or pond, as set forth in Section 1251, supra. Under such circumstances, even though there may be no established system of sanitary sewers in a given territory within a municipality, conditions may be such as to warrant the director of health, in the exercise of his sound discretion, in refusing to approve any proposed means for sewage disposal other than by a system of sanitary sewers and a sewage disposal plant. That is to say, where the matter of water pollution is involved, a portion of a municipality may, for instance, be so thickly populated that no means of sewage disposal other than a system of sanitary sewers leading to an adequate sewage disposal plant, would be sufficient to prevent such water pollution. Under whatever circumstances it may be contended that the director of health has authority to compel a municipality to install sanitary sewers, such authority under Sections 1249 to 1251, inclusive, General Code, may only be exercised in the event of the pollution of a stream, water course, canal, lake or pond.

Sections 1252 to 1261, inclusive, General Code, relate to the jurisdiction of the State Department of Health in matters affecting the public water supply and provide the machinery for enforcing the orders of the State Department of Health in relation thereto.

Referring to the particular complaint which gave rise to your inquiry, it appears from an examination of the brief submitted in support of the complaint that it is claimed that sewage is actually being discharged into small streams and water courses which empty into Rocky River. You do not, however, state this to be a fact. It is of course a matter for your determination. If such proves to be the fact, I should have little difficulty in concluding that you as Director of Health have jurisdiction in the premises under Sections 1249, et seq., hereinabove commented upon.

In view of the foregoing, it is my opinion in specific answer to your inquiry that the State Department of Health or the Director of Health has no authority to compel a municipality to install, maintain and operate a system of sewers in any territory within the limits of such municipality unless the sewage or other wastes of such territory are corrupting or polluting a stream, water course, canal, lake or pond as provided in Sections 1249, et seq., General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2808.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN WOOD COUNTY, OHIO.

COLUMBUS, OHIO, January 9, 1931.

Hon. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

2809.

CHATTEL LOAN ACT—JEWELRY AND LOANS——SPECIFIC INSTANCE DEEMED TO COME WITHIN THE PROVISIONS OF SUCH ACT.

SYLLABUS:

When a jewelry store is engaged in the business of selling jewelry and loaning money, and the consideration for making loans is two fold, first, that the borrower pay interest at the rate of eight per centum per annum, and, second, that the borrower

purchase jewelry from the lender, such jewelry store should comply with the provisions of the Chattel Loan Act, as contained in Sections 6346-1, *et seq., General Code.*

COLUMBUS, OHIO, January 9, 1931.

HON. ED. D. SCHORR, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

> "Persons who were formerly engaged in business commonly known as 'salary purchasers' are now operating as 'jewelry companies.' The plan of operation is as follows:
>
> Customers buy jewelry either for cash or on an installment payment plan. If the purchase is made on the installment payment plan a cognovit note is given by the customer for the balance owing. The form of such note is hereto attached, marked figure 1.
>
> The 'jewelry company' also loans money to customers who pay cash for jewelry. Form of note in such transaction is hereto attached, marked figure 2. No loan is made to anyone who has not purchased jewelry.
>
> The rate of interest charged on the loan is 8% per annum.
>
> The 'jewelry company' does not comply with the Chattel Loan Act claiming that it does not charge more than 8% interest.
>
> The profit on the sale of jewelry runs from 300 to 600%.
>
> Will you please advise whether under the facts outlined above, the 'jewelry company' is violating the Chattel Loan Act?"

Attached to your letter is the usual form of interest bearing cognovit note in which the maker promises to pay the principal amount thereof in installments. There is also attached to your communication a single leaf booklet which you have marked as Exhibit No. 2, containing spaces to record payments made and balances due.

The company's business appears to consist of selling jewelry and loaning money. There are perhaps two kinds of transactions which are pertinent to a consideration of your inquiry: First, the sale of jewelry on the installment plan; second, the loaning of money in connection with the sale of jewelry at the time jewelry is sold.

In the event either of these transactions may be said to constitute making loans at a rate of interest in excess of 8% per annum, including all charges, it is necessary that the provisions of the Chattel Loan Act as contained in Sections 6346-1, et seq., General Code, be complied with. Section 6346-1, General Code, provides 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."

Considering first the business of selling jewelry on the installment plan and charging interest on the balance due at the rate of 8% per annum, it is obvious that when such transaction is bona fide and there is no showing of fraud, it is not usurious. It is said in 39 Cyc. p. 927 that:

> "A vendor may well fix upon his property one price for cash and an-

other for credit, and the mere fact that the credit price exceeds the cost price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties but not to the courts, barring evidence of bad faith. If the parties have acted in good faith such a transaction is not a loan, and not usurious."

Considering next the transactions whereby the company in question loans money to its customers in connection with the sale of jewelry at a rate of interest on the loan of 8% per annum, it is difficult to form a categorical conclusion upon the facts submitted as to whether or not this practice amounts to loaning money for a consideration of more than 8% per annum, thereby necessitating a compliance with the provisions of the Chattel Loan Act. There are numerous conflicting authorities on this point as to transactions similar in their nature.

Referring again to 39 Cyc., the text appearing on pp. 926, 927, in support of which numerous authorities are cited, is as follows:

"It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such a sale, if bona fide, cannot be usurious, however unconscionable it may be. But the law will not permit a usurious loan to hide itself behind the form of a sale. Whether parties intended a sale or a loan is a question for the jury.

* * * * * * * * *

A pretended sale on credit, however, will not be allowed to cloak a usurious loan If the contract of sale upon deferred payments is but colorable and the real transaction a loan providing for illegal profit, it will be held usurious. Where the sale is made on a cash basis and for a cash price and the vendor forbears to require the cash payment agreed upon in consideration of the vendee's promising to pay at a future day a sum greater than such agreed cash value with lawful interest, in such case there is a forbearance to collect an existing debt, and the excessive charge therefor is usurious."

In the Englisli case of *Floyer* vs. *Edwards,* 1 Cowp. 112, 116, 98 Eng. Reprint 995, Lord Mansfield says:

"I lay the foundation of the whole upon a man's going to borrow under colour of buying: there the contract is usurious; but where it is a bona fide sale . . . it certainly is not."

Further quoting from 39 Cyc. 929:

"When the lender corruptly requires of the borrower, as a condition of securing a loan, the purchase of the lender's property at an exorbitant price to be taken out of the loan, or payable at a subsequent date, and takes the borrower's obligation for the sum loaned, or for both the loan and purchase-price, such obligation is usurious, although on its face it bears no more than lawful interest. The same principles apply in respect of sales by the lender to the borrower at an exorbitant price as a condition of extending time in which to pay a debt. In such case the principal debt is the amount of the loan plus the fair value of the property at the time of its receipt by the buyer. All in excess of that sum is usury. But if the evidence does not disclose a guilty intent, such a contract will be upheld even though the collateral sale is made at a price higher than the market value of the property sold."

Substantially the same principle that courts in passing upon such transactions as are here under consideration will look beyond the form to their substance is stated in 27 R. C. L. 211, 212, as follows:

> "The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan, or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings. Every species of contrivance in the modification of any loan or contract, for the purpose of evading the statute, being cases within the mischief, are also within the remedy. Usury is a moral taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender. Though the principle stated above may be extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied, it is not surprising if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstances."

The Ohio Supreme Court has recognized the principle that where the borrower in order to make a loan must enter into an additional contract to purchase an article from the lender at an exorbitant price resulting in the lender receiving more than the legal rate of interest, the contract may be usurious. In the case of *Life Insurance Co.* vs. *Hilliard, et al.*, 63 O. S. 478, the court said at p. 494:

> "Decisions are not lacking, and many are cited, to the effect that where the borrower is induced to make with the lender some unusual and unfair additional contract, as to buy a piece of land from the lender at an exorbitant price, or give a note to secure a loan of gold at a higher rate than the market value in addition to legal interest, the contract will be held usurious."

As previously stated, upon the facts which you submit, I am unable to categorically say whether or not the company in question is in effect lending money at a rate of interest higher than eight per cent per annum.

It is my opinion, however, that in the event a customer of a jewelry store should make a bona fide loan from such store at a rate of interest not exceeding 8% per annum, including any charges connected with such loan, such interest is not usurious providing the purchase of jewelry is not part of the consideration for the loan. If, however, such jewelry store in connection with its business of loaning money requires, as part of the consideration for making a loan, that the borrower purchase an article of jewelry from such store at an exorbitant price in addition to requiring the borrower to pay interest on the loan at the rate of 8% per annum, undoubtedly such a transaction is usurious in the absence of compliance with the provisions of the Chattel Loan Act. Even under such circumstances if the article of jewelry which the borrower is compelled to purchase in order to obtain temporary relief from

financial embarrassment and pressure, is sold at the usual market price for such an article, I am inclined to the view that such a transaction may very properly be held to be nothing more nor less than a device on the part of the lender to evade the usury laws.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2810.

APPROVAL, LEASE TO OHIO CANAL LANDS IN LAFAYETTE TOWNSHIP, COSHOCTON COUNTY, OHIO, FOR PASTURAGE AND AGRICULTURAL PURPOSES—IRVIN SNEDEKER.

COLUMBUS, OHIO, January 9, 1931.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval a certain lease in triplicate, executed by you as superintendent of public works on behalf of the State of Ohio, by which lease there is granted to one Irvin Snedeker of Fresno, Ohio, the right to use and occupy for pasturage and agricultural purposes only a portion of the Ohio Canal lands located in Lafayette Township, Coshocton County, Ohio, and more particularly described as follows:

> "Beginning at a line drawn at right angles to the transit line of the G. F. Silliman survey of said canal property through Station 3230 of said survey, and running thence westerly 400 feet, as measured along said transit line to a line drawn at right angles to said transit line through Station 3234 of said survey, and containing five and seven-tenths (5.7) acres, more or less; excepting therefrom any portion of the above described property that may be occupied by the public highway along the easterly and northerly sides of the above described property."

The lease here in question is one for a term of fifteen years and the same calls for an annual rental of seventeen dollars, payable in semi-annual installments of eight dollars and fifty cents each.

Upon examination of the provisions of said lease, I find that the same are in accordance with the provisions of Sections 13965, et seq., General Code, and with other statutory provisions relating to leases of this kind. Said lease is therefore approved by me as to legality and form, as is evidenced by my approval endorsed upon said lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.