it could not be claimed that there had been a diversion of the funds from the purpose for which they exist. The very most that could be said would be that the wrong officer was disbursing them.

In conclusion, in view of the fact that the Clerk of the Circuit Court's certificate is so incomplete, I suggest that payment be withheld until it is definitely ascertained that the question as to whether Brown Township continues to exist is still in litigation.

ACCOUNTS, STATE BOARD OF: Clerks not entitled to fees for services rendered in the admission of persons to the Coleman or Robert Long Hospitals.

April 17, 1940.

Mr. E. P. Brennan,
State Examiner, State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Mr. Brennan:

I have your letter of April 10, 1940 in which you request an official opinion on the following questions:

"1. Are Clerks of the Circuit Court entitled to receive a fee of $5.00 for the duties required of them in connection with the admission of persons to the Robert Long or the Coleman Hospitals, which are operated by the Trustees of Indiana University? (See Ch. 6, Acts of 1939.)

"2. Are Clerks of the Circuit Court entitled to receive the $5.00 fee provided in Chapter 39, Acts of 1937, (a) if after a person has been adjudged insane by the court, and before being admitted into the hospital such person dies; (b) if prior to being adjudged insane by the court the person dies or the complaint is withdrawn?"

Your first question refers, of course, to Chapter 6 of the Acts of 1939, called the "Hospitalization of Indigents Act". The Act itself does not provide expressly for a $5.00 fee or,
indeed, any fee payable to the clerk of the circuit court; however, in Section 2 of the Act it is provided that the clerk, upon court order, shall make an application for the admission of persons to the indicated hospitals and that such clerk shall also take any other steps as may be required by the decree of the court. It is further provided in this section that all of the costs of such proceedings for the admission of inmates to hospitals under the control of the Trustees of Indiana University, shall be paid by the county in which the commitment is made if such costs are found to be proper charges by the judge of the committing court. It is clear, therefore, that in terms, Chapter 6, *supra*, does not provide for a $5.00 fee or any fee for the clerk, and accordingly, if the clerk of the circuit court is to receive a fee in connection with his duties under the Act, the authority for the payment of such a fee must flow from a General Fee Act or some other special act covering the precise situation.

Section 1, Chapter 131, Acts of 1927, (Sec. 49-1301 Burns' Indiana Statutes Annotated, 1933), provides in the last paragraph of said section as follows:

“For clerk's service in court actions or court trusts of title or designation different from any mentioned in this act, or on any license or permit not named in this act, the clerk shall tax, charge and collect the same fees as are stated herein for like matters.”

There may be some question as to the exact meaning of the above quoted paragraph, but it is unnecessary to decide its exact meaning since the whole question of the fees received by the clerk of the circuit court was the subject of a recodification by the Legislature when they passed the General Fee Act of 1933. Section 7, Chapter 21, Acts of 1933 (Sec. 49-1007 Burns' Indiana Statutes Annotated, 1933), provided in effect that the salaries received by clerks of the circuit courts should be payment in full for all services as clerks and that all fees now provided by statute to be charged by the clerk, should be the property of the county with the exception of those fees provided by Sec. 49-1302 Burns' Indiana Statutes Annotated 1933 (Ch. 131, Acts of 1927).

The 1933 law just summarized, had as its purpose the removal of the fee basis in payment of the clerks of the circuit
courts. This Section 7 of Chapter 131 of the Acts of 1933 was amended by Section 1, Chapter 39, Acts of 1937 (Sec. 49-1007 Burns' Indiana Statutes Annotated 1933, Supp. of 1939). The only effect of the amendment was to provide for the clerks' duties in connection with the admission of persons into hospitals for the insane, the Fort Wayne State School, the Muscatatuck Colony, the Indiana Village for Epileptics and the James Whitcomb Riley Hospital for Children; that the clerk should receive a fee of $5.00 for each person, which fee was to be the personal property of the clerk.

From the foregoing it will be observed that whatever was the disposition of fees to the clerk as contemplated by the 1927 law, the whole procedure and set up was changed by the enactment of the 1933 statute; furthermore, the 1933 statute remains in full force and effect except as to the 1937 amendment which applied exclusively to hospitals for the insane and certain other specified state institutions. Hospitals under the control of the Trustees of Indiana University, such as Robert Long or Coleman, were not mentioned in the exception contained in the 1937 amendment to the 1933 General Fee Act. I am forced to the conclusion, therefore, that since Chapter 6 of the Acts of 1939 provides for no fees for the clerk and since the other fee Acts in force now, either by terms or inference, do not provide for a fee in such cases, the clerk of the court cannot receive a fee to become his personal property from any duties in connection with the admission of persons to hospitals as contemplated by Chapter 6 of the Acts of 1939. Whether or not it is proper or necessary for the court to assess a fee to the clerk which shall flow to the county in such cases, is not necessary to be decided.

Your second question requires an interpretation of clause (b) in the third sentence of Sec. 49-1007 Burns' Indiana Statutes Annotated as amended by Section 1, Chapter 39 of the Acts of 1937. I set out the pertinent part of said section:

"* * * The fees provided in section two (Sec. 49-1302), Chapter 131 of the Acts of 1927 as the property of the clerk shall, under this act, become and be the property of the county, except that * * * (b) for all duties required in connection with the admission of persons into and discharge from any hospital for the insane, the Fort Wayne state school, the Muscatatuck
colony, the Indiana village for epileptics and the James Whitcomb Riley Hospital for children, the clerk shall be entitled to receive the sum of five dollars ($5.00), for each person, which shall be paid from the county treasury, and which shall be the personal property of the clerk. * * *” (Our italics.)

The two situations outlined in your second question present the same legal question. In other words, if a person has been adjudged insane by the court but dies before admission to the hospital, that situation in the legal sense is practically the same as if the person dies or if the complaint is withdrawn prior to an adjudication of insanity by the court. It is only necessary to observe that in either of the two mentioned cases, there is no actual admission into any of the hospitals or schools named under the Act, nor is there a commitment to such institutions and, obviously, there could be no discharge of such persons from such institutions. While it may be true that there are certain duties which the clerk of the court must discharge preparatory to the actual commitment to or admission in those institutions, the terms of the proviso now under consideration, expressly limit the clerk’s eligibility to receive the $5.00 fee to those duties connected with “the admission of persons into and discharge from any hospital * * *”. I am, therefore, led to the conclusion that a clerk of a circuit court is not entitled to receive the $5.00 fee provided in Chapter 39 of the Acts of 1937 under the two circumstances contained in your request for an opinion.

AUDITOR OF STATE: Evidence required to support a refund of gasoline tax.

April 22, 1940.

Hon. Frank G. Thompson,
Auditor of State,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion as to your authority to make refunds of the gasoline tax in certain cases hereafter described upon the basis that the gasoline upon which the tax has been paid was not used “for propelling