merely as a security, the bank would have taken immediate possession of the premises; it would not have stated that the conveyance was for the purpose of *security;* it would not have provided for a power of sale, because a grantee in an absolute deed may sell when and as he pleases; it would not have agreed to pay any surplus to Mr. Patton; it would not have agreed that upon payment of the debt the deed should be null and void; and it would not have agreed to make a quit-claim deed.

* * * * *

Much stress is laid by plaintiff in error upon the promise in the instrument in question, upon payment of the debt, to make a quit-claim deed, and it is urged that that provision shows that the title passed. We do not so construe it. The instrument was evidently intended to serve as a mortgage security to the bank, but to be so far in the form of a deed as to permit its record in the record of deeds instead of mortgages, and it was so recorded. Under these circumstances, upon payment of the debt by Mr. Patton, the instrument, even though made null and void by such payment, could not be released as a mortgage upon the margin of the deed record, without leaving a blur upon the title, and therefore for the protection of the title in case of payment, the provision for a quit-claim deed was very properly inserted. But that provision did not make the instrument a deed, but was a strong confirmation of its being a mortgage, because it showed that the grantor still had a vested interest in the property, the title to which he was careful to protect. The intention was to secure the bank and shield Mr. Patton. That intention failed of its purpose, as is often the case, when the rights of third parties intervene. In such cases courts disregard mere forms, and consider the substance and legal effect of the transaction."

In view of the decision of the court in the above case, which involved the proper construction of an instrument almost precisely like the trust deed here under consideration, I am of the opinion that the said "trust deed" is a mortgage rather than a deed, and that the grantor therein retains a vested interest in the property which the deed purports to convey and that the said deed should be recorded in the record of mortgages.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3608.

DISAPPROVAL, LEASE TO CANAL LAND IN VILLAGE OF NEWCOMERSTOWN, TUSCARAWAS COUNTY, OHIO, FOR THE RIGHT TO OCCUPY AND USE FOR RESIDENCE AND LAWN PURPOSES—FIRST NATIONAL BANK.

COLUMBUS, OHIO, December 10, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You recently submitted for my examination and approval a canal

land lease in triplicate, executed by you in your official capacity as Director of Public Works to The First National Bank of Newcomerstown, Ohio. By this lease, which is one for a stated term of fifteen years and which provides for an annual rental of $15.00, there is leased and demised to the lessee above named the right to occupy and use for residence and lawn purposes that portion of the abandoned Ohio Canal, including full width of the bed and banks thereof, which is located in the Village of Newcomerstown, Tuscarawas County, Ohio, and which is more particularly described as follows:

> "Beginning at a point in the southerly line of said canal property, opposite Station 2866+32.5, of the G. F. Silliman Survey of said canal property, and running thence westerly with the said southerly line sixty-seven and five-tenths (67.5') feet, to a point opposite Station 2667, of said survey; thence northerly at right angles with the transit line of said survey eighty-nine (89') feet, more or less, to the northerly line of said canal property; thence easterly with said northerly line sixty-seven and five-tenths (67.5') feet; thence southerly eight-nine (89') feet, more or less, to the place of beginning, and containing six thousand and seven (6,007) square feet, more or less."

As above noted, this lease is executed to the national bank above named "for residence and lawn purposes." This provision in the lease obviously suggests the question as to the authority of the bank to take a lease on the property for the purposes stated. As to this, it may be noted that the federal statutes relating to national banks constitute the measure of the power and authority of such corporations, and they can rightfully exercise only such powers as are expressly granted to them or which are incidental to the conduct of the business for which they are established.

In the case of *Logan County National Bank* vs. *Townsend,* 139 U. S. 67, it was held:

> "The National Banking Act is an enabling act for associations organized under it, and one cannot lawfully exercise any powers except those expressly granted, or such incidental powers as are necessary to carry on the business for which it was established." (See also *Gross* vs. *Fort Loramie,* 100 O. S. 35, 40).

It does not appear that the property covered by this lease is to be used for any purpose which is connected with or incidental to the business conducted and carried on by this bank, and for this reason I am quite clearly of the opinion that the bank has no authority to take a lease on this property for the purposes stated in the lease. It may be that if this lease is approved and the same is accepted by the bank the same rule would apply as applies with respect to conveyances taken by national banks without legal authority, that is, that objection to the conveyance can be made only by the government through proceedings to that end. However, this rule does not relieve me of my duty in passing on the question of the legality of leases presented for my approval and to disapprove the same if I find that the parties to the lease or either of them are not competent to enter into the contract. For the reasons above stated I am required to dis-

approve the lease here in question and the same is hereby returned to you without my approval endorsed thereon.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3609.

APPROVAL, LEASES TO RESERVOIR LAND AT BUCKEYE LAKE, LICKING COUNTY, OHIO—M. R. HODSON.

COLUMBUS, OHIO, December 11, 1934.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a recent communication over the signature of the Chief of the Bureau of Inland Lakes and Parks of the Division of Conservation in your department, submitting for my examination and approval two certain reservoir land leases in triplicate executed by you to M. R. Hodson of Columbus, Ohio. By the leases here in question, each of which is for a stated term of fifteen years and each of which provides for an annual rental of $21.00, there are leased and demised to the lessee above named, the east and west halves, respectively, of Lot Numbr 3, west of the waste gates; the same being a part of the outer slope of the northerly embankment of Buckeye Lake in the Southeast quarter of Section 14, Town 17, Range 18, Licking County, Ohio.

Upon examination of these leases I find that the same have been properly executed by you as Conservation Commissioner and by M. R. Hodson, the lessee therein named.

I further find upon examination of the provisions of this lease and of the conditions and restrictions therein contained that the same are in conformity with section 471 and other sections of the General Code of Ohio relating to leases of this kind. I am accordingly approving these leases as to legality and form as is evidenced by my approval endorsed upon the leases and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3610.

APPROVAL—RESERVOIR LAND LEASE AT BUCKEYE LAKE, FAIRFIELD COUNTY, FOR THE RIGHT TO USE AND OCCUPY FOR COTTAGE SITE AND DOCKLANDING PURPOSES—F. G. KETNER OF COLUMBUS, OHIO.

COLUMBUS, OHIO, December 11, 1934.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—The Chief of the Bureau of Inland Lakes and Parks of the