It will be noted that the appropriation therein mentioned is to be made at the beginning of each fiscal year. In the case of earnings of a publicly operated public utility the earnings of such public utility are not ascertainable at the beginning of the fiscal year. In some cases the earnings of the public utility cannot even be approximated at the time when such appropriations should be made. The funds from which the operating expenses of the public utility are paid are raised by the charges made against the user of the product of the public utility.

There seems to be no apparent reason why contracts as distinguished from any agreement or other obligation, should not require a certificate that the funds have been appropriated and are in the treasury or in the process of collection. Contracts are usually such as are made for an expenditure involving a large amount and it would seem ridiculous to say that it would not be necessary to have the certificate when entering into a contract for the expenditure of a large amount of money and at the same time require a certificate for the expenditure of some trivial sum for the purchase of supplies.

It is therefore my opinion that all obligations payable from the earnings of a publicly operated public utility, such as salaries, wages, supplies purchased, etc., are to be considered contracts within the meaning of the term as used in the last paragraph of section 5660 of the General Code.

Respectfully,
C. C. CRABBE,
Attorney General.

3091.

THE CONSENT REQUIRED UNDER SECTION 9662 OF THE GENERAL CODE IS NECESSARY TO BE OBTAINED IN CONNECTION WITH THE PLEDGING OR ASSIGNING OF INTEREST BEARING OBLIGATIONS OF BUILDING AND LOAN ASSOCIATIONS AS COLLATERAL SECURITY.

SYLLABUS:

The consent required under section 9662 of the General Code is necessary to be obtained in connection with the pledging or assigning of interest bearing obligations of building and loan associations as collateral security.

COLUMBUS, OHIO, January 25, 1926.

HON. J. W. TANNEHILL, *Supt. Division of Building and Loan Associations, Department of Commerce, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication as follows:

"Section 9662 of the General Code authorizes building and loan associations

" '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.' * * *

"Section 9656 authorizes such an association

" 'To borrow money not exceeding twenty per cent of the assets, and issue its evidence of indebtedness or other security therefor.'

"In exercising this right under section 9656, building and loan associations in conformity with the requirements of the banks from whom the money is borrowed have in the past pledged certain interest bearing obligations secured by real estate mortgages with such banks as collateral security.

"We desire to be advised at this time whether or not the consent required under section 9662 is necessary to be obtained in connection with the pledging or assigning of these interest bearing obligations as collateral security."

Section 9662 of the General Code as quoted in the communication above prohibits the selling of interest bearing obligations secured by real estate mortgages except on certain contingencies.

Section 9656 of the General Code quoted above, authorizes building and loan associations to borrow money not exceeding twenty per cent of the assets and to issue evidences of indebtedness or other security.

Section 9655 of the General Code empowers building and loan associations to lease, acquire, hold, *encumber,* convey and rent such real estate and personal property as is necessary for the transaction of its business, or necessary to enforce or protect its securities.

In construing section 9662 of the General Code, the Court of Appeals of Mahoning County, Ohio, in the case of *Mahoning Valley Mortgage Co.* vs. *Matilda Shermesser,* decided on March 25th, 1925, held that this statute was mandatory and not directory merely, and that any sale of interest bearing obligations secured by a mortgage without such consent was invalid.

The present question is whether the opinion of the court in the case above quoted is applicable to cases where a pledge or an assignment is made of an interest bearing obligation secured by a real estate mortgage. Whether or not the assignment by a building and loan association of such interest bearing obligation and mortgage is in effect a sale, is not attempted herein to be answered for the reason that we are not informed as to the exact nature of the assignment in these cases.

A pledge or an assignment cannot be said to be a sale under the ordinary use of such word. Assignment has been defined in the case of *Christmas* vs. *Griswold,* 8 Ohio St. 558, as follows:

"In order to constitute an assignment there must be such an action or constructive appropriation of the subject matter assigned as to confer a complete and present right upon the assignee."

A pledge has been defined in the case of *Barnes* vs. *Swift,* 11 Dec. Rep. 321, as follows:

"A pledge is made 'where, by contract a deposit of goods is made a security for a debt and the right to the property rests in the pledgee so far as is necessary to secure the debt.' "

A sale in its limited sense has been defined in the case of *Clark* vs. *Gault,* 77 Ohio St. 497, as follows:

"A sale is a contract founded on a money consideration, by which the absolute or general property in the subject of sale is transferred from the seller to the buyer and the essentials of a sale are:

"1. A mutual agreement;
"2. Competent parties;
"3. A Money consideration;
"4. Transfer of the absolute or general property."

It is therefore important to take into consideration the reason for the enactment of this statute.

In the case of *Mahoning Valley Mortgage Co.* vs. *Matilda Shermesser,* supra, in the opinion of Farr, Judge, may be found the following:

> "Therefore, the issue is whether or not under this section of the General Code, The Home Savings & Loan Company had a right to endorse as it did upon the mortgage and note its transfer of the same to John D. Funk, saying, in effect, that for valuable consideration it assigned and sold to John D. Funk 'all right, title and interest in and to the within mortgage.' It is, therefore, important to examine this statute and discover, if possible, the reason for its enactment. It must be conceded that it is in a way a public statute; that is, one for the protection of the public, especially the patrons of Building and Loan Associations. Evidently the primary purpose of such enactment was that a Building and Loan Association could not by sale and transfer of its notes and mortgages so impair its credit and its assets as to injure the security thus provided for investors in the stock of the association. It is insisted here that this section is merely directory and not mandatory. If indeed it be directory, then the contention that The Home Savings & Loan Company had a right to transfer this mortgage and note should be sustained. If mandatory, then such transfer is invalid. If this section is directory rather than mandatory, then it is a meaningless part of Ohio law, for the reason that a Building and Loan Association might transfer its mortgages and its notes and then the holder assert his right to the same under and by virtue of the rule that the section of the statute is directory only, and if directory then it must be conceded that it is of little value, because it would not protect investors in Building and Loan Associations in Ohio. It would be practically meaningless legislation because its terms might be avoided intentionally by a Building and Loan Company, and if the mortgage be transferred to an innocent purchaser for value, he could then assert that the statute is directory and thus avoid its terms."

The reasons set out by the court above why such statute is mandatory and not directory would be equally as applicable to the assignment or pledge of an interest bearing obligation as it is to the sale. If a Building and Loan Association may not sell its securities without the consent of the Superintendent of Building and Loan Associations it might by assignment or pledge so reduce its available assets that it would be unable to repay the obligation for which the pledge is made as security and make necessary the absolute sale of such securities and therefore jeopardize the security provided for the stockholders of such association.

The paramount reason for the enactment of the above statute so far as can be learned from the wording of the same is apparently to protect the stockholders of such association and it is believed that the word sale as used therein cannot be limited to an actual sale of all rights in such securities but that the same should include an assignment or pledge of the security as collateral security for loans.

You are therefore advised that the consent required under section 9662 of the

General Code is necessary to be obtained in connection with the pledging or assigning of interest bearing obligations of building and loan associations as collateral security.

Respectfully,
C. C. CRABBE,
Attorney General.

3092.

THE PROCEEDS DERIVED FROM THE GASOLINE TAX MAY NOT BE USED BY THE COUNTY FOR THE PURCHASE OF ROAD MACHINERY AND EQUIPMENT.

SYLLABUS:

The proceeds derived from the gasoline tax may not be used by the county for the purchase of road machinery and equipment.

COLUMBUS, OHIO, January 25, 1926.

HON. G. WALTER BOOTH, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This will acknowledge receipt of a recent communication from Mr. Harold W. Slabaugh, an assistant prosecuting attorney in your office, requesting an opinion on the two following questions:

1. May the proceeds of the annual license tax, levied upon the operation of motor vehicles, be used for the purchase of road machinery and equipment?
2. Same question as to proceeds derived from the gasoline tax.

A negative answer to the first question will be found in an opinion of my predecessor, found in the Opinions of the Attorney General for the year 1920, Vol. 1, page 802, where it was held, as shown by the syllabus, that political subdivisions constituting districts of registration may not use funds, coming into their hands by reason of the motor vehicle license tax, for the purpose of purchasing road repair equipment, such as trucks, rollers, etc., which opinion is approved and followed.

The gasoline tax, referred to in the second question, is collected by virtue of the provisions of Enacted House Bill No. 44 of the Eighty-sixth General Assembly, which is found in 111 Ohio Laws, 295. According to the title thereof, the purpose of this act is, among other things, to provide for the adequate maintenance of the public highways and streets of the state.

The purpose of levying the tax is set out in Section 5527 of the General Code, the pertinent part of which reads:

"For the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties and municipal corporations of the state to properly maintain and repair their roads and