2272.

CONTRACT OF OTTERBEIN HOME, WARREN COUNTY—STATE DOES NOT HAVE CLEAR TITLE TO LAND WHERE IT IS UNDER LEASE THAT HAS NOT EXPIRED.

COLUMBUS, OHIO, June 25, 1928.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which you submit an option contract given to the State of Ohio by the Board of Trustees of the Otterbein Home on land situated in Warren County, Ohio. The option is for land which has been recommended by a committee appointed for that purpose, upon which to locate an institution for the feeble minded. The option, among other things, contains the following:

> "It is understood by the State of Ohio that the west 350 acres of optioned property is now leased to Taylor and Bell under lease expiring March 1, 1931, and that the remaining acreage is leased to various tenants for terms ending March 1, 1929. It is agreed that the consideration undertaken to be paid by the said lessees under the terms of their present leases, shall be paid the Otterbein Home up to March 1, 1929."

You inquire as to whether the State of Ohio could be given a clear title and proceed to cultivate and develop the property, considering the state might wish to use the acreage under lease as a building site for the transportation of materials and supplies during the construction period. It is noted that a portion of said land is now leased until March 1st, 1931, and that the remainder is leased until March 1, 1929. It is assumed that said leases are valid and subsisting leases and therefore said lessees will not be deprived of their rights under said leases by conveyance by the owners of said land of the title thereto to the State of Ohio. It is also noted that under the conditions in said option contract hereinbefore quoted, it is expressly stated that the State of Ohio, in accepting a deed for said lands, understands that said leases are in existence and that the consideration undertaken to be paid by said lessees under the terms of their said leases shall be paid to the Otterbein Home up to March 1, 1929.

You are therefore advised that the state cannot be given a clear title to said lands at the present time but that the same may only be conveyed to the State of Ohio subject to the leases mentioned in said option contract.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2273.

LOANS—LICENSE—COLLATERAL FOR ONE WHO IS LICENSED—ONE WHO IS NOT LICENSED.

SYLLABUS:

1. *One who is licensed to make loans in accordance with Sections* 6346-1, *et seq., General Code, may borrow money from one who is not a licensee and pledge, as collateral to the loan, notes and mortgages collateral thereto secured from borrowers*

in the ordinary course of business, which notes bear interest at a rate greater than eight per cent per annum.

2. *One who is not licensed to make loans in accordance with the provisions of Sections* 6346-1, *et seq., General Code, may purchase from a licensee notes given to such licensee in the course of his business, which bear interest at a rate in excess of eight per cent per annum and such purchaser may continue to collect the interest at the rate provided in said note.*

3. *The purpose of Sections* 6346-1, *et seq., General Code, is to secure the regulation and control of loans of the character mentioned in Section* 6346-1, *General Code, and to prevent the exaction of interest beyond that allowed by law.*

COLUMBUS, OHIO, June 25, 1928.

HON. NORMAN E. BECK, *Chief, Division of Securities, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

"I respectfully submit the following questions for your official opinion:

"A" is a holder of a license from the Division of Securities, Department of Commerce, State of Ohio, under Section 6346, General Code of Ohio, to engage in the business of making loans on chattels, etc. "A" desires to borrow money from "B" who is not a licensee. In order to secure these loans "A" places with "B" the notes which bear interest at a rate greater than 8% per annum, secured by the mortgages as collateral for the loan, but with the agreement and understanding that "A" is to make all collections and "B" is not to appear in the transaction at any time. "B" may be a bank or a private individual.

Question No. 1—May "B" make loans to "A" taking as collateral the notes secured by chattel mortgages, without the necessity of securing a license from the Division of Securities?

Question No. 2—May "B" instead of taking the notes secured by chattel mortgage as collateral purchase these notes from "A"?

Question No. 3—If "B" may legally purchase these notes from "A", may "B" continue to collect interest on same at a rate greater than 8% per annum?

Question No. 4—If the original loan is legally made, does the Division of Securities have jurisdiction of anything which may transpire subsequent to the making of the original loan, provided the loan is not re-made?"

You state that "A" is the holder of a license from the Division of Securities under Sections 6346-1, et seq., General Code. Those sections cover the licensing of those engaged in business of making loans of various characters.

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 per centum 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."

By the terms of this section it becomes unlawful for anyone to do any of the things described therein without being licensed therefor as provided in the succeeding sections of the Code. Of course, by the terms of the section any loans of the character described can be made without a license provided that interest, including all charges, shall not be in excess of eight per cent per annum. It should further be noted that, by the latter portion of Section 6346-5, General Code, the provisions of the act are inapplicable in certain instances. This portion of the section is as follows:

"Nothing in this act (G. C. Sections 744-14 to 744-24, 6346-1 to 6346-10, 6373-3, 6373-7 and 6373-24) shall apply to pawn brokers who obtain a municipal license as provided in sections 6337 to 6346, inclusive, of the General Code or to national banks or to state banks or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks. No charge or fee shall be made unless the loan is actually made. A copy of this section shall be furnished each borrower at the time the loan is made."

The provisions of this act, prior to its amendment in 107 O. L., transferring the supervision of such licensing from the Superintendent of Banks to the Division of Securities, were held constitutional in the case of Ex Parte Wessell, 19 O. N. P. (N. S.) 209, the case being later affirmed by both the Court of Appeals and Supreme Court without opinion.

It is unnecessary to quote the provisions relative to the form of application,, the issuance of the license, the authority to revoke license and other regulatory portions of the act. The first portion of Section 6346-5, General Code, prescribes certain limitations with respect to loans made by licensees. That portion of the section is as follows:

"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."

The penalty section is Section 6346-8, General Code, which is as follows:

"Any person, firm, partnership, corporation or association, and any

agent, officer or employe thereof, violating any provision of this act (G. C. Sections 744-14 to 744-24, 6346-1 to 6346-10, 6373-3, 6373-7 and 6373-24), shall for the first offense be fined not less than fifty dollars nor more than two hundred dollars and for a second offense not less than two hundred nor more than five hundred dollars and imprisoned for not more than six months. The commissioner of securities upon such second conviction shall revoke any license theretofore issued to such person, firm, partnership, corporation or association.

Any instruments taken in connection with the transaction upon which the conviction is made, shall be illegal, void and of no effect, and it shall then be the duty of the commissioner of securities to so notify the borrower in writing. Any charge of interest paid in excess of that provided herein may be recovered by the payer in an action at law."

This section prescribes a fine for the first offense and a fine and imprisonment for a second offense, together with the requirement that the license shall be revoked. It is also to be observed that this section departs from the ordinary rule applicable to usurious contracts in making any instrument connected with an unlawful transaction, illegal, void and of no effect.

This is a much more stringent rule than has been applied in the interpretation of the general usury statutes. Thus Section 8303, General Code, provides as follows:

"The parties to a bond, bill, promissory note, or other instrument of writing for the forebearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum, payable annually."

Section 8306, General Code, providing for the application of the defense of usury is as follows:

"Payments of money or property made by way of usurious interest, whether made in advance or not, as to the excess of interest above the rate allowed by law at the time of making the contract, shall be taken to be payments made on account of principal; and judgment shall be rendered for no more than the balance found due, after deducting the excess of interest so paid."

Thus it will be seen, that prior to the enactment of what is popularly known as the chattel loan law, the right existed to collect up to the legal rate of interest upon an instrument usurious upon its face. The present provision found in Section 6346-8, supra, is much more drastic and renders entirely void any instrument connected with the transaction in violation of the terms of the act. As I read this, it means that if one makes a loan such as is described in Section 6346-1, General Code, at a rate in excess of eight per cent per annum, including all charges, without being licensed therefor, no recovery upon the notes or other instruments involved in the transaction can be had.

In the instance you cite, however, "A" is a licensed lender, and as I understand your question, has loaned money in the manner authorized by the act and in those transactions has obtained the notes of various borrowers, which notes are secured by mortgages as collateral. "A", being in need of funds, desires to borrow money from "B", who is not a licensee, and desires to secure the loan by hypothecating the individual notes of the borrowers, together with the collateral thereto.

You further state that it is the agreement and understanding that "A" is to make all collections on the notes and "B" is not to appear in the transaction. You further suggest that "B" may be either a bank or a private individual. Your first question is as to the legality of such a course.

Since "A" is a licensee, there can be no contention that the original loans were tainted with usury under the assumptions hereinabove set forth. That is to say, if they were within the provisions of Section 6346-5, supra, "A" had a perfect right to make the loans in question. As an incident to that right he had the further right to take notes as evidence of the debts of the borrowers. Consequently, if "A" sued upon the notes there is apparently no defense available to the borrowers. In the transaction in question I assume that the loan negotiated from "B" by "A" is evidenced by a note of the latter, together with the usual collateral agreement whereby the individual notes are held by "B" as collateral to the payment of the loan. I further assume that there is no taint of usury in the loan from "B" to "A". Under the circumstances I know of no objection to this course of procedure. The individual notes of the borrowers from "A" may, in the aggregate, exceed the amount of money borrowed by "A" from "B", but it is not unusual for banks or individuals for their own protection to exact collateral in excess of the face value of the loan and I know of no provision of law which would prevent.

In the event of the failure of "A" to meet the obligation to "B", it might perhaps be necessary for "B" to dispose of or realize upon in some manner the notes which are held as collateral. The ordinary rule as to collateral would apply and "B" would be precluded from realizing beyond the face value of "A's" obligation and the proper interest thereunder. Any excess collateral would be returnable to "A".

From the wording of your inquiry, however, it is apparent that you have some question about the right of "B" to hold these individual notes and mortgages at all without securing a license therefor from the Division of Securities. I have no hesitancy in saying that a license in such a case would not be required. The obvious purpose of the sections of the Code hereinabove referred to, is to prevent the exaction of interest beyond that allowed by law by a lender from a borrower, and to regulate and control lending at a rate greater than the ordinary rate under certain circumstances. The terms of the statute deal exclusively with the regulation between the original debtor and creditor. The state is not interested in the subsequent disposition of the loans, nor is the borrower. So long as the original loan is lawful, in my opinion, it matters not in the eyes of the law in whom the right of action resulting from the debt created ultimately is vested. I accordingly feel that it is unnecessary that "B", who loans money to "A" and secures as collateral to the loan the notes taken by "A" in his business as a licensee, secure a license under the act. That is true whether "B" be a bank or a private individual.

You next inquire whether "B", instead of taking the notes, as collateral, may purchase these notes from "A".

What has just been said with respect to the purpose of the act is pertinent to this inquiry. The Legislature has sought to protect the borrower against rates of interest beyond those allowed by law. While the notes in question could not be legally acquired by other than a licensee in the first instance by a direct loan, I know of no rule of law precluding their subsequent sale. In the hands of "A", the licensee, they would be valid and enforcible. The defense of usury not being available to the borrower against "A", there is no principle on which the defense of usury would arise as against "B" who succeeds by purchase to the rights of "A". After the original loan, which defines the amount of the obligation of the debtor, it is immaterial to him who subsequently enforces his contract, so long as none of his rights thereunder is prejudiced. You do not inform me as to the char-

acter of the notes which "A" proposes to sell, but I assume that they are negotiable. However, that may be, in either event the rights of "A" may be assigned and "B" is authorized to enforce the notes in accordance with their tenor.

I am, of course, not passing upon the question whether any usury exists in the transaction between "A" and "B". If the purported sale of the notes is merely a device by which "B" furnishes "A" money at a usurious rate of interest, a violation of the terms of the statutes hereinabove noted may exist, but this question is not before me.

You further inquire whether, in the event "B" purchases the notes, he may continue to collect interest on the same at a rate greater than eight per cent per annum. My previous discussion has also answered this inquiry, since "B" may lawfully succeed to all of the rights of "A" which necessarily includes the right to collect interest in accordance with the terms of the notes, although that may exceed the rate of eight per cent per annum.

Your next inquiry is as to what jurisdiction the Division of Securities has over anything which may transpire subsequent to the making of the original loan, provided the loan is not re-made. I assume that your reference to the loan means the loan from "A" to one of the borrowers. In other words, you inquire whether your department should interest itself in the subsequent transactions with relation to the evidences of indebtedness and collaterals taken by a licensee. If your question implies that the investigation of these subsequent transactions has any pertinency with respect to the legality of the original loans by the licensee, my answer must be in the negative. The whole tenor of the act is to protect the borrower in the securing of loans. Consequently, if the original loans are in all respects within the law, anything transpiring thereafter, which in no way affects the obligation of the borrower, is of no materiality. On the other hand, if in your investigation of the affairs of licensees it develops that the licensees themselves are securing money at usurious rates for the purpose of their business, I believe it would be the duty of the Division of Securities to enforce the law with respect thereto. For example, in the instance you have set forth, if "A" is being forced to pay usurious interest by "B", and "B" is not a bank and, as such exempt from the provisions of the act by Section 6346-5, supra, then I conceive it to be the duty of the Division of Securities to take such steps as may be necessary to see that the unlawful practice is discontinued.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2274.

BUILDING AND LOAN ASSOCIATIONS—INVESTMENT OF IDLE FUNDS.

SYLLABUS:

Building and loan associations may invest their idle funds in the classes of securities accepted by the United States to secure government deposits in national banks and postal savings deposits in national and state banks, at the market value of such securities, regardless of the rates at which such securities are accepted by the federal government as collateral security for such deposits.