been cleared away, approval is given to said title.

The condition of the taxes and assessments was pointed out in the former opinion. The only subsequent change that has been made in reference to them is the interlineation of the words "and assessments" by the abstracter in the last paragraph of his certificate (p. 55A, abstract) to indicate that assessments to and including the December, 1931, installments are paid.

Enclosed please find abstract of title and supplemental papers furnished by the abstracter.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4347.

BANKING—LOAN OF FUNDS TO CORPORATION TO BE REPAID IN MERCHANDISE—NOT ENGAGED IN BANKING BUSINESS ALTHOUGH CUSTOMER RECEIVES INTEREST ON SUCH MONEY DEPOSITED.

SYLLABUS:

When an Ohio corporation doing a general retail merchandise business, sells goods on a plan by which the customer pays to the merchant money which is credited upon a pass-book furnished by the merchant in which subsequent payments are to be credited, which pass-book is to be redeemed by a payment in merchandise, such merchant is not doing a banking business even though he may allow the customer a credit of six per cent per annum on the amounts credited in such pass-book.

COLUMBUS, OHIO, May 20, 1932.

HON. G. H. BIRRELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, as follows:

"An Ohio corporation doing a general retail merchandising business, proposes to sell goods according to a plan which it calls the 'Advance Payment Plan'. The nature of the plan is as follows:

1. The customer purchases goods for future delivery.
2. These goods may be within any of the following three classes:

(a) Goods to be made up by the merchant especially for the customer.

(b) Goods selected by the customer at the time of purchase.

(c) Goods to be selected at a future date.

3. The customer at once makes a payment to the merchant to apply upon the purchase and credit therefor is entered in a pass book which the merchant furnishes to the customer. Further payments may be made by the customer from time to time until the goods are delivered.

4. A discount is given the customer purchasing goods under this plan, computed at the rate of 6% per annum on the total of his advance payments at the end of each month prior to delivery of goods so purchased.

5. In the event a customer decides not to purchase goods under his option to select them at a future date as noted in (c) above, The G. Com-

pany will make no refund of the advance payments, but will retain its position of readiness to sell goods either to the person making the advance payments or to his assignee.

Question: Would the acceptance of advance payments, under the terms of the above plan, constitute an act of banking, under Section 710-2, of the General Code of Ohio?"

Section 710-2, General Code, reads as follows:

"The term 'bank' shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass-book, a note, a receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, trust companies and unincorporated banks; provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal; nor to building and loan associations or title guarantee and trust companies incorporated under the laws of this state. All banks, including the trust department of any bank, organized and existing under laws of the United States, shall be subject to inspection, examination and regulation as provided by law."

From your communication, it is evident that the terms of the agreement between the vendor and the purchaser are not that money is to be deposited by the customer, which funds are to be returned on the demand of the customer or at some definite future time, but are that the purchaser agrees to purchase certain goods from the vendor for which he makes a payment in advance, and which may be selected from the merchant or vendor by the customer at some future time.

It is evident from the language of the statute, that in the type of business which is to be defined as banking, there must be a deposit of money, which is to be returned in like amount or with interest. The distinction which is usually laid down by the courts, between the business of banking and other similar types of business usually turns on the question of whether the transaction constitutes a deposit or a loan.

On March 26, 1930, I rendered an opinion to the Director of Commerce, as to what constituted the doing of a banking business under the Ohio law, which opinion is reported in Opinions of the Attorney General, for 1930, page 483 and from which opinion I quote the following:

"I can find no definition in the General Code of Ohio of the word 'loan' or of the word 'deposit'. But our courts have defined both of these terms. In the case of *State* vs. *Buttles,* 3 O. S. 309, the question was as to whether a transaction was a loan or a deposit, in view of the instrument set forth on page 312. The court, per Ranney, J., said:

'We can entertain no doubt that the money advanced to the insurance company was, in substance, and legal effect, a loan, which, upon its face, established the relation of lender and borrower between the state and the company. The instrument, it is true, recites that the sum has been deposited with the insurance company, and that it is to be repaid as specified in other parts of the bond. But the whole instrument, taken

together, most clearly shows that it was to, and did, become the money of the company, and constitutes the 'value received', for which the company undertook to pay the sum of one hundred thousand dollars two years hence, with interest.

The fund could not be withdrawn at the will of the state; it was not placed with the company for safe keeping or transmission; but the clear and manifest object was to enable the company to obtain the use of the money for a long period of time, to be used, controlled, and treated as its own, and the state to derive a profit from its use.'

You will note from the above that the fund was not within the control of the holder of the note and the transaction was a loan. The proceedings in this case in the trial court are reported in 10 W. Law J., 309. There the court drew a firm distinction between a deposit and a loan, the difference being as to whether or not the holder of the instrument retained the right to demand the money. If such right was retained, the transaction was a deposit; otherwise, a loan. On page 312, I find this discussion:

'When a party having a sum of money confides it to another, who is to return to him, not the same money, but a like sum, when demanded, the transaction is a deposit, as that term is ordinarily understood in commercial language. It is not a technical bailment. It creates simply the relation of debtor and creditor. The creditor having the right at any time to withdraw the whole or any part of the fund. It is said to be in the nature of a gratuitous loan.

'Whenever the transaction embraces any other terms or conditions, it ceases to be a simple deposit. If the fund can not be withdrawn at the will of the creditor, but is to remain for a certain period, it becomes a gratuitous loan. If it is to be repaid with interest, it becomes a loan upon interest.

A writing which acknowledges that a sum of money has been deposited by a party and that it is subject to his order, is evidence of a present liability to pay the amount specified, or in other words, is a certificate of deposit. If, however, it acknowledges that a sum of money has been deposited and that it is payable to order or bearer, at a future day, with interest, these conditions destroy its character as a certificate of deposit and it becomes in legal effect a negotiable promissory note; and its terms show that the consideration is money loaned.' "

From the facts stated in your letter, it is evident that such transaction constitutes a loan of funds to the merchant which is to be repaid in merchandise, and does not constitute a deposit.

It is therefore my opinion that when an Ohio corporation doing a general retail merchandise business, sells goods on a plan by which the customer pays to the merchant money which is credited upon a pass book furnished by the merchant in which subsequent payments are to be credited, which pass book is to be redeemed by a payment in merchandise, such merchant is not doing a banking business even though he may allow the customer a credit of six percent per annum on the amounts credited in such pass book.

Respectfully,

GILBERT BETTMAN,

Attorney General.