4960.

TITLE GUARANTEE AND TRUST COMPANY—MAY NOT DESIGNATE SELF AS TRUSTEE TO HOLD NOTE AND MORTGAGE SECURING IT WHEN.

SYLLABUS:

A title guarantee and trust company may not lawfully designate itself as trustee for the purpose of holding a single note and the mortgage securing it, theretofore belonging to said company, for the benefit of the holders of certificates and participation issued against such note and mortgage by said company.

COLUMBUS, OHIO, December 3, 1935.

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

GENTLEMEN:—You have requested my opinion upon the legality of certain mortgage participation certificates issued by The Title Guarantee and Trust Company, of C.......... The question of the authority of a title guarantee and trust company to issue such certificates arises by reason of Opinion No. 4317, rendered by this office June 4, 1935, the conclusion of which opinion was based upon the decision of the Supreme Court in *Ulmer* vs. *Fulton*, 129 O. S., 323.

The certificate submitted with your request recites that for a named consideration the company "does assign and transfer unto (the purchaser) an undivided share of the same amount of the note (or bond) for.................... Dollars * * * and in the mortgage securing same, * * *." The certificate further recites that, "Said note (or bond) and mortgage are held by the Company for account of the holders of the certificates or shares issued therefor * * *."

Under the terms of the certificate the company guarantees to the holder thereof:

> "First.—Payment of interest from date hereof at the rate of ....per cent. per annum, when the same shall have become due under the terms of said note (or bond) and mortgage, upon the amount of the principal sum hereby guaranteed.
>
> Second.—Payment of the principal sum of.................................... Dollars, as and when collected on said note (or bond) and mortgage, but in any event within twelve months after payment shall be demanded by the holder, provided such demand be made after the maturity of said note (or bond) and mortgage; subject, how-

ever, to the following conditions hereby mutually agreed upon between the Company and the holder of this certificate:

(a) The Company is appointed irrevocably by the holder of this certificate as his exclusive agent to collect, sue for and receive the principal and interest secured to be paid by said note (or bond) and mortgage, and to satisfy and discharge the same in its own name on receiving full payment thereof; to decide when and how any provision of said note (or bond) and mortgage shall be enforced and to enforce it in accordance with its judgment; to agree to any extension or anticipation of the time of payment of said note (or bond) and mortgage; to collect, sue for, receive and settle and compromise the fire insurance in case of loss by fire, and to exercise any right, option or privilege in said note (or bond) and mortgage contained and given to the mortgagee.

(b) Whenever the principal sum secured by said note (or bond) and mortgage shall become due for any cause, the Company shall have the right, without expense to the holder of this certificate, to collect said mortgage, and out of the proceeds of such collection to retain so much as may remain after paying to the holder of this certificate whatever may be due to the said holder of principal and interest on this certificate.

(c) The Company shall give to the holder of this certificate written notice of the time of the payment of the principal sum secured by said note (or bond) and mortgage, by mailing the same to the said holder at the address left by the holder with said Company in writing, and upon payment of said note (or bond) and mortgage, the said mortgage may be cancelled of record, although the holder may fail to present this certificate.

(d) The Company may for its own account be the holder or pledgee of one or more of the said participation certificates, and to the extent of such certificates share in the same manner as other certificate holders.

(e) If any portion of the principal of said note (or bond) is paid before the final maturity thereof, the Company shall have the right to apply same when paid to the payment of the full principal sum of this and other certificates of shares of said note (or bond) in the order of issuance thereof; and upon the mailing of notice of such payment applicable to this certificate mailed to the holder at the above-mentioned address, the sum hereby guaranteed and accrued interest shall be deposited to the credit of the holder.

Any excess of interest collected by the Company on said note (or bond) and mortgage beyond the rate above mentioned in this certificate shall belong to the Company.

> This certificate may be assigned by endorsement, but only when such assignment, with the name and mailing address of the transferee, is registered on the books of the Company."

Section 9850, General Code, which defines the powers of title guarantee and trust companies, provides *inter alia:*

> "A title guarantee and trust company may * * * make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans * * *."

By issuing the certificates the company purports to transfer an interest in a particular mortgage note theretofore owned by it as an asset. As above noted, the statute authorizes such company to "make loans for itself." Furthermore, under Section 9851, General Code, its "capital shall be invested as the board of directors of such company prescribe." It follows that a title guarantee and trust company may acquire notes and mortgages.

For the purposes of this opinion, I may assume that a title guarantee and trust company, having legally acquired notes and mortgages, may sell them and pass legal title thereto, and as a condition of such sales may lawfully guarantee to the purchasers payment of principal and interest.

In Opinion No. 4317, supra, which was based upon the Supreme Court decision in *Ulmer* vs. *Fulton,* supra, it was held unlawful for a title guarantee and trust company to designate itself as *trustee* of a mortgage pool for the benefit of the holders of certificates issued by the company against the securities comprising the pool. If the company referred to in your request is a trustee, it will be necessary to determine whether there is any distinction between issuing certificates evidencing a beneficial interest in a single mortgage and certificates issued against a pool of mortgages. If the company here in question is merely an agent to do certain things for the legal owner of a definite interest in a particular note and mortgage, the former opinion and the Ulmer decision are clearly inapplicable.

Under the certificate in question the company "transfers unto" the holder a definite undivided share of a particular note and mortgage which "are held by the company for account of the holders of the certificates or shares issued therefor * * *." This language indicates an assignment by separate instrument of an interest in the note and mortgage. Was this interest legal or equitable?

The following statement appears in 27 *O. Jur.,* 471:

> "Thus, where a mortgage is assigned by a separate instrument, neither witnessed nor acknowledged, and the assignment is not recorded, it is merely equitable."

As stated in 27 *O. Jur.*, 472, since a mortgage is merely an incident of the debt, "the assignment of such debt operates *in equity* as a transfer of the mortgage * * *." While I assume that the note is negotiable, it may nevertheless be transferred by assignment (29 *O. Jur.* 931), and such assignment may be by separate instrument. 8 *C. J., Bills and Notes,* Sec. 568. However, the following appears in 8 *C. J.*, page 385:

> "It is often held that the transfer of a bill or note payable to order, without indorsement, does not pass the legal title but merely constitutes the transferee an equitable assignee thereof. * * *."

Among the cases cited in support of this proposition are *Miles* vs. *Reiniger,* 39 O. S., 499, and *Seymour* vs. *Leyman,* 10 O. S., 283.

Section 8154, General Code, reads:

> "When the holder of an instrument payable to his order transfers it for value without endorsing it, the transfer vests in the transferee such title as the transferer had therein and the transferee acquires in addition the right to have the endorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

Under this section it would appear that, as between the parties, one who pays value to the holder of a negotiable instrument payable to his order accepts a transfer of the instrument, although without endorsement, and acquires legal title with the right to obtain an endorsement. However, the assignee here (certificate holder) could not assert legal title since he pays value for only a part interest in the note.

A bearer instrument may be negotiated by delivery. Section 8185, General Code. The notes against which these certificates are issued are not so transferred to the participation certificate holders. Manifestly a part interest could not be so transferred. In the case of an instrument negotiable by endorsement, such endorsement must be of the entire instrument. Section 8137, General Code.

I cannot escape the conclusion that whether the negotiable notes in question are order or bearer instruments, the participation certificate constitutes an assignment of an equitable interest only. Similarly, an equitable interest only in the mortgage passes to the participation certificate holder.

The fact that an equitable interest only is transferred to the certificate holder indicates that the company is a trustee rather than an agent. As stated in *McClain* vs. *Custer,* 11 O. A. 183, 184-185, "A trustee usually holds the legal title, while an agent ordinarily does not."

As above noted, the company guarantees payment of principal and interest to the certificate holder. As a condition of this guaranty, it is stipulated that the holder irrevocably appoints the company "as his exclusive *agent*" to enforce collection of the note and mortgage "and to satisfy and discharge the same *in its own name.*" It is true that the word "agent" is used but the courts will always look through mere form to substance. If all of the language shows that the powers and duties imposed upon one are not those of an agent, the mere use of the term agent does not make him one. See *In re Cook,* 6 N. P. (N. S.), 298.

As above pointed out, the company is authorized to discharge the debt and security "in its own name." It is elemental that the agent transacts business in the name of his principal or on the latter's account. 1 *O. Jur.,* 614; 21 R. C. L., 817. On the other hand, "the trustee acts for himself." 1 *O. Jur.,* 619, citing *Thomas Gibson Co.* vs. *Carlisle,* 1 N. P. 398. Thus the provision in question strongly indicates the existence of a trust rather than an agency.

I conclude that the company is in reality a trustee and that the certificates evidence a definite beneficial interest in a particular note and mortgage.

In Opinion No. 4317, supra, it was held, as disclosed by the syllabus:

> "Title guarantee and trust companies may not lawfully 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. *Opinions of the Attorney General,* 1928, Vol. 3, p. 2072, and *Opinions of the Attorney General,* 1933, Vol. 2, 960, syllabus 3, overruled, on authority of *Ulmer* vs. *Fulton,* 129 O. S., 323."

The opinion was based upon the decision in *Ulmer* vs. *Fulton,* where the creation of such a mortgage pool was held to be beyond the powers of a trust company. The court held that the statutes authorizing such companies to act as trustee limited them to "the acceptance and execution of trusts at the instance of others." The court began with the premise that trust corporations have only those powers expressly granted and such as may be fairly implied therefrom. In the former opinion this principle was applied to title guarantee and trust companies. This appears sound because of the character of their business which the legislature has seen fit to regulate to a far greater degree than ordinary private corporations.

As pointed out in the former opinion, the sections of the code applicable to trust companies refer to property "held" and "received or held" in trust, and authorized such companies to "receive and hold" property in trust. One

section authorizes such companies to invest trust property "in a general trust fund of the trust company."

These statutes do not provide that a trust company can only "receive" and "hold" property where the settlor is some person or corporation other than the trust company, yet the court in the second branch of the syllabus in the *Ulmer* case held that the statutes do not authorize such company "to act in the dual capacity of settlor and trustee by creating trusts out of its own securities and selling participation certificates therein to the public." A strict grammatical construction would require no distinction between a trust composed of a single note and mortgage and one composed of a number of such securities.

In the course of the opinion the court said:

> "It is a salutary rule of long recognition that a trustee cannot sell his individual property to himself as trustee."

If I am correct in my conclusion that the title guarantee and trust company is a trustee, that is precisely what it did.

The section authorizing a title guarantee and trust company to "make loans for itself or as agent or trustee for others" does not state that such company may declare itself trustee of a note and mortgage which it owns and sell certificates evidencing a beneficial interest therein. Thus upon the conclusion reached in the *Ulmer* decision, I conclude that the statute does not authorize such transaction. I do not find sufficient difference in the statutes or in the types of corporations involved to justify a contrary conclusion.

I am aware that while the syllabus of a Supreme Court decision states the law, it must be interpreted with reference to the facts upon which it was predicated. *Williamson Heater Co.* vs. *Radich,* 128 O. S., 124. I further recognize that since a title guarantee and trust company is not a bank of deposit and since a single note and mortgage are involved, the abuse referred to by the court of substituting good for bad securities in a trust, or *vice versa,* to the prejudice of depositors or certificate holders, as the case might be, could not occur.

Since the company guarantees payment of the certificates, the practice mentioned by the court of purchasing low grade mortgages at a discount and turning them into the trust at face value, could not happen.

In the *Ulmer* case the court pointed out that the interest spread between the mortgages and certificates gave the trust company a profit. In the certificate here in question, it is provided that "any excess of interest collected by the company on said note (or bond) and mortgage beyond the rate above mentioned in this certificate, shall belong to the company." While I do not know what if any interest spread exists in the instant case, the presence of such

a provision indicates the possibility if not the strong probability of the profit-making feature condemned in the Ulmer decision.

In spite of the difference in facts, I conclude that the principle announced in the Ulmer decision and in the former opinion of this office makes it unlawful for a title guarantee and trust company to declare itself trustee of a single note and mortgage theretofore owned by it and to sell participation certificates therein to the public. Having concluded that in substance this is the practice of the company in question under the form of certificate submitted to me, it is my opinion that the issuance of such certificates is unlawful.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4961.

APPROVAL, CERTIFICATE OF AMENDMENT TO ARTICLES OF INCORPORATION OF THE LIFE INSURANCE COMPANY OF AMERICA.

COLUMBUS, OHIO, December 3, 1935.

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

DEAR SIR:—I have examined the certificate of amendment to the articles of incorporation of The Life Insurance Company of America submitted to me for approval. Finding said amendment not to be inconsistent with the Constitutions or laws of the United States or of the State of Ohio, I have endorsed my approval thereon and return the same herewith to you.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4962.

APPROVAL, NOTE OF CAESARCREEK TOWNSHIP RURAL SCHOOL DISTRICT, GREENE COUNTY, OHIO, $1,176.00.

COLUMBUS, OHIO, December 5, 1935.

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