

*Mr Wilson*

June 10, 1949

Mr. J. W. Kelly  
State Treasurer  
Capitol Building  
Phoenix, Arizona

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**ARIZONA ATTORNEY GENERAL**

Dear Mr. Kelly:

We have your letter of May 21, 1949 wherein you state:

"We are asking a legal opinion as to the legality of the Commission composed of the State Treasurer, the Secretary of State and the Governor, to sell Permanent Common School Fund Bonds at a lower rate of interest and buy other bonds at a higher rate."

As we understand your inquiry it concerns an interpretation of Section 10-308, as amended through 1945, 1947 Pocket Supplement, A. C. A. 1939. The section provides in part:

"The state treasurer, with the approval of the governor and secretary of state, shall invest any moneys in the permanent funds of the state, or other moneys authorized by law to be invested in securities as defined by law, in bonds of the United States, general obligations and improvement bonds of this state, or of the counties, incorporated cities and towns, or school districts thereof. Said moneys shall not be invested in bonds yielding a lower rate of interest than two (2) per cent per annum". (Emphasis supplied)

Your question would seem to be: Does this section give the State Treasurer (with the approval of the Governor and Secretary of State) the authority to sell before maturity the securities in which such funds have

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been invested, and use the proceeds of such sales to purchase other securities within the classes designated in said section, these latter securities yielding a higher rate of interest? Our Supreme Court has not had occasion to pass upon this question, and our search would also indicate that there is somewhat of a dearth of authority in other jurisdictions.

The remaining provisions of Section 10-308, supra, provide for the itemizing and inventory of and designation of a safe and secure place of deposit for the bonds or securities in which the permanent funds have been invested. The section provides further for the safekeeping and for the inspection, audit, and examination of said securities. Sections 10-316 and 10-317, A.C.A. 1939 provide, "in the investment of the permanent funds", for the drawing of warrants for the purchase of said bonds, for the keeping of an accurate record of such investments by the treasurer, the collection of all payments of principal and interest and the making of a semi-annual statement showing the status and condition of all such investments.

Nowhere within our statutory material on public finance is there express authority given the State Treasurer to sell or otherwise deal in the securities designated in Section 10-308, supra. Nor is such authority given to any other public officer or officers. The sole provision authorizing the investment or use of the permanent funds of the State is said Section 10-308. If any power to sell securities purchased under the section as an investment and to use the funds to purchase other proper securities exists in this State, it must be found within the language of said section. Its terms are explicit. The State Treasurer "shall invest" such moneys in certain designated securities. Our question must be: does the power to "invest" here granted carry with it the power to "sell" or "reinvest"?

The word "invest" has been defined as:

"To loan money upon securities of a more or less permanent nature, or to place it in business ventures or real estate, or otherwise to lay it out, so that it may produce a revenue or income".  
Black's Law Dictionary, 3rd Ed.

See Also: Definition in 48 C.J.S., at page 785. The word "invest" ordinarily connotes an original act of laying out money for some other kind of property, usually of a permanent nature, so as to produce an income or profit, as distinguished from "reinvest" which is defined in 53 C.J. 1183 as "the act of investing anew; a change of investment; a second or repeated investment". "Reinvestment" implies a previous divestiture or investment. Though these definitions alone are not determinative they do shed some light on the use of the word "invest". We have been unable to find any authority which imports to the word the meaning of a repeated or continued course of dealing with securities, e.g., the investing in them and then selling and reinvesting, ad infinitum - for if it can be done once, there would seem to be no limit to the process.

To the contrary, where the legislature has intended that public officials have the power to sell securities, in which the funds of the State or its subdivisions have been invested, and to buy others as those officials deem proper and beneficial, the statutes have expressly and clearly spelled out such authority. For example, our Teachers' Retirement Act of 1943 provides:

"Fiscal Management. (a) The board of trustees shall be the trustee of the several funds of the retirement system. It shall have power to invest and re-invest such funds in bonds of the United States of America; (etc.) \* \* \* Subject to like conditions, limitations, and restrictions, the board shall have power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments in which \* \* \*". Sec. 54-1729, A.C.A. 1939.

The Arizona Public Employees' Retirement Act of 1948 has a similar provision granting to the board of trustees: "Full power to sell, assign, transfer and dispose of any of the securities and investments of the system". The Workmen's Compensation Law of 1925 gives to the Industrial Commission the power to invest upon resolution the surplus of or reserve of the State Compensation Fund in designated bonds, and expressly provides: "the commission may sell any of said bonds upon like resolution \* \* \*". For similar provisions (this list is not intended

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to be exclusive), see also:

Unemployment Compensation Law of 1936,  
Section 56-1009 (d), A.C.A. 1939;

Section 56-1224, A.C.A. 1939, part of  
the Occupational Disease Disability  
Law; and

Section 54-423, A.C.A. 1939, concern-  
ing the investment of funds belonging  
to school districts.

These statutory provisions are strong evidence that our legislature was well aware that before securities acquired in accordance with law by various State departments and officials could be sold or otherwise disposed of before maturity, specific authority to sell must be granted.

Our view is reinforced further by the legislation enacted in other states concerning the investment of State funds. Typical of the provisions are those of California, Sections 16420-16476, Deering's Government Code, 1945, Pocket Supplement, concern such investment. Section 16424 gives the power to "invest such surplus money in the securities specified". Sections 16430-16432 (Article 2) specify the securities in which the funds may be invested and Section 16440 provides:

"Securities purchased or held under this chapter may be sold or exchanged for other securities specified in Article 2. The money received from any sale may be reinvested in any such securities by the Department of Finance".

See also Section 16474 concerning "Special Fund Investments".

In 59 C.J., States, Section 374, the following rule is announced:

"\* \* \* Where the deposit, lending, or investment of funds is regulated by statute, they must be administered in accordance therewith, and an officer authorized to deposit, lend, or invest funds in a particular manner or on particular terms or conditions is without authority

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to make any other such dis-  
position thereof. \* \* \*".

The Oklahoma Supreme Court in National Surety Co. v. State, Use of Comanche County (1925) 111 Okla. 180, 239 P. 257 (National Surety Company v. State ex rel. Richards (1925) 111 Okla. 185, 239 P. 262) was faced with an analogous situation. The statute there involved gave the county treasurer specific authority to invest certain funds in designated securities. The treasurer disposed of certain bonds properly purchased pursuant to such authority by exchanging them for certain other bonds of the kind and class in which he was authorized to invest the funds in the first place. The Court held:

"\* \* \* we conclude that, while the treasurer was clothed with a grant of power to invest the sinking funds in his hands, he was never clothed with a grant of power to sell, barter, or exchange the securities purchased by him out of the county's sinking fund. The power of the treasurer is limited to the express grant of power contained in section 1 of the act (section 8572, Comp. State. 1921)".

The Court went on to say:

"\* \* \* there is no syllable of authority given to sell or exchange such securities as may be purchased. \* \* \* \* \*";

and,

"\* \* \* the county treasurer is authorized to buy certain classes of securities with sinking funds in his hands but his authority is limited to the original investment \* \* \* \* \*".

The reasoning of the court in this case is also worthy of quotation:

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"The power granted to the officer is to take money out of the sinking funds in his hands and buy securities. There is no part of the section which in any way indicates that it was within the legislative intent to grant power to the officer to sell or exchange the securities which he had purchased with the sinking fund. But, since he may buy securities without reference to the date of maturity, a condition might arise where it would be necessary to convert the securities purchased into cash; that is, a sale of the securities purchased might be necessary. It is plain that the Legislature understood that such necessity might arise, and had the Legislature intended that the officer in charge of the sinking fund, and the securities purchased with sinking funds, should be clothed with power to sell or exchange such securities, we naturally would expect to find some intimation of such intent in the act. It is certain from reading the act that no such intent is expressed. It is manifest that section 1 of the amendatory act expressly clothed the treasurer with all the authority in the matter of handling the sinking fund that the Legislature intended that he should have. The act is plain. It leaves nothing to be guessed at or implied. Beyond express powers given by this section, none existed in the treasurer. There is no part of the act that the treasurer can put his finger upon and say that this part of the act authorizes him to exchange the securities purchased by him out of the county's sinking fund. That

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being so, there is no grant of such a power. This court will not read into the act a grant of power which it is plain the Legislature never intended to grant".

Though there are certain dissimilarities between the fact situation out of which this Oklahoma case arose and the facts presented by your question, it is our opinion that the principle there enunciated is sound and fits the instant situation. 104 A.L.R., at page 628, interprets this Oklahoma decision in this manner:

"A county treasurer has no authority, under a statute authorizing him to invest sinking funds in his hands in specified classes of securities, to sell or exchange such securities, after purchase, and invest the funds in other securities".

Later Oklahoma cases support the National Surety Company case holding. See:

Board of Education v. American Nat. Co., 135 Okla. 253, 275 P. 285;

State v. McCurdy, 115 Okla. 111, 241 P. 816;

State v. Williamson, 177 Okla. 526, 60 P. 2d 1032;

Fourth National Bank of Tulsa v. Board of Commissioners, 186 Okla. 102, 95 P. 2d 878.

We conclude that Section 10-308, supra, giving to the State Treasurer the power (with the approval of

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the Governor and the Secretary of State) to "invest" the permanent funds of the State in certain designated bonds, gives said officer no power to sell such securities before maturity in order to invest the proceeds in other designated bonds, even though the latter yield a higher rate of interest. Nor is such power given expressly or impliedly by any other provision of our laws. The statute gives sanction only to an original investment.

Very truly yours,

FRED O. WILSON  
Attorney General

RICHARD C. BRINEY  
Assistant Attorney General

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