should be furnished with more definite information as to when
the claims for refund were filed so as to establish, if such is
the fact, that the litigation was pending when such limitation
was added in 1929. In other words, your authority to draw
a warrant for a refund, without additional legislation, seems
to me to be limited to the authority conferred by said Section
64-2820, which differs from the limitation as to county re-
unds, and the claimant should bring himself within the pro-
visions of that Section. I think, too, that it is doubtful
whether there is any authority which would authorize you to
draw a warrant for an amount within which is included in-
terest.

There seems to have been considerable litigation concerning
these claims and the result of that litigation is, of course,
bounding upon the parties to such proceedings. It is my un-
derstanding, however, that neither the State nor yourself nor
any predecessor has ever been a party to such proceedings.

As suggested earlier in this opinion, I do not think that
the certificate which has been filed is sufficient to authorize
you, as Auditor of State, to draw a warrant or warrants. It
may be that the infirmities above pointed out can be corrected
so as to authorize the same, but, in my opinion, a new cer-
fificate should be furnished more clearly identifying the claim-
ants, to which should be added the additional information as
stated herein. You can then audit the claims, if proper, and
advise the claimants concerning the presentation of vouchers
so as to clear your records.

FINANCIAL INSTITUTIONS, DEPARTMENT OF: Trust
funds—Limitations of trustees in investment of; whether
such limitations defeat express authorizations contained
in trust instrument.

August 4, 1936.

Hon. Richard A. McKinley,
Director, Department of
Financial Institutions,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion con-
struing Sections 187, 188 and subdivision (f) of 186 of the
Financial Institutions Act, as said Sections were amended in 1935, and with particular respect to the obligations of a bank designated and acting as trustee under a testamentary trust the total value of which is $75,000.00 and of which $20,000.00 represents a single security which is ineligible as an investment under Section 186 supra unless authorized by subdivision (f) thereof and which exceeds the maximum obligation permitted against any one debtor as provided in Section 187 supra unless authorized by subdivision (f) of said Section 186.

The will expressly empowers the trustee "to invest and reinvest the trust property in such loans, stocks, bonds, real estate and other property, both real and personal, tangible and intangible, as said Trustee may deem proper and suitable for the investment of trust funds, without being restricted to a class of investments which a Trustee is or may hereafter be permitted by law to make" and also "to retain, sell, lease without restrictions as to term, mortgage or otherwise dispose of any or all of said trust property in such manner and/or at such times as the said Trustee, in its exclusive uncontrolled discretion and judgment may see fit," and the investment was made pursuant to the above authority.

The question is—

Does the bank have the right to retain the foregoing investment notwithstanding the fact that it does not fall within the allowable investments defined in subdivisions (a), (b), (c), (d), and (e) of said Section 186 and is in excess of the amount allowable in certain cases by said Section 187 as against any one debtor unless authorized under subdivision (f) of said Section 186?

The above Sections limit banks and trust companies in the investment of funds held or received by them in any fiduciary capacity. Section 186, insofar as the same is necessary to the consideration of your question, provides as follows:

"Every bank or trust company shall invest any and all money now held or hereafter received by it in any fiduciary capacity in the following classes of property, but no other:

* * * * * * * * *
“(f) Any other property, real or personal, which the fiduciary is authorized or directed to hold or purchase by the terms of the instrument creating the trust.” * *


Section 187 provides that—

“Not more than five thousand dollars nor more than one-tenth in fair cash value, whichever is the greater, of the estate or trust shall be invested in the obligation of any one debtor if such obligation is described in subsections (b), (c), (d), or (e) of Section 186 of this Act, unless authorized under subsection (f), (g) or (h) of Section 186 of this Act.”


Section 188 provides as follows:

“Every bank or trust company which now holds or which shall hereafter receive any property other than money, as executor, administrator, guardian or trustee, which is not authorized by Sections 186 and 187 of this Act, shall sell such property for the best price and terms obtainable on or before the first day of July, 1937, or within one year after the receipt thereof, whichever is later, unless otherwise directed by each beneficiary of the trust, where all such beneficiaries are competent, or by the court having jurisdiction of the estate or fund, or unless specifically authorized or directed by the person or instrument creating such trust.”


I think the key to the solution of your problem lies in a construction of subdivision (f) of Section 186, also referred to as applied to the foregoing provisions of the will. If it is construed so as to authorize the investment, there is nothing in either Section 187 or Section 188 to prohibit it or to require its sale. On the other hand, if it is so construed as to prohibit the investment, I doubt whether there is anything in either Section 187 or 188 which would justify retaining it later than the date fixed in Section 188.
I pass therefore to a brief study of subdivision (f) of Section 186. It will be noted that subdivisions (a), (b), (c), (d), and (e) of Section 186 undertake to list by *definite description* various types of securities eligible as investments for funds held by banks and trust companies in a fiduciary capacity. Beginning with subdivision (f), however, the designations become more general. There is no attempt to classify except in the general language that the investment shall be authorized or directed by the instrument creating the trust. Does that mean that in order to be embraced within the subdivision the property must be specifically described in the authorization? In Section 188 "specifically authorized" is the term used, but not so in Section 186 (f). Subdivision (f) does not limit the investment to any defined type of securities or to securities at all. The investment may be in real property or personal property of any character if the instrument creating the trust authorizes it.

In this particular case the authority of the trustee to invest as provided in the instrument creating the trust is clear, limited as to *character of investments only* by what the Trustee may deem proper and suitable and "*without being restricted to a class of investments which a Trustee is or may hereafter be permitted by law to make.*" This, I think, is sufficient to bring the authorization within the meaning of subdivision (f) supra.

Section 187 of the Act applies only to obligations described in subdivisions (b), (c), (d), or (e) of Section 186. The investment under consideration is not one of these.

Section 188 of the Act applies only to investments which are *not* authorized by Sections 186 and 187 of the Act. But I think this investment, upon the basis of the statement of facts, is authorized by Section 186, particularly Section 186 (f), and that Section 187, therefore, does not apply.

The answer to your question is in the affirmative.