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MAKING OF LOANS SECURED BY REAL ESTATE MORTGAGES—WHERE INTEREST IN EXCESS OF 8 PER CENT CHARGED—IF MADE BY A LICENSEE, INTEREST RATE GOVERNED BY SECTIONS 8303 AND 8306 G. C.—USURY—LOANS TO CORPORATIONS—CHATTEL AND SALARY LOANS ACT—SECTION 6346-2 G. C. PENAL STATUTE—STRICTLY CONSTRUED—DIVISION OF SECURITIES—AUTHORITY TO REVOKE LICENSE.

SYLLABUS:

1. *Section 6346-1, General Code, does not authorize the making of loans secured by real estate mortgages upon which interest is charged in excess of 8 per cent per annum. Such loans, if made by a licensee, are not in violation of such section but are governed as to the rate of interest charged by the provisions of sections 8303 and 8306, General Code, with reference to usury, and section 8623-78, General Code, as to loans to corporations. (O. A. G. for 1934, Opinion No. 2486, Vol. I, page 443, approved and followed.)*

2. *Section 6346-2, General Code, in providing for the revocation of licenses for violations of the provisions of the Chattel and Salary Loans Act, is a penal statute and should be strictly construed. Since the making of loans secured by real estate mortgages by a licensee corporation is not in violation of the act, there is no authority for revoking its license for the making of such loans.*

COLUMBUS, OHIO, March 22, 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:

“Your attention is directed to Section 6346-1 of the General Code of Ohio, which reads 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.’

and your attention is also directed to the opinion of John W. Bricker, Attorney General of Ohio, under date of April 11, 1934, being 1934 opinion No. 2486, with respect to a corporation making loans on notes secured by real estate mortgages and charging interest exceeding 8 per cent per annum.

The ‘X’ corporation is a licensee operating under a license granted pursuant to the provisions of 6346-1 General Code of Ohio, and succeeding sections. Said ‘X’ corporation has been and is now engaged in the business of making loans at a rate of interest in excess of 8 per cent per annum, pursuant to said license. Said licensee is also engaged in the business of making loans on notes secured by mortgages on real estate at a charge or rate of interest in excess of 8 per cent per annum.

Your opinion is respectfully requested as to whether that portion of the business of said licensee which consists of making loans on real estate at a charge or rate of interest in excess of 8 per cent per annum is a violation of Section 6346-1 et seq. of the General Code of Ohio, above noted.

Furthermore, has the Division of Securities jurisdiction to revoke the license of said licensee in engaging in the practice of making loans on notes secured by real estate in excess of 8 per cent per annum?"

Your first question presents the same question discussed in the 1934 Opinion of the Attorney General, No. 2486, noted in your letter and to which opinion your attention is directed. The syllabus of this opinion, with which I concur, is as follows:

"A corporation engaged in the business of making loans on notes secured by mortgages on real estate only, which charges interest at a rate in excess of eight per centum per annum is not required by the provisions of section 6346-1, General Code, to obtain a license so to do from the commissioner of securities and otherwise complying with the provisions of Chapter 25, Title II of Part Second of the General Code; but such loans are subject to the provisions of sections 8303 and 8306, General Code, with reference to usury as limited by section 8623-78, General Code."

Your second question regarding the revocation of the license of the "X" corporation involves the construction of section 6346-2, General Code, which, so far as it is pertinent, reads as follows:

"The said commissioner of securities may revoke any license, if the licensee, his officers, agents, or employes shall violate any of the provisions of this act."

This portion of the section is clearly penal in its nature.

In 59 C. J., page 1111, section 658, the following is stated:

"The true test in determining whether a statute is penal is whether the penalty is imposed for the punishment of a wrong to the public, or for the redress of an injury to the individual."

It will also be noted in Lewis' Sutherland on Statutory Construction, Vol. 2, page 645, section 337, that:

"* * * Penal statutes are those by which punishments are imposed for transgressions of the law. * * * When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended it should extend further than is expressed;

and humanity would require that it should be so limited in the construction. * * *”

The same rules have been adopted in Ohio, as will be found in 37 O. Jur., page 317, section 25, as follows:

“A penal statute is an act which imposes a penalty for transgressing its provisions. * * *”

The provision in section 6346-2, General Code, for the revocation of licenses being penal in its nature must be strictly construed. Section 10214, General Code, reads as follows:

“The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice. The rule of the common law, that statutes in derogation thereof must be strictly construed has no application to such part; but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature.”

Again, it will be noted in 37 O. Jur., pages 744 to 749, inclusive, sections 420 and 421, that:

“Sec. 420. It is a well-settled general rule, recognized by the General Code, that a strict construction is to be accorded to penal statutes. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. On the other hand, exemptions from such restrictive provisions are liberally construed.”

“Sec. 421. It has been declared to be a well-established rule of construction that a statute should, if possible, be so construed as to avoid a penalty. Moreover, penal statutes are not to be extended in their operation by inference, implication, or construction beyond the manifest intention of the legislature. They are not to be extended by implication or construction to persons or things not within their descriptive terms, even though such cases appear to be of equal atrocity, or within the reason and spirit of the statute, or within the mischief intended to be avoided. It has been declared that only those transactions are included within penal statutes which are within both their spirit and letter. There is also authority in Ohio to the effect that all doubts in the interpretation of the penal statutes are to be resolved in favor of the accused.”

In the case of *Fenn & Frank v. State*, 17 O. N. P. (N. S.) 472 (Aff. by the Court of Appeals, without opinion), section 6346-3, General Code, was construed by Leighley, J., who made the following comment in his opinion on page 480:

“* * * that the fact that a person, firm or corporation is conducting a loan office under a license from the state under this act, does not preclude loaning upon real estate mortgage or promissory note or in any other way than upon chattel mortgage or salary assignment as provided in Section 1 of said act without complying with details provided by Section 3 of said act.”

The syllabus of this case is as follows:

“A loan office, doing business under the act to regulate and license the loaning of money upon chattels or personal property or salaries or wage earnings, is required to give the borrower a card containing detailed information with reference to the loan as provided in Section 6346-3, only in case the borrower is one who is obtaining a loan upon chattel property or by assignment of salary or wage earnings. Where the loan is upon real estate mortgage, or on a promissory note, or in any other form than on chattel property or by the assignment of wage earnings or salary, the said section has no application.”

Since the provision in section 6346-2, General Code, for the revocation of small loan licenses is penal in its nature and should be strictly construed, the license of the “X” corporation cannot be revoked unless the licensee, his officers, agents or employes have violated some provision of the Chattel and Salary Loans Act. The only complaint made is that the “X” corporation has made loans secured by real estate mortgages and charged interest thereon in excess of 8% per annum. As pointed out in the 1934 opinion, no provision is made in section 6346-1, General Code, for making loans secured by real estate mortgages. In fact, real estate mortgages are not even mentioned in the section. The act simply provides that it shall be unlawful to make loans in excess of 8% per annum on the named types of securities without first securing a license. There being no direct stipulation in the act prohibiting licensees from making other types of loans, such as real estate mortgage loans, a strict construction of the penal statute, section 6346-2, General Code, leaves the Division of Securities without authority to revoke the license.

In conclusion, it is my opinion that a licensee under section 6346-1, General Code, is not prohibited by sections 6346-1 to 6346-13, inclusive, General Code, from making loans secured by real estate mortgages. If

such licensee does make loans secured by real estate mortgages, the rate of interest charged thereon is limited by sections 8303 and 8306, General Code, and as to loans to corporations, by the further provisions of section 8623-78, General Code. Such loans not being included in the provisions of sections 6346-1 to 6346-13, inclusive, General Code, there is no authority for the Division of Securities to revoke the license of the mortgagee, as granted under section 6346-1, General Code, even if the rate of interest charged thereon exceeds 8% per annum.

Respectfully,

THOMAS J. HERBERT,
Attorney General.