tax for "every soldier and sailor in the active service of the United States Army and Navy, * * *.”

An official opinion of the Attorney General of 1949, p. 242, construed Section 45-1210 Burns’ 1940 Replacement as exempting officers and enlisted men of the Indiana National Guard from the payment of poll tax. However, this section of the statute makes no provision for exemption should such officers and enlisted men of the Indiana National Guard be inducted into Federal Service of the Armed Forces of the United States.

It is, therefore, apparent that all persons who are residents of Indiana and who are now serving with the armed forces of the United States are subject to the payment of Indiana poll-tax. Persons who have been discharged or might be discharged, who served in the armed forces of the United States after June 25, 1950, and who are receiving service connected disability compensation; would be eligible for exemption of poll tax.

OFFICIAL OPINION NO. 104

November 29, 1951.

Honorable Henry F. Schricker,
Governor,
State of Indiana,
State Capitol,
Indianapolis, Indiana.

Dear Governor Schricker:

We have your request for an official opinion which presents the following question:

"Should there be a vacancy in the office of Clerk of a Circuit Court by death, resignation or otherwise, who has the authority to fill the vacancy thus created?"

The office of Clerk of the Circuit Court is created by Section 2, Article 6 of the Indiana Constitution, which provides as follows:

"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, and Recorder, shall continue in office four years; and no person shall be eligible to the office of Clerk, Recorder, or Auditor, more than eight years in any period of twelve years. The Treasurer, Sheriff, Coroner, and Surveyor, shall continue in office two years; and no person shall be eligible to the office of Treasurer or Sheriff more than four years in any period of six years.”

Section 49-404 of Burns, 1933, provides:

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

Section 49-405 of Burns, 1933, provides:

“The board of county commissioners shall fill all (other) 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.”

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 appointment shall, without election, serve the full unexpired term of such predecessor.

The question thus is: Is the office of Clerk of the Circuit Court a “circuit” or a “county” office?

“* * * A clerk may be a person who keeps the records of a court, but not necessarily so. He may be the keeper of other records, such as are kept by the recorder, and he also may, and at one time die in
this State, perform the duties of the county auditor. Jones v. Cavins, 4 Ind. 305.

"A county clerk may be the prothonotary of a court, county auditor, and county recorder at once, but these offices are, nevertheless, separate and distinct, though held by one person called clerk. 19 Am. & Eng. Encyc. of Law, 548.

"The words county clerk are not used in our constitution to designate the functionary whose duty it is to keep the records of the courts in the various counties, but that official is designated as the clerk of the circuit court. Const. Ind., Article 6, section 1; R. S. 1894, Section 151.

"The terms county clerk and clerk of the circuit court are often used interchangeably, it is true, but incorrectly so, we think."

It is pointed out in the opinion that a clerk of a court keeps the records of the court, while a county clerk may keep various records and may not keep the records of a court or be a clerk of the court.

In the case of Taylor v. State ex rel. (1906), 168 Ind. 294, the court had before it an Act of 1901 which fixed the time when the terms of certain county officers should begin. The act, both in the title and the body, referred to the "county clerk". The question was whether this applied to the clerk of the circuit court and it was held that it did not. The court said at page 296:

"The office in controversy exists in pursuance of a mandate of the Constitution of the State, and its proper name is 'clerk of the circuit court.' Const., Art. 6, § 2; Bolds v. Woods (1894), 9 Ind. App. 657.

"In the course of legislation many duties have devolved upon this officer, wholly independent of his relation to the court, and in many instances he has been inaccurately styled 'clerk of the county', and 'county clerk.' Correctly speaking no such officer as 'county clerk' is known in the law of this State. The present controversy in no way involves legislation upon collateral subjects in which the clerk of the cir-
The court held "that the date of succession to the office of clerk of the Sullivan Circuit Court was not affected by the statute of 1901."

The clerk of a court is a ministerial officer of the court, having custody of its records and seals. In 10 Am. Jur., Clerks of Court, Section 2, page 942, it is said:

"The clerk of a court of justice, using the term as the title of a particular officer, is a ministerial officer of the court, having the custody of its records and seals, with power to certify to the correctness of transcripts from such records, and possessing authority to perform certain acts of a judicial nature incidental to his ministerial duties. In some jurisdictions the term 'prothonotary' is applied to such an officer. * * *"

The duties of a clerk, as set forth in the above work, at Section 14, are as follows:

"The duties of a clerk of court are, generally speaking, to serve in a ministerial capacity for the court, ordinarily to perform certain judicial or quasi-judicial duties in connection therewith, to act as the custodian of its records, to receive money in his official capacity, but, as a rule, only as authorized by statute, and generally to perform such duties as are enjoined by statute or imposed by the lawful authority of the court. The powers conferred upon clerks of the courts are to be strictly construed, however, and are to be exercised in accordance with the statute conferring them."
In *Ex parte Brown* (1906), 166 Ind. 593 the court said at page 601:

"The clerk of this court is an officer thereof and in the discharge of his duties in the making up and safekeeping of our records he may be considered as an arm thereof. He is charged by law with the duty of entering and recording the proceedings of the court and of safely keeping all the records and papers belonging to his office, and he may, by rule of court, be required to perform such official duties. In fact, in recording and making up the proceedings of the court he may be said to act as its amanuensis, subject to its control. **"**

"** ** While the clerk of this court is a ministerial officer only and the functions which he performs are wholly of that character, still he is a ministerial officer of the judicial department, and it would certainly appear as a logical conclusion, under all the circumstances, that this court is the proper tribunal to which its clerk may apply for advice in matters pertaining to his office of the character of those herein involved."

It thus seems clear that the clerk of the circuit court, provided for by the constitution, is an officer of that court whose duties are to act as a ministerial officer of that court, have custody of its records and generally to perform such duties as may be enjoined upon him by lawful authority of the court and by statute. These are in substance the duties enjoined upon him by statute. Section 49-2710, *et seq.* of Burns, 1933.

The clerk is an officer of the court. In *Buell v. The State* (1880), 72 Ind. 523, 524, it is said:

"Courts take judicial knowledge of the signatures of their officers, and we may well presume that the Porter Circuit Court knew the signature of Rufus P. Wells to be that of its clerk."

In *Hipes v. State* (1880), 73 Ind. 39, at page 40, the court said:

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It is contended by appellant's counsel, that the affidavit upon which the information is based is insufficient because not attested by a seal. The jurat is as follows: 'Subscribed and sworn to before me, this 22nd day of January, 1880. John S. Hedges, Clerk.' We think that we are bound to presume that the affidavit was sworn to before the clerk of the Henry Circuit Court. The court ex officio takes notice of its officers and their signatures, and we must presume that the Henry Circuit Court did take notice that John S. Hedges was its clerk, and that the signature attesting the affidavit was his. Brooster v. The State, 15 Ind. 190; Buell v. The State, 72 Ind. 523."

It being clear that the officer in question is clerk to the circuit court and an officer of that court, we refer to the nature of the circuit court. Section 1 of Article 7 of the Indiana Constitution provides:

"The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other courts as the General Assembly may establish."

Section 9 of Article 7 provides as follows:

"The State shall, from time to time, be divided into judicial circuits; and a Judge for each Circuit shall be elected by the voters thereof. He shall reside within the Circuit, and shall hold his office for the term of six years, if he so long behave well."

Webster defines "circuit" as "A regular or appointed journeying from place to place as in the pursuit of one's calling, as of a judge, or a preacher." "Circuit Court" is defined as "A court which its successively in different places in its circuit."

The circuit court in the days of the constitution was a true circuit court. The circuit consisted of a large number of counties, usually about ten. Each circuit court consisted of one presiding judge and two associate judges. Rev. St. 1938, p. 161. The judges then moved from county to county within the circuit. Such judges were not county officers, but were officers of a judicial circuit. In the case of State ex rel. 317
Howard v. Johnston (1884), 101 Ind. 223, at page 229, the court said:

"Under the Constitution a prosecuting attorney is an officer of a judicial circuit."

In State ex rel. v. Tucker (1874), 46 Ind. 355, at page 359, it was said:

"Judges of the circuit court and prosecuting attorneys are not states, county, or township officers."

This was quoted with approval in State v. Patterson (1913), 181 Ind. 660, 663.

It is thus clear that the judge of the circuit court is not a county officer, but is an officer of a judicial circuit. It is also established that the clerk is an officer of the circuit court. All the clerks within a judicial circuit are officers of that circuit court.

A county officer is defined in the case of State ex rel. Osborn v. Eddington (1934), 208 Ind. 160. In that case the court said at page 165:

"The office of county superintendent of schools is not provided for in the Constitution, nor does the Constitution define county office. Consequently in order to determine whether the county superintendent of schools is a county officer we must accept some definition of county officer and, in the light of such definition, examine his official duties and his official relationship to the county and to the state.

"The Supreme Court of the United States has defined a county officer as follows: 'An officer of the county is one by whom a county performs its usual political functions; its functions of government.' Sheboygan County v. Parker (1865), 70 U. S. 93, 96.

"The county superintendent performs no functions of government for the county of a political or civil character. His powers and duties relate entirely to the functions of school government. The county is not an administrative agency for school government, either as a school corporation or school district. Con-
sequently the powers and duties of a county superintendent of schools can not devolve upon him as an officer of a county; but must devolve upon him as an officer of the public school system, which is a state institution. All of the powers and duties of a county superintendent pertain to the administration of school government. * * *'*

The duties of the clerk of the circuit court, as above pointed out, are for the circuit court. He is a ministerial officer of the judicial department. He performs no functions of government for the county of a political or civil character as such clerk of the court. Even though the Legislature might impose duties upon such clerk in addition to his duties as an officer of the court, they would be in the nature of *ex officio* duties and would not change the character of his office. The authorities make a distinction between a clerk and a clerk of a court. The latter is a prothonotary to the court.

It may be argued that the clerk is a county officer because he is elected "in the county." I do not believe this fact can override the fact that he is an officer of the circuit court. It was contemplated, and the statutes provided at the time of the adoption of the Constitution of 1851, that the judges should hold court in each county. Terms of court were established by counties in the circuit and there was a clerk in each county where the court sat in moving around the circuit.

A scrutiny of the records will reveal an inconsistency in the procedure in making such appointment. In some instances, appointments have been made by the Governor, and in others by the Board of County Commissioners, but it is our opinion that the only conclusion to be reached, would be that where such appointment was made by the County Commissioners and properly certified to and commissioned by the Governor, that it is the exercise of the alternative by the Governor in the permissive language of Section 49-404, which provides that the Governor "may" make such an appointment, rather than "shall". Consequently, a correct determination would be that in these instances, the Governor has not waived his statutory prerogative but merely concurred in a selection submitted to him.
For these reasons and under these authorities, I am of the opinion that the clerk of the circuit court is not a county officer, but is an officer of the circuit court and a circuit officer. The clerk of the circuit court, being a circuit officer, and an officer commissioned by the Governor, (Section 49-201 Burns), any vacancy in that office should be filled by appointment by the Governor under the provisions of Section 49-404 of Burns, 1933, rather than by the board of county commissioners under the provisions of Section 49-405 of Burns, 1933.

OFFICIAL OPINION NO. 105

December 3, 1951.

Honorable Ross Teckemeyer,
Executive Secretary,
Public Employees' Retirement Fund,
707 Board of Trade Building,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of August 21, 1951, has been received requesting an official opinion on the following question:

The County Council of Madison County has informed the Public Employees' Retirement Fund that the Council refuses to allow the retirement fund's claim for Madison County's contribution in return for that county's participation in the fund. "In your official opinion, what steps should be taken by the Executive Secretary and/or the Board of Trustees of the Public Employees' Retirement Fund to cause the Auditor and, if necessary, the Board of County Commissioners to comply with the act and make the necessary remittance?"

In substance, your problem is simply to determine the procedure available to the Public Employees' Retirement Fund to secure payment of Madison County's fair contribution to the fund.