5936.

APPROVAL—CERTIFICATE OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF DANIEL BOONE PIONEER LIFE INSURANCE COMPANY.

COLUMBUS, OHIO, August 5, 1936.

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

DEAR SIR: I have examined the certificate of amendment to the articles of incorporation of Daniel Boone Pioneer Life Insurance Company which you have submitted to me for my approval. Finding the same not to be inconsistent with the constitution or laws of the United States or of the state of Ohio, I have endorsed my approval thereon.

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

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5937.

SUPERINTENDENT OF BANKS—EXCLUSIVE RIGHT TO LIQUIDATION OF BANKS—MAY NOT PLEDGE ASSETS OF BANK IN LIQUIDATION FOR A LOAN AND RELINQUISH CONTROL OF LIQUIDATION OF SUCH ASSETS.

*SYLLABUS:*

*1. Section 710-95a, General Code, authorizing the Superintendent of Banks to borrow money and pledge the assets of a bank in liquidation as security therefor, does not empower the Superintendent, under the guise of borrowing money, to relinquish the duties of liquidation imposed upon him by Section 710-95, General Code, and other statutory provisions.*

*2. The Superintendent of Banks is without authority to pledge all of the assets of a bank in liquidation for a loan estimated to be the full net recovery value thereon, under an agreement whereby the pledgee is to have complete control of the liquidation of the assets for the purpose of repaying the loan.*

COLUMBUS, OHIO, August 5, 1936.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR: I have your request for my opinion, which reads:

"Representatives of the C. Loan Agency of Reconstruction Finance Corporation have recently conferred with me with refer-

ence to the possibility of terminating certain bank liquidations by loans to be made by that corporation. It desires, with my approval and that of the Court, to aid, in so far as practicable, the winding up of the affairs of closed state banks.

The plan under consideration contemplates that I will obtain from the corporation a loan in the amount of the full recovery value of the total assets in the particular liquidation, less delinquent and estimated future taxes, expenses, interest and the cost of liquidation during the life of the proposed loan. The assets to be pledged as security for the loan will, in so far as possible, be physically delivered into the possession of the corporation's custodian bank. The assets to be pledged are to be assigned by me to the corporation without recourse or warranty.

The plan further provides that immediately after disbursement of the loan, the assets of the bank in liquidation will be sold by me subject to the security rights of the corporation, that is to say, the equity therein will be so sold. This sale is to be made pursuant to order of court having jurisdiction of the liquidation proceedings and for a consideration which will represent the cash value of the equity on the date of the sale. The corporation will consent to such sale and agree to look only to the pledged assets for repayment of its loan. It is anticipated that the equity will be purchased by three trustees who shall execute an agreement providing among other things that the corporation is to liquidate the collateral and that any equity in the assets remaining after the corporation has been repaid will be liquidated for the benefit of the depositors, creditors and/or shareholders of the bank.

This procedure will enable me to pay as large a dividend as though the corporation had purchased the assets outright and will have the further advantage of preserving for the depositors, creditors and/or shareholders of the bank an equity in the assets after the loan made by the corporation has been paid.

Will you kindly advise me if the contemplated plan is in your opinion legal."

Section 710-95a, General Code, reads:

"The superintendent of banks, liquidating agent, receiver, or other person or persons lawfully in charge of the property and affairs of closed banks are authorized, upon the order of the common pleas court in and for the county in which the principal office of such bank is located, to borrow money and to issue evidences of indebtedness therefor and to secure the repayment of

the same by the mortgage, pledge, transfer in trust and hypothecation of any or all of the property of such bank, whether real, personal or mixed, superior to any charge thereon for expenses of liquidation as provided in section 710-97, hereof. Such loans may be obtained for the purposes of facilitating liquidation, protecting or preserving the assets in his charge, expediting the making of distributions to depositors and other creditors, providing for the expenses of administration and liquidation and aiding in the reopening or reorganization of such bank or its merger or consolidation with another bank or the sale of all of its assets. The superintendent of banks, liquidating agent, receiver or other person or persons lawfully in charge of the affairs of such bank, shall be under no personal obligation to repay any such loans so made and shall have power to take any and all action necessary or proper to consummate such loan and to provide for the repayment thereof and to give bond, when required, for the faithful performance of all undertakings in connection therewith. The superintendent of banks, liquidating agent, receiver, or other person or persons in charge of the affairs of such bank shall make application to said common pleas court for approval of such loan and the giving of security therefor. Notice of such application shall be given by publication once each week for two (2) consecutive weeks, in each case upon any week day of the week, in a newspaper of general circulation in said county and by notice from the superintendent of banks, liquidating agent, receiver or other person or persons lawfully in charge of its affairs to such bank, by service of a copy thereof upon an officer or upon a majority of the directors acting at the time such bank was closed, of the time and place of making application to said court for such order. Hearing on such application shall be had not less than ten (10) days after the first publication of such notice. At the hearing upon such application any stockholder, depositor or other creditor of such bank shall have the right to appear and to be heard thereon. Prior to the obtaining of such court order, the superintendent of banks, liquidating agent, receiver or other person or persons lawfully in charge of the affairs of such bank may make application or negotiate for such loan or loans, subject to the obtaining of such court order."

I assume that the procedure prescribed in this section would be followed in procuring the proposed loans from the Reconstruction Finance Corporation. I further assume that by "disbursement of the loan" you mean payment of the proceeds of the loan to the bank's depositors and

other creditors. One of the express purposes for the procuring of such a loan is "expediting the making of distributions to depositors and other creditors."

You state that the pledged assets would be physically delivered to the pledgee's custodian bank in so far as possible, and that the assets would be assigned to the pledgee without recourse or warranty.

The following is stated in 32 O. Jur., Pledges, Sec. 8, pp. 14, 16:

> "Possession by the pledges, or control equivalent thereto, is indispensable to a pledge. * * *
>
> * * * In the case of the pledge of an intangible, the requirement of delivery may be satisfied symbolically by a delivery of the only muniment of title possessed by the debtor or by the execution of an instrument conveying legal title to the pledgee * * *."

The contemplated provisions with respect to possession of the assets which would constitute the subject of the pledge appear to be in accord with these principles. I assume that the "custodian bank", as the name implies, would have mere custody of the assets.

As was stated in *People* v. *Burr* (N. Y.), 41 How. Prac., 293, 296:

> "The term 'custody of property' as contradistinguished from legal possession, means the charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master, confided to his mere care, which custody may be terminated and prolonged according to the will and pleasure of the master."

As I understand the arrangement the pledgee corporation would have legal possession of the pledged assets, although a bank would have the custody. This arrangement concerning possession and custody would not be unlawful.

I understand from your letter that by agreement the pledgee corporation is to liquidate the pledged assets, which constitute the sole source from which the loan can be repaid, until payment of the loan has been completed.

While Section 710-95a, General Code, authorizes the superintendent to pledge assets for a loan and provides that he "shall have power to take any and all action necessary or proper to consummate such loan and to provide for the repayment thereof," the other statutory provisions defining his duties in liquidation must not be overlooked. Section 710-95, General

Code, being part of the banking act, and relating to the same subject, must be read *in pari materia* with Section 710-95a, *supra.*

The former section is quite long and need not be quoted in full here. Suffice it to say this section confers upon the superintendent, among other powers, the authority (1) to collect all money due the bank; (2) perform all acts desirable or expedient in his discretion to preserve assets; (3) to sell, exchange and compromise assets; (4) to compromise claims against the bank; (5) to pay liens upon the bank's assets; (6) to maintain suits against the officers, directors, employees and stockholders; (7) to institute, prosecute and defend all actions and proceedings involving the liquidation; and (8) to abandon worthless assets. Certain of these powers can be exercised only with court approval.

It is clear from these provisions that the Superintendent of Banks is charged with the duty of reducing the assets to money. He is also charged with distribution of the proceeds to those entitled thereto. Section 710-93, General Code. It has been held that statutes analogous to Section 710-95, General Code, sub-paragraph 1, authorizing a sale of assets, do not authorize a state officer charged with the duty of liquidation to enter into a contract of agency providing for liquidation by others under the guise of a sale, and thereby relieve himself of his statutory duties to depositors, other creditors and stockholders. *Mobley v. Marlin,* 166 Ga. 820, 144 S. E. 747; *Jackson* v. *McIntosh,* 12 Fed. (2nd), 676 (C. C. A. 5); *In re LaFayette Bank & Trust Co.,* 198 N. C. 783, 153 S. E. 452. By a parity of reasoning, the Superintendent of Banks could not delegate his statutory duties of liquidation under the guise of borrowing money and pledging the bank's assets as security therefor.

You state that a loan "in the amount of the full recovery value of the total assets", less certain expenses, is contemplated. It is further stated that after the disbursement of the loan the Superintendent will sell the equity in the assets. If the full recovery value were received from the lending corporation, there would be no equity to sell. I presume that the possibility of appreciation in the value of the assets is contemplated, as well as the possibility that the estimated full recovery value might be too low. In view of my conclusion that the proposed transaction is beyond the power of the Superintendent of Banks, further discussion of this and other provisions of the plan is unnecessary.

Specifically answering your inquiry, it is my opinion that:

1. Section 710-95a, General Code, authorizing the Superintendent of Banks to borrow money and pledge the assets of a bank in liquidation as security therefor, does not empower the Superintendent, under the guise of borrowing money, to relinquish the duties of liquidation imposed upon him by Section 710-95, General Code, and other statutory provisions.

2. The Superintendent of Banks is without authority to pledge all of the assets of a bank in liquidation for a loan estimated to be the full net recovery value thereon, under an agreement whereby the pledgee is to have complete control of the liquidation of the assets for the purpose of repaying the loan.

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

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5938.

APPROVAL—PAPERS IN CONNECTION WITH THE CONVERSION OF THE CITIZENS SAVINGS AND LOAN COMPANY, FREMONT, OHIO, INTO FIRST FEDERAL SAVINGS AND LOAN COMPANY OF FREMONT.

COLUMBUS, OHIO, August 5, 1936.

HON. WILLIAM H. KROEGER, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR: I have examined the various papers submitted by you in connection with the conversion of The Citizens Savings and Loan Company, Fremont, Ohio, into First Federal Savings and Loan Association of Fremont, and find the papers submitted and the proceedings of said The Citizens Savings and Loan Company as disclosed thereby to be regular and in conformity with the provisions of Section 9660-2 of the General Code.

All papers, including two copies of the charter issued to the said First Federal Savings and Loan Association of Fremont, are returned herewith to be filed by you as a part of the permanent records of your department except one copy of the charter which the law provides shall be filed by you with the Secretary of State. The law further provides that such filing with the Secretary of State shall be within ten days after the requirements of said Section 9660-2 have been complied with by The Citizens Savings and Loan Company and that your approval shall be endorsed upon the copy so filed. You will find on the copies of the charter form of approval for your signature.

Yours very truly,
JOHN W. BRICKER,
*Attorney General.*