1232.

"SMALL LOAN ACT"—LICENSEES NOT REQUIRED TO ACCEPT PAYMENTS FROM BORROWERS PRIOR TO MATURITY DATES SET FORTH IN NOTES—STATUS WHERE PROVISION MADE FOR PAYMENT PRIOR TO MATURITY—INSTALLMENTS—ACCELERATION—ELECTION TO PAY.

SYLLABUS:

Sections 6346-1 to 6346-13, inclusive, General Code, do not require small loan licensees to accept payments from borrowers before the maturity date or dates set forth in the note or notes given as evidence of indebtedness by such borrowers. If such note or notes provide that payment may be made on or before maturity or in installments of not less than the amount specified, or any similar provisions, the makers are thereby given the option to accelerate the maturity date and licensees are obliged to accept payment in accordance with the election of such borrowers.

COLUMBUS, OHIO, September 27, 1939.

HON. PAUL L. SELBY, *Chief, Division of Securities, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

> "Certain of our small loan licensees contend that they are not obliged under the terms of the small loan laws (sections 6346-1 to 13 inclusive) to accept payment in full of an account before maturity. This may be further illustrated by the following example. 'Borrower' applies for and receives a loan of $100 from 'Loan Company' which he agrees to repay in 12 months at the rate of $10.05 per month for 11 months and $10.01 on the 12th month. When the first payment is made, $3.00 is applied to interest and $7.05 to principal. On the second month 'borrower' tenders payment in full to 'Loan Company' and offers to pay the unpaid principal amounting to $92.95 and interest at 3 per cent per month on this sum for the 30 days past. 'Loan Company' refuses to accept tender of payment, contending that the note was written payable in monthly installments for one year and insists that 'borrower' is bound by this agreement. Prepayment of the account is, therefore, refused.
>
> Your opinion is requested as to whether 'Loan Company,' under the small loan laws, is required to accept payment in full when tendered and whether refusal to accept payment in full may be considered a violation of the small loan laws.

Sample notes attached hereto and marked Exhibit 1, 2, 3, and 4 are enclosed in order that you may be fully familiar with the terms and conditions of these instruments which are in general use throughout the state. You will observe that Exhibit 1 merely provides that the amount loaned shall be paid back in a number of payments together with interest until fully paid, interest payable monthly on the unpaid principal.

Exhibit 2 provides for the repayment of the principal sum together with interest at the agreed rate on the unpaid principal balance, payments to be made on a fixed day and regularly thereafter for the agreed period.

Exhibit 3 states that 'on or before' the period agreed the sum borrowed will be repaid together with interest on unpaid monthly balances, payable in monthly installments.

Exhibit 4 provides that the money borrowed shall be repaid in a number of 'successive monthly payments' of a fixed sum and shall include interest on the unpaid principal balance.

Will you state in your opinion whether any of these instruments fall within or are exceptions to your finding."

As a means "to regulate and license the loaning of money upon chattels or personal property of any kind, and of purchasing or making loans upon salaries or wage earnings", the 79th General Assembly adopted what is generally termed the "Small Loan Act". Several amendments and additions have been made to the Act, its provisions now being contained in sections 6346-1 to 6346-13, inclusive, General Code. The nature of the transactions now regulated is found in section 6346-1, which is as follows:

"It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue, in the business of making loans, on plain, endorsed, or guaranteed notes, or due-bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight percentum per annum, including all charges, without first having obtained a license so to do from the commissioner of securities and otherwise complying with the provisions of this chapter."

The maximum charges licensees are permitted to make are governed by sections 6346-5 and 6346-5a, which so far as pertinent are as follows:

Section 6346-5:

"No such licensee or licensees shall make a loan or purchase or furnish guaranty, or security, as hereinbefore provided at a greater total charge, including interest, than three per cent. per month; except that on loans that do not exceed fifty dollars in amount, in whatever manner made payable, an inspection fee of not to exceed one dollar may be collected at the time the loan is made, when such loan is made for a period of not less than four months; and such inspection fee shall not be imposed upon the same borrower for any new or additional loan made within four months after such charge has been imposed. Said three per cent. per month shall not be paid in advance and shall be computed on unpaid monthly balances, without compounding interest or charges. No bonus, fees, expenses, or demands of any nature whatsoever, other than said inspection fee and said total charge of three per cent. per month (which shall include interest) as hereinbefore provided, shall be made, paid, or received, directly or indirectly, for such loans, purchases or furnishing guaranty or security, wage assignments or advancements except court costs upon the actual foreclosure of the security or upon the entry of judgment."

Section 5346-5a:

"Provided, however, that upon the amount in excess of three hundred dollars ($300.00) for principal owing to the licensee for any such loan, purchases or furnishing guaranty or security, no licensee shall directly or indirectly charge, contract for or receive any interest or consideration greater than at the rate of eight per cent per annum, which shall include all charges, shall not be paid in advance and shall be computed on unpaid monthly balances, without compounding interest or charges. The foregoing eight per cent per annum limitation of rate herein made shall also apply to any licensee who permits any person, as borrower, or as endorser, guarantor, surety for, or as spouse of any borrower, to owe directly or contingently, or both, to the licensee at any time the sum of more than three hundred dollars ($300.00) for principal.

If interest, consideration or charges in excess of those permitted by this act shall be charged, contracted for or received, the contract and all the papers in connection therewith shall be void and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever."

Any charges made by licensees in excess of those permitted in the above sections are considered violations and subject the offending licensees

to the penalties provided. Loan Company v. Bell, 17 O. N. P. (N. S.), 385; Northern Finance Corporation v. Weiss, 31 O. N. P. (N. S.), 196; Rebholz v. Family Loan Company, 6 O. O., 82, and Loan and Savings Company v. Biery, 134 O. S., 333.

The provisions of the Act and decisions of the courts definitely indicate that any provision made whereby the licensee might be entitled to receive more than three per centum interest per month on the uupaid balance would constitute a violation of the Act and would subject the licensee to severe penalties, both civil and criminal, but a careful examination of the Act fails to disclose any stipulation as to the manner in which the principal of the loan is to be repaid. In the absence of such stipulation, the contract of the parties must govern. When a note provides that a maker may pay the same on or before the date of maturity or in installments of not less than a specified amount, or any similar provisions, the maker is of course permitted by the very language of his note to accelerate his payments. That such provisions vest the makers with authority to optionally accelerate the maturity of their notes, seems to have been uniformly conceded, the only question raised being as to the negotiability of such notes. In Jordan v. Tate, 19 O. S., 586, the court said:

> "The negotiable character of a promissory note is not affected by the fact that it is made payable by its terms on or before a future day therein named. *Though the maker has a right to pay such note at any time after its date,* yet for all purposes of negotiation it is to be regarded as a note payable solely on the day therein named." (Italic the writer's.)

As you have observed in your inquiry, your third exhibit is a note form stipulating that the sum borrowed should be repaid "on or before" an agreed period of time. Consequently, it is optional of the makers signing such notes to elect any time before maturity to repay the entire unpaid balance, plus interest, as agreed to within the limits permitted by the Small Loan Act.

The remaining exhibits each provide for repayment in specified monthly installments.

Commenting on notes of this type, it is stated in 29 O. Jur., 1171, section 462:

> "It is a principle of law, well settled by a course of uniform decisions, that the maker of a promissory note does not have the right to pay, nor is the holder obliged to receive payments therefor, before the note matures."

To the same effect, it is said in 8 C. J., 603, section 840:

> "The maker of a note has no right to pay the same before maturity without the consent of the holder unless it is other-

wise provided in the instrument, although payment made before maturity is valid between the parties."

An examination of the notes you have submitted, marked as Exhibits 1, 2, and 4, shows that in the Exhibits 1 and 2 provision for acceleration upon default is made in each case at the option of the holder, and in Exhibit 4 the default appears to make acceleration mandatory. Such accelerations, however, are only effective upon default and, in the first two cases, then only upon election of the holder. There is no provision for the maker to effect acceleration and in the absence thereof, as pointed out above, the terms of the notes must govern.

It is, therefore, my conclusion that sections 6346-1 to 6346-13, inclusive, General Code, do not require small loan licensees to accept payments from borrowers before the maturity date or dates set forth in the note or notes given as evidence of indebtedness by such borrowers. If such note or notes provide that payment may be made on or before maturity or in installments of not less than the amount specified, or any similar provisions, the makers are thereby given the option to accelerate the maturity date and licensees are obliged to accept payment in accordance with the election of such borrowers.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1233.

BONDS—CITY OF AKRON, SUMMIT COUNTY, $10,000.00.

COLUMBUS, OHIO, September 27, 1939.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Akron, Summit County, Ohio, $10,000. (Unlimited.)

The above purchase of bonds appears to be part of a $1,000,000 issue of sewer bonds of the above city dated January 1, 1921. The transcript relative to this issue was approved by this office in an opinion rendered to the State Employes Retirement Board under date of August 21, 1935, being Opinion No. 4564.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,
THOMAS J. HERBERT,
Attorney General.