ject and grade for which contracts will expire at the end of the 1945-46 school year.

To summarize the answers to the foregoing questions I am of the opinion in answer to your first question the State Board of Textbook Commissioners are not authorized to give the thirty (30) day legal notice for a meeting under Section 3 of said statute prior to the promulgation of the Acts of 1945; and in answer to your second question I am of the opinion that after said Acts are duly promulgated said Textbook Commission may give the thirty (30) day notice of a meeting to thereafter be held for the adoption of a multiple list of textbooks for each subject and grade for which contracts will expire at the end of the 1945-1946 school year.

OFFICIAL OPINION NO. 116

November 14, 1945.

Hon. Ralph F. Gates, Governor
State of Indiana,
State House,
Indianapolis 4, Indiana.

My Dear Governor:

This will acknowledge receipt of your letter which is as follows:

> "I am writing you regarding a situation that is very critical.
>
> "The Boards of Trustees of Indiana University, Purdue and our State Teachers College called upon me a couple of days ago regarding proper buildings in order to care for properly the returning veterans. Of course, if we followed the usual procedure we would have a special session of the legislature in order to make these appropriations.
>
> "I am wondering if it is possible the money which has accumulated from the alcoholic beverage tax which is earmarked for institutional use could be used for the building of these structures without the calling of the special session of the legislature."

The question presented by your inquiry is whether the "Postwar Construction Fund," referred to in Sections 13 and 14 in Chapter 357 of the Acts of 1945, can now be used for the erection of buildings and structures in Indiana University, Purdue, and State Teachers College without further action by the Legislature.

Said Section 14 is as follows:

> "There is hereby transferred the sum of Five Hundred Thousand Dollars ($500,000) from the 'Alcoholic Beverage Commission Enforcement and Administrative Fund' now existing by virtue of Section 7 of Chapter 237 of the Acts of 1941, to a fund to be known as the 'Postwar Construction Fund' to be used for postwar construction by the State of Indiana for the use of penal, benevolent, charitable and educational institutions of the state."

Section 13 makes provision for additional excise taxes upon alcoholic beverages and provides in part as follows:

> "The Chairman of the Indiana Alcoholic Beverage Commission shall collect all the additional excise taxes herein levied and imposed, together with all penalties accruing thereon and shall deposit them daily with the Treasurer of State, and shall, not later than the fifth day of the following month, cover same into a fund to be known as the 'Postwar Construction Fund' to be used for postwar construction by the State of Indiana for the use of penal, benevolent, charitable and educational institutions of the state."

Section 3 of Article 10 of the Indiana Constitution provides as follows:

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

Therefore, the first question to be decided is whether the language above quoted from Sections 13 and 14 of the Alcoholic Beverage Law constituted an appropriation made by law. As shown by the above quotations, a "Postwar Con-

struction Fund" is created, and it is provided that said fund is "to be used for postwar construction by the State of Indiana for the use of penal, benevolent, charitable and educational institutions of the state." Said Act does not contain any express provision for its expenditure by any public officer, department, board or agency. There are more than twenty benevolent, charitable and educational institutions of the State of Indiana. No provision is made for the division or distribution of said funds to the said respective institutions, nor is any provision made in said Act empowering any officer or state agency to contract for the construction of buildings at any of said institutions.

1. There are a number of decisions and authorities defining and interpreting the legal meaning of the phrase "an appropriation made by law." The authorities are mostly in accord upon the statement that an appropriation need not be made in any particular form of words. It has been stated that any act of the legislature setting apart or assigning a certain sum or fund of money for a particular purpose, so that the public officers are authorized to draw and expend the money so set apart and no more for the specified purpose only, is an appropriation. It has also been held that statutory provisions for the raising of funds and the apportionment of the funds raised do not constitute an appropriation where no specific authority to expend the funds thus raised and apportioned is given. In 59 Corpus Juris, Section 388, under States, at page 246, it is said:

> "Thus it has been held that statutory provisions for the raising of funds and the apportionment of the funds raised do not constitute an appropriation where no specific authority to expend the funds thus raised and apportioned is given; * * *"

In 42 American Jurisprudence, Section 43, under Public Funds, at page 747, it is said:

> "In specific terms, an 'appropriation' may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. * * *"

In the present Act, there is a fund created and a designation of the purpose for which it is to be used, so the question really narrows itself to whether it is necessary that legislative authority also be given to expend the funds thus apportioned in order to constitute an appropriation made by law of the character that it can be withdrawn from the treasury by the public officers. There are a number of decisions in which it has been held that the creation of a fund for a purpose is not sufficient as an appropriation in the absence of statutory authorization to proper officers to expend or withdraw the money from the treasury. In other words, such decisions, like the statement quoted from Corpus Juris above, make a distinction between the creation of a fund for a purpose and an appropriation. Among such authorities are the following:

In the case of McCord v. Slavin (1904), 143 Cal. 325, the court said at page 331:

> "The provision that the moneys derived from the sale of uncovered lands should be 'paid into the school fund of the county where the land lies' was not an 'appropriation' of these moneys, but was merely a designation of the fund or account, under or in the name of which the treasurer should keep a record of the moneys received by him from this source. An appropriation of public moneys includes a direction or authority for their payment, as well as setting them apart for a particular purpose. Merely directing them to be paid into a particular fund does not effect their appropriation, especially if the moneys of that fund are to be applied for different purposes, as may be directed by law."

In the case of Hunt v. Callaghan (1927), 32 Ariz. 235, the court discussed the difference between an apportionment and an appropriation, and said at page 239:

> "* * * An apportionment is 'the act of dividing and assigning in just proportion.' Webster's New International Dictionary (1925 ed.). While an appropriation is 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the govern-

ment are authorized to use that money, and no more, for that object, and no other.' State v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; Clayton v. Berry, 27 Ark. 129; Stratton v. Green, 45 Cal. 149.

"It will therefore be seen that the difference between an 'apportionment' and an 'appropriation' is that, to make the 'appropriation,' there must be added to the dividing and assigning of funds which constitutes the 'apportionment' the specific authority to spend. This difference is of vital importance in the consideration of this case."

Next taking up the Indiana decisions, we find that one of the earliest cases is Lange, Auditor v. Stover (1862), 19 Ind. 175. In this case the court said at page 176:

"But, we think, the statutes on the subject of swamp lands make an ample *appropriation* of the swamp land fund to the payment of legitimate claims against that fund. 1 G. & M., Stat., p. 597, *et seq.* These statutes not only make a sufficient appropriation of the funds to that purpose, but prohibit their diversion to any other. The Auditor is authorized to draw his warrant, in a proper case, upon these funds, and no other or further appropriation is necessary than is found in the statutes above referred to. It is not disputed that the claim in this case was a legitimate one against the fund in question."

The swamp lands statutes referred to by the court did expressly provide how the money was to be withdrawn and expended and by what officers.

Next are two companion cases decided in 1863. Ristine, Auditor v. State, 20 Ind. 328, and State, *ex rel.* Board of Commissioners, etc. v. Ristine, Auditor, 20 Ind. 345. In the first of the above cases the court said at page 338:

"* * * 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 court also said on said page:

> "Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the Legislature given at the proper time, and in legal form to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the State.
>
> "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the Auditor is authorized to draw his warrant upon an appropriation, and the Treasurer is authorized to pay such warrant if he has appropriated money in the treasury.
>
> "And such an appropriation may be prospective, that is, it may be made in one year, of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues.
>
> "So a direction to the officers to pay money out of the treasury upon a given claim, or for a given object, may, by implication, include in the direction an appropriation.
>
> "But the pledge of the faith of the State that revenues shall be provided in future and applied to the discharge of given claims against the State, does not authorize the officers of State, without further legislative direction, to apply the general fund in the treasury to the payment of those claims; it is not an appropriation of the money in the general fund. We think there can be no mistake as to the correctness of this proposition. If it is not true, then we are certainly thrown back upon that very official discretion which *England* abrogated at the revolution of 1688, and which it was the design of our constitution to abrogate here. Such pledges are solemn obligations upon the people and Legislature of a State, but they are not legislative directions to the officers, temporarily in position, to pay out the given funds without further appropriation by the Legislature. Such pledges, in language of Chief Justice *Lowrie,* in Sunburry, etc.,

> Co. v. Cooper, are 'to be enforced by means of the moral sense of the community operating upon the Legislature, and by means of the moral sense of the civilized world operating upon both the people and the Legislature—an influence and responsibility to which all States are subject.' 7 Am. L. Reg. 158; S. C. 9 Penn. State Rep. 278."

It is to be noted that the first quotation above from said decision does not include the idea that the appropriation must include authority from the legislature to proper officers to expend the money as is contained in the second quotation. However, in the first quotation reference is made to the swamp land act as an illustration, and said act as above stated did contain provisions for the expenditure of said money by specified officers. The statute before the court in both of the above cases did refer to a fund and provided for its transmittal to New York. Said fund was for the purpose of paying the interest on the state debt so that the court in said cases could have found that a fund was set up and a purpose and use specified, but the court in said cases held that there was no appropriation. The Attorney General of the state in his brief filed in the above case took the following position:

> "To constitute an appropriation, money must be set aside for a definite purpose. The specific amount need not be fixed; that may be dependent upon circumstances, to be ascertained by some system of auditing. There must also be authority to take the money from the treasury for application to this purpose, for a mere setting aside of money may be for accumulation for future disposition by the Legislature; both elements must exist to constitute an appropriation." (See p. 361.)

The court said at page 354:

> "* * * When he had thus obtained the funds he was to transmit the same to *New York* by express or other safe mode; but no person or officer is named to whom he is to send it, *nor is it directly said that it shall be paid upon the interest* on the public debt. 3d. The next part of the section is clearly for the benefit

> of the banks, that is, when the demand is made upon them, on the notes in the treasury, they may furnish drafts on *New York* instead of the specie upon the terms named in said section. Taking these two sections, the fifteenth and sixteenth, together, and it pretty clearly appears that the general interest, as well as the rival interests, of banks were being looked to in the enactment of said sections, about as much as the formation of a treasury system. Viewing these two sections in this light, and it is clear to us they were intended merely as directory to the Treasurer as to the mode or manner in which he should discharge his duty, when an appropriation might be made; therefore, we will examine the whole act to see whether a more extended construction ought to be placed upon the language employed, and such interpretation placed thereon as will make it an act providing for continuing appropriations. This is made necessary for, up to the passage of this act, our conclusion is that no appropriation existed. It is clearly right in the interpretation of any particular part of a statute, to look to the whole context, to the preamble, if there is one, to the title, and to the circumstances which called forth the enactment." (Our emphasis.)

In addition, the court, at page 336, in speaking of the purpose of the constitutional provision, said:

> "* * * And the abuse to be corrected by the establishment of the principle, was the exercise of official discretion in paying out the public money. The purpose to be accomplished, was the giving to the legislative power alone the right, and imposing upon it the duty, on designating, periodically, the particular demands against the State, or other objects, to which the moneys in the treasury shall be, from time to time, applied, and the amount to each. Opinions Att'y. Gen., Vol. II, p. 670. * * *"

The opinion of the Attorney General, Vol. II, p. 670, above referred to by the court, was an opinion of Mr. Butler dated November 28, 1834, in which he said:

> "The constitutional provision that 'no money shall be drawn from the treasury, except in consequence of appropriations made by law,' was undoubtedly intended to secure to the National Legislature the exclusive power of deciding how and when the public money shall be applied to the discharge of the expenses, debts, or other engagements or liabilities of the Government."

The statute in question contains no legislative direction or authorization as to how and when the money in said fund shall be expended or withdrawn from the treasury.

As above pointed out, there are more than twenty penal, benevolent, and educational institutions. What part of said fund is to be expended by each of them? Who is to determine that question under said act? Upon these questions the Act is silent. Under the Indiana Constitution not only the power to raise revenue, but to control its disposition after it is raised is vested in the legislative branch of the government. In 20 Ind. above referred to, at page 352, the court said:

> "It is clear that under the present constitution, and, perhaps as fully under that which preceded it, *the power* to raise revenue and to *control the disposition thereof after it is raised, is vested in the legislative branch of the government.* We can not say but what there might be causes of very great moment, which might be considered by such branch of the government of such overruling importance as to justify the temporary suspension of the collection of any considerable amount of taxes. This might be produced by a wide-spread and general famine or other calamity. Therefore, that department might desire to control the disposition of the funds in the treasury, in a direction other than towards the payment of interest on the public debt. If the argument that the acts of 1846 and 1847 should be construed as an appropriation, is given the full force claimed, it would go to the length of maintaining that such continuing appropriation became a part of the contract, or settlement with the bond holders, and not subject to the future control of the Legislature, except as involving a breach of

such contract upon the part of the State." (Our emphasis.)

In 59 Corpus Juris, Section 382, under States, at page 238, it is said:

> "Power of Legislative and Other Branches of State Government. The legislative power is supreme in matters relating to appropriations as to which no constitutional restrictions exist. *Constitutional provisions requiring the existence of appropriations made by law secure to the legislature this exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government,* and are conservative, not restrictive or prohibitory of the legislative power over the public revenue. The policy of making appropriations of a particular kind, not repugnant to the constitution, is exclusively a question for the legislature, and whether or not an appropriation should be made is a legislative question over which the courts have no supervision or control. In like manner, the executive branch is not invested, in the absence of statutory or constitutional authorization, with the right to make or alter appropriations, nor to exceed the limits of those made by the legislature; and, even when authorization exists, the executive is strictly confined, in the exercise of such power, to the authority given; and, moreover, according to some authority, legislation permitting the governor to appropriate money is repugnant to a constitutional requirement of appropriations made by law, and hence is void. The discretion and control of the legislatures over appropriations cannot be limited or destroyed by the acts of preceding legislatures."

It may be argued that the failure of the legislature to make provision for the expenditure of said fund may be supplied by inference from the language that the fund is to be used for postwar construction. It is true that it has been held that a legislative direction to an officer to pay money out of the Treasury upon a given claim or for a given object may,

by implication, include in the direction an appropriation which would satisfy the constitutional provision.

> Carr, Auditor v. State, *ex rel.* (1891), 127 Ind. 204;
>
> Henderson, Auditor v. Board of Comm. Soldiers & Sailors Monument (1891), 129 Ind. 92.

But, in such instance there is a fund, the unappropriated general fund, and a provision for its expenditure for a particular purpose, and unless such a statutory direction to spend be held an appropriation, it would be without meaning. In such instance, it is clear that the legislature intended the officer to expend such fund. But in the case where the legislature merely creates the fund to be used for a particular purpose, it is entirely consistent with an intention of the legislature to raise a fund and ear-mark the same. As was stated by the court in State, *ex rel.* v. Ristine, 20 Ind. at page 352, above quoted, we cannot say but what there might be matters to be considered by the legislative branch of the government which might arise to justify the expenditure of said fund for some particular specific purpose.

If there is any real doubt as to whether the legislature has exercised its function to appropriate, the officers should not take the money from the treasury. In Ristine v. State, *ex rel.*, 20 Ind., *supra,* it is said at page 336:

> "* * * If it is doubtful whether the legislative power has exercised its function in this particular, the officers of State should not take the money from the treasury. See The People v. Schoonmaker, 3 Kernan, N. Y. R. 238. It may be laid down as a maxim in constitutional government, that officers, as a general rule, should not assume to exercise doubtful powers. Such assumption is the first step in usurpation, in setting at naught, in fact, the Constitution. That step should not be taken; for if it is, there is danger that it will be followed by others in the same direction, till the constitutional prohibition is entirely trodden under foot. There is no necessity that the State officers should assume doubtful powers. * * *"

Other Indiana cases on the question of appropriation are:

Campbell v. Board of Comm. State Soldiers & Sailors Monument (1888), 115 Ind. 591;
Gafill v. Bracken, Auditor (1925), 195 Ind. 551;
Williams, Governor v. Mansur (1880), 70 Ind. 41;
Williams, *et al.* v. Willett, *et al.* (1936), 102 Ind. App. 193;
Board of State-House Commissioners v. Whittaker (1882), 81 Ind. 297.

It is not necessary that the section of the Act creating the fund and assigning it to a particular use and the authorization to expend or withdraw it for that purpose be expressed in the same section. The entire Act should be examined as well as other acts but when this is done it should be disclosed that the legislature has set apart or assigned to a particular use a certain sum or fund of money so that the public officers are authorized to withdraw the money or funds so set apart for the specified purpose. While it is usually customary I do not believe that a specific amount of money need be fixed under the Indiana Constitution; that may be made to depend upon circumstances or be according to a system or method provided by the legislature. After applying the foregoing principles to the statutory provisions in question it is my opinion that because of the failure of the legislature to make any provision for the expenditure or the withdrawal of said funds from the state treasury by any public officer or state agency Section 3 of Article 10 of the Constitution has not been complied with.

2. If it could be said that the language in Sections 13 and 14 of Chapter 357 could by inference be construed as an appropriation, we would then be confronted with the question of whether when so construed it would be within the title of the Act. The title of said Act is as follows:

> "AN ACT concerning alcohol, alcoholic beverages, liquids, and substances, providing for the regulation and taxation thereof, abolishing the Alcoholic Beverages Division, the office of Excise Administrator and the Alcoholic Beverage Commission of Indiana, creat-

ing 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."

In 42 American Jurisprudence, Section 47 of Public Funds, at page 749, it is said:

> "As a general rule an appropriation a necessity for which is suggested by the title of an act, if it has congruity and proper connection with the subject or object stated therein, need not be specifically expressed in the title; but if such an appropriation is not expressed in the title, and is neither suggested by it nor is germane or cognate to the subject or object stated, the object or subject is not sufficiently stated, and the act, or so much thereof as violates the constitutional provision which requires that the subject of an act shall be expressed in the title, is void. * * *"

In a note in Lawyers Reports Annotated 1917 B, at page 812, upon the question of the necessity and sufficiency of reference in the title of the statute to an appropriation therein it is said:

> "There is no fixed, well-defined rule by which the title of every act can be tested for compliance with the constitutional requirement that the 'subject' or 'object' of an act must be expressed in its title. It is, of course, unquestioned that the purpose of such constitutional provisions is to prevent deception of the public and of members of the legislature by means of provisions in bills of which the title gives no intimation. In other words, the requirement is that the title must give notice of the particular subject or object to be legislated upon in a manner that clearly invites all persons interested in any provisions contained in the body of the act to examine the same. It is also a generally

accepted rule or principle that a title fairly expressing the subject generally covers provisions for all proper means and instrumentalities necessary to the accomplishment or enforcement of the expressed purpose, or, as it has been expressed, 'the title . . . may cover any matters having congruity and proper connection with it' (36 Cyc. 1028).

"But applying these broad rules or principles to the question of the necessity and sufficiency of a reference in the title of a statute to appropriations to put its purposes into effect, it would seem that, generally speaking, an appropriation, a necessity for which is suggested by the title of an act, if it has congruity and proper connection with the subject or object stated therein, need not be specifically expressed in the title, but *that if such an appropriation is not expressed in the title, and is neither suggested by it nor is germane or cognate to the object stated,* such as, for instance, an appropriation for fees and expenses for examinations, etc., *not reasonably to be anticipated as provided for in an act having such a title,* the subject is not sufficiently stated, and the act, or so much thereof as violates the constitutional provision, is void. In fact, most, if not all, of the few decisions upon this question, are in effect an application of this general test." (Our emphasis.)

Numerous cases are then cited in support of the above principles, including the case of White v. Burgin, 113 Ala. 170, in which it was held that the title "To Regulate the Management of State and County Convicts" was not sufficiently broad to embrace an appropriation for the payment of said costs incurred in the prosecution and conviction of convicts as being foreign to the management of convicts. In the case of Clark v. Wallace County, 54 Kan. 634, it was held that the title, "An Act to Protect Fruit Trees, Hedge, Plants, and Fences," did not include an appropriation for the paying of bounty for gopher scalps. In the case of Ryerson v. Utley, 16 Mich. 269, it was held that the title, "An Act Providing for the Preservation of the Muskegon River Improvement and for Other Purposes," would not permit a provision appro-

priating a sum of money to pay for the improvement, the court saying, "the only object mentioned in the title to this act is the preservation of the Muskegon river improvement, for which purpose the act authorizes tolls to be levied and expended." The court also said the title to the Act would apprise neither the legislature nor the public that it covered provisions under which a large sum was to be collected and disbursed to pay for the original construction of the work. The question of the title of an Act was also considered by our Supreme Court in the case of State, *ex rel.* v. Ristine, Auditor, *supra.* In that case the court said at page 356:

> "* * * Here the title is 'an act to provide a treasury system for the State of *Indiana,* for the manner of receiving, holding and disbursing the public moneys of the State, and for the safe keeping of the public moneys.'
>
> "What is the leading idea here—the subject on which legislative wisdom was being brought to bear? It is the establishment of a treasury system. * * *
>
> "Can it be believed, considering this title with reference to the constitutional provision last quoted, that a continuing appropriation of large sums, for an indefinite period of time, would be found covered up under the term '*manner* of disbursing the public moneys?' It appears to us that the 'manner' provided for in this act was upon warrants drawn, as contra-distinguished from the *manner* which had before prevailed, in some instances, of removing money from the treasury; that is, disbursing it upon a requisition only.
>
> "The subject matter of this act was and is the establishment of a treasury system. The matters properly connected with that subject were, providing a place to keep said funds, and the mode in which they should be kept, and the safeguards to insure the accomplishment of that object—the manner or mode by which money should get into the treasury, and in which it should get out of the same. * * *"

So in the case at bar the subject matter of Chapter 357 is an Act concerning alcoholic beverages and the providing