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1. SECURITIES—DEPOSITED WITH TREASURER OF STATE—PROTECTION OF HOLDERS OF LAND TITLE GUARANTEES—DUTY TO DETERMINE VALUE AND SUFFICIENCY—SECTION 1735.03 RC.
2. WHERE NO STATUTORY METHOD PROVIDED FOR VALUATION OF THE SECURITIES—WITHIN POWER OF TREASURER OF STATE TO DETERMINE SUFFICIENCY—DUTY—MORTGAGE ON REAL ESTATE—APPRAISAL OF PROPERTY—REPORTS AS TO PAYMENTS.

SYLLABUS:

1. The treasurer of state has the duty under the provisions of Section 1735.03, Revised Code, to determine the value and sufficiency of securities deposited with him for the protection of the holders of land title guarantees.
2. Where no method for the valuation of such securities is provided by statute, it is within the power of such officer, as part of his duty to determine their sufficiency, to adopt such methods of valuation as will best serve the purposes and objectives intended by the statute; and where such security consists of a mortgage on real estate, he may require an up-to-date appraisal of the property covered by the mortgage and the submission of timely reports as to the payments made thereon.

Columbus, Ohio, May 13, 1955

Hon. Roger W. Tracy, Treasurer of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“Section 1735.03, Revised Code, provides for the deposit of securities with the Treasurer of State by title guarantee companies.

“Company ‘A’ has deposited with this office with proper assignment attached, a mortgage in the amount of \$55,000 given to secure a note in the same amount, and in addition thereto filed insurance policies covering the buildings involved in the total sum of \$29,000 with a loss payable clause attached in favor of the Treasurer of State. An appraisal of the property is on file, dated August 6, 1951, indicating land value of \$14,000, and building value \$66,000.

“Inasmuch as Section 1735.03 is devoid of instructions pertaining to the qualification of such securities, will you please advise what powers are possessed by the Treasurer of State, if any, to ascertain the sufficiency of said securities, particularly with respect to the right to demand an up -to-date appraisal to demand the title company report monthly as to payments on the mortgage, and the establishment of any other standards by which the protection contemplated by the statute would be insured.”

Section 1735.04, Revised Code, requires all companies doing business of guaranteeing titles to real property to comply with the provisions of Chapter 1735 of the Revised Code. One of the provisions, Section 1735.03, Revised Code, relates to the securities such companies are required to deposit with the state treasurer to secure the faithful performance of the guarantees entered into by them. The section reads:

“No title guarantee and trust company shall do business until it has deposited with the treasurer of state fifty thousand dollars, in securities permitted by sections 3925.05, 3925.06, and 3925.08 of the Revised Code. The treasurer of state shall hold such securities deposited with him as security for the faithful performance of all guarantees entered into and all trusts accepted by such company, but so long as it continues solvent he shall permit it to collect the interest of, or dividends on, its securities so deposited, and to withdraw any of such securities on depositing with him cash or other securities of the kind specified in this section so as to maintain the value of such deposit at fifty thousand dollars.

“If such a company has made such deposits with the treasurer of state, it may request him to return to it securities held by him in such deposit in excess of the amount required, and he shall then surrender such excess to the company, taking proper receipts therefor.”

The securities contemplated by the above section are those required under the provisions of the Insurance Act, and consist of government bonds,

stock of national banks, first mortgage railroad bonds, and those provided by Section 3925.05(D)(1), Revised Code, namely:

“Bonds and mortgages on unencumbered real estate within this or any other state, worth double the amount loaned thereon, provided that if the amount loaned exceed(s) one-half of the value of the land mortgaged, exclusive of structures thereon, such structures must be insured in an authorized fire insurance company, other than the company making the loan, in an amount not less than the difference between half the value of such land exclusive of structures and the amount loaned, and the policy must be assigned to the mortgagee; * * *.”

It will be noted that the statute merely creates a requirement that the real estate mortgaged must be worth double the amount loaned, and where such amount exceeds one-half of the value of the land exclusive of structures, insurance protection must be provided. It does not, however, fix any standard or method by which such value may be determined. It has been held that the word “value” is in its nature so vague and indefinite that no human scrutiny can seize all its constituent parts; at its best it is a matter of opinion. 44 Words and Phrases, page 43.

There are various methods or rules for the valuation of real estate developed by the courts construing the statutory terms. There is the rule of “true value in money” for taxation purposes; real value after actual view in judicial sale appraisals; valuation according to tax duplicate; valuation based on income; rule of reproduction cost less depreciation; price in open market between willing buyer and willing seller; rule of functional depreciation, etc. Revised Code, Sections 5713.01 and 2329.17; *Re Shane*, 9 O. D., 830; *Hibshman v. Board of Tax Appeals*, 112 Ohio St., 47; *Cleveland v. Board of Revision (C. A. Ohio)* 115 N.E. 2d, 690; 51 American Jurisprudence, page 658, Section 710; *Keith Columbus Company v. Board of Revision*, 148 Ohio St., 253.

Some of these methods were considered in *American Steel & Wire Company v. Board of Revision*, 139 Ohio St., 388, such as reproduction cost less depreciation, or “physical” method; comparative sales of similar property or “market value” method; the “economic” or capitalized income method. Commenting upon their pertinency the court said:

“With respect to these methods it should be observed that, while reproduction cost, depreciation, opinions as to market value, and income may be given proper consideration, true value is a question of fact to be determined by the taxing authorities. * * *

“In determining the value of land or the improvements thereon all the facts and circumstances relating to the nature of the property, its availability for the purpose for which it was constructed or for any other purpose for which it may be used, its obsolete character, if such it has, and every other factor that tends to prove the *true value in money* of the land and the improvements thereon, * * *” (Emphasis added.)

I see no valid reason why this method of valuation of real estate founded on true value in money may not also be resorted to for the valuation of a mortgage as a security risk, in the absence of any other method provided by statute. The court in that case observed, not unlike the situation here, that “neither the constitution nor the statutes fix any method for the valuation of property.” Hence, the treasurer, charged with the duty of determining the sufficiency of the mortgage security, stands in no different position than tax assessors and his duty in such instance is so aptly stated in *Underwood Typewriter Co. v. Hartford*, 99 Conn., 329, 122 At., 91 and discussed in 104 A. L. R., page 798:

“It does not follow that, when the tax assessors cannot ascertain the market value of certain property, they cannot determine the valuation of that property for legal taxation * * * Hence, if the rule indicated cannot be followed, other means must and may be found by which assessors can perform the duty the law has put upon them.”

In Opinion No. 977, Opinions of the Attorney General for 1933, page 960, it was held that under the provisions of Section 1735.03, Revised Code, Sections 9852 and 9854, General Code, it is the duty of the state treasurer to determine the value and sufficiency of securities deposited with him under the provisions of said section. Since the statute fixes no method by which the value of real estate forming the subject matter of a mortgage may be determined, it would seem that such officer, charged with the duty to determine the sufficiency of such security, could adopt any method of valuation which most likely would furnish the maximum security to the holders of the guarantees whom the statute intended to protect.

There is a well recognized and long established principle of law that where there is no statute defining the duties of an office, usage and custom may be the basis of defining their scope. 32 Ohio Jurisprudence, page 947, Section 87. Elaborating on the principle, it is there stated:

“The duties of an office generally include all those which fairly lie within its scope and all those which are essential to the accom-

plishment of its main purpose which although incidental and collateral, are germane to or serve to promote or benefit the accomplishment of the principal purposes.”

The Supreme Court went even further. It, in effect, held where there is the duty there is also the power, and that the performance of an official act by a public officer depends on his legal duty, not upon his doubts; and where the duty is clear its performance will not be excused, however strong or honest his doubts may be. *State ex rel. Manix v. Auditor*, 43 Ohio St., 311. It further held that additional powers necessary for the due and efficient exercise of the powers expressly granted may be fairly implied from the statute granting the express powers. In *State ex rel. Hunt v. Hildebrant*, 93 Ohio St., 1, the fourth syllabus reads:

“Where an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed.”

An analysis of the facts stated in your request shows an apparent insufficiency of security to meet the statutory requirement. The statute requires a deposit of fifty thousand dollars in specified securities. The land covered by the mortgage, as shown by the appraisal submitted with the deposit, is valued at \$14,000, the buildings at \$66,000, and insured at \$29,000. In the event of total destruction of the buildings by fire, such security, assuming that the land would yield \$14,000, would only return a total of \$43,000 and thereby entail a loss of \$7,000 to the security fund. The insurance is equally insufficient, since the statute requires such insurance to be in an amount not less than the difference between half the value of the land and the amount loaned, namely \$55,000 less \$7,000, or in the sum of \$48,000. It seems to me that in such case the treasurer is not bound by the appraisal submitted by the assignor of the mortgage, and he may, in the circumstances, require a new appraisal and such other compliances as will fully protect the security deposit against all hazards.

Accordingly, in specific answer to your questions it is my opinion:

1. The treasurer of state has the duty under the provisions of Section 1735.03, Revised Code, to determine the value and sufficiency of securities deposited with him for the protection of the holders of land title guarantees.

2. Where no method for the valuation of such securities is provided by statute, it is within the power of such officer, as part of his duty, to determine their sufficiency, to adopt such methods of valuation as will best serve the purposes and objectives intended by the statute; and where such security consists of a mortgage on real estate, he may require an up-to-date appraisal of the property covered by the mortgage and the submission of timely reports as to the payments made thereon.

Respectfully,

C. WILLIAM O'NEILL

Attorney General