of their predecessors and that no election should be held for such offices in 1948.

OFFICIAL OPINION NO. 29

March 19, 1948.

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

Dear Governor:

You have asked my opinion concerning the availability for present expenditure of the Cigarette Tax Account in the General Fund. As a matter of preface I would like to say that this question is so close that the inclination is to resolve every doubt against expenditure or to attempt some form of judicial determination. I consider that, however, an evasion of responsibility.

In the final analysis, no matter how many objections are raised to present expenditure, we are confronted with the phrase in the statute "as the governor may direct." There is no way to explain that phrase except as a clear indication of legislative intent that there be a present expenditure of the fund. Otherwise it is completely meaningless.

In arriving at an opinion I have tried to confine the interpretation to the statute itself and its legislative history. Based on the attached memorandum it is my opinion that there is an appropriation of the Cigarette Tax Account and that that appropriation, although not in a desirable form, is in adequate legal form for present expenditure.

The funds, however, are limited in expenditure to general education, general and mental health and general welfare programs. They must be allotted pursuant to Chapter 279 of the Acts of the General Assembly for 1947 by the Budget Committee upon request of the Governor.

MEMORANDUM

I have made an examination of the authorities upon the question as to whether the proceeds from the cigarette tax

may be used for general education or other purposes on the direction of the Governor without further legislation. This first involves a consideration of whether there is an appropriation of the proceeds of said tax for the reason that Section 3 of Article 10 of the Indiana Constitution provides as follows:

> "No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

The act in question is Chapter 222 of the Acts of 1947. Section 27 of this act is in part as follows:

> "All proceeds derived from the sale of stamps, except as herein otherwise provided, all registration fees and all amounts received from fines or penalties or any other source pursuant to the provisions of this act shall be deposited daily with the treasurer of state and shall not later than the fifth day of each month be quietused by him into a separate account to be known as the Cigarette Tax Account in the General Fund of the State of Indiana.
>
> "The proceeds from the Cigarette Tax hereby imposed shall be for, but not limited to, the following purposes: General education, general and mental health, and other general welfare programs as the governor may direct."

In Official Opinion No. 116, dated November 14, 1945, the question of what constitutes an appropriation is fully discussed and the authorities are collected and considered. Without reviewing the authorities, it is sufficient to point out that to constitute an appropriation the Legislature has set apart or assigned to a particular use a sum or fund of money, a purpose must be specified and a public officer must be authorized to expend the fund. It is not necessary that a definite sum be specified if the amount may be ascertained from circumstances or according to a system or method provided by the Legislature.

Applying these tests to the section in question, we find that while a definite sum is not specified, a method is provided to make the sum certain. That is, the proceeds from the Cigarette Tax imposed by the act shall be deposited with the

Treasurer of State and by him quietused into the "Cigarette Tax Account."

In the early case of Lange, Auditor v. Stover (1862), 19 Ind. 175, the statute made a fund of the amount received from the sale of swamp lands and this was held sufficient.

In Ristine, Auditor v. State (1863), 20 Ind. 328, at page 338, the court said:

> "* * * An appropriation may be made in different modes. It may be made by an act setting apart and specially appropriating the money derived from a particular source of revenue to a particular purpose. Our swamp land act is of this character. * * *"

The section of the act quoted provides "the following purposes: General education, general and mental health, and other general welfare programs as the governor may direct." Thus a purpose is expressed.

We next come to the question of whether a public officer is directed or authorized to expend the fund.

In Barnsdall Refining Corporation v. Welsh (S. Dak. 1936), 269 N. W. 853, the act provided for store license tax and provided that:

> "* * * All money remaining after the payment of administration expenses shall be deposited by the State Treasurer in a fund to be known as the State Relief Fund and which fund shall be expended for the relief of the poor in a manner to be directed by the Governor of this State. * * *"

This was held to be an appropriation.

It has been held in Indiana that an appropriation does not need to be made in a particular form or in express terms. It is sufficient if the intention to make the appropriation is clearly evinced by the language used, or if it is evident that no effect can possibly be given to the provision unless it be construed as making the necessary appropriation.

In the case of Carr, Auditor, *et al.* v. State, *ex rel.* Coetlosquet (1890), 127 Ind. 204, 209, the court said:

> "It does not, however, follow that because no claim can be enforced where there is no appropriation, the

> appropriation must be made in a particular form or in express terms. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statutes upon the subject, or if it is evident that no effect can possibly be given to a statute unless it be construed as making the necessary appropriation. * * *"

In the case of Campbell v. Board of Commissioners (1888), 115 Ind. 591, at page 594, it is said:

> "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific, terms. It may also be a continuing or fixed appropriation, as well as one for a temporary purpose or a limited period.
>
> "The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said generally, that a direction to the proper officer, or officers, to pay money out of the treasury on a given claim, or class of claims, or for a given object, may, by implication, be held to be an appropriation of a sufficient amount of money to make the required payments. Ristine v. State, *ex rel.*, 20 Ind. 328."

The above case was quoted with approval in Henderson v. Board of Commissioners (1891), 129 Ind. 92, 100.

If there be doubt as to the construction of a statutory provision, one may look to the legislative history. Upon the question of intent it is noted upon consideration of the legislative history of Chapter 222 that in the Ways and Means Committee of the House this bill was amended in its entirety and the second paragraph of Section 27 was inserted in the amended draft of the bill. Previously, the first paragraph of Section 27 had read substantially the same. If the Legislature intended that the fund merely accumulate in the Cigarette Tax Account in the General Fund, there was no purpose in adding this paragraph by amendment.

As a matter of statutory construction, effect and meaning must be given to every word and clause, if possible, and a word or clause will be treated as surplusage only when no other possible course is open.

In the case of State *ex rel.* Donahue v. Board of Tr. Firemen's Pension Fund (1937), 211 Ind. 643 at 647, it is said:

> "* * * But it is a cardinal rule of construction that effect and meaning must be given to all the language of an act where it is possible. * * *"

In Garvin, Rec. v. Chadwick Realty Corp. (1937), 212 Ind. 499, at page 506, it is said:

> "Words and phrases must be given their plain, ordinary, and usual meaning, unless a contrary purpose clearly appears, and in seeking the intent of an act effect must be given to every word and clause therein, if it is possible to do so. * * *"

In Fletcher Avenue Savings & Loan Association v. Roberts (1934), 99 Ind. App. 391, at page 396, the court said:

> "In construing statutes we must presume that the legislature intended each word used in the statute to be necessary to express its intention, * * *."

In Lincoln National Bank and Trust Co. v. Nathan (1938), 215 Ind. 178, 187, the court said:

> "* * * A word or a clause in a statute is to be treated as surplusage only when no other possible course is open."

With these rules of construction in mind, we call attention to the language of the paragraph inserted in the Ways and Means Committee that "The proceeds * * * *shall* be for * * * General education, general and mental health, * * * *as the governor may direct.*" (Our emphasis.) When the word "shall" is used in a statute, it is presumed to have been used in its imperative sense.

In Board, etc. v. People's National Bank (1909), 44 Ind. App. 578, at page 581, it is said:

> "* * * The word 'shall' as used in said act gives said board no discretion in the selection of said banks or trust companies. When said word is used in the statute it is presumed to have been used in its imperative sense. 25 Am. and Eng. Ency. Law (2d Ed.), 633; Robertson v. State, *ex rel.* (1887), 109 Ind. 79."

In State, *ex rel.* v. Meeker (1914), 182 Ind. 240, at page 243, it is said:

> "* * * As a general rule of statutory interpretation the presumption is that the word 'shall', as used in any given law, is to be construed in an imperative sense, rather than directory, and this presumption will control unless it appears clearly from the context or from the manifest purpose of the act as a whole that the legislature intended in the particular instance that a different construction should be given to the word. Morrison v. State, *ex rel.* (1914), 181 Ind. 544; Robertson v. State, *ex rel.* (1887), 109 Ind. 79; Board, etc. v. People's Nat. Bank (1909), 44 Ind. App. 578; 25 Am. and Eng. Ency. Law (2d Ed.) 633."

The word "direct" according to Webster's Dictionary means "to utter with a definite aim," "to cause a person or thing to * * * move * * * or follow a course," " to devote," "to order with authority." It is a word that contemplates action.

The language used thus is that the Governor shall devote the proceeds of the tax to the purpose of general education and general and mental health. The language employed evinces an intention that the fund be used for the purposes specified.

Unless this construction be placed on this paragraph, it is meaningless and there was no point or purpose in the paragraph being inserted. It is a well known rule of statutory construction that absurd or meaningless provisions should not be attributed to the Legislature unless no other construction can be followed.

> Lost Creek School Twp. v. York (1939), 215 Ind. 636, 644;
>
> Groher, Treas. v. Colgate-Palmolive-Peet Co. (1931), 94 Ind. App. 234, 246.

In the case of Gafill v. Bracken (1924), 195 Ind. 551, the gasoline tax law authorized the State Auditor to make rebate of gasoline tax on gasoline not used in operating motor vehicles and it was held that such authority and direction was sufficient appropriation of the money necessary to make the rebate payments.

In Williams v. Willett (1936), 102 Ind. App. 193, it is said that the gasoline tax law provided for a distribution of the fund between the state, counties, and cities and provided that the money distributed to the counties "shall constitute a special road fund for each of the respective counties and may be used by the Board of Commissioners of any county in the construction, maintenance, or repair of any public highway within such county." The court held that this constituted a legislative appropriation of these funds for a specific purpose; that the board of commissioners could expend these funds without an appropriation by the county council.

I have not been able to find any case where the language of the statute in question was just like that here in question and for that reason can not pretend to speak with complete assurance. Whenever there is a departure from formal appropriating language there may always be a question which only a court can decide. I recognize that a logical argument may be made to the contrary but, in my opinion, some effect should be given the paragraph in question and the only meaning which will give it effect is to construe it as an appropriation.

In Official Opinion No. 116 of 1945, above referred to, it was held that the language of Chapter 357 of the Acts of 1945 creating the "Postwar Construction Fund" was not sufficient to constitute an appropriation for the reason that no officer was named to expend the fund. In the present act provision is included which seems to me to be to the effect that the Governor may direct or devote the fund to the purposes specified. In other words, the Legislature has, by the amendment made in the Ways and Means Committee, supplied the omission in the language creating the Postwar Construction Fund which prevented it being an appropriation made by law.

There is another difference between this act and the situation in the 1945 Act. At that time there was no public official with authority to contract for such public construction or

improvement. In 1947, by Chapter 279, the Legislature provided for a Director of Public Works with authority to contract for construction of improvements for most state agencies. So far as educational and health purposes are concerned, there are agencies, both state and local, with authority to carry out various educational and health programs.

TITLE

Since I have arrived at the conclusion that the paragraph under discussion meets the constitutional requirements of an appropriation, it is necessary to consider whether it is within the title of the act. The title of Chapter 222 is as follows:

> "AN ACT to provide for the raising of public revenue by imposing a tax upon cigarettes, to provide for the enforcement and administration of said tax, to define certain unlawful acts relating to said tax, to provide penalties for the violation of the provisions of this act, and declaring an emergency."

The case most nearly in point upon the facts is Forrest v. State (1926), 154 Tenn. 13, 285 S.W. 589, where the title of the act was:

> "An Act to impose a special privilege tax upon sales and/or distribution, by gift or sale, in this State of cigars, cigarettes, manufactured tobacco and snuff sold and/or distributed by any person, firm, association, joint stock company, syndicate or corporation in this State, and to provide methods and penalties for its enforcement." (Public Acts 1925, Chapter 2, page 2.)

In addition to levying the tax on the cigarettes, Section 7 of that act contained the following proviso:

> " ** * 'Provided, that, in addition to one-third of the revenue derived from this tax that under the present law will accrue to the general school fund that the further sum of $250,000.00 from the revenue from this tax shall be used as a special fund to create an

> eight months school term in the rural schools of the state to be expended under any state law which may be enacted for securing such school term in the rural schools in the absence of such future legislation under the direction of the commission of education and the Governor.' "

It will be noted that this appropriation (except for the contingency as to the enactment of a specific law for its expenditure) was an appropriation for expenditure at the discretion of the Governor in like manner as is contained in the Indiana Cigarette Tax Law. Objection was made that the title of this Act did not cover this proviso but that the appropriation was a separate matter which had not been expressed in the title. In holding that the appropriation was so closely connected with the title as to be embraced within it, the court said (page 591):

> "* * * it is apparent that the general subject of the statute, expressed in the caption, is the raising of revenue by a tax on tobacco. Provisions for the application of the revenue so raised, or expressions of the legislative purpose in raising such revenue and the disposition thereof, are clearly germane to and directly connected with the general subject of the statute.
>
> "* * *
>
> "We are of the opinion that the raising of revenue by taxes on tobacco and the disposition of that revenue when so raised are things naturally and usually connected in thought and germane to the main thought in the caption. The imposition of a tax on tobacco was certainly made for some purpose, to support some department of the state government, and this thought would naturally and usually occur in connection with an act to raise revenue."

Upon the question of the necessity of reference in the title of a revenue act of an appropriation of the funds raised by the act, it was said in Dahl v. Wright (1943), 65 Idaho 130, 139 Pac. (2d) 754:

> "* * * Since the act does not attempt to appropriate any funds except those which it provides for the

> collection of, it certainly does not go beyond the scope of the title. On the other hand, the disbursement of funds thus created is a concomitant part of the completed legislative act. * * *"

In Kelly v. Finney (1934), 207 Ind. 557, the court had under consideration Chapter 153 of the Acts of 1933 entitled, "An Act concerning the payment of fees by the owners and operators of motor vehicles for hire." Section 6 of this act provided that the fees collected should be credited to the State Highway Fund in the General Fund "to be used by the state highway commission for the construction, maintenance and repair of the state highways, except so much thereof as may be appropriated for the expenses of administering this act." The court held the title to be sufficient.

In Lutz v. Arnold (1935), 208 Ind. 480, the court had under consideration the intangible tax law, being Chapter 81 of the Acts of 1933, which was entitled "An Act concerning taxation and declaring an emergency." Section 22 of that act provided for the payment of the proceeds of the tax into the general fund of the state; the retention in that fund of ten per cent of the net proceeds; and the distribution and payment of the balance to local general funds and school funds. The court held that this title embraces but one subject and that all parts of the act related to the same subject.

These cases illustrate that an appropriation in a revenue law of the funds to be raised by that law is not an uncommon procedure in Indiana. Such a practice can hardly be said, therefore, to be one that would mislead the General Assembly. The fact that the Supreme Court approved the title of the Motor Vehicle Fee Act and the Intangibles Tax Law is of great weight in the present inquiry. There should be no element of surprise in the fact that a revenue bill disposes of the revenue raised. That is the very purpose of a revenue bill.

In Commonwealth v. Powell (1915), 249 Pa. 144, 94 Atl. 746, the court had under consideration the Motor Vehicle Act of that state which appropriated the proceeds of registration and license fees to the State Highway Department. The court held:

> "* * * The general subject of the act is the regulation of motor vehicles, and that subject is clearly ex-

> pressed in the title. * * * The suggestion that provisions in the statute for granting licenses, and for disposing of the money received from the grant, are not germane to each other, seems to us to be without force. Having, as part of the system of regulating the operation of motor vehicles on the state highways, provided for the imposition of registration and license fees, nothing would follow more naturally than a direction as to what disposition should be made of those fees. * * *"

In State v. Ingalls (1913), 18 N. M. 211, 135 Pac. 1177, the court had under consideration an Automobile Licensing Act which contained an appropriation for administration of the act. It was there held:

> "The subject of the act of 1912 was 'to provide for state license on automobiles.' The disposition of the funds resulting from the collection of the license was perhaps even a necessary part of the act, and certainly is not incongruous to the subject expressed in the title."

The opinion of the Attorney General, above referred to (1945 Ind. O.A.G. 499), held that the title of the Alcoholic Beverage Act, to-wit:

> "An Act concerning alcohol, alcoholic beverages, liquids, and substances, providing for the regulation and taxation thereof, abolishing the Alcoholic Beverage Division, the office of Excise Administrator and the Alcoholic Beverage Commission of Indiana, creating the Indiana Alcoholic Beverage Commission, providing for the appointment and terms of its members and a chairman and chairman *pro tempore* thereof, fixing their rights, powers, duties and immunities, transferring appropriations and funds, rights, powers, duties and properties, providing for the issuance, suspension and revocation of permits, providing penalties, repealing all laws in conflict herewith, and declaring an emergency."

was not broad enough to embrace an appropriation of the proceeds of the Postwar Construction Fund arising out of

the proceeds of a tax imposed by an amendment to that Act. It must be noted that that title was not a general title specifying a general subject of legislation, but was a detailed specification of the contents of the Act, the general subject being alcohol, alcoholic beverages, liquids, and substances. The conclusion of that opinion was that the reading of this title would not give notice that large sums of money were to be spent by Indiana or Purdue Universities in the construction of buildings. I do not believe that this conclusion is inconsistent with a conclusion that an act raising revenue may provide for the disposition of the revenue so raised whether such disposition be by appropriation or otherwise. However, I recognize that an argument may be made to the contrary based on the authorities cited in said opinion.

An additional case which is authority on the validity of the title is McCaslin v. State (1873), 44 Ind. 151.

THE PURPOSES AUTHORIZED

The limitation of the use of the funds to education, health and welfare programs allied with education and health, is fairly clear under the well known rule of *ejusdem generis*. It is true that there is language "but not limited to the following purposes." However, the words "but not limited to" may be consistently applied to "other general welfare programs" and I do not believe the language of the appropriation could be interpreted to include expenditures for other purposes. In fact, to give it any other construction would make it an invalid attempt on the part of the Legislature to delegate to the executive the legislative power to determine the purposes of the expenditure and to expand them beyond those specified by the Legislature. That, therefore, the funds from the Cigarette Tax Account may be used only for the purposes set forth in the act, to-wit: general education, general and mental health and general welfare programs dealing with education and health. Consequently, the funds may not be used for highway funds or other purposes not connected with education or general or mental health without further legislation.

CHAPTER 279

I wish to further point out that this fund is also subject to the allotment and other provisions of Chapter 279 of the Acts of 1947.