

110.

APPROVAL—BONDS OF CITY OF DAYTON, MONTGOMERY COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, February 6, 1937

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

111.

APPROVAL—BONDS OF GREEN SPRINGS VILLAGE SCHOOL DISTRICT, SANDUSKY AND SENECA COUNTIES, OHIO, \$15,000.00.

COLUMBUS, OHIO, February 6, 1937.

Industrial Commission of Ohio, Columbus, Ohio.

112.

APPROVAL—BONDS OF MAHONING COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, February 6, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

113.

RESOLUTION—REAL ESTATE BROKERS AND DEALERS' BONDS EXECUTED BY SURETY COMPANIES, UNCONSTITUTIONAL, WHEN.

SYLLABUS:

Under the authority of Section 6373-35, General Code, the Board of Real Estate Examiners cannot by resolution prescribe that bonds

offered by applicants for a real estate broker's license be executed by recognized surety companies for the reason that such a resolution is violative of Article I, Sections 1 and 2, of the Constitution of Ohio.

COLUMBUS, OHIO, February 9, 1937.

HON. L. J. CORCORAN, *Acting Secretary, Board of Real Estate Examiners, 407 Wyandotte Building, Columbus, Ohio.*

DEAR SIR: I have your inquiry of recent date, as follows:

"Under date of August 18, 1936, the State Board of Real Estate Examiners passed the following resolution:

'I make a motion having reference to Section 6373-35 G. C. as to bonds of brokers, that no bond shall be accepted by the State Board of Real Estate Examiners unless it is given by a recognized surety company, and, further that on the expiration of all the bonds now in force, said new bonds shall be executed by a recognized surety company.'

You are aware heretofore we have accepted both personal and surety bonds. I am taking the liberty of enclosing herewith letter from Kerr, Kerr and Kerr, Attorneys at Law, Tippecanoe City, Ohio, under date of December 21, 1936, copy of my reply to them, copy of letter from Mr. Benesch to said firm under date of December 23, and their reply under date of December 26.

In transmitting these communications to your attention, I desire to obtain an opinion as to the right of our Board to pass a resolution prescribing that only surety bonds may be accepted, in other words, under said resolution we are not authorized to accept personal bonds as heretofore. Inasmuch as all licenses expire December 31, it is urgent, you will note, that a prompt reply be received."

The first question contained in your request is, whether under the provisions of Section 6373-35, General Code, the Board of Real Estate Examiners has the power to prescribe, by resolution, that only recognized surety companies may be offered as sureties by applicants for a real estate broker's license, with the resultant exclusion of personal sureties.

Section 6373-35, General Code, provides:

"No real estate broker's license shall be issued until the grantee thereof shall have executed and filed a bond to the State of Ohio in the sum of \$1,000 and with such surety as the real

estate examiners may require. Such bonds shall be filed with the state board of real estate examiners and kept by them in their offices. Such bond shall be conditioned upon the faithful observance of all the provisions of this act and shall also indemnify any person who may be damaged by a failure on the part of the applicant for a real estate broker's license to conduct his business in accordance with the requirements of this act. Any person claiming to have been damaged by any misrepresentation or fraud on the part of a real estate broker or by reason of the violation of the terms of this act, may maintain an action at law against the broker making such representations or perpetrating such fraud or violating the provisions of this act, and may join as parties defendant the sureties on the bonds herein provided for. Such bonds shall be in the form prescribed by the board of real estate examiners and approved by them."

There is no express or incidental statutory authority granting the Board of Real Estate Examiners power to adopt a resolution of this nature. Notwithstanding a long line of well considered opinions to the contrary in other jurisdictions, this question is definitely settled in Ohio by the decision of the Supreme Court, in the case of *State of Ohio, ex rel vs. Robins*, 71 O. S. 273. In this case an administratrix tendered a bond in the amount of \$200,000, signed by personal sureties. The Probate Judge refused to accept the personal sureties in view of Section 3641c, Revised Statutes (G. C. Sections 9571, 9572 and 9573), which required that any administrator's bond in excess of \$2,000 must be executed and guaranteed by a surety company authorized to do business in the State of Ohio. In declaring Section 3641c, Revised Statutes (G. C. Sections 9571, 9572 and 9573) unconstitutional and void, being in violation of Article 1, Sections 1 and 2 of the Constitution of Ohio, the court said at page 291:

"It is the undoubted right of the general assembly to require bonds to be given 'for the faithful performance of official or fiduciary duties, or the faithful keeping, applying or accounting for funds or property, or for one or more such purposes,' and to make reasonable requirements as to execution, approval and security to affectuate fully the purposes thereof. But unless the public welfare should justify and require it, the power of the general assembly is so limited by the constitution, Article 1, Section 1, that it cannot deny or restrict the liberty of the officer or fiduciary to obtain or contract for a bond on terms satisfactory to himself. Before the enactment of this statute an officer

was at liberty to present a bond signed by personal sureties or by a surety company or companies, as his own interest or convenience might suggest. The right of choice between the classes of sureties is now denied him. It is now made compulsory upon him to give bond signed by surety companies, and personal security is in effect abolished. It is very plain that the security companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights, is not apparent. The amount of loss to the state, county, township or municipality on official bonds, or to the beneficiaries under bonds of executors, administrators, guardians, trustees or other fiduciaries, comparatively speaking, is trifling. Indeed it is possible that the loss is no greater than would result when the bonds shall be signed exclusively by incorporated companies, which sometimes become insolvent as individuals do. It is true that the loss, if any default occurs, falls on the sureties, and that there have been special acts of the general assembly for the relief of sureties in cases in which it was claimed that the principal was not in fault. Some of these acts are meritorious, many of them improvident and most of them unconstitutional. It argues nothing in favor of the legislation which is assailed here that sureties sometimes seek to escape from the consequences of their contract of suretyship. The fact remains that those whose interests are protected by personal bond rarely lose. We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution therefor of corporate security, and the reasons which we have given persuade us that the public welfare does not require it.

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It does not seem to us, therefore, that any part of this statute was promoted by considerations of public necessity or public welfare, and thence it follows that it is an unconstitutional restriction upon the liberty to contract which is guaranteed by Article 7, Section 1 of the constitution of this state."

In the case of *State, ex rel. Barr, vs. Deckebach, Auditor*, 105 O. S., 643, the court was confronted with the constitutionality of an ordinance of the City of Cincinnati which required operators of motor vehicles and taxicabs to post a bond signed by a surety company as a prerequisite to the issuance of a license. The court held, upon the authority of *State*

vs. *Robins*, supra, that the ordinance which required the filing of the bond of a surety company for the purposes stated was invalid.

You will note that the reason underlying the passage of the ordinance in *State vs. Deckeback*, was precisely the same as the adoption of the resolution under consideration. A very slight distinction might be drawn between these two cases in that the operators of motor vehicles and taxicabs use the public streets and highways in the pursuance of their business, whereas, real estate brokers engage in a strictly private business and avail themselves of no public property in the pursuance of their business. However, in both cases the protection of the general public under the police power of the state is the paramount consideration.

It having been held that the legislature does not have the constitutional authority to prescribe corporate sureties to the exclusion of personal sureties, *a fortiori*, the legislature could not delegate to a ministerial board the power to enact a similar measure.

In view of the decision of *State ex rel. Robins*, supra, followed by *State vs. Deckeback*, 105 O. S., 643, I am of the opinion that the Board of Real Estate Examiners cannot prescribe corporate sureties to the exclusion of personal sureties on the bonds of applicants for a real estate broker's license.

It necessarily follows that if your board did not have power to pass such resolution all bonds offered after December 31, 1936, may be signed either by corporate or personal sureties.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

114.

APPROVAL—RESERVOIR LAND LEASE TO LAND IN FAIRFIELD COUNTY, OHIO—DR. CURTIS A. SMITH, COLUMBUS, OHIO.

COLUMBUS, OHIO, February 9, 1937.

HON. L. WOODDELL, *Commissioner, Conservation Division, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a reservoir land lease in triplicate executed by you as Conservation Commissioner to one Dr. Curtis A. Smith of Columbus, Ohio.