4693.

BUILDING AND LOAN ASSOCIATION—UNAUTHORIZED TO MAKE LOANS UNLESS FUNDS IN TREASURY FOR THAT PURPOSE — MAY ISSUE NEGOTIABLE CERTIFICATES WHEN—CRIMINAL ACTION DISCUSSED.

SYLLABUS:

1. *A building and loan association, authorized to do business in Ohio, is without power and authority to make loans when such association does not have money in its treasury, available for loaning, to complete the loan when the same is made.*

2. *A building and loan association, authorized to do ousiness in Ohio, which does not have money in its treasury, available for loaning, to complete the loan when the same is made, is without power and authority to issue its negotiable certificates of deposit to a borrower for a newly created obligation to such association evidenced by the note and mortgage of such borrower, when no money was deposited for such certificates, and such certificates were issued to the borrower in lieu of money for such loan.*

3. *Criminal action will not lie against the directors or other officers of a building and loan association based on the making of such unauthorized loans and the issuance of such unauthorized certificates of deposit, such acts not having been made criminal by statute.*

COLUMBUS, OHIO, September 20, 1935.

HON. WARD C. CROSS, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—This will acknowledge receipt of a request for my opinion which has been submitted by your office, which reads as follows:

> "It seems that some time back a certain savings and loan company was unable to advance cash on first mortgage loans that were made, and in lieu thereof by reason of the fact that they had no cash, certificates of deposit, negotiable in form, payable twelve months from date with interest at 6% per annum, payable semi-annually, were issued to the mortgagors. The first mortgages were given to the Loan by these mortgagors. The form of the certificate was as follows:
>
> 'CERTIFICATE OF DEPOSIT
>
> This certifies that John Doe has deposited with the D. Savings and Loan Company the sum of One Thousand Dollars payable to his order upon the return of this Certi-

ficate properly endorsed twelve months after date. The same to bear interest at the rate of six per cent per annum, payable semi-annually.

D. Savings & Loan Company,
By.....Pres.

Attest:

.....
Treasurer.'

Many of these Certificates have gotten into the hands of innocent holders and when they fall due and demands were made for the payment of same, the Company was unable to pay them off.

The following questions are presented for your consideration:

1. May a Building and Loan Company, organized and doing business under the Building and Loan Act of Ohio, issue its negotiable certificates of deposit for time deposits, as in the manner above set out.

2. May a certificate of this character be issued for a newly created obligation to the Building & Loan Company, which obligation is secured by a first mortgage on improved real estate, for an amount, not in excess of 60% of the appraised value of such real estate.

3. In the event the preceding inquiries are answered in the negative, in your opinion, will criminal prosecution lie against the directors of the Loan Company, who, acting as members of the Board, authorized, approved or ratified, the issuance of such certificates, as well as the officers who participated in issuing same."

In Ohio, building and loan associations are created, regulated and controlled by statutes, and such statutes define the purpose and provide the measure of the powers, rights and liabilities of such associations.

The court in the case of *State ex rel. Attorney General* vs. *Court of Common Pleas,* 124 O. S., 269, referred to the *quasi-public* character of building and loan companies, and said at page 275:

"Recognizing the character of such institutions and the purpose they seek to serve the legislature of the state has enacted statutes governing, controlling and regulating them."

Thompson in his work on Building Associations, Section 185, page 376, says:

"That building associations must comply with the statute governing them in the conduct of business is so true that it is hardly

necessary to state the proposition. * * * Loans made by them can only be made out of the amount in the treasury derived from interest, dues and fines received from members. * * * "

Referring to the powers and purpose of building and loan associations, the court in *Main Street Building and Loan Company* vs. *Richter,* 16 C. C. 191, laid down the following:

"A corporation of this character has such power conferred by law as will enable it to carry out all the purposes of its organization. * * * The essential purpose of this kind of a corporation is to raise money to be loaned among its members."

It may be noted in passing that while the court in the case last cited referred to "money to be loaned among its members", the law as it then existed (1898) authorized loans to members *and others.*

The case of *Cramer* vs. *Southern Ohio Loan and Trust Company,* 72 O. S., 395, at page 413 is authority for the following:

"The law creating these associations can confer upon them such reasonable and ample powers for their successful operation as the general assembly may deem necessary within the purpose and scope of the organization * * *."

At page 402, the court said:

"That section provides 'a corporation for the purpose of raising money to be used among its members shall be known in this act as a building and loan association'."

The Supreme Court in the case of *State ex rel. Warner* vs. *Mutual Building and Investment Company,* 128 O. S., 37, at page 42, says:

"The state gave life to the Mutual Building and Investment Company, invested it with certain powers and provided a code by which it should live. It was given power to *receive, invest and account for the money* of the individiuals. It was likewise given power to formulate and adopt a constitution and by-laws with the limitation that they be in consonance with the constitution and laws of the state." (Italics the writer's.)

On page 44, the court quotes the following from 4 R. C. L., page 384; section 39:

> "If building and loan associations should be kept strictly within the purpose for which they are organized, it is difficult to conceive how they could become insolvent * * *. The history of these associations, however, shows that they have been drawn into speculation and that their officers instead of relying solely upon the *natural source of supplies of capital to be loaned,* have hypothecated their notes and mortgages to secure additional funds for loaning * * *."

While it does not appear that the building and loan company mentioned in your communication, and which will hereafter be referred to in this opinion as the D. Company, hypothecated securities in order to obtain additional funds for loaning, the last mentioned case and the quotation therefrom are cited to show the importance which the court attaches to the restriction of loaning to the proper and normal operations of building and loan associations and through the medium of its natural source of income or supply of capital. As a matter of fact, the D. Company did not bother to raise money to buy securities to hypothecate in order to obtain additional funds for loaning purposes, but, on the contrary, got notes and mortgages direct from the borrowers, without any money in its treasury, and thus placed itself in a position where it could hypothecate such notes and mortgages, bringing itself squarely within the reasoning of the Warner case and quotation therefrom, supra.

In the case of *State ex rel. Colburn* vs. *Oberlin Building and Loan Association,* 35 O. S., 258, at page 263, the court says:

> "The money to be loaned by associations like this, if, as here, deposits are not received, can only be properly accumulated in the manner contemplated by the statute * * *."

The same fundamental principle would apply to associations where deposits are received under authority of statute for such deposits would then "be properly accumulated in the manner contemplated by the statute", and hence subject to be loaned by the association.

Section 9643 of the General Code of Ohio, so far as pertinent to the questions submitted by you, reads as follows:

> "A corporation *for the purpose of raising money to be loaned* to its members and others shall be known * * * as a building and loan association or as a savings association." (Italics the writers).

As early as 1867 the statutes defined building and loan associations as those formed for the purpose of "raising funds to be loaned", and no amendments since that time have disturbed this basic declaration of purpose.

Section 9647, General Code, provides that "such corporations shall have

all the powers set forth in the following sections of this chapter", and then follows numerous sections conferring express authority on building and loan associations to do certain things, all consistent with the general purpose provision set forth in section 9643, supra. Section 9648, General Code, authorizes an association "to receive money on deposit"; section 9649 empowers it to issue stock and receive payments on stock subscriptions; section 9652 permits withdrawal of deposits, except by check or draft; section 9651 permits the repurchase by an association of stock credits; and section 9657 grants an association the power "to make loans to members and others on such terms and conditions as may be provided by the association and as are provided by the limitations of this section * * *."

Building and loan associations are further authorized, by the provisions of section 9668, General Code:

> "To have all such other powers as are necessary and proper to enable such corporation *to carry out the purpose of its organization.*" (Italics the writers).

From the foregoing cases and statutes the primary purpose of an Ohio building and loan association clearly appears, which purpose is divisible into two parts: (1) the raising of money in the manner provided by law; and (2) the loaning of the money so raised in accordance with and subject to the limitations of statutory provisions.

It would seem to follow as a logical conclusion that in order for an association to loan money, it would first have to raise it. This question was before the court in the case of *Wineman* vs. *First Mortgage Loan Company,* 117 Ill. A., 302. The facts of that case sufficiently appear in the following questions:

> "A loan made by a homestead loan association at a time when it had no money in its treasury applicable to loans is usurious, where, in lieu of the payment of the money under such loan, it issued what is termed 'borrowers' certificates' payable at no definite or fixed time." (second syllabus).

In the opinion at page 305 the court said:

> "When a loan of money is agreed to be made, the borrower, when the security agreed upon has been given by him to the lender, is entitled to demand and receive from the lender the amount of the loan in money. Here the lender issued to the borrower 'borrower's loan certificates' for the amount of the loan, and the trust deed recites that the borrower had received such certificates in

> full consideration of the bond of indebtedness, which he had given the company for the amount of the loan. The bond, the certificates, the assignment and guaranty of the certificates and the trust deed bear the same date and were executed as parts of the same transaction. Wineman, by accepting the certificates in full consideration for the bond he had given appellee (building and loan association), gave up his right to demand or receive from it the amount of the loan in money, and in lieu thereof took only the right to demand and receive the amount of the certificates when they by their terms became due and payable. * * * The provisions of a statute are to be construed in the light of the general purpose of its enactment. The object of this statute as expressed in its title is to 'enable persons to become incorporated to raise funds to be loaned only among the members of such association.' No authority is given by the statute to issue such 'borrower's loan certificates' as were issued in this case. An association organized to 'raise funds to loan only to its members' has no occasion to issue such certificates, for the statute contemplates that the funds shall be raised before they are loaned. No doubt loans may be accepted in advance, to be made as funds come into the treasury in the order in which the applications are made, but the loan cannot be made until the money is in the treasury, and when the loan is made the borrower is entitled to receive the amount of his loan in money, not in certificates payable at no definite or fixed time. In our opinion the transaction in question was not a loan of money by appellee to Wineman within the provisions of the Building and Loan Association statute, but was a transaction neither within the letter nor the spirit of that act, nor protected by it from the statute against usury."

The similarity between the purpose clause of the Illinois statutes and section 9643 of the General Code of Ohio is so marked as to make the Wineman case, supra, clearly applicable to the transactions you present.

It is true that in the Illinois case the certificate was not payable at a definite time while the D. Company certificates mature on a day certain. However, in my opinion, this does not render the reasoning of the case inapplicable, for it is quite apparent that the case did not turn on the form of the certificate but on the fact that a loan was made when no money was available for the purpose. The D. Company did not loan money which it had raised, for, as stated by you, it had no funds available for loaning. On the contrary, it undertook to make a loan, and took a note and mortgage from the borrower in the hope that it would be able to raise the money at some time in the future and pay it to the mortgagor. It certainly could not be said to come within the realm of sound building and loan practice for a company to

indulge in the loaning of money which it does not possess and issue certificates of deposit for money which it has not received.

An examination of the form of certificate of deposit submitted by you in your letter indicates that it is a certificate of deposit in name only. In an opinion of the Attorney General, found in *Opinions of the Attorney General for* 1928, Volume I, Page 713, a certificate of deposit is defined as follows:

> "A certificate of deposit may be defined as a receipt evidencing the deposit of a sum certain * * * In form they are substantially simple receipts * * * for so many dollars."

Applying that definition it is easy to conclude that since there was no deposit of any money the instrument could not be a certificate of deposit issuable under the statute authorizing an association to "receive money on deposit." The language of the instrument seems to indicate very clearly that it is an ordinary negotiable promise to pay or promissory note, coming within the description of a negotiable instrument as defined by section 8106 of the General Code, which reads:

> "An instrument to be negotiable must conform to the following requirements:
>
> 1. It must be in writing and signed by the maker or drawer;
> 2. Must contain an unconditional promise or order to pay a sum certain in money;
> 3. Must be payable on demand, or at a fixed or determinable future time;
> 4. Must be payable to order or to bearer; * * *"

It is not made subject to the by-laws of the association and its form, and the circumstances surrounding its issuance indicate that it is not subject to the withdrawal rules of the association, but that upon its maturity it is subject to payment by the association upon presentation, and if not paid is collectible from the association the same as any other promissory note issued by it.

To permit an association to issue such instruments and carry them on its books as certificates of deposits would enable it to evade the restrictive provisions of section 9656 which limits the borrowing power of building and loans associations to a certain per cent of the "amount paid in by stockholders and depositors at the time the money is borrowed." The necessity of keeping a healthy relationship between borrowing and deposits is recognized by the legislature in the enactment of section 9656, and associations can not be permitted to expand the base of borrowing beyond legal limits by the simple devise of designating its obligations as deposits when they are not such.

Surveying the entire transaction, and in view of the foregoing authorities, I am of the opinion, in specific answer to your questions 1 and 2, that a building and loan association authorized to do business in Ohio, is without power and authority to make loans when such association does not have the money in its treasury, available for loaning, to complete the loan when the same is made; and further that such association is without power and authority to issue its negotiable certificates of deposit to a borrower for a newly created obligation to such association evidenced by the note and mortgage of such borrower, when the association is without available funds to loan, no money was deposited for such certificate, and the certificate is issued to the borrower in lieu of the money for such loan.

I now come to a consideration of your last question as to whether the acts set forth in your inquiry are violative of the criminal laws of this state.

The rule that there are no common law crimes in Ohio may be said to be axiomatic. The General Assembly has assumed the responsibility of defining what acts or missions are crimes or offenses against the State in case of guilt, and the elements necessary to constitute the offense must be gathered from the statute describing the offense and not *aliunde.*

An offense against a law of the State has been defined to be an act "punished as a crime under a statute." *State* vs. *Schlatterbeck,* 39 O. S., 268.

The court in the case of *Breaker* vs. *State,* 103 O. S., 670, stated that "a statutory crime is not a private wrong but a public wrong."

In the case of *McNary* vs. *State,* 128 O. S., 497, the directors of a bank declared and paid dividends from an undivided profits account, arrived at by disobeying the provisions of law, and the court held that, while they were guilty of acts of maladministration, they committed no criminal offense because no penalty was provided for the violation of the statute. The reasoning of that case applies here.

I do not find any specific section of the criminal statutes of Ohio making the acts you describe criminal, and applying the foregoing tests, it is my opinion that however violative they may be of sound, constructive building and loan practice and management, and beyond the scope of the power and authority of the association, the acts in and of themselves do not constitute a crime.

However, if it should appear by the facts that during the course of the transactions, a specific criminal statute was violated by the officers of the association in order to accomplish the acts recited by you, such officers would, of course, be amenable to the provisions of the statutes so violated.

Respectfully,

JOHN W. BRICKER,

Attorney General.