3130.

APPROVAL—BONDS, CITY OF PORTSMOUTH, SCIOTO COUNTY, OHIO, $3,000.00, PART OF ISSUE DATED DECEMBER 1, 1935.

COLUMBUS, OHIO, October 24, 1938.

Public Employes Retirement Board, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of City of Portsmouth, Scioto County, Ohio, $3,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated December 1, 1935. The transcript relative to this issue was approved by this office in an opinion rendered to the Industrial Commission under date of March 26, 1938, being Opinion No. 2158.

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

Respectfully,
HERBERT S. DUFFY,
Attorney General.

3131.

AUTOMOBILE DEALERS' AND SALESMAN'S LICENSING ACT —FINANCE COMPANIES—AUTOMOBILES—WHERE REPOSSESSED AND SOLD TO CONSUMERS AT RETAIL—WHERE VOLUME OF SALES RECURRING AND CONTINUOUS—REGISTRATION UNDER SECTION 6302-1 G. C.—STATUS OF AGENT—CERTIFICATE OF OWNERSHIP—DIRECT SALES—CASUAL OR ISOLATED SALES.

SYLLABUS:

1. *Finance companies who repossess automobiles and in turn sell the same to consumers at retail must register under the Automobile Dealers' and Salesman's Licensing Act, Section* 6302-1, *et seq., General Code, when the volume of such sales reach that point at which they can be characterized as recurring and continuous (State, ex rel. City Loan and Savings Company of Wapakoneta vs. Zellner, Clerk,* 133 *O. S.* 263, *Ohio Bar, No.* 47, *February* 14, 1938, *Opinions of the Attorney General for*

1938, *No.* 2511.) *Such a finance company cannot designate a duly licensed retail dealer in automobiles to act as their agent in making such sales when the certificate of ownership is transferred directly from the finance company to the consumer. Such a procedure is not in compliance with the Automobile Dealers' and Salesman's Licensing Act.*

2. *Finance companies, although the volume of their retail business in selling repossed automobiles is characterized as continuous and recurring need not comply with the provisions of the Automobile Dealers' and Salesman's Licensing Act (Section* 6302-1, *et. seq. General Code) when the certificate of ownership is transferred directly from the finance company to a duly licensed retail dealer by outright sale and the duly licensed retail dealer sells directly to the consumer without the renewed intervention of the finance company. Such a transaction is not a sale at retail as that phrase is defined in Section* 6302-1, *et seq. General Code, and consequently not within the scope of those sales sought to be brought within the purview of the Automobile Dealers' and Salesman's Licensing Act.*

3. *Finance companies whose retail business in selling repossessed automobiles is of such a nature as determined by the particular facts involved to be characterized as casual or isolated sales need not register under the provisions of the Automoile Dealers' and Salesman's Licensing Act. (Opinions of the Attorney General for* 1938, *No.* 2511 *affirmed.)*

COLUMBUS, OHIO, October 24, 1939.

HON. FRANK WEST, *Registrar, Bureau of Motor Vehicles, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent request for my opinion which reads as follows:

> "Calling your attention to the Automobile Dealer's and Salesman's Licensing Act, particularly to the provisions of Section 6302-2, G. C., a question has arisen concerning the legality of an automobile finance company in selling motor vehicles which have been repossessed to general purchasers under the following conditions:
>
> "The finance company repossesses a motor vehicle and obtains a certificate of title for the same in its own name. By arrangement with a duly licensed motor vehicle dealer the motor vehicle is sold to a general purchaser by the dealer for the finance company by assignment of ownership of the certificate of title form from the finance company to the general purchaser, the dealer acting in the capacity of an agent in selling the motor vehicle for the finance company. Specifically, is this procedure

legal or is it compulsory for the finance company to first qualify and be duly licensed as an automobile dealer, or, is it compulsory that transfer of ownership of the motor vehicle be made from the finance company to the automobile dealer?"

The pertinent part of Section 6302-2, General Code to which you refer reads as follows:

"No person other than a salesman or dealer licensed according to the provisions of this act shall engage in the business of selling motor vehicles at retail within this state on and after April 1, 1938."

In the part of Section 6302-2, just quoted, there are certain words and phrases that find a legislative definition in the preceding section, Section 6302-1. This section defines persons as:

" 'Persons' includes individuals, firms, partnerships, associations, joint stock companies, corporations and combinations of individuals of whatsoever form and character."

In the same section (6302-1) the term licensed dealer is defined as:

" 'Dealer' includes all persons as hereinbefore defined, regularly engaged in the business of selling, displaying, offering for sale or dealing in motor vehicles at an established place of business which is used solely and exclusively for the purpose of selling, displaying, offering for sale or dealing in motor vehicles. For the purpose of this definition, a place of business which is used for selling, displaying, offering for sale or dealing in motor vehicles shall be deemed to be used solely and exclusively for those purposes even though farm machinery is sold or displayed for sale thereat, or if repair, accessory, gasoline and oil, storage, parts, service or paint departments are maintained thereat if such departments are operated for the purpose of furthering and assisting in the business of selling, displaying, offering for sale or dealing in motor vehicles. Places of business or departments in a place of business used to dismantle, salvage or rebuild motor vehicles by means of using used parts are not considered as being maintained for the purpose of assisting or furthering the selling, displaying, offering for sale or dealing in motor vehicles."

Engaging in business has been given the following legislative definition in 6302-1:

> "'Engaging in business' means commencing, conducting or continuing in business as well as liquidating a business when the liquidator thereof holds himself out to be conducting such business. However, making a casual or isolated sale is not engaging in business."

The phrase at retail is defined by Section 6302-1 as follows:

> "'Retail sale' or 'sale at retail' shall mean the act or attempted act of selling, bartering or exchanging or otherwise disposing of a motor vehicle to a person for use as a consumer. Other forms of the same expression shall have the same meaning expressed in appropriate form."

One phase of the inquiry which you present involves the legality of the procedure by which the finance company, after repossessing the automobiles designates a licensed dealer as their agent to produce a prospective customer. When the customer has decided to purchase the automobile in question the certificate of ownership is then transferred directly from the finance company to the purchaser. The change of title is from the finance company to the purchaser. The dealer merely occupies the position of agent of the finance company for the sole purpose of finding a purchaser. Whether such procedure is legal depends upon whether the finance companies themselves, must register as dealers under the provisions of the *Automobile Dealers' and Salesman's Licensing Act* (Section 6302-1, et seq.). Surely it could not be plausibly contended that by the device of agency the finance companies, as principal, could thereby effect a result which would be impossible of attainment if they acted as individuals, unconnected and unassociated with any agents in the premises. It is a well established principle of law that an agent has only that authority which the principal has in the first instance, and under no circumstances can a principal confer on an agent power or authority that the principal himself does not possess. The thought is tersely expressed in the statement "power can not rise above its source." This principle of law is stated in I Ohio Jurisprudence, p. 622, Section 5, as follows:

> "It is a familiar proposition that what one does by another he does by himself and it hardly need be stated that a man may authorize another to do for him whatever *he may lawfully do for himself;* in other words, that he may lawfully do by the

> agency of another that which he may lawfully do himself, * * *". (Italics, the writer's.)

and further on in the same section on p. 624, it is said:

> "It is implied in the statement of the rule that a man may delegate to another authority to do any act he himself may lawfully do; that he will not be permitted to delegate authority to do an act *illegal*, immoral, or opposed to public policy." (Italics, the writer's.)

The situation is analogous to an infant acting as the principal in appointing an adult to act as his agent in the making of a contract. Such an appointment does not take away the voidable nature of the contract, though the agent making it has full capacity to so act. This principle is stated in I Ohio Jurisprudence, 626, Section 6, as follows:

> "But the appointment of an agent or attorney to make contracts is said to be inconsistent with or repugnant to, the privilege of infancy, for the reason, among others that might be named, that it is imparting a power that the principal does not possess, viz., that of performing valid acts."

The pivotal question to be answered then is whether or not the finance companies themselves must register in accordance with the provisions of Section 6302-1, et seq., General Code.

In an opinion rendered by this office earlier this year appearing in Opinions of the Attorney General for 1938, No. 2511, it was held as disclosed by the first branch of the syllabus:

> "Chattel Loan Companies making casual or isolated sales are not required to secure a motor vehicle dealer's license."

As is pointed out in that opinion, it is a question of fact whether "sales" are "isolated, or casual," as that phrase is used in Section 6302-1, or whether they are continuous and successive and of the nature contemplated by the Automobile Dealers' and Salesman's Licensing Act (6302-1 et seq., General Code.) If the facts of any one particular situation disclose that the finance companies therein involved are making casual or isolated sales, then by the express terms of Section 6302-1 such companies are excused from complying with the law. On the other hand, when the business of any one particular finance company reaches a certain volume at which they can be considered to be dealers in fact,

although not in name, then they must secure a license according to law. A sale is casual or isolated depending upon the particular facts involved; still there are certain sign posts which lead to one conclusion or another. The total amount of business done by such a company, expressed in terms of dollars and cents, is a very pertinent fact. Also, the successive nature of such sales is determinative.

In *State ex rel., The City Loan and Savings Company of Wapakoneta, Ohio* vs. *Zellner,* Clerk, 133 Ohio State 273, 10 Ohio Bar No. 47. February 14, 1938, it was held as disclosed by the syllabus:

> "One engaged in the chattel loan business, who conducts continued and systematic sales of repossessed tangible personal property, is a vendor, within the meaning of Section 5546-1, et seq., General Code, in the absence of proof to the contrary."

As was pointed out in the statement of the above case on p. 265, the agreed statement of facts on which this case was tried show:

> "That ' * * * the only property of any kind that the City Loan & Savings Company has ever sold or sells was, and is chattel property seized by it by reason of default on mortgage security given to secure loans by the company to its customers; that said company during the year of 1936 did business in Ohio in the sum of $26,448,633.88 and that in the year 1936 the business done by the Mansfield, Ohio, office of the plaintiff (relator) amounted to $942,368.05. Furthermore, in the year 1936 the value of the property which is was compelled to repossess by reason of defaults amounted to $27,656.82 and that the amount of such repossession by its Mansfield, Ohio, office during said year amounted to $949.35. The amount of the property repossessed and sold amounts to about 1/1000 of the volume of its business in said state; that the figures for the year of 1936 above mentioned are representative figures of the annual business of said company."

On p. 271 of the Zellner case, supra, Judge Day in holding that such Chattel Mortgage Companies were vendors within the meaning of the Sales Tax Law said:

> "These sales are not occasional but are so abundantly recurrent and continuous as to yield in excess of $25,000 annually. The activity of selling is not only commenced, but continually and systematically conducted, and as such, constitutes engaging

in the business of selling within the meaning of the provisions of Section 5546-1 et seq., General Code."

For the purposes of this opinion and in answer to the specific inquiry which you present, I shall assume that the finance companies about which you inquire are doing a similar volume of business as was the company in the Zellner case, supra. Our opinion is limited to just such companies, whose volume of business approximates that done by the City Loan Company in the Zellner case.

True such companies have no established place of business which is used solely and exclusively for the purpose of selling, displaying, offering for sale, or dealing in motor vehicles. But the volume of sales for these companies is so great that such companies are dealers in fact though not in name, and since they are dealers in fact, it is incumbent on them to establish a permanent show room if they are to continue in the business of selling automobiles at retail. There is little doubt but that these finance companies are "engaging in business" as that term is defined in Section 6302-1, supra. Section 6302-2, supra, expressly prohibits all persons except those licensed under the Act from "engaging in the business of selling motor vehicles at retail."

We have then the anomalous situation in which all persons are prohibited from selling automobiles at retail except those licensed dealers, and according to the particular facts before us the finance companies are not dealers as that term is defined in Section 6302-1, supra, for the reason that they have no permenent show room or place of distribution. But the fact remains that there are certain finance companies, as the one involved in the Zellner case, supra, that are making something more than casual or isolated sales. Such transactions partake of the nature of successive and continual sales. It is my opinion that such companies must register under the provisions of the automobile dealers' and salesman's licensing act. The reason as above stated is because such companies are in fact dealers within the meaning of the law. In view of this conclusion, it seems unnecessary to restate the proposition that such companies can not, by the evasive device of agency, do that which they can not do unaided by such a protective scheme. These companies can not evade compliance with the law by designating a licensed dealer to find a purchaser, and then after such purchaser is found to transfer the title directly to the purchaser.

An entirely dieffrent result is possible if the finance companies sell the repossessed automobiles directly to a licensed dealer. In such a case the certificates of title is transferred to the licensed dealer and from the dealer to the purchaser. When such a transaction takes place the title passes from the dealer to the purchaser rather than from the finance com-

pany to the purchaser. The "sale at retail" is from a dealer, duly licensed under the law, to a purchaser. The sale of a finance company to a licensed dealer is not a sale at retail within the meaning of this phrase as defined by Section 6302-1, supra, because the purchaser in this transaction is himself a dealer and not a consumer. Such sales from the finance companies to the dealers are sales at wholesale. If this procedure, outlined above, is followed whereby the title goes directly from the finance company to the dealer, the finance company need not comply with the provisions of the Automobile Dealers' and Salesman's Licensing Act.

Accordingly, in specific answer to your inquiry, it is my opinion that the procedure is legal if the title and the accompanying certificate of ownership is transferred directly from the finance company to a licensed automobile dealer, and the automobile is then sold directly from the dealer to the consumer without the renewed intervention of the finance company. However, as to that type of company which is doing something more than a casual or isolated business in the selling of automobiles at retail, unless they follow the procedure outlined above and transfer title directly to a licensed dealer, they must comply with the provisions of the Automobile Dealers' and Salesman's Licensing Act. As to those few finance companies who, according to the factual determination of their status, are engaging in only isolated or casual sales, these companies need not comply with the Automobile Dealers' and Salesman's Licensing Act.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

3132.

APPROVAL — WARRANTY DEED AND OTHER INSTRUMENTS, STATE OF OHIO, THROUGH DIVISION OF CONSERVATION, TRACT OF LAND, LOCATED IN JEFFERSON TOWNSHIP, JACKSON COUNTY, OHIO, DONATED TO STATE BY SPORTSMEN IN JACKSON COUNTY, OHIO, IN CONNECTION WITH CONSTRUCTION OF CERTAIN PROPOSED DAM AND LAKE.

COLUMBUS, OHIO, Octobr 24, 1938.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certificate of title and warranty deed relating to a tract of land in Jeffer-