7. Accompanying the abstract is a copy of a journal entry in the Columbiana county Probate Court covering the administration of the Ide Stallman estate. The proceedings are not abstracted, and in view of the fact that there are minors having an interest in the real estate, it is necessary that these proceedings be abstracted.

8. The 1926 taxes, which are a lien, are not paid.

9. No showing is made in the abstracter's certificate with reference to special assessments. This certificate shows that no examination was made in the United States Courts, and examination was made in the name of record owners only and only for the period during which each one respectively held said title."

In view of the fact that the 8.59 acres desired by the state is not the same 8 and a fraction acres covered by the abstract, I suggest that the abstracter cover the entire 19.17 acre tract; show why Jacob Paxson did not join his sisters in the 1856 deed to James Galbraith; show how Elizabeth Blackburn became seized of the land; cover the proceedings in the Stallman estate in respect to the sale of the land; and secure a certificate as to special assessments.

The encumbrance estimate submitted with the above abstract bears No. 3979, is dated December 22, 1926, was prepared by the Department of Highways and Public Works, addressed to Ide Stallman, R. F. D. Hanoverton, Ohio, and covers Tract No. 6 (8.59 acres of land) of the Guilford Lake Park site in Hanover township, Columbiana county, Ohio, at an estimated cost of five hundred fifty-eight and 35-100 dollars ($558.35). This encumbrance estimate was duly certified by Wilbur E. Baker, Director of Finance, under date of December 23, 1926.

No deed was submitted with the other papers, although a blank form of Ohio Warranty Deed, containing a description of the premises proposed to be conveyed, was transmitted. Since this deed has not been prepared or executed, this department cannot pass upon the same.

I am returning herewith the file relating to Tract No. 6, including the abstract of title, encumbrance estimate and the deed blank containing the description. When the corrections and additions indicated shall have been made, I will make such further examination as may be necessary.

Respectfully,
EDWARD C. TURNER,
Attorney General.

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BUILDING AND LOAN ASSOCIATION—CANNOT INVEST IN "PARTICIPATION CERTIFICATES"—SECTIONS 9660, 9661 AND 9662, GENERAL CODE, PARTIALLY CONSTRUED.

SYLLABUS:

1. *A building and loan association is not legally authorized to invest any of its surplus funds in any securities other than those mentioned in Sections* 9660, 9661 *and* 9662 *of the General Code.*

2. *A building and loan association is not legally authorized under Section* 9662

of the General Code to invest any of its surplus funds in "participation certificates" which are essentially the same as collateral trust certificates.

COLUMBUS, OHIO, March 4, 1927.

Department of Commerce, Division of Building and Loan Associations, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your request for an opinion under date of February 24, 1927, reading as follows:

> "We enclose herewith copy of form of Participation Certificate which the Trust Department of a certain Ohio bank desires to issue to a building and loan association.
>
> "Will you please advise whether or not a building and loan association is legally authorized to invest any of its surplus funds in the manner provided in this certificate?"

With the above request you have submitted what is entitled "Participation Certificate in First Mortgage Interest Bearing Obligations Secured by Real Estate Mortgages," which it is proposed shall be issued by The ————————Savings & Loan Company, which is also called in said certificate The———————— Savings & Trust Company, and will be hereinafter referred to as the bank, to The ————————Building Loan & Savings Company, which will be hereinafter referred to as the association. The certificate recites that the association is entitled to a participation to the extent of————————dollars in the fund held by the bank in trust in its Trust Department, known as the trust of said association, said fund consisting of interest bearing promissory notes secured by real estate first mortgages, which notes and mortgages have been and will be selected and appraised by the proper officials of the bank and do and shall in all respects comply with and be within the rules adopted for making mortgage loans by said association, the principal amount of said funds being and to be at all times equal to the aggregate par value of all participation certificates issued by the bank and outstanding against said fund, no participation in said fund to be issued to any party other than said association. The certificate also provides that the bank shall at all times hold, manage and control said fund and the investment and reinvestment thereof in accordance with the rules adopted for making mortgage loans by said association.

Said participation certificate also provides:

> "TWO: On the first days of January and July in each year, while this certificate shall be outstanding, those being the days on which interest from the interest bearing notes, secured by mortgage in which this certificate represents a share, will be available, the undersigned will pay to said The ———————— Building & Savings Company on this certificate such proportion of said interest so received, accruing on said fund from and after the date hereof, as the amount of this certificate bears to the entire amount of said fund, less the compensation of the undersigned, which it is agreed shall be the amount of said interest, referable to this certificate, over and above interest at the rate of six per cent (6%) per annum on the face amount of this certificate, interest at said rate of six per cent (6%) per annum to be paid to said The ———————— Building Loan & Savings Company.
>
> The term of this certificate shall expire on the —— day of ————, 19——; and thereupon and thereafter said The Home Building Loan &

Savings Company shall be entitled to receive the amount represented hereby out of the principal of said fund, together with any interest referable to this certificate which has accrued to said date, upon surrender and cancellation of this certificate.

This certificate is non-assignable."

Building and loan associations are creatures of statute and have only such powers as are conferred upon them by law or which may be reasonably incident to the carrying out of the powers expressly conferred upon them.

The powers of building and loan associations organized under the laws of Ohio are set forth in Sections 9647 to 9675 of the General Code, both inclusive. The powers with reference to making loans and investing the funds of such associations are found in Sections 9657, 9660, 9661 and 9662 of the General Code.

Section 9657, General Code, permits loans to be made to members and others upon the following securities:

1. Obligations secured by mortgage or deed of trust on real estate which shall be first liens on said real estate;
2. Obligations secured by pledge of stock or of deposits in such association not to exceed the paid up value or withdrawal value of such stock or deposits;
3. Obligations secured by pledge of securities provided for in Section 9660 of the General Code not to exceed, however, ten percent of the assets of the association;
4. To continue loaning on other securities where such companies have been making loans primarily on such securities continuously since January 1, 1915.

Section 9660, General Code, provides that building and loan associations may invest any of their idle funds in bonds or interest bearing obligations of the United States, District of Columbia, State of Ohio, or of any county, township, school district or other political subdivision of the State of Ohio, or of any incorporated city or village in the State of Ohio, or in farm loan bonds under the provisions of the Federal Farm Loan Act, approved July 17, 1916, and the amendment thereto, and in such other securities as are now or hereafter may be accepted by the United States to secure government deposits in National Banks. Said section also provides that such investments at no time shall amount in the aggregate to more than twenty per cent (20%) of the assets of the corporation.

Section 9661, General Code, permits building and loan associations to deposit idle funds in financial institutions that are subject to inspection by the United States or the state of Ohio and to receive therefor certificates of deposit.

Section 9662, General Code, provides:

"To buy but not to sell except with the written consent previously granted by the superintendent of building and loan associations interest bearing obligations secured by real estate mortgages, which shall in all respects comply with, and be within the rules adopted for making mortgage loans by the corporation making such investments. Such mortgage investments may be held and reported as mortgage loans."

In an opinion rendered by this department on October 18, 1921, (Opinions of Attorney General, 1921, Vol. II, p. 919), it was held that a building and loan association is not authorized by Section 9662 of the General Code to purchase collateral trust notes secured by a trust deposit of notes secured by real estate mortgages

from time to time assigned to the trustee. On page 921 of the opinion it is said:

> "The question as thus assumed may be put as follows:
> Is an interest-bearing obligation secured by a deposit of other interest-bearing obligations, which in turn are secured by real estate mortgages and 'interest-bearing obligations secured by real estate mortgages,' within the meaning of Section 9662 of the General Code?
> In the opinion of this department, a negative answer must be given to this question. Section 9662 is very explicit. The security for the interest-bearing obligation must be the real estate mortgage. This security must be direct and, in addition, must 'in all respects comply with, and be within the rules adopted for making mortgage loans by the corporation making such investments'. It is impossible to say that the collateral trust notes in question comply with these requirements; they are not directly secured by real estate mortgage; in case of any default in the payment of the principal or interest of any such collateral trust note, there could be no immediate recourse to the land, and this of itself, in the opinion of this department, is sufficient to take the case out of the application of Section 9662."

The "participation certificate" submitted is essentially a collateral trust note or collateral trust certificate. It is true that participation in the trust fund is limited to the association and that the notes and mortgages making up the fund are limited to such as comply with the rules adopted by the association for making mortgage loans, but the objection made in the opinion referred to has equal application here in that the certificates are not directly secured by real estate mortgages and in case of default in the payment of the principal or interest of any of the certificates there could be no direct recourse to the land.

I can not understand the reason why a building and loan association should seek to do by indirection that which it is authorized to do directly. In other words, if the building and loan association is to be, as claimed by attorneys submitting briefs on the question, the real owner of the notes secured by mortgages, what is to be gained by the trusteeship? Why should not the association buy the notes rather than an interest in a fund made up of such notes?

Counsel, in their brief urging the legality of such certificates, claim:

> "Building and loan companies are frequently in a position where they have funds for investment, which, however, can not be placed in a long term investment security. It is of the utmost importance to such associations that they should be able to invest a part of their funds in short term security, which none the less meets all of the requirements of the law and of their own rules and regulations with reference to investment."

The only inference that we can draw from this argument is that the bank will seek to set aside and appropriate to the trust fund notes secured by mortgages owned by the bank, rather than to sell to the association the notes and mortgages themselves.

For the above reasons, I am of the opinion that a building and loan association is not legally authorized to invest any of its surplus funds in the manner provided by the participation certificate submitted.

Respectfully,
EDWARD C. TURNER.
Attorney General.