

October 27, 1933

Turney, Burgess, Culwell and Pollard,
Attorneys and Counsellors at Law,
First National Bank Building,
El Paso, Texas.

Gentlemen:

Attention Mr. Pollard.

This will acknowledge receipt of your letters of October 16th and October 17th, in reference to the opinion heretofore given by your firm to the Reconstruction Finance Corporation, and also copy of the opinion given by the law firm of Kibbey, Bennett, Gust, Smith and Rosenfeld of Phoenix, Arizona, to the Valley Bank and Trust Company of Phoenix, Arizona.

I have examined both opinions. It occurs to me that each of the opinions points to or lays stress on a different portion of Section 238, R. C. A. 1928, as amended by Chapter 97, Session Laws 1933, Regular Session. Your opinion lays stress upon the following portion of said section;

"***but at no time shall the amount for which the bank is liable as borrower be in excess of its combined capital and surplus."

I agree with your opinion that the language just quoted is broad enough to cover any borrowing by the bank and would include borrowing by way of issuance of debentures as contemplated by Section 304 of the Bank Conservation Act of 1933, as amended.

The opinion of the law firm of Kibbey, Bennett, Gust, Smith and Rosenfeld takes the position that "the issuance of capital notes or debentures would, if the same be denominated as a borrowing or not, is prohibited neither expressly or by implication, if payment of such capital notes or debentures is not made out of assets which are by statute made available for deposit."

33 - 501

Turney, Burgess, Culwell and Pollard.
Page No. 2.

I am of the opinion that the opinion referred to was not intended to convey the impression that a bank could issue capital notes or debentures in excess of its combined capital and surplus.

I have examined the form of debenture submitted. My examination of the same leads me to believe that said form of debenture meets every suggestion contained in the opinion of Kibbey, Bennett, Gust, Smith and Rosenfeld.

I concur in the opinion of Kibbey, Bennett, Gust, Smith and Rosenfeld that Arizona commercial banks may borrow money by means of capital notes or debentures, but at no time shall the amount for which a bank is liable as borrower, evidenced by capital notes or debentures, be in excess of its combined capital and surplus.

Very truly yours,

ATL/dn

Attorney General.