STATE V. MARRON, 1913-NMSC-092, 18 N.M. 426, 137 P. 845 (S. Ct. 1913)

STATE OF NEW MEXICO, Relator,
vs.
OWEN N. MARRON, State Treasurer, Respondent

No. 1618

SUPREME COURT OF NEW MEXICO

1913-NMSC-092, 18 N.M. 426, 137 P. 845

December 17, 1913

Original in the Supreme Court, Mandamus.

SYLLABUS

SYLLABUS (BY THE COURT)

1. The deposit of the Permanent School Fund of the State in interest-bearing deposits in banks, under the provisions of Joint Resolution No. 14, Laws of 1913, is an investment of the same. P. 437

2. Whether the word "securities" as used in the enabling act and the Constitution is not limited to public obligations for the payment of which the taxing power is available, is not decided because its decision is not necessary to a determination of this case, and is not discussed by counsel. P. 439

3. Said Joint Resolution No. 14, insofar as it requires the deposit of these funds in banks, is beyond legislative power and void. P. 440

4. The Governor, Secretary of State and Attorney General have power to eliminate by means of disapproval any given form or forms of investment, and thereby bring the State Treasurer to one single form of investment, and in such event, he is subject to mandamus to perform all acts necessary to accomplish the same. Whether he does not possess discretion, as to the safety of the investment, which he may exercise independent of control by mandamus, not decided, because not involved. P. 441

5. The alternative writ of mandamus in this case examined, and found to be inadequate to justify the issuance of a peremptory writ. P. 443

COUNSEL

Frank W. Clancy, Attorney General, for state.

Brief of Respondent resisting application for peremptory mandamus.

Francis E. Wood, Albuquerque, New Mexico, for respondent.

If the investment of school monies by the State Treasurer requires the exercise of any discretion or judgment on the part of the respondent mandamus will not lie. Goodrich v. Guthrie, 58 U.S. 284; U. S. v. Seaman, 58 U.S. 225; Regents, etc., v. Vaughn, 12 N.M. 333; United States v. Black, 128 U.S. 40.

Duty was upon the State Treasurer to seek safe interest-bearing securities in which to invest the school funds. The power of the Governor, Secretary of State, and Attorney General is only to approve or disapprove proposed investments. Laws 1907, ch. 104, sec. 36; Const. N.M. art. XXII, sec. 6, 7; C. L. 1897, sec. 225; Enabling Act. sec. 9, 10; Const., art. XXI, sec. 9; Const., art. XII, sec. 2, 7.

The act of the State Treasurer in retaining and depositing these funds at interest in banks, pending more profitable investment, is in strict compliance with his legal duty. Laws 1907, ch. 104; art. XXII, secs. 6, 7, Const. of N. M.; Joint Resolution No. 14, 1913; Const., art. VIII, sec. 10.

JUDGES

Parker, J. Roberts, C. J., concurring.

AUTHOR: PARKER

OPINION

*{*428}* OPINION OF THE COURT.

{1} This is a proceeding in mandamus to compel the investment of the Permanent School Funds of the State in the State Highway Bonds.

{2} It appears that respondent, as State Treasurer, received from the Territorial Treasurer, at the inception of the State government, the sum of $ 110,453.52, the result of the sales of public lands of the United States in the Territory, under the terms of the Act of Congress of June 21, 1898, 30 Stat. L. 484, 6 Fed. Stat. Ann. 482. These funds, at the time respondent took office, were deposited in banks, in pursuance to the provisions of sec. 36 of chapter 104, laws of 1907, where they still remain. Since Statehood, respondent has received funds of the same class and from the same source in the amount of $ 10,587.31 and $ 3,825.86 as proceeds of the sale of school lands in the State. All of these funds constitute the Permanent School Funds of the State.

{3} Chapter 104, laws of 1907, was repealed by section 79 *{*429}* of chapter 82 of the laws of 1907, leaving no statutory authority for the deposit of these funds in banks, until the session of the State legislature of 1913.

{4} By section 10 of the enabling act, 36 Stat. L. 557, 1 Sup. 1912, Fed Stat. Ann. 357, it was provided as follows:

"Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." * * *

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the State Treasurer in the fund corresponding to the grant under which the particular land producing such moneys were (sic) by this act conveyed or confirmed. The State Treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the Governor and Secretary of State of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as defined by this act and the laws of the State not in conflict herewith."

{5} By section 7 of article XII of the Constitution of the State, it was provided as follows: --

"Sec. 7. The principal of the permanent school fund shall be invested in the bonds of the State or Territory of New Mexico, or of any county, city, town, board of education or school district therein. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which *{*430}* any portion of the school fund shall be invested must be first approved by the governor, attorney general and secretary of state. All losses from such funds, however occurring, shall be reimbursed by the state."

{6} In pursuance of the provisions of this section of the Constitution, the State legislature of 1913, (by a required three-fourths vote of each house, it is assumed by counsel on both sides), passed Joint Resolution No. 14, which is as follows:

"Section 1. That the principal of the permanent school fund may be invested in an interest-paying deposit in any bank or banks in this state, in the manner hereinafter provided.

"Sec. 2. It is hereby made the duty of the Governor, State Treasurer, Attorney General and Secretary of State, to ascertain which bank or banks in the State will pay the highest rate of interest for the deposit of the said permanent school fund and deposit the same therein upon said bank or banks giving a bond as hereinafter required.

"Sec. 3. Before the making of the deposit of the said permanent school fund in any bank or banks applying therefor, the said bank or banks shall make, execute and deliver a bond to the State of New Mexico in a penalty which shall not be less than one and one-fourth the amount of the deposit applied for and which it is to receive, conditioned that such bank will promptly pay out to, the parties entitled thereto, all such public monies in its hands upon lawful demand made therefor and will whenever thereunto required by law, pay over to the State Treasurer such monies. The surety on such bond shall be a surety company authorized to do business under the laws of the State and such bond shall be approved as to form by the Attorney General, and as to the sufficiency by the Governor, State Treasurer and Secretary of State."

{7} In pursuance of said joint resolution No. 14, the Governor, Secretary of State, Attorney General and State Treasurer, met on June 16, 1913, and decided to request bids from banks for the deposit of the entire Permanent *{*431}* School Fund, amounting to $ 121,040.78, and accordingly the State Treasurer requested bids for the deposit of the same from the banks of the State, to be received up to July 1, 1913. Many of the banks responded, and offered to pay interest at rates ranging from three and one-half per cent to seven and five-eighths per cent per annum.

{8} At a meeting of said officers, held on July 1, 1913, for the purpose of opening and passing on said bids, the following resolution was adopted, the respondent, as said Treasurer, voting in the negative, viz:

"RESOLVED, That all of the bids received from the various banks for deposits of the Permanent School Fund be rejected for the purpose of investing said funds in the State Highway Bonds, the difference in the rate of interest received, which would be about four cents per annum per capita of school children as shown by the last enrollment, being so small as to be more than offset by the benefits to be derived from the construction of highways to the schools themselves as well as to all other interests."

{9} On July 7, 1913, the respondent addressed a letter to the Governor, Secretary of State and Attorney General, which is as follows: --

"Dear Sir:

"I am firmly of the conviction that the investment of the Permanent School Fund of the State in the securities offered under House Joint Resolution No. 14, by the banks offering the highest rate of interest in the bids opened on Tuesday last, the first of July, is the best and safest investment that could be made of these funds.

"In the resolution rejecting these bids, which is as follows, (the preceding resolution) you do not base your disapproval of these securities upon the ground that they are not safe nor that they would not bring the largest returns to the Permanent School Fund, but solely upon the ground that it was for the purpose of investing these funds in the Highway Bonds.

"I deem it to be my duty, under the law, to most respectfully decline to invest these funds in the Highway Bonds for the reason that the Highway Bonds yield only *{*432}* 4%, while the bank securities offered will average more than 6% and for the further reason that the value of the Highway Bonds, measured by the best bids obtained therefor, is only 77, while we would be required to pay par or 100.

"I respectfully request, therefore, that you indicate to me whether or not you deem these bank securities offered to be unsafe. In the event that you approve the same as to their safety, I will make the investment in the proper bank securities.

"Yours very truly,"

{10} On July 10, 1913, the Governor, Secretary of State and Attorney General addressed to the respondent a letter, in reply to his letter of July 7, as follows: --

"We decline to pass upon the question as to whether the bank securities are unsafe or not, as it is no part of our duty to do so, nor have you any right to demand of us that we should pass on that question, especially after we have united in rejecting the bids of the banks for the avowed purpose of investing the funds in the State Highway Bonds.

"We cannot find any provision of law giving you any authority to make any investment of this fund except as directed by us, nor are you in any way charged with any responsibility as to such investment. No investment of the fund can be made in any securities unless they are first approved by the Governor, Secretary of State and Attorney General, and if there should be any resulting losses from such investment the State must reimburse them, but there is nothing to make you officially or personally liable for what is done.

"Therefore, we now say to you that, under existing circumstances, we approve of the investment of this fund in the State Highway Bonds, and that we will not approve of its investment in any other securities at this time."

{11} The State Treasurer, still persisting in his refusal to withdraw these funds from the bank and invest them in the State Highway Bonds, this proceeding was instituted by the Attorney General, ex-officio, in behalf of the State.

*{*433}* **{12}** It is to be observed that the enabling act imposes no restrictions, in terms, as to the class of interest-bearing securities in which the funds may be invested, the only restriction in this regard being that they be "safe." The supervising control over the investment, conferred upon the Governor, and Secretary of State by that act, however, would seem to vest in them power to exclude any given class of securities which might, in their judgment, be deemed unsafe. On the other hand, the Constitution expressly limits, in terms, the class of securities in which these funds may be invested, until the legislature shall otherwise provide. The supervising body is enlarged by the addition of the Attorney General. Otherwise the enabling act and the Constitution are the same in substance and effect, except that, by the Constitution, the Treasurer is not, in terms,

charged with the duty of investing the funds. This latter divergence we deem of no importance, as it would seem clear in the light of both provisions, that it is still the duty of the State Treasurer to invest the funds in interest-bearing securities, subject to the restrictions and the supervision and control provided for in the Constitution. As before stated, the legislature of 1913, by said joint resolution No. 14, attempted to pursue the power conferred by the constitutional provision and provided that these funds should be "invested in an interest-bearing deposit in any bank or banks in this State," in the manner in the resolution provided. The deposit, when made, is not for any definite period of time, but is "conditioned that such bank will promptly pay out to the parties entitled thereto, all such public moneys in its hands upon lawful demand made therefor, and will whenever thereunto required by law pay over to the State Treasurer such moneys." It thus appears that, by the terms of the resolution, these funds are always subject to the immediate call of the State Treasurer and the bank makes no contract to retain them and may at any time, we assume, surrender them to him. The funds are subject to the check of the State Treasurer at any time in favor of any person entitled to receive the same by reason of some investment *{*434}* thereof, or the State Treasurer may at any time recall the funds from any given bank or banks. The words "required by law," in this connection, must evidently mean that whenever, by reason of demand of the State Treasurer, the legal duty to return the funds arises, the bank or banks are "required by law" to return the same. Otherwise, if it be required to have a new act of legislation before the banks can be held to be "required by law" to return the moneys, then, when the State Treasurer has once deposited them in a bank, they must remain there until the legislature recalls them, regardless of the solvency or insolvency of the bank and the consequent danger of loss of the funds and vexatious litigation with the sureties on the bank's bonds. Such could not have been the legislative intent as expressed in the joint resolution. The State Treasurer must be held to have at all times the right to immediately call for the funds, either for the purpose of investing them in interest-bearing securities, or of recalling them from any bank in which, for any reason satisfactory to him, or for no reason, he no longer desires the deposit to remain.

{13} We have, then, a case where the enabling act and the Constitution require the investment of the Permanent School Fund of the State in interest-bearing securities, and where the legislature has authorized and required the deposit of these funds in banks subject to the call of the State Treasurer, and the question is, whether this is an investment of the funds within the meaning of the provisions of the enabling act and the Constitution.

{14} Various cases are reported in which the question as to what amounts to an investment of public and private funds has arisen. In State v. McFetridge, 54 N.W. 1, 84 Wis. 473, 20 L. R. A. 223, the State Treasurer of Wisconsin was sued on his official bond for interest received by him on deposits in banks of the public funds, and his liability was made to turn upon whether his act in making the deposit was lawful or unlawful, which, in turn, depended upon whether or not the deposit was an investment of the funds. If it was an investment of the funds *{*435}* it was unlawful, because the concurrence of the Governor and Commissioners of public Lands was necessary, and had not been obtained. The Court said: --

"If those deposits were 'investments' within the meaning of the above statutes, they were unlawfully made. Were they investments? The distinction between a general deposit of money in a bank, payable at any time on demand, and an investment of such money, is plain and substantial. By such a deposit the depositor does not lose control of the money, but may reclaim it at any time. True, he loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value, which, as we have seen, is all that is required of him. But if the funds in the treasury are invested in United States or State bonds, or in loans on time to counties, cities, etc., the treasurer loses control thereof, and the same cannot be replaced in the treasury until such bonds are paid or sold, or such loans become due, and are collected by the due course of law. The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, mark the leading distinction between a mere deposit of the funds and an 'investment' thereof, as those terms are used in statutes."

{15} In State v. Bartley, 58 N.W. 172, 39 Neb. 353, 23 L. R. A. 67, a different definition was given to the word. The Constitution of that State required the investment of the Permanent School Fund in the United States, or State, securities, or registered county bonds, and the legislature provided that all public funds should be deposited in banks which should pay interest and give security for the safety of the funds, and hold the funds subject to check by the State Treasurer. Mandamus was brought to compel the deposit of some of these funds in a bank, and it was held that in-so-far as the act authorized or required the deposit of the educational funds, it provided for an "investment" of the same in a manner not authorized by the Constitution, and was, therefore, invalid. The Court defined the word "investment" as including bank deposits, *{*436}* notwithstanding they are subject to immediate withdrawal.

{16} As applied to private funds, the word "investment" has been frequently defined. Thus in Law's Estate, 144 Pa. 499, 14 L. R. A. 103, 22 A. 831, a guardian had deposited funds of his ward in a bank awaiting investment. The bank was to pay three per cent interest, and he was to give two weeks' notice before withdrawing the funds. The bank failed and the guardian was sought to be charged with the loss, on the theory that he had invested the moneys and was, consequently, liable. The Court said:

"Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a banker for safekeeping subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan."

{17} In Jennings v. Davis, 31 Conn. 134, 143, it is said: --

"It is not stated whether the money was deposited in the bank for safe-keeping merely, or in the character of a loan to the bank for which a stipulated rate of interest was to be paid during its continuance there; nor is is material to inquire, because, in either case, the deposit (being a general, as contradistinguished from a special one) created a debt in favor of the depositor and against the bank, and then the money became "invested" in that debt, and being thus invested in the name of Mrs. Morehouse, was protected by the statute against her husband's claims upon it." See also 4 Words and Phrases, title Investment, where many cases are collected.

{18} The Wisconsin and Pennsylvania cases draw a distinction between deposits for a definite period of time and those which are subject to call by check or order, holding *{*437}* that the former would constitute an investment, and that the latter would not. The Nebraska-Connecticut cases recognize no such distinction, and rely upon the well-known principle that upon the deposit of funds in a bank, the title to the money passes to the bank, and the relation of debtor and creditor arises between the bank and the depositor. This is so whether the money is subject to call, or whether the debt of the bank to the depositor matures at some specified future time. The law applies to a transaction, in either form mentioned above, an obligation to pay its debt to the depositor according to the terms of the deposit.

{19} We assume that had the legislature, in its joint resolution No. 14, provided for the deposit of these funds for stated periods of time, no one would question that their deposit in that form would be an investment for the same. If this is so, then the legislature might have provided for annual, or semi-annual, or quarterly, periods of time, or even a shorter period, so that the transaction of depositing these funds would be, in substance and effect, as a practical matter, the same as it now is provided for in said joint resolution. It may be that the definition of the word "investment" by the Wisconsin and Pennsylvania courts is more scientifically correct, but we can see no good reason to unduly hamper the legislative branch of the government by adopting a construction of the enabling act and the Constitution which would subserve no useful purpose. The legislature has, to all intents and purposes, accomplished by the joint resolution all that it could accomplish by a more scientifically drawn act, if, indeed, it has not added to the security and safety of these funds by providing that they may be withdrawn at any time, from any bank in which they may have been deposited.

{20} We, therefore, hold that the deposit of the Permanent School Funds of the State in banks, in pursuance of provisions of said joint resolution, is an investment of the same, unless prohibited by the considerations mentioned in the next paragraph.

{21} The Attorney General argues that the words "other *{*438}* interest-bearing securities" are to be construed **ejusdem generis** with the class of securities specifically mentioned in the section of the Constitution, and that, therefore, bank deposits are prohibited as a form of investment of these funds.

{22} The argument has great force. Taking into consideration the character of the fund provided by the Federal government for the education of the youth of the State, its

permanency and ever-increasing volume, the evident care with which the donor has safeguarded the same by the terms of its grant, and the character of the investments enumerated in the Constitution, there is presented to the mind, at once, the question whether it was not the intent of both congress and the constitutional convention, by the use of the word "securities," to limit the investment of these funds to some form of obligation for the payment of which the taxing power is available. It may be said, however, that the taxing power of the State is available to reimburse the fund in case of loss for any reason. But loss of the fund is exactly what is not to be desired and every consideration, consistent with the circumstances and language used, should be indulged to avoid the possibility of the same. On the other hand, the rule of construction mentioned may not be employed unless the same is consonant with the intent of congress and the constitutional convention as expressed in the enabling act and the Constitution.

{23} In this connection, it may be said that while the Permanent School Fund, at present, is comparatively small, it is to be borne in mind that this fund is a permanent fund for all time, and must, necessarily, constantly and rapidly increase. The proceeds from the sales of the lands so bountifully granted by the United States for educational purposes, will swell this fund so that within a comparatively short time it may reach such proportions as that it may become difficult to find in the class of securities enumerated in the Constitution a place for the profitable investment of the same. The legislature, it may be said, should be left free, if possible, to meet such conditions *{*439}* when they arise, and for that reason, the restricted interpretation, before mentioned, ought not to be applied.

{24} We expressly decline to decide this proposition at this time, and what has been said is for the purpose, merely, of calling attention to the question, so that its importance may be more fully appreciated. We decline to decide the question because its decision is not necessary to a decision of this case, and because the same was not fully treated by counsel in argument or in the briefs. When, if it shall be, in some case in future, the question is clearly presented to the Court, and fully argued, we shall then feel that it is proper to dispose of it.

{25} The legislature, in said joint resolution No. 14, has attempted to control the discretion of the Governor, Secretary of State and Attorney General in the exercise of their supervisory control over the investment of these funds. The act is mandatory in terms, and requires them, absolutely, to deposit the funds in banks. In this the legislature has evidently exceeded its constitutional power. The Constitution has conferred upon the Governor, Secretary of State and Attorney General the power to approve or disapprove any proposed investment of these funds. This discretion is in no way limited, but is absolute. It is not confined to the question as to whether the investment is safe or not. If for any reason, lack of safety, length or shortness of time for which the loan can be obtained, rate of interest obtainable, or any other consideration of public policy, any given investment of these funds is deemed inadvisable, the Governor, Secretary of State and Attorney General clearly have the power to withhold their approval, and we know of no authority, neither legislative nor judicial, to control this

discretion. The grant of legislative power in the section of the Constitution is not a grant of power to direct the investment in any particular form of security. The selection of the investment is not a legislative function under the provisions of the Constitution.

{26} We, therefore, hold that said joint resolution, insofar *{*440}* as it requires the deposit of these funds in banks, is beyond the legislative power and void.

{27} This conclusion leaves the respondent without any authority to make these deposits, the approval thereof having been expressly refused by the Governor, Secretary of State and Attorney General.

{28} The real, practical, controversy between the State Treasurer on the one hand, and the Governor, Secretary of State and Attorney General on the other, is as to who has the right to select the securities for the investment of these funds. The State Treasurer, believing in the validity of the joint resolution, and being desirous of obtaining the largest possible return in the way of income on the money, insists upon the deposit of the funds in banks. In his right to do so, over the objection of the Governor, Secretary of State and Attorney General, as we have seen, he is mistaken. On the other hand, the Governor, Secretary of State and Attorney General, notwithstanding the income will be slightly less, insist upon the investment in the State Highway Bonds. It is argued by the Attorney General that the greater permanency of the investment in these bonds, the direct benefit of good public highways to the schools themselves, and the subserving of the general welfare of the people of the State, more than counter-balance the temporary slight loss in income. It is argued for the State Treasurer that, as he is charged by the enabling act with the duty of keeping the funds constantly invested and is required to give bond for the faithful performance of his duty, he must secure the highest possible income from these bonds consistent with safety. On the other hand, the Attorney General argues that there is no liability of the State Treasurer on his bond so long as he, in good faith, invests the funds within the constitutional restrictions, and with the approval of the Governor, Secretary of State and Attorney General. In this position he is correct. It is to be observed, in this connection, that no absolute duty is imposed upon the State Treasurer to invest these funds. The duty of doing so is conditioned upon his obtaining the approval of the Governor *{*441}* and Secretary of State, by the enabling act, and of the same officers, together with the Attorney General, by the Constitution. If he endeavors to obtain this approval and exhausts all available sources, and fails to obtain it, his duty and, consequently, his liability, necessarily ceases.

{29} We have then, simply, a question as to who, the State Treasurer on the one hand, or the Governor, Secretary of State and Attorney General on the other, has the right to determine the particular form of investment in which these funds may be placed. It is argued that this supervisory power of the Governor, Secretary of State and Attorney General is in the nature of a veto power. This may be admitted.

{30} The usual and orderly course of procedure, we assume, would be for the State Treasurer to submit to the Governor, Secretary of State and Attorney General, a list of available and safe investments for approval. He is, no doubt, primarily chargeable with

the duty of ascertaining these available channels of investment, and is entitled to present the same for approval, and to urge upon the Governor, Secretary of State and Attorney General the advisability and expediency of making such investments. It nevertheless remains true that the Governor, Secretary of State and Attorney General have the power to eliminate any given form of investment and by that process of elimination they may reduce the State Treasurer to one single form of investment, that being the one form left to him which will receive the necessary approval. Thereupon, there arises, except under circumstances to be hereafter mentioned, a ministerial duty on the part of the State Treasurer to invest the funds. This duty does not arise by reason of any order or direction of the Governor, Secretary of State and Attorney General. The State Treasurer occupies as important a position, and is charged with even greater responsibility than they are, in regard to the investment of these funds. His ministerial duty arises out of the law provided by Congress in the enabling act, for the administration of this fund, and which act requires the fund to be kept invested in safe, interest-bearing securities. *{*442}* The duty is ever-present, and is never discharged until the whole field has been explored, and exhausted without avail. It is the law of the administration of the trust, not any order or direction of the Governor, Secretary of State and Attorney General, which furnishes the basis for any remedy against the State Treasurer by mandamus. If a given investment, under such circumstances, is safe, there is no discretion left in the State Treasurer under the terms of the rule for the administration of his trust prescribed by the enabling act. He must invest the funds in safe, interest-bearing securities, and he may be compelled to do so by mandamus.

{31} At this point a consideration presents itself which is not directly involved in this case. It is this. By the terms of the enabling act, which, together with the Constitution, is the law for the administration of this trust, the State Treasurer is charged with the duty of safely investing these funds, and must give bond for the faithful performance of this duty. It, therefore, becomes his duty to inquire into and pass upon the safety of any given investment before it is made, and he may have a discretion in that regard, not subject to control by mandamus. This discretion, if possessed by the State Treasurer, is of no importance where the proposed security is one of those specifically enumerated in the Constitution, as in this case. But if the proposed investment were bank deposits, as now authorized or were in some other form, as might be provided by the legislature in the future, then this discretion of the State Treasurer, if he possesses the same, might become of vast importance in safe-guarding the fund. Whether important, or unimportant, in any given case, is not the question. If it is possessed by him, he is entitled to exercise it, and it cannot be controlled by mandamus. As before stated, this question is not directly involved in this case, and is not relied upon in argument, and, for that reason, we expressly refrain from deciding whether the State Treasurer has this discretion, or, if he has, just what its nature and extent is, reserving the question for future determination when it arises.

*{*443}* **{32}** If the State Treasurer has the discretion hereinbefore mentioned, he is not, of course, subject absolutely to mandamus to make any particular form of investment of these funds. But when, by the process of elimination, heretofore mentioned, he is left with but one form of available investment, he may be proceeded against and put in

motion, and compelled to do all of such acts, including the exercise of such discretion as he may possess, as are required of him by the law of his trust, all to the end that it shall be determined whether the given investment shall be made or not.

{33} A practical difficulty is presented by the record in this case. Chapter 58, laws of 1912, authorizes the issuance of these bonds, section 4 requires the bonds to be sold at not less than par and accrued interest from the next preceding interest date, and requires four weeks' publication of notice of the time and place of sale. No such notice has been given, and the proposed sale under the former notice was not continued by the State Treasurer. The proceeding, in its present form, is not broad enough to compel the State Treasurer to re-advertise a sale of these bonds, nor to bid at such sale the amount required by the act. As we understand the rule, relief may be granted for less than what is prayed for, but not more, and the acts sought to be enforced must be specifically pointed out in the alternative writ. High Ex. Leg. Rem., sec. 450; 26 Cyc. 466; State v. Cavanac, 30 La. Ann. 237; People v. Dulaney, 96 Ill. 503; State v. Einstein, 46 N.J.L. 479. This has not been done in this case, and the relief sought, for this reason alone, must be denied.

{34} The peremptory writ is denied.

CONCURRENCE

CONCURRING OPINION.

{35} ROBERTS, C. J. -- I do not believe that any duty rests upon the Governor, Secretary of State and Attorney General to seek out the mode or avenue of investment of the school fund. It was never the intention to place upon these officials this duty. Their power, as stated by Justice Parker, is simply a veto power. This being true, the *{*444}* power cannot be exercised in advance of its lawful requirement. It might be argued with as much consistency, that the governor of a state could say in advance of the legislature that he vetoed a pending bill, prior to its passage by that body.

{36} The construction sought to be placed upon the Constitution and enabling act by the Governor, Secretary of State and Attorney General would strip the Treasurer of all discretion in the matter of investing the school fund and relieve him from all responsibility in this regard, casting this duty upon three men, no one of whom is required by law to execute a bond for the faithful performance of his duties in this respect. Such I do not believe was ever the intention of Congress or the constitutional convention. In the enabling act we find this language:

"The State Treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the Governor and Secretary of State of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as defined by this act and the laws of the State not in conflict therewith."

{37} Thus placing upon the State Treasurer the duty of keeping these funds invested in safe interest-bearing securities, but the securities in which the funds are invested must be approved by the Governor and Secretary of State.

{38} The constitutional convention adopted sec. 7 of art. XII, which reads as follows: --

"The principal of the Permanent School Fund shall be invested in the bonds of the State or Territory of New Mexico, or of any county, city, town, board of education or school district therein. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first approved by the Governor, Attorney General and Secretary *{*445}* of State. All losses from such funds, however occurring, shall be reimbursed by the State."

{39} It will be observed that the clause quoted, does not in specific terms require the Treasurer to invest the funds, but it says the "funds shall be invested," and in view of the enabling act requiring the Treasurer to perform this duty, it must be presumed that the Constitution likewise requires the same duties of this official. It was the purpose of Congress and the constitutional convention to throw every possible safeguard around this trust fund, so that it might forever remain intact for the benefit of the schools of the State. With this end in view, they placed the duty of keeping this fund invested upon the fiscal officer of the State, supposedly because the Treasurer would be in close touch with financial affairs, the issuance and sale of bonds and securities by the State and its subdivisions, and he thereby be enabled to propose the best investment for the fund, from time to time. He was, by the enabling act, required "at all times to be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto." As an additional safeguard to the fund, the enabling act provided that the securities in which the Treasurer proposed to invest the fund should be "approved by the Governor and Secretary of State." This provision was carried forward in the State Constitution, but the further approval of the Attorney General, the law officer of the State, was also required, as an additional safeguard. Thereby, requiring the affirmative sanction of four separate individuals before the money could be invested; first, the proposition by the Treasurer to invest, and second, the approval of each of the officials named. But it is argued, that the Treasurer, by failing to propose any investment of the fund, might retain the same in his hands and derive a profit therefrom. This argument is based upon the assumption that the Treasurer would be remiss in his duties. The law always presumes that an official will do his duty, and, it might be further said, that no Treasurer would dare assume the risk which such action would entail. If he *{*446}* should be so remiss in his sworn duty, he would, of course, be liable on his bond, at the suit of the State for the interest which could have been procured by an investment of the fund, and would further be liable for all loss that might accrue to the fund. Again, it might be said, that the investment of the fund could likewise be prevented by either the Governor, Secretary of State or Attorney General, by the failure to approve of proposed investments. These officials are not required to give bond for the faithful performance of the duties imposed upon them in this regard. The securities in which the Treasurer is authorized to invest the funds are specified in the Constitution. In the named, or

authorized, securities only can he propose investments. While mandamus would not lie to compel him to propose to the three named officials an investment of the fund in any particular security, it would issue to compel him to propose the investment in some of the named securities, leaving it to his discretion to propose the avenue of investment, within the limits fixed. The writ would set him in motion. High's Extraordinary Legal Remedies, sec. 34.

{40} I do not understand by what rule of grammatical construction the word "approve" can be given the meaning of "direct." The words are not synonymous, and the meaning is in no wise related. The word "approve" is defined by Webster to mean "to sanction officially; to ratify; to confirm; to regard as good; to commend; to think well of." It will be seen that the word relates, for its object, to something already done, made or said by another. How could the named officials approve, unless something was proposed by the Treasurer? In the case now under consideration the Treasurer proposed to invest the funds, by depositing them in banks, upon certificates of deposit. This was the proposition before the officials for their approval. They did not approve, consequently the Treasurer had no right to invest the funds in that manner. This was the only question before them, or that was proposed for their consideration and approval. The three officials went further, however, and directed the Treasurer to invest *{*447}* the funds in the State Highway Bonds. True, it is argued that they did not "direct," but by a process of elimination and disapproval, confined the Treasurer to this one avenue of investment, but it amounts to the same thing as "directing," and it would hardly be argued that these officials could do indirectly what they could not do directly.

{41} In the case of Thaw v. Ritchie, 5 Mackay 200, the Supreme Court of the District of Columbia discussed the word "approve" as used in a statute which authorized the Orphan's Court to order a sale of real estate, but provided that the realty should not thereby be diminished without the approbation of the general court of Chancellor. The Court says: --

"The action of the Orphan's Court must precede that of the Chancellor, and it is this action which he is to approve. He is not to order or decree a sale, which would be the appropriate terms for an original proceeding before him, but is to APPROVE, which term is only appropriate to a revisory proceeding. And as the statute clearly contemplates a previous decree by the Orphan's Court, it must be this which is to receive his approbation,"

{42} The term "approve," only being appropriate to a revisory proceeding, the enabling act and our Constitution therefore must have contemplated a proposed action by the State Treasurer, which would be revised by the officials named.

{43} In the case of Long v. Commissioners, 75 Ohio St. 539, 80 N.E. 188, the Supreme Court of Ohio say "The word 'approve' seems to relate for its object to some thing made, done or said by another."

{44} In the case of Old Colony Trust Co. v. City of Atlanta, 83 F. 39, it was contended, on behalf of the city, that it had the power to fix the rates of fare and freight, by reason of a provision in the ordinance which read, "provided that the rates of fare and freight upon said railroad shall be subject to the approval of the mayor and city council of the city of Atlanta." The power was denied, the Court *{*448}* holding that the power to approve rates did not grant the right to fix the rates originally.

{45} It seems to me that the construction contended for by the Attorney General would destroy, in the main, the purpose of the carefully worded provision in the enabling act and Constitution, and relax the safeguards which Congress and the framers of the Constitution sought to place over the administration of this sacred fund. Our government is a government by the people, through chosen representatives. Some of the officers, it is true, are required to execute a bond for the faithful performance of their duties, but acts, within their discretion, and within the limits of their power to act, and not corruptly or wilfully done, are without the terms of the bond. Many officials are not required to execute any bond. All, however, are answerable before the bar of public opinion for their stewardship. It has always been the policy of the law to require public records to be kept of the actions and doings of public officials, so that the public might have full information, at all times, relative to such matters, and be able to judge of the conduct and doings of their representatives. This, I judge, is largely the purpose of the carefully framed provisions relating to the investment of this fund. The State Treasurer is required to propose to the three officials named, an investment of the school fund in certain bonds specified. By his proposition, he goes on record as being willing to invest this fund in the named security, at the rate of interest specified and for the price stated in his proposition. If the three men, each approve, he can proceed to make such investment; if they disapprove, he must look further. Now, if the Treasurer should propose a poor investment for the fund, he is answerable to the people. If, on the other hand, the three officials named, or any one of them, should refuse to approve a good investment for the fund and force the Treasurer, by elimination, to propose a poor investment, such official, or officials, would be held accountable by the people, and by them only, for they are not under bond. Suppose, for instance, that the State Treasurer should propose to pay 125 for bonds selling in *{*449}* the market for but par, would he not be severely criticized for so doing and never afterwards entrusted with place or power? Or, on the other hand, suppose the State Treasurer should propose to the three officials the purchase of solvent securities, within the class named, which would pay the fund 6% interest, and the proposition should be rejected and the Treasurer forced to invest in securities returning only 3% or 4%. For a breach of duty in either of the supposed cases, it is probable that the official would only be answerable before the bar of public opinion. It was the design, however, of the framers of the provision, that the public should have full information, and so important was it considered that the people should be able to fix the responsibility, that each official was required to assume the whole of the same. No investment could be made without being proposed by the State Treasurer, and hence he was not to be permitted to escape responsibility by shouldering it upon the other three officials. On the other hand, the proposed investment could not be made without the affirmative approval of each of the state officials named, so that no one man could say that the act was done without his concurrence. All were answerable alike to the

people for the management of the fund. The construction contended for would absolutely absolve the State Treasurer from his accountability to the people for the management of the fund, and so long as he followed the directions of the three officials named, he would be held blameless. All opportunity for the people knowing how profitable an investment might be made of the fund can be cut off at once by the Governor, Attorney General and Secretary of State, adopting a resolution, as was done in this case, that they will approve only the one named investment. This being true, and the Treasurer being bound thereby, how is he to present to them more advantageous sources of investment? Again, no one of the three is under bond, and this construction relieves the only bonded official from liability, so long as he follows the directions given him.

{46} Before mandamus will lie, it must be determined that *{*450}* the investment of school moneys by the State Treasurer requires the exercise of no judgment or discretion on his part.

"The only acts to which the power of the courts by mandamus extends are such as are purely ministerial and with regard to which nothing like judgment or discretion in the performance of his duties is left to the officer but that wherever the right of judgment or decision exists in him it is he and not the courts who can regulate its exercise." Goodrich v. Guthrie, 58 U.S. 284, 15 L. Ed. 102.

{47} An added reason might be given for the above conclusion that the Governor, Secretary of State and Attorney General have not the right to direct in advance, the action of the State Treasurer relative to the investment of the school fund. The fund is by law committed to the care and custody of the Treasurer. While now, the money in his hands, is only slightly in excess of one hundred thousand dollars, eventually it will amount to millions. He is the only official who keeps a daily check on this money and knows the amount of the same. When received, it is by him, and he is not required by law to account to either of the three officials. Suppose, for instance, that the resolution adopted by the board be treated as sufficient authority for him to invest the school funds in the State Highway Bonds. The other officials are occupied with a multiplicity of duties, which necessarily occupy much of their time. They do not keep in touch with the amount of money on hand, belonging to this fund, and might assume that a small amount is being invested by the Treasurer in the channel authorized. In the meantime, millions of dollars come into the Treasurer's hands, which he, acting under the authority conferred by the three officials, and as required by their resolution, invests in the named securities, when it might never have been the intention of the three officials to authorize such an amount to be invested. Such was never the intention. Upon the Treasurer was placed the responsibility of keeping the fund invested and for so doing he would be held responsible under his bond, which he is required to execute as a guaranty of *{*451}* his conduct in that regard. He is the custodian of the fund and at all times is fully informed as to the daily receipts. He dare not permit it to lie idle without investment, and must present to the officials named a proposition to invest it, so often and as soon as he has on hands an amount justifying investment. The board should have at the time each investment is proposed, an opportunity of passing upon the advisability of the proposed

investment. The bond market, as is well known, is subject to fluctuation. Each proposed purchase of bonds, were an individual buying, would be governed as to price, by the market value of such a security. Should we, by a strained construction, hold that the three officials, by a resolution, may authorize the Treasurer to act for an indefinite time in the purchase of securities, regardless of changing conditions of the market, such, I believe to be foreign to the purpose of Congress and the constitutional convention.

{48} Again, the resolution adopted by the three officials, and upon which this action of mandamus is predicated, reads as follows:

"Resolved, that all of the bids received from the various banks for deposits of the Permanent School Fund be rejected for the purpose of investing said funds in the State Highway Bonds, the difference in the rate of interest received, which would be about four cents per annum per capita of school children as shown by the last enrollment, being so small as to be more than offset by the benefits to be derived from the construction of highways to the schools themselves as well as to all other interests."

{49} Which may be considered as supplemental by the following extract from a letter sent by the three officials to the State Treasurer:

"Therefore, we now say to you that, under existing circumstances, we approve of the investment of this fund in the State Highway Bonds, and that we will not approve of its investment in any other securities at this time."

{50} If mandamus will lie, it must be that the Treasurer has no discretion in the matter of the investment, and must blindly follow the direction contained in the above *{*452}* resolution. That is, he must invest these funds in the State Highway Bonds, regardless of the price which he might be compelled to pay for the same. Suppose, for instance, that he should purchase these bonds at a premium of twenty-five cents on the dollar, could he justify under the above resolution or direction? Again, is the above direction sufficient warrant for his action, should he buy the bonds, and would he not be required to report to the three officials the price which he paid for the bonds? If it is not sufficient warrant for his so acting, clearly mandamus would not lie to compel him to act.

{51} The question is as to who, the State Treasurer on the one hand, or the Governor, Secretary of State and Attorney General on the other, has the right to determine the particular form of investment in which these funds shall be placed. It seems to me that the answer is plain, that neither has the right, but the form of investment must be concurred in by the four officials named, and any one of the four has the power to prevent any particular form of investment.

{52} I concur in the denial of the writ.