the expiration of two years from the date of the death of said decedent."

Therefore, when the act provides that if that tax is not paid when due, it clearly means that if such tax is not paid on or before two years after the death of said decedent, then the interest thereon runs from said due date. As a consequence, it is clear that this section, by its express terms, means that any interest which may be due and payable under Burns' 7-2438, *supra*, begins to accrue on the day following the expiration of two years from the date of the death of said decedent.

OFFICIAL OPINION NO. 48

September 26, 1961

Mr. Arthur Campbell, Commissioner
Department of Correction
804 State Office Building
Indianapolis, Indiana

Dear Mr. Campbell:

This is in answer to your letter requesting an Official Opinion as to the correct method of computing maximum release dates for the individual inmates of our penal institutions who have been incarcerated by virtue of the revocation of probation or the revocation of a suspended sentence. The questions you have asked are:

> "(1) When the probation of an individual is revoked and he is incarcerated, does his sentence start from the date of the original imposition of the sentence, or does it instead start from the date of the revocation of probation? In other words, should time spent under the restrictions implicit in probation be deducted from the sentence?
>
> "(2) Are the terms 'probation' and 'suspended sentence' used synonymously? If not, from what point in time should a sentence be computed for an individual whose suspended sentence was revoked?"

In Indiana, the suspension of sentences and the placing on probation of those persons whose sentences have been suspended is governed solely and exclusively by statute.

> Acts of 1907, Ch. 236, Sec. 1, as amended and as found in Burns' (1956 Repl.), Section 9-2209.

The revocation of such probation or of an order suspending such sentence is likewise controlled by statute.

> Acts of 1927, Ch. 210, Secs. 2 and 3, as found in Burns' (1956 Repl.), Sections 9-2210 and 9-2211;
>
> Shideler v. Vrljich (1925), 195 Ind. 563, 145 N. E. 881.

The pertinent parts of the above statutes read as follows:

Section 9-2209:

"The several circuit and criminal courts and the city and municipal courts in the cities of the first and second class of this state, shall have power, in any case where any person shall have been convicted of a felony or misdemeanor, or shall have entered his plea of guilty to a charge of a felony or misdemeanor, upon the entry of judgment of conviction of such person, to suspend such sentence and parole such person, by an order of such court, duly entered of record as a part of the judgment of the court in such case, except the crimes of murder, arson, burglary, rape, treason, kidnapping, and a second conviction for robbery, whenever such court, in the exercise of its judgment and discretion, shall find and determine that such person has committed the offense for which he or she has been convicted under such circumstances as that, in the judgment of such court, such person should not suffer the penalty imposed by the law for such offense if he or she shall thereafter behave well, or whenever such court shall find and determine that by reason of the character of such person, or the facts and circumstances of such case, the interest of society does not demand or require that such person shall suffer the penalty imposed by law if he or she shall thereafter behave well: Provided, That the court may not suspend the execution of sen-

tence after the defendant shall have commenced to serve his sentence of imprisonment. * * *"

Section 9-2210:

"The court placing a defendant on probation shall impose such conditions as it may deem best. The court may subsequently revoke or modify any condition of probation or may change the period of probation. * * *"

Section 9-2211:

"* * * At any time within the maximum period for which the defendant might originally have been committed, but in no case to exceed five [5] years, the court may issue a warrant and cause the defendant to be arrested and brought before the court. If it shall appear that the defendant has violated the terms of his probation or has committed another offense, the court may revoke the probation or the suspension of sentence *and may impose any sentence which might originally have been imposed.*" (Our emphasis)

In 1935 O. A. G., page 301, the then Attorney General considered a factual situation wherein a sentence pronounced on October 24, 1934, was suspended upon the good behavior of the defendant. On December 13, 1934, the order suspending the sentence was revoked as follows:

"* * * it is therefore considered and adjudged by the court that the order suspending the sentence be and same is hereby revoked and set aside and that *the Sheriff of Vanderburgh County is now charged with the due execution of the judgment heretofore entered on said October 24th, 1934.*" (Our emphasis)

The Official Opinion concluded as follows:

"* * * when the Vanderburgh County Court rendered final judgment on the 24th day of October, 1934, and sentenced the defendants for a period of one to ten years, the period of time of sentence began to run on that date, whether or not the operation of the sentence confining them was suspended or imposed. * * *"

A question virtually identical to that herein considered was answered in 1950 O. A. G., pages 239, 242, No. 60, as follows:

> "In answer to your problem then it is my opinion that at any time within the maximum period of the original sentence (but not exceeding five years) the court may revoke the suspension of sentence and impose any sentence which might originally have been imposed and the sentence so imposed should begin to run at the time of its imposition."

The 1950 Opinion went on to state that insofar as it conflicted, the prior 1935 Opinion was expressly overruled. This latter expression perhaps has led to the conclusion that in all cases where a suspended sentence is revoked, the term of imprisonment is to be computed from the date of revocation.

It is my opinion that the 1935 Official Opinion is not in conflict with the 1950 Official Opinion, in that those Opinions were concerned with separate and distinguishable, though related questions.

The 1950 Official Opinion treated the question of revocation of suspended sentences in general terms as contemplated by the statutes hereinbefore quoted, whereas the 1935 Official Opinion treated a specific factual situation in which the revocation of the suspended sentence expressly ordered execution of the judgment theretofore entered. The 1935 Official Opinion did not purport to discuss or consider the imposition of a new sentence as contemplated by the emphasized language in Burns' 9-2211, *supra,* as hereinabove quoted and as considered in the 1950 Official Opinion. The conclusions reached in the two opinions are compatible.

In answer to your first question, therefore, it is my opinion that the date from which the term of imprisonment for one whose suspended sentence has been revoked is to be computed, must necessarily depend upon the precise wording of the order entered subsequent to or at the time of revocation. If such order specifically imposes a new sentence, pursuant to the provisions of Burns' 9-2211, *supra,* even though that new sentence is for the same term of imprisonment as in the original sentence, that new sentence begins to run from the date of its imposition, which may or may not be the same date

as revocation of the suspended sentence or probation, and the time spent under the restrictions implicit in probation is not deducted from the sentence. If the order is otherwise, the term of imprisonment is to be computed from the date of the original sentence.

Your second question inquires whether the terms "probation" and "suspended sentence" are synonymous as used in the statutes. Your question is perhaps prompted by the following language from Burns' 9-2211, *supra:*

> "* * * the court may *revoke the probation or the suspension of sentence* and may impose any sentence which might originally have been imposed." (Our emphasis)

The terms "probation" and "suspended sentence" are not synonymous. "Suspension of sentence" refers to the judicial act of relieving a person from the burden of a penalty imposed by law, whereas "probation" refers to the status of such person and embraces the "during good behavior" condition of such suspension. In practice, however, and in contemplation of the statutory enactments, the two terms are inseparable.

Burns' 9-2209, *supra,* calls for the suspension of a sentence *and* the placing of such person on probation. It has been held that a sentence can be suspended only during good behavior.

> Vickery v. State (1952), 230 Ind. 662, 106 N. E. (2d) 223.

An order suspending the sentence of a person convicted of crime would be meaningless, therefore, unless such person were released. Conversely, a person convicted of a criminal offense could not properly be released on probation unless there had previously been a suspension of his sentence.

In keeping with my answer to your first question, it is my opinion that the date from which a term of imprisonment is to be computed, is unaffected by the distinction between or the inseparability of the terms hereinabove considered. The term of imprisonment to be served following revocation, either of probation or of a suspended sentence, technically is not computed from the time of revocation, but rather from the

time of imposition of a new sentence under Burns' 9-2211, *supra,* which sentence may be imposed as part of the revocation order or subsequent thereto. If no new sentence is imposed, revocation has no bearing upon the computation since the term of imprisonment is computed from the date of the original sentence.

OFFICIAL OPINION NO. 49

September 28, 1961

Mr. Earl M. Utterback
Executive Secretary
Indiana State Teachers' Retirement Fund
506 State Office Building
Indianapolis, Indiana

Dear Mr. Utterback:

This is in reply to your request for an Official Opinion on the following question:

> "Should the Teachers Retirement Fund assume the retirement reserve for years of service credited to the teacher for which no contributions were ever made if this teacher is retiring from a Municipal Unit, covered under Public Employes' Retirement Fund (where she has been employed for the past two years) rather than from a State Unit of Government?"

Your letter of request states that an application for retirement is currently on file for the employee in question in the office of the Public Employes' Retirement Fund. The employee has asked that her teacher's service be used in computing her retirement.

Additional information supplied me shows that the employee in question has been a member of the Public Employes' Retirement Fund continuously since January, 1948, as an employee of a county department of public welfare.

The right of any public employee to a pension or retirement benefit depends entirely upon the terms of the statute under which he claims such benefit. The right in this instance is