to four years, or from four years to two years, must be held to include appropriate power to provide for the administration of the county office of commissioner during the interval or interim existing in that office by reason of any such change."

While this language is extremely broad, it must be construed in the light of the question then before the court. The court was there concerned with a prospective law providing for a term of office of less than two and four years. The court was not concerned with a question of the power of the legislature to extend the term of an elected officer beyond that for which such officer was elected. It is therefore my view that this language of the court is not controlling or declarative of the law of Ohio as applicable to the question here under consideration.

There are numerous authorities in other jurisdictions which are pertinent to this question. It is sufficient to say that each case necessarily depends upon the particular constitutional provisions of the state involved. The case of *State, ex rel. Hensley* vs. *Plasters* (Nebr.), 105 N. W. 1092, 3 L. R. A. (N. S.) 887, held as disclosed by the syllabus:

"1. The legislature cannot appoint county officers, nor, by an act solely for that purpose, extend the terms of such officers.

2. Chapter 47, p. 292, of the Laws of 1905 is unconstitutional and void."

The provision in the Nebraska constitution upon which the decision of the court was chiefly predicated was to the effect that elective officers must be elected "at the general election next preceding the time of the termination of their respective terms of office". In a well considered opinion, the court commented upon a decision of the Supreme Court of California, *Christy* vs. *Sacramento County*, 39 Cal. 3, the syllabus of which is as follows:

"But when office has been filled by an election, the legislature may extend the term of the incumbent; provided the whole term, when extended, does not exceed the time limited by the Constitution."

The opinion of the Supreme Court of Nebraska continues in the following language:

"We find no suggestion in their opinion as to what force or meaning should be given to such a constitutional provision. They say: 'The people select the incumbent of the office, but the legislature has the power to define the duration of the term,'—that is, the people by election shall designate the person who shall hold the office, and the legislature shall then provide for how long a time he shall hold. Again they say: 'It cannot be denied that he was elected to the office, and that he would not be the incumbent of it, except for his election. The people have exercised their constitutional right in selecting him for the office,' etc. Such language as this does not satisfy our idea of the meaning and force of our constitutional provision. *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. In the argument it was stated by counsel for the respondent that the inducement to this legislation was not to assist in carrying out the general idea of the more comprehensive biennial law, but the sole object of this legislation was to extend the terms of the various registers of deeds for one year; that is, by an act for that sole purpose the legislature has declared that A., who is now occupying the office of register of deeds, and whose term for which the people elected him will expire in January next, shall hold that office for another year. This is nothing else than providing by legislative enactment who shall be register of deeds in the respective counties of the state from January, 1906, to January, 1907. This we think the legislature cannot do. On the other hand, it is plainly provided by that part of the Constitution above quoted that the legislature shall provide for an election so that, before the current term of elective officers expires, the people may select the incumbent for the succeeding term. The view of the California court makes no distinction between the term of office itself, and the tenure of that office during that term by the incumbent, between the official house and the individual who occupies it. The legislature establishes the office, and the people provide the incumbent. *So that attempted legislation, which has for its sole purpose to determine who shall be the incumbent of the office for another definite period of time, is infringing upon the rights of the people, and is void.*" (Italics the writer's.)

It was held in *State, ex rel. Perry* vs. *Arrington,* 18 Nevada 412, 4 Pac. 735, that the extension of the terms of county treasurers by an act of the legislature beyond the time for which they were elected contravened a constitutional provision for the election of these officers by the people.

There are numerous decisions by the courts of New York which are in accord with the principles followed in the Hensley case, supra. In *People, ex rel. Eldred* vs. *Palmer,* 154 N. Y. 133, 47 N. E. 1084, it was held that where the Constitution provides that the district attorney of a certain county shall be chosen by the electors once in every two or four years as the legislature shall direct, it is incompetent for the legislature to extend to four years the term of an incumbent whose term, in the absence of legislation relative thereto at the time of his election, must be deemed to be two years. See also *People, ex rel. Fowler* vs. *Bull,* 46 N. Y. 57, 7 Am. Rep. 302. This last cited case was followed in *People, ex rel. LeRoy* vs. *Foley,* 148 N. Y. 677, 43 N. E. 171, and in *People, ex rel. Lovett* vs. *Randall,* 151 N. Y. 497, 45 N. E. 841. Also in Re Burger, 21 Misc. 370, 47 N. Y. Supp. 292, it was held that the terms of county coroners could not be extended by the legislature.

Adopting a somewhat middle ground between the principles followed by the Nebraska and New York courts on the one hand and the California courts on the other, is the case of *Jordan* vs. *Bailey,* 37 Minn. 174, 33 N. W. 778. This case held that the legislature had power to postpone the time for an election, thus maintaining the then incumbents in office for longer than their original terms, provided the postponement was not so remote as to raise the presumption of a design to substantially deprive the office of its elective character.

In the above cited Nebraska, Nevada and New York cases, the courts were confronted with a constitutional mandate that the office under consideration be filled by election. The Ohio Constitution contains the same mandate with respect to county officers. Article X, Section 2; *State, ex rel.* vs. *Graves,* 91 O. S. 23, 27.

It is not necessary for the purposes of this opinion to review all the cases in Ohio which might be considered as pertinent to this question. There are some early cases which might be cited as authority for a conclusion other than that which I have already indicated, but these are not in my judgment controlling. The early case of *State, ex rel.* vs. *Howe,* 25 O. S. 588, upheld the legislative power to extend the term of a state officer but the office was appointive and not elective. In *State, ex rel* vs. *Killits,* 8 O. C. C. 30, the Circuit Court of Williams County held as set forth in the syllabus:

> "Under the constitution and laws of this state the term of office of the clerk of court of common pleas continues until his successor is elected and qualified, and this is so even if the time for his successor to qualify and take his office has been extended, as under the act amending sec. 1240, Rev. Stat., passed March 2, 1893."

This case was decided in 1893 before the adoption of Section 2, Article XVII hereinabove discussed, and is not supported by later decisions of the Supreme Court.

The language of the Supreme Court in *State* vs. *Pattison, supra,* with respect to Article XVII, Section 2, is substantially dispositive of the question. It is therein said at p. 329 that "The general assembly is not empowered to extend terms defined by or created under the amendment which is now designated as article 17 of the constitution; but that such power is confined to such officers as were already elected at the time when the amendment became effective." In this case the Supreme Court expressed the same view contained in the Nebraska case of *State, ex rel. Hensley* vs. *Plasters, supra,* that "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." The Ohio Supreme Court at p. 327, referring to the 1905 amendment of the Constitution, expressed this view in the following language:

> "It therefore appears that in legal contemplation *the choosing an officer at an election,* duly proclaimed, *is a choosing for the constitutional or statutory term of the office,* as the case may be."

In view of the foregoing discussion and particularly in view of the fact that in adopting Article XVII, Section 2, of the Constitution, the people have seen fit to grant to the legislature the specific power to extend the terms of office of incumbents which were then in office at the time of the adoption of this section, it is my opinion that the General Assembly is without constitutional power to extend the term of office of present incumbents of elective county offices from two to four years.

Respectfully,
JOHN W. BRICKER,
Attorney General.