definite term and the term must be less than the original term given less full good time allowed for good behavior.

Since my opinion on the questions submitted affects not only the division of institutions but also the heads of our penal institutions and the clemency commission, I am sending copies of this opinion to the several heads of our institutions and the clemency commission so that we may achieve a uniform procedure with regard to commuting sentences in conformity with this opinion.

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AUDITOR OF STATE: Vehicles entering State bearing extra supply tanks containing in excess of fifteen gallons of fuel violate Indiana Motor Vehicle Fuel Tax Law.

July 31, 1939.

Mr. Howard Etzold,
Director, Motor Vehicle Fuel Division,
Office of the Auditor of State,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge your request for an official opinion involving section 4 of the Indiana Motor Vehicle Fuel Tax Law (section 47-1504 Burns Supplement), and more especially the following provision of that section:

"Provided, That any person, tourist or traveler coming into the State in a motor or commercial vehicle may bring into the State in the tank or container of such vehicle, and for use in the operation thereof, not more than fifteen (15) gallons of motor vehicle fuel at one time, and use the same for the operation of such vehicle without the payment of such license fee thereon: any motor fuel so brought into the State in excess of fifteen (15) gallons shall be subject to the license fee prescribed by this Act."

With regard to the excerpt above set out, you make the following inquiry:

"The question has arisen as to whether this restriction would pertain to extra supply tanks, for added capacity in excess of 15 gallons, as provided above, of
motor vehicle fuel, on large trucks, etc., entering Indiana from other states. Would the stopping of such trucks and an investigation, thereof, to curtail this practice, and assessing penalties in enforcing this provision, infringe upon the Interstate Commerce Law? Does the penalty as provided in the section just preceding the above mentioned provision, apply to this violation?"

Section 47-1504 Burns Supplement, as amended, was originally section 5 of chapter 182 of the Acts of 1923, which was the first gasoline license fee law in Indiana. The 1923 law received an early court test and its constitutionality was upheld in a very extensive opinion by the Supreme Court in the case of Gafill v. Bracken, Auditor, 195 Ind. 551. In the course of this opinion, the court had this to say at page 561:

"It is complained that persons who buy gasoline in Indiana for the operation of automobiles must pay the tax although they may drive at once to the State line and across into another state. But the law does not require such a person to purchase in Indiana more than sufficient gasoline to carry him to the State line. If he prefers, he may reach that point with an empty tank, and replenish his supply in the other state without paying the Indiana tax."

Again in the same case on petition for rehearing, the court said this at page 563:

"We think that counsel for the appellant assign to the decision in this case a broader scope than it really has. And construed as a decision that the particular statute under consideration does not conflict with any provision of the Constitution of the State of Indiana or the Constitution of the United States, we think it correct."

The 1923 law was variously amended in 1931, 1932, 1933 and 1939. The proviso contained in section 5, which is set out earlier in this opinion, was added after the decision to which we refer, was written. But, by the insertion of this proviso, the legislature, instead of adding new penalties and restrictions to the law, in fact, relaxed the operation of the law and granted a qualified exemption to motor vehicles coming into
Indiana from other states. Therefore, there can be no question as to the constitutionality of the proviso in question and, accordingly, both interstate carriers and all others would come under the provisions of the Act, as amended, and in my opinion the provision does not in any way infringe upon the Interstate Commerce Law or the commerce clause of the federal constitution.

Since the excerpt in question is a mere proviso inserted into the Act, it must conform to the usual statutory interpretation of a proviso. It is well established that the office of a proviso in a statute is either to except something from the enacting clause or to qualify or restrain its generality. A proviso cannot be extended by construction but is limited to objects fairly within its terms and must be strictly construed.

In the example contained in your inquiry, the question is put whether or not a large truck carrying extra supply tanks for added capacity in excess of fifteen gallons would come within the restriction. As said above, the proviso must be strictly construed and the exemption given is for “not more than fifteen gallons of motor vehicle fuel at one time.” It is obvious that the bringing into Indiana for operation on our highways of more than fifteen gallons of gasoline at one time is a clear violation of the proviso and the exemption granted by it.

Section 4 (47-1504 Burns Supplement) of the Motor Vehicle Fuel Tax Law, provides that a violation of the Act shall be deemed a misdemeanor and, upon conviction, a penalty by fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment at the Indiana State Farm for a term not to exceed six months, or both, shall be levied. This criminal penalty is operative against all violators of the Act and includes those persons or operators who may incidentally also come within the proviso permitting the bringing into the State of not more than fifteen gallons of gasoline at one time. The proviso is limited to its subject which is concerned only with an exemption as to the amount of fuel and does in no way immunize out of State trucks or other persons from the criminal penalties of the Act.

In summary, my answer and opinion on the question submitted means that the fifteen gallon exemption or proviso is to be strictly interpreted and that persons or operators violating such provision by bringing more than fifteen gallons of un-
taxed gasoline into Indiana for use in operation on our highways are susceptible to the criminal penalties set out in the section as a whole.

TAX COMMISSIONERS, STATE BOARD OF: Intangibles tax, whether imposed on mortgage for which mortgagor is not personally liable.

State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Sirs:

You have asked whether intangibles tax is imposed by the Intangibles Tax Law, Secs. 64-901 et seq. Burns Ind. St. Supp., 1939, upon a mortgage given to secure the payment, at a time certain, to the mortgagee of a certain sum of money, with interest and attorney's fees but for the payment of which the mortgagor is not personally liable. You have furnished a copy of the mortgage involved, which contains the following provisions:

"Upon failure to pay any part of the mortgage debt, principal or interest, as the same shall become due, then all of the mortgage debt shall at the option of the mortgagee, become due and collectible and this mortgage may be foreclosed accordingly. In the event of suit to foreclose said mortgage, the mortgagee shall be entitled to the possession, rents and profits of said real estate from the time of filing such suit, such rents and profits, less costs and expenses, to be applied on the mortgage debt.

"It is understood and agreed that the mortgagor will presently convey said real estate to .......... upon certain trusts to be set forth in the deed of trust. Said trustee and/or his successors in trust shall apply all the net income from said real estate, and all proceeds of sale or of any insurance, thereon, to the reduction of the mortgage debt, shall keep all legal taxes and assessments against said real estate paid as they become due, and shall keep the buildings thereon insured for the benefit of the mortgagee, as his interest may