

2558.

TITLE GUARANTEE AND TRUST COMPANIES—MAY DESIGNATE
 SELF AS TRUSTEE FOR HOLDERS OF ITS OWN CERTIFICATE OF
 PARTICIPATION.

SYLLABUS:

Title guarantee and trust companies may lawfully, by proper action, designate themselves as trustees for the purpose of holding securities theretofore belonging to them for the benefit of the holders of certificates of participation issued against such securities by such companies.

COLUMBUS, OHIO, September 7, 1928

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent letter enclosing a communication from one of your examiners, which is as follows:

“The Title and Trust Companies, as you know, loan money on real estate, take mortgages and some of said companies place said mortgages ‘in trust’ and issue certificates of participation against said mortgages, selling said certificates to the public at a lower rate of interest than the mortgages bear.

Several of the said companies have appointed themselves and are acting as their own trustee, holding said mortgages in trust instead of appointing a bank or trust company as such trustee and depositing the said mortgages with said bank or trust company to be held in trust for the protection of purchasers of said certificates.

While the trust powers that the Title and Trust Companies possess seem to cover the legality of acting as their own trustee, yet it appears to the writer that the object of a trusteeship loses its real identity when handled in this manner.

I have consulted with several of the Assistant County Prosecutors in this office who feel that the practice of the Title Companies acting as their own trustees is a dangerous one and should be discontinued and I would ask if the question can be submitted to the Attorney General for his opinion as to the powers of the Title and Trust Companies acting as trustee in holding the said mortgages for the protection of purchasers of certificates of participation in said mortgages.”

The powers of title guarantee and trust companies are defined by Section 9850 of the General Code, as follows:

“A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it.”

It is to be observed that the right is now extended to this class of company to secure all trust company powers upon compliance with the laws with relation thereto. This is found in Section 710-170 of the General Code, which is:

"A title guarantee and trust company heretofore organized and now existing may accept the provisions of this act (G. C. Sections 710-1 to 710-189) and be granted trust company powers provided that it shall qualify and comply with all the requirements herein provided for the organization, conduct and supervision of trust companies; provided also that upon the acceptance of the powers granted under this act, all trust powers heretofore granted to title guaranty and trust companies are thereby revoked."

The communication of your examiner does not disclose whether the title and trust companies under consideration have accepted the benefits of this latter section. In my view of the matter, however, that fact is immaterial for the reason that in my opinion title guarantee and trust companies have, under the provisions of Section 9850 of the Code, supra, authority to act in the manner here under discussion.

You will observe that the section authorizes such a company to make loans as trustee for others. In my opinion this is in substance what is being done by the companies in question. The section clearly authorizes such companies to act as trustee in the making of loans. It does not specify that such trusteeship must result from a designation by others; nor does it in fact attempt in any way to describe in what method the trust relationship shall be created. Such being the case, I take it that the relationship may be established in any one of the recognized methods, and this clearly includes the right of the person establishing the trust to make himself a trustee with relation to his own property.

The general rule on this point is clearly set forth in the following quotation from 39 Cyc., 66:

"It is not essential in all cases that the creator of a trust constitute a third person trustee and transfer the legal title to him, for it is well settled that one may create a trust in his own property by constituting himself trustee, provided his words or acts clearly and unequivocally denote an intention to hold henceforth as trustee for the benefit of another. As the nature and effect of a transaction of this character is that the legal title remains in the donor for the benefit of the donee, no transfer or assignment of the legal title is necessary."

Again, on page 248 of the same volume, it is stated:

"It is competent for a person creating a trust to himself become the trustee."

I assume that in the transactions referred to the companies are taking definite, formal action in setting aside certain designated mortgages in trust for the benefit of the holders of the certificates of participation issued against such mortgages and unequivocally stating that such securities are held in trust for such purposes. In my opinion there is no general rule prohibiting such course, nor do I find any statutory prohibition applicable. In this instance the companies are in reality acting as trustee in the loaning of the funds of the holders of the certificates of participation. While it is true that the funds are not first advanced and then invested, in my opinion this is of no significance. The company furnishes the funds for the investments in the first instance and then establishes a trust for the benefit of those who subsequently supply the capital for investment in the certificates of participation.

I note that your examiner suggests that the practice is a dangerous one and this may possibly be true in some instances. I do not, however, believe that as a general proposition such practice may be characterized as dangerous. If the company is financially responsible and its officers are of proper character, I see no reason why

there should be any more question as to the faithful performance of the trust with respect to its own property than could be raised with respect to its performance of similar duties with respect to the property of others. Of course, transactions of this character require a complete segregation of the property so trusteeed and a faithful performance of the duties of the companies in question, as such trustees, but this is true in the event of any trust.

Accordingly, and by way of specific answer to your inquiry, I am of the opinion that title guarantee and trust companies may lawfully, by proper action, designate themselves as trustees for the purpose of holding securities theretofore belonging to them for the benefit of the holders of certificates of participation issued against such securities by such companies.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2559.

FORMS—FOR USE IN PROCEEDINGS RELATING TO THE CONTINUATION OF A STATE HIGHWAY THROUGH THE LIMITS OF A MUNICIPAL CORPORATION.

COLUMBUS, OHIO, September 8, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication requesting of this department approved forms for use by the authorities of a municipal corporation in proceedings relating to the continuation of a state highway through the limits of such municipal corporation. I accordingly submit in proper order the following:

1. Resolution of Council consenting to the improvement of the continuation and determining the additional width of said improvement.
2. Ordinance approving surveys, plans, profiles, cross-sections, estimates and specifications for the improvement of said continuation within the limits of said municipality to such increased width.
3. Certificate to be filed by the clerk of a village that the moneys necessary to pay the agreed share of the village of the cost and expense of the improvement is in the treasury of the village or in the process of collection. A duplicate of such certificate should be filed with the Director of Highways.
4. Contract between the Village and the State of Ohio whereby the Village contracts and agrees to pay its agreed share of the cost and expense of said improvement upon requisition of the Director of Highways.
5. Ordinance approving contract for the payment of the share of the Village of the cost and expense of the improvement and making appropriation of moneys in the treasury for said purpose.

As above noted, these forms are in terms adapted for use by the council and other officers of villages. This for the reason that I have been advised that the same are needed at once for use in connection with the improvement of a state highway through certain villages in Lorain County, Ohio. These forms can, of course, be readily changed and adapted for use in the case of the projection of a state highway improvement through a city. In such case the certificate that the money necessary to pay the share of such city of the cost and expense of the improvement is in the treasury or is in process of collection would be made by the auditor of the city, or by such other fiscal officer as