

Opinion No. 33-584

April 19, 1933

BY: E. K. NEUMANN, Attorney General

TO: Mr. Jesse T. Smith, State Land Office, Santa Fe, New Mexico.

{*41} You have asked this office for an interpretation of the following language in Section 6 of an act passed by the 11th legislature of the State of New Mexico, known as Committee Substitute for S. B. 233: "The state treasurer or such other treasurer is hereby **authorized** to take out insurance to protect such securities against burglary and hold-up." The specific question is whether or not this language is mandatory or merely permissive.

If the primary and usual meaning of the language be taken it would certainly be considered as permissive only. However, the true intent of the legislature cannot always be thus arrived at. The general rule with reference to the construction of statutes of the kind above mentioned is stated by Mr. Justice Swayne -- in *Supervisors, etc., vs. U. S.*, 71 U.S. 435, 18 L. Ed. 419, as follows:

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language -- whenever the public interest or individual rights call for its exercise -- the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

"In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty'."

See also 15 Op. Atty. Gen. 621; 6 *Roses Notes* (Rev. Ed.) 26; *Black on Interpretation of Laws* (2nd Ed.) P. 540.

The application of the above rule to the New Mexico Statute referred to would, in my opinion, require a restatement of the rule in the language of the New York Supreme Court, to-wit:

"And, in general, where such a duty is imposed by statute whether by words peremptory in themselves, as here, or merely permissive, as in the case of New York they have no discretion to refuse its performance, **as against a party having an interest in such performance.**" *Martin vs. Mayor, etc.* 1 Hill (N. Y. 545.

It is, therefore, my opinion, that a County Treasurer has no discretion to refuse to take out burglary and hold-up insurance to protect securities placed with him by public depositories for the protection of public {**42*} moneys, when requested so to do by an interested party.

By: QUINCY D ADAMS,

Asst. Attorney General