

Obviously, this matter is now in the hands of the legislature. An examination of the General Code discloses no such inhibition as was formerly contained in Section 3, Article X, *supra*, and unless such a provision is enacted into law by the legislature, in the absence of the adoption of a county charter relating thereto, it follows that the sheriff of your county may be a candidate for a third consecutive term of the same office.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

2058.

MUTUAL SAVINGS BANK—ORGANIZED UNDER H. B. NO. 10 MAY BECOME MEMBER OF FEDERAL RESERVE SYSTEM AND PURCHASE STOCK IN "FEDERAL DEPOSIT INSURANCE" CORPORATION WHEN—"GUARANTY FUND" NOT PART OF SURPLUS—MAY ISSUE CAPITAL NOTES OR DEBENTURES WHEN.

*SYLLABUS:*

1. *A mutual savings bank organized pursuant to the authority of H. B. No. 10, enacted by the second special session of the 90th General Assembly, or a savings society or society for savings, organized prior to its enactment, but having complied with the provisions of Section 710-148k, General Code, each having a surplus fund and undivided profit fund jointly equal in amount to the capital required for the organization of a national bank in the place where such institution is located, are authorized by such H. B. No. 10, to become a member bank of the federal system and may legally purchase stock in the "Federal Deposit Insurance" corporation for the purpose of procuring deposit insurance pursuant to the requirements of the federal "Banking Act of 1933" or as hereafter amended.*

2. *A "guaranty fund" created by a mutual savings bank pursuant to the requirement of Section 710-148e, General Code, is not a part of the surplus of such institution.*

3. *A mutual savings bank organized pursuant to the provisions of H. B. No. 10, as enacted by the second special session of the 90th General Assembly, a society for savings or savings society upon compliance with the requirements of Section 710-148k, General Code, subject to the written approval of the superintendent of banks as to the amount, terms and conditions thereof, may legally issue its capital notes or debentures and when so issued, such debentures or capital notes will become valid and subsisting obligations of such corporation according to their tenor.*

COLUMBUS, OHIO, December 27, 1933.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"The Legislature recently enacted House Bill No. 10 providing for the organization of mutual savings banks. Section 710-148k of this act provides that any existing society for savings or savings society may elect to avail itself of the provisions and powers conferred by said act.

I request your opinion as to whether or not a society for savings or savings society newly incorporated or re-incorporated pursuant to the

terms of said act has the right and power to become a member under the Federal Reserve Act in accordance with the act of Congress known as the Banking Act of 1933, or as may be hereafter provided by law, and do all things necessary and proper, including the purchase of stock in the Federal Deposit Insurance Corporation to secure permanent and temporary insurance of deposits in accordance with the provisions of said Banking Act of 1933, or as may hereafter be provided by law, and also issue its capital notes or debentures in accordance with the provisions of Section 710-148j of the act first above referred to, and if so will such capital notes or debentures when so issued and sold be valid and existing obligations of such society for savings or savings society."

Sections 710-148h, 710-148i, 710-148j and 710-148k, General Code, as enacted at the second special session of the 90th General Assembly, read:

Sec. 710-148h. "Such corporation shall have the right and power to become a member bank under the federal reserve act, upon the terms and conditions set forth in the act of congress known as the Banking Act of 1933, or as may hereafter be provided by law. Every such corporation which becomes a member bank shall have the right and power to do everything required of or granted by said federal reserve act and amendments thereof to member banks, and shall be subject to the provisions of section 710-5 of the General Code."

Sec. 710-148i. "Such corporation may do all things necessary or proper, including the purchase of stock in the Federal Deposit Insurance corporation, to secure temporary and permanent insurance of deposits in accordance with the provisions of said banking act of 1933, or as may hereafter be provided by law."

Sec. 710-148j. "Such corporation may issue its capital notes or debentures at such times, in such amounts and subject to such terms and conditions as the superintendent of banks shall in writing approve; provided that in no event shall such terms and conditions require or permit that the holders of such capital notes or debentures be held individually responsible as such holders for any debts, contracts or engagements of such corporation."

Sec. 710-148k. "Any society for savings or savings society now doing business in this state may become subject to and entitled to the privileges of this act by filing with the secretary of state a certificate signed by its president or vice president and its secretary or assistant secretary to the effect that such society by the affirmative vote of two-thirds of the trustees thereof has elected to avail itself of the privileges and powers conferred by this act and setting forth such matters as would be required in original articles of incorporation of a society for savings incorporated under this act, and thereupon such society shall be deemed to be incorporated hereunder and shall have such powers only as corporations incorporated under this act may have. Such certificate shall be accompanied by a fee of twenty-five dollars. A copy of such certificate shall be delivered by such corporation to the superintendent of banks. The secretary of state shall record such certificate and all other certificates relating to such corporation thereafter filed."

By reason of the language of such sections, it becomes necessary to refer to the provisions of the federal "Banking Act of 1933". Section 5, sub-paragraph (c) contains the following language:

"Section 9 of the Federal Reserve Act, as amended (U. S. C., title 12, secs. 321-331; Supp. VI, title 12, secs. 321-332), is further amended by adding at the end thereof the following new paragraphs:

'Any mutual savings bank having no capital stock (including any other banking institution the capital of which consists of weekly or other time deposits which are segregated from all other deposits and are regarded as capital stock for the purposes of taxation and the declaration of dividends), but having surplus and undivided profits not less than the amount of capital required for the organization of a national bank in the same place, may apply for and be admitted to membership, in the Federal Reserve System in the same manner and subject to the same provisions of law as State banks and trust companies, except that any such savings bank shall subscribe for capital stock of the Federal reserve bank in an amount equal to six-tenths of 1 per centum of its total deposit liabilities as shown by the most recent report of examination of such savings bank preceding its admission to membership. Thereafter such subscription shall be adjusted semiannually on the same percentage basis in accordance with rules and regulations prescribed by the Federal Reserve Board. If any such mutual savings bank applying for membership is not permitted by the laws under which it was organized to purchase stock in a Federal reserve bank, it shall, upon admission to the system, deposit with the Federal reserve bank an amount equal to the amount which it would have been required to pay in on account of a subscription to capital stock. Thereafter such deposit shall be adjusted semiannually in the same manner as subscriptions for stock. Such deposits shall be subject to the same conditions with respect to repayment as amounts paid upon subscriptions to capital stock by other member banks and the Federal reserve bank shall pay interest thereon at the same rate as dividends are actually paid on outstanding shares of stock of such Federal reserve bank. If the laws under which any such savings bank was organized be amended so as to authorize mutual savings banks to subscribe for Federal reserve bank stock, such savings bank shall thereupon subscribe for the appropriate amount of stock in the Federal reserve bank, and the deposit hereinbefore provided for in lieu of payment upon capital stock shall be applied upon such subscription. If the laws under which any such savings bank was organized be not amended at the next session of the legislature following the admission of such savings bank to membership so as to authorize mutual savings banks to purchase Federal reserve bank stock, or if such laws be so amended and such bank fail within six months thereafter to purchase such stock, all of its rights and privileges as a member bank shall be forfeited and its membership in the Federal Reserve System shall be terminated in the manner prescribed elsewhere in this section with respect to State member banks and trust companies. Each such mutual savings bank shall comply with all the provisions of law applicable to State member banks and trust companies, with the regulations of the Federal Reserve Board and with the conditions of membership pre-

scribed for such savings bank at the time of admission to membership, except as otherwise hereinbefore provided with respect to capital stock."

From the language just quoted, it would appear that the motive of the legislature was to enable mutual savings banks to obtain the privileges of such "Banking Act of 1933." This section authorizes "mutual savings banks having no capital stock \* \* *but having surplus* and undivided profits not less than the amount of capital required for the organization of a national bank" at the place where the mutual savings society is located to become member banks. Referring to Section 5138 U. S. R. S. (U. S. C., Title 12, Sec. 51; Supp. VI, Title 12, Sec. 51) it will be noted that a national bank cannot be organized with a capital of less than \$100,000 except where the place of its organization has a population of less than 6,000, in which case the capital stock must be not less than \$50,000. In cities having a population in excess of 50,000, the capital must be \$200,000. (See §710-37 G. C.)

From the language of Section 710-148c, General Code, above quoted, it would appear that at the time of organization of a mutual savings bank it is only necessary to have a "guaranty fund" of \$35,000. There is no specific requirement for a *surplus* at the time of commencement of business, unless the "guaranty fund" is a paid-in surplus. It is true that provision is made in the act for the ultimate creation of a surplus of ten percent of the deposits with a minimum of \$50,000. Assuming for the present that the "trust fund" created by the incorporators is a paid-in surplus, you will observe that it is not necessarily equal to the minimum amount of capital with which a national bank may commence business. As above indicated, if such "trust fund" be considered as a "paid-in surplus" it would have to be in the amount of \$50,000 or more, where the population of the place of business of the mutual savings bank is less than 6,000; and if the population is in excess of 50,000 the trust fund must be \$200,000 or more.

Is the "trust fund" required by the provisions of Section 710-148c, General Code, a surplus?

The common or ordinary meaning of "surplus", as applied to corporate accounting, is the difference in the value of the assets and the liabilities of the corporation after deducting the capital therefrom. It is generally recognized that a "surplus", or as it is often called "capital surplus", may be created either by an appreciation of assets, by earnings or by the contributions by the stockholders. When created by the latter method the surplus is ordinarily called "paid-in surplus" or "contributed surplus". Ordinarily, "paid in surpluses" are created by means of an assessment on the stockholders, a subscription by them for the stock at a figure above its par value, or by a reduction of the par value of the shares without full recompense to shareholders. (See Coynton, Bennett & Pinkerton on Corporation Procedure, page 1059.) From the nature of a "paid-in" or "contributed" surplus, it is evident that it may be used as any other assets of the corporation. In Section 710-148c, General Code, the use of the "reserve fund" is limited to two uses, viz:

- (1) For the protection of its depositors against losses upon its loans and investments.
- (2) For payment of organization and operation expenses during the first year.

It might be forcibly argued that the intent of the legislature in the enactment of Section 710-148c, General Code, was to require sufficient moneys in addition to the guaranty fund, to be paid in by the incorporators to pay the

expenses of operation of the corporation during the first year. Assuming, for the purposes of this opinion, that such contention was unsound, and that the guarantee fund was for both of such purposes, it yet remains doubtful whether such guaranty fund can be considered as a surplus.

Section 710-148c, supra, specifically provides that the contributions to such "guaranty fund" may be repaid to the contributors from the surplus of the corporation whenever the finances of the corporation are such that it may be repaid without reducing the surplus below an amount equal to ten percent of the deposits. It also provides for the repayment of such contributions in the event of the liquidation of the corporation. Section 710-148c, General Code, further provides that before any dividend or interest may be paid by such corporation it must have a "surplus fund" of not less than "five percentum of the whole amount of deposits." The legislature evidently did not consider the guaranty fund as a part of the "surplus" or it would not have created the power on the part of the corporation to repay it to the contributors. The legislature has defined "surplus fund" for the purpose of such section, as follows:

"the surplus fund shall be understood to mean the net assets of such corporation over and above the amount of its debts and deposits, excluding, however, from its liability on capital notes or debentures as hereinafter authorized if such capital notes or debentures are subordinated to its other debts and deposits."

It would, therefore, appear to me that the "guaranty fund" authorized by Section 710-148c, General Code, can not be considered as a part of the surplus of a mutual savings bank within the meaning of Section 5, sub-paragraph (c) of the federal "Banking Act of 1933", especially since there is authority on the part of the corporation to repay it to its contributors upon the happening of certain conditions.

However, from an examination of H. B. No. 10, as enacted by the second special session of the 90th General Assembly and the federal "Banking Act of 1933", I am unable to discern any reason why mutual savings banks, whether organized pursuant to the authority of such H. B. No. 10, or having become entitled to the privileges of such act by reason of compliance with the provisions of Section 710-148k of such act, may not become a "member bank" of the Federal Reserve System under the authority of the Federal "Banking Act of 1933" and obtain such other privileges as may be afforded by such act providing they have a reserve and undivided profit funds which, together, are equal to the amount of capital required for the organization of national banks in the district in which the mutual savings bank is located.

Specifically answering your inquiry it is my opinion that:

(1) A mutual savings bank, organized pursuant to the authority of H. B. No. 10, enacted by the second special session of the 90th General Assembly or a savings society or society for savings, organized prior to its enactment but having complied with the provisions of Section 710-148k, General Code, each having a surplus fund and undivided profit fund jointly equal in amount to the capital required for the organization of a national bank in the place where such institution is located is authorized by such H. B. No. 10, to become a member bank of the federal system and may legally purchase stock in the "Federal Deposit Insurance" corporation for the purpose of procuring deposit insurance pursuant to the requirements of the federal "Banking Act of 1933" or as hereafter amended.

(2) A "guaranty fund" created by a mutual savings bank pursuant to the

requirement of Section 710-148e, General Code, is not a part of the surplus of such institution.

(3) A mutual savings bank organized pursuant to the provisions of H. B. No. 10, as enacted by the second special session of the 90th General Assembly, a society for savings or savings society, upon compliance with the requirements of Section 710-148k, General Code, subject to the written approval of the superintendent of banks as to the amount, terms and conditions thereof, may legally issue its capital notes or debentures and when so issued, such debentures or capital notes will become valid and subsisting obligations of such corporation according to their tenor.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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2059.

APPROVAL, PROPOSED ARTICLES OF INCORPORATION OF THE  
FARM BUREAU MUTUAL FIRE INSURANCE COMPANY.

COLUMBUS, OHIO, December 27, 1933.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have examined the proposed articles of incorporation of the Farm Bureau Mutual Fire Insurance Company, and find the same to be not inconsistent with the Constitution or laws of the United States or of the State of Ohio, and I have therefore endorsed my approval thereon.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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2060.

APPROVAL, BONDS OF LAWRENCE TOWNSHIP RURAL SCHOOL  
DISTRICT, STARK COUNTY, OHIO—\$2,606.12.

COLUMBUS, OHIO, December 27, 1933.

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

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2061.

APPROVAL, BONDS OF PULTNEY TOWNSHIP RURAL SCHOOL DIS-  
TRICT, BELMONT COUNTY, OHIO—\$8,000.00.

COLUMBUS, OHIO, December 27, 1933.

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