58, Chapter 59, Acts 1919, as amended, which provides as follows:

> "* * * The authority for signing the application for mortgage deduction shall not be delegated, by the owner, to any other person except upon duly executed and recorded power of attorney."

Under the last mentioned section of the Indiana statute it is clear the only person who could file for a mortgage exemption was the owner of the property or some person to whom authority therefor had been delegated by duly executed and recorded power of attorney. Section 6½ of Chapter 2 of the First Special Session of the Indiana General Assembly, 1944, *supra*, merely provided that a mortgage exemption for a member of the armed forces of the United States could be filed by the owner himself, his widow, "or by some relative in his behalf." The statute cannot be construed to be retroactive to the year 1943 and does not relieve the veteran, or some other designated person in his behalf, from filing for such mortgage exemption between March 1st and the first Monday in May, inclusive, of each year. I do not find any provision in the Federal Act regarding the filing of such mortgage exemptions.

In answer to your second question I am, therefore, of the opinion this veteran is not entitled to a mortgage exemption for the year 1943 under the facts stated in your letter, due to the fact he did not file a mortgage exemption between March 1, 1943, and the first Monday of May, 1943, as required by Section 64-210, Burns' 1943 Supplement, *supra*.

OFFICIAL OPINION NO. 5

January 24, 1945.

Hon. Ralph F. Gates, Governor,
State of Indiana,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of January 11, in which you state:

"In connection with the exercise of my powers of appointment of public officers, as Governor of the State of Indiana, I find that considerable confusion has arisen by reason of the various forms of the statutes affecting these offices as they may relate to my constitutional powers as Governor.

"I am therefore requesting that you furnish me an opinion as to whether or not the appointive powers are vested in me with reference to the following officials."

Your letter then gives a list of twenty-nine officials which will be hereinafter specifically mentioned. Your question involves a consideration of several provisions of the Indiana Constitution.

Section 1 of Article 3 provides:

"The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Section 1 of Article 4 provides:

"The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: 'Be it enacted by the General Assembly of the State of Indiana'; and no law shall be enacted, except by bill."

Section 1 of Article 5 provides:

"The executive power of the State shall be vested in a Governor. He shall hold his office during four years, and shall not be eligible more than four years, in any period of eight years."

Section 1 of Article 7 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."

The most recent decision of the Supreme Court of this State on the question of appointive power is the case of Tucker et al. v. State of Indiana (1941), 218 Ind. 614. That case has never been modified or overruled and to the extent that it applies to your questions must be followed.

On page 641 the Court said:

> "The legislative power is vested not in a department, but in the General Assembly; the judicial power is vested not in the judicial department, but in the courts; *and the executive power is vested not in the 'Executive including the Administrative' department, but in one man, one officer, the Governor.* * * *"

On page 649 the Court said:

> "* * * It was generally understood that the grant of executive power carried with it, among other things, the general power of appointment. * * *."

On page 652 the Court said:

> "* * * It is established by the great weight of authority here and elsewhere that the power to appoint officers is in the executive, where it is not merely an incident to the exercise of some other power expressly granted. This court has claimed for itself the right to exercise the executive appointing power in the case of all officers and employees who assist in the performance of judicial functions. It is equally well established by our decisions, and decisions elsewhere, that the General Assembly may exercise the executive power of appointment of officers and employees whose duties are an incident to its legislative functions; and it cannot be seriously doubted that administrative officers in the administrative department of the government or in the judicial department may exercise the executive power of appointing their own deputies and employees whose duties are incidental to the carrying out of the administrative functions of the offices they occupy. * * * But the Constitution has vested in the Governor not certain specific powers, executive or other-

wise, which carry with them incidentally or secondarily the executive power to appoint to office, but *he has been vested with the general executive power of the state which carries with it the general power to appoint to office, not as an incident to some other power, but as a principal power in itself.* Logically, then, the appointive power vested in the Legislature, aside from those particular clearly executive powers which vest in it by certain exceptions, is limited to the *incidental* power of appointing those who assist in carrying out the legislative functions. And the appointive power of the courts is limited to those instances which are incidental to the judicial functions; and the appointive powers of administrative and ministerial officers in any department must be limited to that which is incidental to their principal administrative or ministerial functions. Appointment is construed as including election. Certain powers of appointment by election of state officers were reserved in the people, and discretion was lodged in the Legislature to create other offices not specifically mentioned in the Constitution, and to determine that the officers should be elected by the people. *All of the rest and residue of the appointive power is vested in the Governor by investing him with the general executive power.* * * *"

We next come to a consideration of two additional provisions of the Indiana Constitution. Section 18 of Article 5 provides:

"When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of Judge of any court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified."

Section 1 of Article 15 provides:

"All officers, whose appointment is not otherwise provided for in this Constitution, shall be chosen in such

manner as now is, or hereafter may be, prescribed by law."

Concerning Section 1 of Article 15 the Court in the Tucker case, *supra,* said at page 664:

"* * * The consistent and reasonable construction is that it was intended that the Legislature should continue to select the officers that it was then selecting until such time as it should desire to delegate that duty to that department of the government in which the officers properly function, and in that case that it might delegate the appointing power to the appropriate agency in that department of government, or that it might provide by law that the officer should be elected directly by the people. The same applies to new officers that might be created. If they are in the judicial department it might provide by law that they should be elected by the people or appointed by the appropriate judicial officer, *and if in the executive including the administrative department that they might be elected by the people or appointed by the Governor.* * * *"

On the question of appointive power given by the Legislature to administrative officers or Boards the Court said on page 666 of the opinion:

"* * * *But it must also be seen that those ministerial officers are not officers of the executive department. They are officers in the administrative department, which is included in and made a part of the executive department.* * * *"

On page 667 of the opinion the Court said:

"* * * the general supervision of the greater part of the State's activities in carrying out and executing the laws is involved in the powers of the boards. Among their express powers is the selection of executives who make up the boards and officers at the head of the various agencies which carry on the state's business and affairs, and these executives thus appointed are vested with full power to employ assistants, fix

> salaries, and remove from office at pleasure, a clearly and purely executive function, subject, however, to the approval of the supervising board. That the exercise of such discretion is not ministerial is so clear and well settled as to need no citation of authority.
>
> "* * * *where the authority vested is executive, it cannot be vested in the Governor and others, since executive power may be vested only in the Governor.*"

On page 668 the Court said:

> "* * * It is not intended to convey the impression that a limited executive power, incidental to the management and carrying out of the duties of the offices of these administrative offices, may not be exercised by them. They may properly exercise the executive power to appoint their own deputies, who are state officers, and other assistants and employees, but, as in the case of the officers in the judicial department of the government exercising executive power, *it must be limited to that which is incidental to the constitutional functioning of the office. Not so of the Governor.* If he had not been vested with the general executive power of the State it would still be concluded that, as in the case of the administrative officers, he would have executive power incidental to the duties expressly conferred upon him. But, in addition to any such incidental power, the Governor is vested with the general executive power of the State."

On page 673 the Court said.

> "* * * The creation of the offices is a legislative function. The appointment of officers is an executive function. * * *"

Prior to the "Tucker" case, Section 1 of Article 15, and particularly the phrase, "manner as now is," was before and discussed by the Supreme Court of Indiana in the case of French v. State, *ex rel.* Farley (1895), 141 Ind. 618. The "French" case involved the appointment of prison directors by a board consisting of the Governor, Auditor of State, Treasurer of State, Secretary of State and the Attorney Gen-

eral. The conferring of this appointive power on said board was upheld by the Supreme Court in the "French" case. Concerning the "French" case the Supreme Court in the "Tucker" case said at page 690:

> "* * * In a discussion that was not depended upon as a basis for the result reached in the case, the court seems to have fallen into difficulty in respect to the provisions of Section 18 of Article 5 of the Constitution, which refers to filling vacancies in any office, the appointment of which vests in the General Assembly. After noting that the words 'election' and 'appointment' are used synonymously, it is said that, without having been directed to some provision of the Constitution supplying the office to be filled by the General Assembly, it must be concluded that there are none, and that the words referred to are meaningless and confusing unless it be concluded that they refer to 'officers, whose appointment is not otherwise provided for in this Constitution,' which led to the conclusion that the Legislature might create new offices outside of the legislative department and provide for filling them by the General Assembly. We have referred to numerous cases holding that there were certain officers who were appointed by the General Assembly at the time the Constitution was adopted, and that these were the officers referred to by the expression, 'the appointment to which is vested in the General Assembly.' But the court seems to have overlooked these cases. * * *"

On page 692 the Court further said:

> "* * * It is said that practical construction sustains the view that the General Assembly had the right to appoint the prison officers. But it never before had been put upon that ground. It had always been agreed that prison officers had been appointed by the General Assembly at the time the Constitution was adopted, and that the power to appoint continued there under the 'now is' clause. * * *"

The Court then directed other criticism to the opinion in the "French" case and concluded at page 695:

> "* * * The opinion cannot be considered as authority for anything more than the conclusion that officers, the appointment of whom was expressly vested in the General Assembly by the Constitution, may be appointed by boards consisting of the Governor and state administrative officers. * * *"

The "French" case treated with prison officials of a prison which was established after the adoption of the Constitution of 1851 and might therefore be deemed authority for the proposition that under the "now is," clause of the Constitution the Legislature could appoint or provide for the appointment of officers of institutions created or provided for after 1851 where the same kind of institution was in existence prior to 1851 and its officials had been appointed or elected by the General Assembly. This case, however, must be considered in the light of the "Tucker" opinion which is the last word of the Supreme Court of Indiana. Some of the literal language used in the "Tucker" case above quoted is in conflict with the result in the "French" case but the "French" case was not expressly overruled. However, the language used by the Court in the "Tucker" case in criticism of the "French" case and the principles laid down in the "Tucker" case require that the "French" case be limited as authority to the facts in that case and under the facts of that case the institution created after the adoption of the Constitution was identical in character to the prison in existence prior thereto.

Therefore the only officers who can under the Constitution and the opinion in the "Tucker" case be appointed by the Legislature or in a manner provided by the Legislature, are those who were appointed or elected by the General Assembly prior to the adoption of the Constitution. *As to the offices created since the adoption of said Constitution, the appointive power is in the Governor except officers of those institutions which are identical in kind with those in existence prior to the adoption of the Constitution of* 1851 *and whose officers were appointed by the Legislature prior thereto.*

Applying these rules to the list of officials submitted by you, we find that a number of them fall within the rule laid down in the "Tucker" case that the appointive power is executive and lodged with the Governor and the historical excep-

tion would not apply. These are as follows as numbered in your letter:

1. The Director of the Department of Financial Institutions;
2. The Administrator of the Department of Public Welfare;
3. The State Veterinarian (now Indiana State Veterinarian);
4. State Personnel Director (now Director of State Personnel);
5. Director of the Unemployment Security Division (now Director of Employment Security Division);
6. Director of Department of Conservation;
12. Superintendent of the Indiana Village for Epileptics;
13. Superintendent of the Indiana State Sanitarium;
14. Superintendent of the Southern Indiana Tuberculosis Hospital;
17. Superintendent of the Fort Wayne State School;
18. Superintendent of the Indiana Boys' School;
19. Superintendent of the Indiana Girls' School;
24. Commandant of the Indiana State Soldiers' Home;
25. Superintendent of the Muscatatuck Colony (now Superintendent Muscatatuck State School);
26. Superintendent of the Indiana Soldiers' and Sailors' Children's Home;

There are two of the officials mentioned in your letter which present a more difficult problem; they are:

15. Superintendent of the Indiana State School for the Deaf;
23. Superintendent of the Indiana State Farm.

15. This one presents a more difficult question as to whether it would be within the "now is" clause of Section 1 of Article 15 of the Constitution. The Indiana State School for the Deaf was in existence in 1851. It was first created by the Acts of 1843, Chapter 16, page 36, which Act provided that the Governor, the Treasurer, the Secretary of State, and others be a body corporate under the name of "Trustees of Indiana Asylum for Educating the Deaf and Dumb." Under

Section 11 of that Act the House of Representatives annually chose five trustees. The Act provided that the board might employ teachers; there was nothing in the Act about a superintendent. In 1845, by Chapter 59, page 56, the law was amended so that the Governor appointed annually five trustees. There was no provision for the appointment of a Superintendent. The superintendent is not mentioned until the Revised Statute of 1852, Volume 1, Chapter 26, page 243, which provided for five trustees nominated by the Governor and confirmed by the Senate. The superintendent was appointed by the board of trustees. We thus see that there was no provision for a superintendent at all at the time of the adoption of the Constitution. It was therefore an office created thereafter, and, in my opinion, the general rule as laid down in the "Tucker" case would apply and he would be appointed by the Governor.

23. The Indiana State Farm was established as a correctional institution for male violators of the law, by Chapter 236, Acts of 1913, page 660 (Sec. 13-501 Burns' R. S. 1933). Persons who were subject to commitment to this institution were male persons above the age of commitment to the Indiana Boys' School who had been convicted of the violation of the criminal law of the State of Indiana, the punishment for which consisted of imprisonment in the county jail. Where the imprisonment adjudged was less than sixty days, the court was given the discretion to commit either to the said State Farm or the jail. I have already pointed out that the "Tucker" case requires a strict construction of the historical exception and, in my opinion, the Indiana State Farm is sufficiently different in character that the historical exception of the Indiana State Prison should not be extended to cover said State Farm and therefore the Superintendent of the Indiana State Farm should be appointed by the Governor.

Above in this opinion I pointed out that under the Constitution of Indiana and the opinion in the "Tucker" case, the only officers who could be selected by the Legislature or in a manner provided by it, are those who were appointed or selected by the General Assembly prior to and at the time of the adoption of the Constitution. An examination has been made of the statutes and journals of 1851 and prior for the purpose of ascertaining what officers were elected or appointed

by the General Assembly at the time of the adoption of the 1851 Constitution for the purpose of determining what officers included in the list submitted by you would come within the "now is" provision of Section 1, Article 15 of the Constitution.

7. Superintendent of the General Hospital.

At the time of the adoption of the Constitution, the office of Superintendent of the now Central State Hospital was in existence and was appointed by a board of six trustees who in turn were elected by the General Assembly under Chapter 86, page 83, of the Acts of 1848. This method was continued in the Revised Statutes of 1852, see Volume I, page 322. In 1859 the number of trustees were reduced to two, who were elected by the General Assembly (Acts 1859, Chapt. 11, p. 41). Under Chapter 3 of the Acts of 1879 the Governor appointed two trustees with the consent of the Senate. Under the Acts of 1883, Chapter 14, provision was made for two trustees and a president of the board who acted as a third trustee; all were elected by the General Assembly. In 1897 (Chapt. 103, Acts 1897) the Governor appointed all three trustees. The Acts of 1907, Section 22-101 Burns' 1933, provided for four trustees, the additional trustee to be appointed by the Governor. Under all of these Acts the Superintendent was appointed by the board of trustees. Chapter 38, Acts of 1941, page 115 (Sec. 22-123, *et seq.* Burns' 1933) provided for two trustees to be appointed by the Governor and two by the Lieutenant Governor, except if they were of the same political faith, the Governor appointed all four trustees and the trustees appointed the superintendent. We thus see that prior to 1851 and at the time the Constitution was adopted the Superintendent of Central State Hospital was appointed in the manner provided by the Legislature and was appointed by the board of trustees. It is therefore my opinion that the Superintendent of the Central State Hospital should be appointed by the board of trustees of said hospital.

8. Superintendent of Logansport State Hospital.

9. Superintendent of the Richmond State Hospital.

10. Superintendent of the Evanville State Hospital.

11. Superintendent of the Madison State Hospital.

The above four may be considered together. Chapter 122, page 164, of the Acts of 1883, provided for the location and

erection of three additional hospitals for the insane. The title of this Act was, "An Act providing for the location and erection of additional hospitals for the insane and providing for the management thereof." Under the Acts of 1889 the government of hospitals for the insane was by board of trustees elected by the General Assembly. Under the Acts of 1897 the boards of trustees of the four hospitals for the insane were abolished and thereafter appointed by the Governor, the boards of trustees to appoint superintendents. The 1907 and 1941 Acts have already been referred to under number 7 above. What is now the Madison State Hospital was first created by the Act of 1905, Chapter 29, page 26. Under that Act the Governor appointed the board of trustees in accordance with the Acts of 1897 above referred to, and according to the same laws relating to the insane hospitals and the board of trustees appointed the superintendent. It is therefore my opinion that these four hospitals for the insane were created as merely additional hospitals to the Central State Hospital and that giving the "French" case a strict construction and considering it in the light of the opinion in the "Tucker" case, the present hospitals for the insane mentioned in numbers 7, 8, 9, 10 and 11, would come within the historical exception reserved to the Legislature by Section 1, Article 15 of the Constitution and that the superintendent of each of the above hospitals for the insane should be appointed by the board of trustees and not by the Governor.

16. Superintendent of the Indiana State School for the Blind.

An institute for the education of the blind was in existence in 1851 at the time of the adoption of the Constitution and had been in existence since 1847. However, at the time of the adoption of the Constitution, the superintendent of this institute or school was appointed by the board of trustees of said school, and I am therefore of the opinion that this method of appointment would be preserved by the "now is" clause, and that the superintendent should be appointed by the board of trustees.

20. Superintendent of the Indiana Women's Prison.

21. Warden of the Indiana State Prison.

It was recognized by the "Tucker" case that prison officers had been appointed by the General Assembly at the time the

Constitution was adopted. The Court in that case said, page 692:

> "* * * It had always been agreed that prison officers had been appointed by the General Assembly at the time the Constitution was adopted, and that the power to appoint continued there under the 'now is' clause."

The House Journal for 1845-1846, page 70, shows the election by the General Assembly of a Warden for the State Prison. The State Prison had been in existence prior to 1831. The Women's Prison was first created as a separate institution in 1869, which Act provided for the transfer from the existing prison of the women inmates. It is therefore my opinion that the Superintendent of the Indiana Women's Prison and the Warden of the Indiana State Prison are each appointed in the manner provided by the Legislature, which, under the Act of 1941, is by the board of trustees (Acts 1941, Chapt. 38, p. 115; Sec. 22-128 Burns' 1933, pamphlet part).

22. Superintendent of the Indiana State Reformatory.

This was originally the State Prison at Jeffersonville. As previously shown in this opinion, the warden or chief executive officer of the prison was elected by the General Assembly. In 1897 (Acts 1897, Chapt. 53), the name of the Indiana State Prison South was changed to the "Indiana Reformatory." Thereafter in 1921 provision was made for the removal of this institution and for the sale of the land on which it was located. (Acts 1921, Chapt. 67, p. 145.) This Act was amended at the Special Session of 1921, which amendment is found in the Acts of 1923, Chapter 2, page 5. The institution was re-located near Pendleton, Indiana. It is thus seen that the present Indiana State Reformatory is the original State Prison South, re-named and re-located. It is therefore my opinion that the superintendent of the Indiana State Reformatory should be selected in the manner provided by the Legislature, which is by appointment by the board of trustees.