inquiring, as it does, that they be "lawfully issued by" such a corporation.

In conclusion, it is my opinion that anticipatory warrants issued under authority of the 1933 Act in question, and in conformity with its provisions, may legally be purchased by your board as a proper means of investment of the funds under your control.

AUDITOR, OFFICE OF: Purdue University Permanent Endowment Fund, relation of state to; liability of state for interest on.

June 30, 1936.

Hon. Laurence F. Sullivan,
Auditor of State,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion with respect to the relation of the State to the permanent endowment fund of Purdue University in the sum of $340,000 arising from the Congressional grant of July 2nd, 1862.

The Act of Congress by which the grant was made provided among other things that the fund should be invested "in stocks of the United States, or of some other safe stocks, yielding no less than five per centum upon the par value of said stocks, and that the moneys so invested, shall constitute a perpetual fund." The Congressional Act also provides that the fund "shall remain forever undiminished except so far as may be provided in Section fifth of this Act, and the interest of which shall be inviolably appropriated by each State, which may take and claim the benefit of this Act, to the endowment, support and maintenance of at least one college, where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, * * *."*

In 1883 the above provisions of the Congressional Act were modified somewhat and for the purposes of this opinion I desire to quote only a part of the amended Section as follows:

"All moneys derived from the sale of lands aforesaid by the States to which the lands are apportioned, and
from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States or of the States, or some other safe stocks; or the same may be invested by the States having no State stocks, in any other manner after the legislatures of such States shall have assented thereto, and engaged that such funds shall yield not less than 5 per centum upon the amount so invested and that the principal thereof shall forever remain unimpaired: Provided, That the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in Section 305 of this chapter), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of Sections 301 to 308, inclusive, of this chapter, to the endowment, support, and maintenance of at least one college where the leading object shall be without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts,* * *.”


Note: To the extent that reference is made to Sections of U. S. C. A. the language is not an exact quotation.

In 1926 the same Section was again amended so as to provide that the States may invest the fund other than in United States, States or other safe bonds providing the legislatures of the States shall have assented thereto and engaged that the funds shall yield a fair and reasonable rate of return to be fixed by the State legislatures and that the principal should remain forever unimpaired.

The General Assembly of Indiana accepted the congressional grant as made in 1862 in the following language:

“The State of Indiana accepts and claims the benefits of the provisions of said Acts of Congress and assents to all the conditions and provisions in said Act contained.”

The legislative acceptance further provided that the trustees of the university should invest the funds in the stocks of the United States or of this State yielding not less than 5 per cent per annum upon the par value of the stocks. Acts of 1865, page 110. No further action has been taken by the State of Indiana with respect to the acceptance of the provisions of the Act of Congress, so far as the relations between the State and the United States are concerned. The legislature, however, did in 1869 authorize the trustees of Purdue University to accept the grant made by John Purdue to establish the university, in which act, however, the same general provisions authorizing the trustees to take charge of these particular funds were carried forward. Acts of 1869, page 25.

In 1881 the legislature, so far as it was possible under the law, authorized the execution of a negotiable bond of the State of Indiana to be signed by the Governor and the State Treasurer and attested by the Secretary of State, to be dated April 1st, 1881, and to be payable twenty years after date to the trustees of Purdue University with interest at the rate of 5 per cent per annum and in the principal sum of the endowment fund under consideration. Acts of 1881, page 585. This authorization was again renewed in 1901 for a similar period of twenty years. Acts of 1901, page 34. This last extension from the standpoint of the relations between the State and the United States apparently complied with the amendment of 1883 of the Congressional Act as above referred to and could be treated as an investment in a manner assented to by the State and in which the engagement is made that the fund should yield not less than 5 per cent upon the amount invested. In 1920 I am advised that these funds were invested in United States government bonds, which, of course, would be in strict compliance with the congressional grant, but in 1921 I am advised that the bonds were sold and the trust fund was carried as a part of the General Fund of the State, the State paying the interest at the rate of 5 per cent. I am advised that in July of 1926 the Board of Finance awarded the fund to public depositories of the State, agreeing to pay 5 per cent interest. I am advised that during the year 1933 that the Treasurer of State invested the funds in such a way that increase in the value of bonds and interest equaled the 5 per cent which was paid to the trustees of Purdue Univer-
sity for the year ending June 30, 1934, and provided sufficient funds to pay 5 per cent interest for the fiscal year ending June 30, 1935. The Department of Treasury has signified to the trustees of Purdue University that the fund is available for their investment.

It seems to me that the original contract with the United States is embodied in the Acts of 1865 already referred to whereby the State accepted the provisions of the Act of Congress and assented to all the conditions and provisions in the Act contained. The amendment of the congressional act of 1883 in my opinion, however, changed that contract to a certain extent without any corresponding action of the legislature. The congressional act of 1862 required that the funds should be invested in stocks of the United States or in some other safe stocks yielding no less than 5 per cent upon the par value. The amendment of 1883, however, as I construe it, did not attach the obligation of a 5 per cent yield of income if the fund was invested in stocks of the United States or of the State or other safe stocks, but if the same was invested in any other way the assent of the legislature was necessary and the agreement that such investment should yield not less than 5 per cent upon the amount invested. The change in the Act made in 1926, which authorized the investment in other manners than in the bonds of the United States or of the State or other safe bonds without the 5 per cent guarantee, required legislative action and that appears to be missing so far as the present relation of the State of Indiana to this fund is concerned. As I see it, under the present congressional provisions relative to this fund the State may invest the fund in bonds of the United States or in State or in some other safe bonds, in which event it would only be required to pay to the university the actual yield from the investment. If, however, the funds are invested in any other way they would be required to yield, so far as the State is concerned, 5 per cent in conformity both with the State Act and also with the congressional Act in view of the fact that the State has made no provision by its legislature assenting to a different investment and providing the rate of return required. The case of People ex rel. Cornell University vs. Davenport, Controller, 23 N. E., page 664, decided by the Court of Appeals of New York on January 14, 1890, in considering your question uses the following language:
"The state could not obtain at par bonds of the character described in these Acts, paying interest at the rate of 5 per cent., and we do not think, in view of the language both of the Act of congress and of the statutes of the state, that the latter is liable at all events to insure to the university 5 per cent. upon the amount of the trust fund, irrespective of the rate which it is enabled to receive by investing the fund in bonds of the character named in the legislation, both state and national, upon the subject."

In this case, however, there had been an investment of part of the funds, at least, in United States bonds. Under the Act of Congress as it now stands, therefore, two ways are open for the investment of these funds. First, they may be invested in bonds of the United States or of the States or in some other safe bonds, in which event the State is liable to appropriate for the use of the university only the actual interest received. Secondly, the funds may be invested by States having no State bonds, which would include Indiana, "in any manner if the legislatures of such states shall have assented thereto and engaged that such funds shall yield a fair and reasonable rate of return, to be fixed by the state legislatures." This last condition, however, does not apply until the State, through its legislature, has acted. I think it follows that the State is liable for 5 per cent interest upon the fund except insofar as it may be invested in the character of bonds above described, as to which case it is liable only for the actual return.

The question arises as to whether there is a sufficient appropriation to entitle the Auditor to draw his warrant. There undoubtedly is no such appropriation in the biennial appropriation Act and the question arises as to whether the language of the Act of 1865 is sufficient to authorize the issuance of a warrant. I am advised that such has been done over a period of years without specific appropriation in the biennial appropriation act, and of course that has some bearing in the consideration of the question. I do not find anything in the Indiana decisions bearing directly upon this point. I do find, however, that a similar question has arisen in the States of Nebraska and Washington. The Nebraska case was dealing specifically with the Congressional Act of 1862 and I think
upon the basis of those decisions there is a sufficient appropriation of actual earnings without a specific appropriation in the biennial appropriation Act. See State ex rel. Ledwith vs. Brian etc., 120 N. W., page 916, and State ex rel. Attorney General vs. McGraw etc. et al., 43 Pac. 176. These decisions, however, do not actually meet the situation with which I am confronted because in this particular case, as I understand it, there are no earnings and the question is whether the Auditor may draw a warrant for the guaranteed interest in view of the situation as above stated. The answer to your question must depend upon the answer to the further question as to whether the Act of 1865 amounts to such an appropriation because as already stated the biennial appropriation Act contains no such appropriation. It is with respect to this particular situation that a uniform administrative construction may perhaps have a bearing. It is true, as already pointed out, that the liability of the State in my opinion is for the full 5 per cent under the conditions above set out. The original Act of acceptance bound the State to all the conditions and provisions of the Act of Congress, one of which was that the interest charge could be no less than 5 per cent unless the money was invested in bonds of the character described in the Act, and that such interest “shall be inviolably appropriated by each State which may take and claim the benefits of this Act, to the endowment, support, and maintenance of at least one college where the leading object shall be * * * to teach such branches of learning as are related to agriculture and the mechanic arts * * *.”

It was upon the basis of this provision, as I understand it, that previous Auditors have made the payments. The language is perhaps susceptible of such a construction and I think it may be followed in this case pending a clarification of the issue involved which, it must be admitted, is far from clear.