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to the hospital, that situation in the legal sense is practically the same as if the person dies or if the complaint is withdrawn prior to an adjudication of insanity by the court.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
motor vehicles operated in whole or in part upon any of the public highways of the State."

The question applies typically to the case where a truck is used for the transportation of gasoline and where, upon the sale of gasoline to a filling station operator, it is delivered from such truck by pumping it into the filling station tanks, using the motor of the truck to operate said pump.

The amount of gasoline so used is taken from the same tank as the gasoline used for transportation purposes and is measured by a meter through which the gasoline flows when the motor is being used to pump gasoline from the truck to the filling station tanks, but through which the gasoline used for transportation does not flow. The measuring device is so constructed that it operates only when the motor is connected so as to operate the pump, and proof of use for other than transportation purposes is based solely upon the meter readings.

You ask as to whether you may accept these meter readings as the sole evidence of the use of the motor vehicle fuel for a purpose entitling the user to a refund. The taxing section of the statute is Burns' Indiana Statutes Annotated, 1933, Section 47-1501, and provides as follows:

"A license fee of four cents (4c) per gallon, or fraction of a gallon, is hereby imposed on the use of all motor-vehicle fuel used in this state for any purpose whatsoever. The license fee hereby provided for, unless such fee shall have been previously paid, shall be collected by the dealer selling motor-vehicle fuel to purchasers who purchase for purposes other than resale, and shall be paid by the purchaser to the dealer and by such dealer to the auditor of state in the manner and within the time hereinafter specified. Any and all sums of money paid by the purchaser to the dealer, as motor-vehicle fuel license fees, shall be and remain public money, the property of the state of Indiana, and shall be held in trust by such dealer for the sole use and benefit of the state of Indiana until paid to the auditor of state as hereinafter provided."

This section purports to impose a tax upon the use of all motor vehicle fuel used in the state "for any purposes whatsoever."
The refunding section, which is your authority for making a refund in the case described, if there is authority, is Section 47-1505 of the December, 1939, Pocket Supplement of Burns' Indiana Statutes Annotated, 1939. The applicable provisions of this section are as follows:

"Any person who shall buy or use any motor vehicle (fuel) for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor-boats, airplanes or aircraft, or who shall purchase or use any motor vehicle fuel for cleaning or dyeing or for any other commercial use except for propelling motor vehicles operated in whole or in part upon any of the public highways of the state, shall be reimbursed and repaid the amount of such license fee paid by him upon presenting to the auditor of state a statement accompanied by the original invoices showing the payment of such purchases, including the motor vehicle fuel license fees due thereon, the truth of which statement shall be supported by the oath of said person and shall set forth the total amount of such motor vehicle fuel so purchased and used by such consumer, other than for propelling motor vehicles operated or intended to be operated in whole or in part upon any of the public highways of this state, and the auditor of state shall, upon the presentation of such verified statement and such invoices, cause to be repaid, to such consumer, from the fund created by the license fees collected on the use of motor vehicle fuel as herein provided, the amount of the license fees paid by such consumer on motor vehicle fuel used for purposes other than propelling motor vehicles as hereinbefore provided."

I think it is significant that the Legislature in providing for a refund in the case of certain designated commercial uses excepted the use for propelling motor vehicles "operated in whole or in part upon any of the public highways of the State." The significant language, I think, is the language "operated in whole or in part." That is, the Legislature recognized that there would be administrative difficulties if the administrators of the act undertook to arrive at an allocation of the amount of gasoline used for purposes other than
propelling motor vehicles on the highways from that which was not so used, if such gasoline were all in one service tank. Therefore, if the gasoline used for propelling the motor vehicle on the highways came out of the same service tank as that used for other commercial purposes, no attempt at allocation was made and all was treated as taxable and none subject to refund.

I think this is emphasized by the character of the proof which the Legislature required. It will be noted that the statement which is to be filed and which forms the basis of the refund, shall be supported by the oath of the person seeking the refund and accompanied "by the original invoices showing the payment of such purchases." In other words, it was contemplated that when the purchase was made it definitely became a purchase for transportation purposes on the public highways or for some other commercial use as to which a refund could be made.

The statute forms the basis for your authority to make a refund and, I do not think you are authorized to substitute for the proof required by the statute some other evidence of an excepted use.

As to what the Legislature may say when its attention is called to the matters embraced in your letter no one, of course, can tell, but until and unless the Legislature authorizes you to accept the meter readings as proof of an excepted use, or gives you a broader discretion than the present statute gives you, I think you should adhere to the statute and make refunds only in such cases as are expressly provided for therein.

---

TEACHER'S RETIREMENT FUND: Whether teachers electing to come under the 1937 and 1939 amendments may thereafter withdraw such election.

Hon. Robert B. Hougham,  
Executive Secretary,  
State Teachers' Retirement Fund,  
Indianapolis, Indiana.

April 23, 1940.

Dear Sir:

I have before me your letter in which you state, among other things, that a number of requests have been received by