

of the Railroad Commission, has no right or power to prescribe the location of any crossing of a railroad by a state highway, yet it is necessary that the location as proposed by the State Highway Commission, must be approved by the commission before such crossing may be established."

Therefore, from the broad interpretation placed upon the word "highway" by the Indiana Supreme and Appellate Courts, and from the broad interpretation of Burns' 55-1807, *supra*, by the courts and former Attorneys General, it is my opinion that it is necessary to obtain the consent of the Public Service Commission in order to establish a street or highway at grade across the right of way and tracks of a railroad within or without the limits of a city or town.

OFFICIAL OPINION NO. 37

June 4, 1962

Mr. Eugene Garrison, Executive Secretary
Public Employes' Retirement Fund
501 State Office Building
Indianapolis 4, Indiana

Dear Mr. Garrison:

This is in reply to your request for an Official Opinion on the following question:

"In the light of the State Constitution, are stocks in opened-end investment trusts a legal investment for the Public Employes' Retirement Fund?"

The Public Employes' Retirement Fund was created by the Acts of 1945, Ch. 340, as since amended and found in Burns' (1961 Repl.), Section 60-1601 *et seq.* Section 13 of the Act, as found in Burns' 60-1613, *supra*, created a five member board of trustees which is responsible for the general administration and proper operation of the fund. The board's powers are prescribed in Section 14 of the Act, as found in Burns' 60-1614, *supra*. These powers include, in subsection (i), the power to make contracts and to sue and be sued in the

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name of the board, and, under subsection (f), the right to invest all cash not required for current payments in securities eligible for investment under the act. The statutory authorization for investments by the board of trustees of the fund is found in the Acts of 1945, Ch. 340, Sec. 18a, as added by the Acts of 1957, Ch. 232, Sec. 6. This section was amended by the Acts of 1959, Ch. 376, Sec. 3, as found in Burns' (1961 Repl.), Section 60-1618, by inserting subparagraph (l), which expressly authorizes the board to invest in an additional class of securities as follows:

“(1) Shares of capital stock of an opened-end investment trust or mutual fund which has been registered with the federal securities and exchange commission under the Federal Investment Company Act of 1940 [F. C. A., tit. 15, §§ 80a-1—80a-52].”

Your question arises because of the provisions of the Indiana Constitution, Art. 11, Sec. 12, which states:

“The State shall not be a stockholder in any bank, after the expiration of the present bank charter; nor shall the credit of the State ever be given, or loaned, in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association.”

The first question for determination is whether the Public Employees' Retirement Fund is included within this constitutional prohibition. Public moneys are appropriated to the fund and the state manages and controls the fund. Statutory provisions fix the basis of employer and employee contributions and employee retirement benefits. The fund and the board which administers it were created for a public purpose and cannot embark on enterprises of a private character. It was determined in 1947 O. A. G., page 201, No. 40, that a member of the board holds a lucrative office under the state, and the Opinion stated on page 204:

“It is also evident that the Board of Trustees of the Public Employees' Retirement Fund exercises sovereign powers granted to them by the General Assembly and that compensation is given them for their services.”

It is therefore my opinion that the Public Employees' Retirement Fund is an agency of the State of Indiana, and as such is within the constitutional provision which prohibits the state from becoming a stockholder in any corporation or association.

In view of this determination, it must next be decided whether the purchase of "shares of capital stock of an open-end investment trust or mutual fund" would make the state agency purchasing them a stockholder in a corporation or association, and thus be violative of the Indiana Constitution, Art. 11, Sec. 12, *supra*.

An open-end investment company or trust is commonly referred to as a mutual fund. Hugh Bullock in his book, *The Story of Investment Companies*, published in 1959, defines an open-end investment company or trust as follows on page 80:

"1. 'Open-end company' means a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer. (A redeemable security is one which the company must redeem on demand. Thus an open-end company need not be, although generally is, a company which is continually selling its own capital stock.)"

On page 154 of the same book, Mr. Bullock states:

"The second broad classification of investment companies is of course the open-end companies—the mutual fund. As we know, these have only one class of stock outstanding and the familiar self-liquidating or redemption feature which assures that their shares should command a market closely related to their asset value. The open-end company is so named because it is virtually always repurchasing its shares, and in consequence it is generally issuing new shares, whereas the closed-end company's capital remains relatively unchanged."

Webster's Third New International Dictionary defines "mutual fund" as a "mutual investment company." The term "mutual investment company or mutual investment trust" is then defined as "an investment company that has a variable

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number of shares outstanding and that is ready at any time to issue or redeem shares at or near current liquidating value." Webster's then defines "investment company or investment trust" as "a company that holds securities of other corporations for investment benefits only."

A mutual fund may take the legal form of either a corporation or a business trust. As a corporation, its capital stock is clearly a prohibited investment for the fund under the Indiana Constitution, Art. 11, Sec. 12, *supra*. If such fund is organized as a trust, it comes within the term "association" used in the constitutional provision and is likewise a prohibited investment. (Webster's Third New International Dictionary defines "association" as "an organization of persons having a common interest * * * a body of persons organized for the prosecution of some purpose, having no charter from the state, but having the general form and mode of procedure of a corporation.") In the case of *Stephenson et al. v. Kirkham* (1927), Tex. Civ. App., 297 S. W. 265, 266, the court defined a business trust as "an association of individuals for the purpose of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more and which are transferable by the owner."

In *Fletcher et al. v. Clark* (1944), D. C. Wyo., 57 F. Supp. 479, 480, the court determined that a business trust was an "association" when it had a continuing entity throughout the trust period, centralized management, continuity of trust uninterrupted by death among beneficial owners, means for transfer of beneficial interest, and limitation of personal liabilities of participants to property embarked in the undertaking.

See also: *Morrisey et al. v. Commissioner of Internal Revenue* (1935), 296 U. S. 344, 80 L. Ed. 263, 56 S. Ct. 289.

The case of *Enochs & Flowers v. Roell* (1934), 170 Miss. 44, 154 So. 299, 300, states:

"* * * 'Massachusetts trust' [is] a form of business organization where property is conveyed to trustees and held and managed for the benefit of certificate

holders, *which certificates are, in all respects, like certificates of stock in a corporation*, and the trust estate is managed by trustees for the benefit of the cestuis que trustent * * *” (Our emphasis)

In *People v. Clum* (1921), 213 Mich. 651, 182 N. W. 136, 15 A. L. R. 253, a common law trust was held to be an unincorporated association and the certificates issued by the association were held to be stock within the Michigan Blue Sky Law.

See also: 12 C. J. S. Business Trusts, § 1.

In view of the foregoing, it is my opinion that opened-end investment trusts and mutual funds would be “corporations or associations” within the meaning of those terms as used in the Indiana Constitution, Art. 11, Sec. 12, *supra*. The particular part of that section concerning the state as a stockholder in any corporation or association has apparently never been before the Indiana courts. However, when there is any uncertainty in regard to the meaning and application of a constitutional provision, it is desirable and permissible to look to the background and circumstances out of which it arose to determine its correct application. The restrictive provisions of the Indiana Constitution, Art. 11, Sec. 12, *supra*, were incorporated into the Constitution of 1852 after extensive debate in the Constitutional Convention of 1850. The primary argument had been over the state’s connection at the time with the then State Bank and whether the state’s direct interest in that bank should continue. However, the discussion was extended beyond this point, and the Debates and Proceedings of the Indiana Constitutional Convention 1850 show that an amendment was offered, “Nor shall the State hereafter become a joint owner, or stockholder in any corporation or association,” and the sponsor stated, as shown on page 645 of the Debates:

“Mr. President, my object in offering the proposed amendment, is to effect a complete separation between the State and all corporations, in carrying on business of any kind whatever.

* * *

“My design, in the amendment which I now propose, is to produce a complete divorce of the State from cor-

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poration mongering of all kinds. The section, amended, embraces just this principle—that the State shall not loan its credit to corporations, nor enter into a partnership, in any form, with them.”

It appears from the arguments and provisions adopted that the convention had, as its object, the complete separation of the state from corporations and associations of any kind, including advancing funds to them or purchasing interests therein. However, in enacting Burns' 60-1618(1), *supra*, the Legislature has specifically authorized the Public Employees' Retirement Fund to purchase “shares of capital stock.” In the case of Michigan Savings & Loan League *et al.* v. Municipal Finance Commission of the State of Michigan *et al.* (1956), 347 Mich. 311, 79 N. W. (2d) 590, the court determined that it was not within the power of the Legislature expressly to authorize school districts to invest money from their debt retirement funds in state and federal building (or savings) and loan associations in view of the Michigan constitutional provision which states, “The state shall not subscribe to, nor be interested in the stock of any company, association, or corporation.” At page 595 of 79 N. W. (2d), the court stated:

“It may also be noted that the legislature in the enactment of the statute directly involved in this case referred to investments by school districts in ‘the shares of a building and loan association or savings and loan association incorporated under the laws of this state.’ Thus the legislative enactment that plaintiffs are asking the Court to sustain designates the investment as a purchase of shares in an incorporated organization. The conclusion may not be avoided that what the legislature has undertaken to say may be done falls squarely within the inhibition of the Constitution. Such being the situation there is but one course open to the Court. We may not ignore the clear mandate of the Constitution. * * *

“In the framing and adoption of the Michigan Constitution, particularly with reference to Article X, § 13, no exception was made with reference to investments in the stock of savings and loan associations. The language used may not be interpreted as providing for

their exclusion. Such organizations are clearly included under the specific terms employed. *The conclusion may not be avoided that it was intended to place investments in the stock of all corporations, associations and companies in the same category insofar as purchases thereof by the State, or by any municipality or governmental agency of the State, is concerned.* The fact that plaintiffs protect investors in their shares by insurance does not alter the situation insofar as the application of the constitutional provision in question is concerned. In accordance therewith school districts may not invest funds in stock of State or Federal savings and loan associations. The act of the legislature undertaking to grant such authority is, in consequence, invalid." (Our emphasis)

This same conclusion was reached in 1935 O. A. G., page 383, when Attorney General Lutz determined that the trustees of the Indiana State Soldiers' Home could not legally invest money in its pension fund in stock of a federal savings and loan association, due to the provisions of the Indiana Constitution, Art. 11, Sec. 12, *supra*. That Opinion stated on page 385:

"While the above language [Burns' 22-2202] is effective to create of the board of trustees a corporate existence, I think it must be held that it functions only as an agency of the state and in my opinion it is prohibited from becoming a stockholder in any corporation by the above provision of the Constitution."

One of the most frequently cited cases in this area is that of *Almond v. Day* (1956), 197 Va. 782, 91 S. E. (2d) 660, which considered the precise question of whether or not the board of trustees of the Virginia Supplemental Retirement System could invest funds under its control in certain corporate securities which it desired to purchase. The court determined that the state retirement system was an agency of the state and within the constitutional prohibition against buying stock, but that the purchase in question was not unconstitutional because of the terminal phrase in the constitutional prohibition which definitely qualified it. However, the

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language of the Opinion is well taken here, when the court stated as follows at page 667 of 91 S. E. (2d) :

“We now consider the ‘stock or obligations clause’ which forbids the State to ‘subscribe to or become interested in the stock or obligations of any company, association, or corporation, *for the purpose of aiding in the construction or maintenance of its works.*’ (Emphasis added.)

“When this clause was first inserted in the Constitution of 1869, the italicized terminal phrase was not included. The framers of the Constitution of 1902 added this qualifying phrase. Before its addition and incorporation into § 185, the clear and certain prohibition forbade the State to subscribe to or become interested in the stock or obligation of any company, and the purchase by the State of bonds or stock of a private company was undoubtedly forbidden. If the clause were still in effect without the qualifying phrase added in 1902, § 51-111.24(a) would be invalidated insofar as it, by reference to Title 38.1, authorizes the purchase of stock or obligations of private corporations with State funds * * *”

In view of the foregoing, it is my opinion that the Legislature is without authority to authorize the purchase of stock by the state by reason of the constitutional prohibition in the Indiana Constitution, Art. 11, Sec. 12, *supra*. Since the Public Employes’ Retirement Fund is a state agency and is thereby covered by such constitutional provision, it cannot purchase shares of capital stock of any corporation or association, including shares of capital stock of opened-end investment trusts or mutual funds.