OPINION 65-58

Syllabus:

1. Section 1317.08, Revised Code, places a limit of two per cent of the principal balance of the retail installment contract upon the amount which may be retained or received by or paid to a retail seller who sells, assigns or transfers such contract to a financial institution, but this section does not refer to or control in any way subsequent sales, assignments or transfers of such contracts from one financial institution to another.

2. Whether a corporation formed for the purpose of financing retail installment contracts is a sham formed by or on behalf of the retail seller for the purpose of circumventing Section 1317.08, Revised Code, so that the corporate entity may be disregarded, is a question of fact to be determined by a court in each instance upon the evidence presented and proved as to such corporation.

3. Where a retail seller negotiates a loan directly between a retail buyer and a financial institution so that there is no retail installment contract which is sold, assigned or transferred by such seller, payment of compensation for such service, sometimes called a "finder's fee," by the financial institution to the retail seller does not violate Section 1317.08, Revised Code.

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To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William B. Saxbe, Attorney General, April 9, 1965

In your request for my opinion you have referred to and quoted from Section 1317.08, Revised Code, which limits the amount which may be paid to or received by a retail seller who sells, assigns or transfers a retail installment contract. The maximum amount fixed by that section is two per cent of the principal balance of the contract. Your inquiry then reads:

> "Briefly, the practices to which I have heretofore referred consist of two methods.
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> "In the first method, a dummy corporation is formed which is owned or controlled by or on behalf of the retail seller. The retail seller then sells the installment paper to the corporation at par or within the 2% limitation. The corporation then resells the paper to the financing institution without regard to the 2% limitation. The supposed rationale for this device seems to be that the retail installment sales act and its limitations apply only to the initial transfer by the dealer. Both the initial sale and the resale to the financial institution are being made by the dealer or his corporate alter ego.
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> "The second method involves transmuting the installment sales transaction into a direct loan with the retail seller or his corporate alter ego receiving an amount in excess of the 2% limitation as a finders fee for originating the loan. The installment purchaser, of course, never sees the money he has purportedly 'borrowed' in order to finance his purchase. At best he has a glimpse of the check long enough for him to endorse it over to the dealer. He probably never sees the inside of the bank which has 'loaned' the money under the same system and mechanics employed in erstwhile sales financing arrangements. More probably, the purchaser merely signs an authorization permitting disbursement of the funds he has 'borrowed', to the installment seller directly. The entire transaction originates in the basic installment sale. The consumer does not appear on the premises of the retail seller to borrow money. He appears for the purpose of purchasing consumer goods.
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> "Your opinion therefore is respectfully requested as to whether or not either or both

of the methods above-described constitute a violation of law by direct or indirect payment or receipt by the retail seller of an amount in excess of the limitation imposed by the quoted portion of Section 1317.08, supra."

The pertinent part of Section 1317.08, Revised Code, reads:

"No person shall enter into any agreement with any retail seller regarding the purchase, assignment, or transfer of any retail installment contract whereby the retail seller shall receive or retain, directly or indirectly, any benefit from or part of any amount collected or received, or to be collected or received, from any retail buyer as a finance charge or as the cost of insurance or other benefits to the retail buyer, in excess of two per cent of the principal balance of the retail installment contract. No person shall, directly or indirectly, pay to the retail seller, and no retail seller shall, directly or indirectly, receive or retain any part of the amount collected, or to be collected, as a finance charge or retail buyer's cost of insurance or other benefits on any retail installment contract purchased, assigned, or transferred from him, in excess of two per cent of the principal balance of the retail installment contract, provided this paragraph does not apply in case of a bona fide sale of a retail installment contract, if, as part of the consideration for such sale and purchase, the retail seller agrees to act, and does act, as agent for the purchaser in making collection of all amounts due on and otherwise completely servicing said retail installment contract, including billing, posting, and maintaining complete records applicable thereto.

"Compensation received by the retail seller as commission received by him from an insurance company as its licensed agent, is not a benefit received by the retail seller out of the insurance charge to the retail buyer under the installment contract. Any sale, assignment, or transfer of a retail installment contract in violation of this section is void. Except as specifically limited by this paragraph all instruments which are a part of a retail installment contract are freely assignable and transferable."

This language clearly places an upper limit on the payment which may be made to a retail seller by a financial institution financing the retailer's credit sales which are evidenced by a retail installment contract initially made payable to the retailer and then sold, assigned or transferred to such institution.

In Teegardin vs. Foley, 166 Ohio St., 449, the Supreme

Court, at page 462, said this concerning the reasons for the enactment of Section 1317.08, Revised Code:

> "Although somewhat lengthy, the quotations set out not only indicate but impel the conclusion that a retail automobile dealer could not exist as such without having an exceedingly close relationship with at least one financial institution regarding the immediate transfer or assignment of his 'paper,' and that it is this interrelationship which bred the evils of hidden costs, 'kick-backs,' excessive rebates or 'packs' (included in the finance plan worked out by both businesses and 'sold' by the dealer), which the General Assembly attempted to curb by the enactment of the Retail Installment Sales Act.
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> "From this it becomes at once apparent that the function of the act is to control finance charges on retail installment sales, to compel a disclosure of such charges to the consumer and to separate the interest of the retail dealer from the interest of the financial institution in the profit resulting from the financing of a sale made by the dealer to a consumer, i.e., to prevent the retail dealer from being, in effect, a commission agent for the financial institution which has the finance plan with the most 'padding.'"

This statute, however, by its express language, limits only the amount payable to the retail dealer in return for his negotiation of the contract. There is nothing in this section which in any way touches upon or controls the compensation which may be retained by or paid to a financial institution which purchases the contract from a retail seller and subsequently sells, assigns or transfers the contract to another financial institution.

In the situation you have described, the retail dealer has formed a separate corporation to act as the original financial institution purchasing the retail installment credit contracts. Section 1317.08, Revised Code, prohibits both direct and indirect payments to a retail seller in excess of the two per cent maximum figure, and I am, therefore, of the opinion that where a corporation is indeed a sham created solely for the purpose of securing an illegal benefit, the indirect payment through the intervening corporate entity is in violation of Section 1317.08, supra.

I could, of course, never rule as a matter of law that any corporation is a sham. The fact that such a corporation exists demonstrates that articles of incorporation have been filed, setting forth a legal purpose as authorized by Chapter 1701, Revised Code.

The solution to the question you have presented would necessarily involve a determination in the proper tribunal that under the existing facts the corporate entity may be disregarded. Certain language which I used in Opinion No. 1580, Opinions of the Attorney General for 1964, page 2-445, seems pertinent here. Beginning at page 2-446, I said this:

> "The doctrine of 'disregard of the cor-

porate entity' or, as it is sometimes referred to, 'piercing the corporate veil' is a legal theory introduced in appropriate cases for purposes of public convenience and to protect against wrong. It was first used in this country in Bank of the United States v. Deveaux, 5 Cranch 61, 3 L.ed. 38 (1809), in which it was concluded that a corporation cannot be a citizen for purposes of determining the jurisdiction of the courts of the United States. Since the Deveaux case the doctrine has become a part of the law in all states including Ohio. E.g. State, ex rel Watson v. Standard Oil Co., 49 Ohio St., 137; Auglaize Box Board Co. v. Hinton, 100 Ohio St., 505. While it is not within the scope of this opinion to catalog the many cases in which the corporate entity has been disregarded, broadly speaking the courts have done so when: (1) to treat the acts as those of the corporation alone would cause an inequitable result; (2) the corporate form is used to evade the effect of a statute or law. If the corporate structure is to be disregarded in the application of the provisions of paragraph (H), Section 1151.292, supra, it is on the basis that not to disregard the entity would circumvent these provisions.

"Despite the willingness of most courts to disregard the corporate entity, it is clear that this theory is to be relied on only in special circumstances. See North v. Higbee Co. 131 Ohio St., 507; United States v. Elgin, Joliet and Eastern Ry., 298 U.S. 492; 26 Iowa L.R. 350. The reason is of course that it is in direct conflict with the basic principle upon which the whole law of corporations is based. In addition, where the question is of a statutory violation the result sought by disregarding the corporate structure could be as easily -- and in most instances more logically -- reached by legislative change.

"Judicial disregard of the corporate entity in the enforcement of public law has, generally speaking, been based ostensibly on the presence of two conditions. The first is a unity of interest such that the individuality of the corporation and its officers and stockholders has ceased. The second is the formation of the corporation for the purpose of evading the law. See Auglaize Box Board Co. v. Hinton, supra; The State, ex rel. The Johnson and Higgins Co. v. Safford, 117 Ohio St., 576; Pearson v. Ali Borg, 23 F. Supp., 837,842. Despite their rationale, analysis of the decisions indicates that in most instances the presence of either or both of these conditions is not alone determinative of the application of the doctrine. Cases based on unity of interest seem actually explainable on a theory of agency. While those

> purportedly based on intent to evade the law seem by expression to beg the question. The corporate structure was invented--and is sanctioned by law--to take advantage of priveleges unvailable (sic) to individuals, and it seems anomolous to destroy its efficacy because of this intent alone.
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> "The real test and the one actually applied by the courts in this area appears to be whether preserving the corporate aegis will defeat the policy of the law. This of course depends upon the purpose for the law, and it means that each law presents a separate problem in itself."

Under the second method of procedure you have described, the retail seller, or perhaps the separate corporate entity, negotiates a loan between a financial institution and the retail buyer and is paid a fee or commission for this service, which payment you have designated a "finder's fee."

In this transaction the creditor is, in the first instance, a financial institution, and the sale by the retail dealer is in fact not a retail installment sale. There is no retail installment contract payable to the retail seller, and thus there is no contract which may be purchased, assigned or transferred by him. Neither is there any contract regarding the purchase, assignment, or transfer of a retail installment contract.

It is my conclusion that this method of negotiating a loan between a retail purchaser and a financial institution is not within the scope of the prohibition in Section 1317.08, Revised Code, and, for that reason, could not violate that section. I shall not at this time explore the possibility that some financial institutions may be prohibited by other provisions of the Ohio law from engaging in this method of securing consumer loans.

It is, therefore, my opinion and you are advised:

1. Section 1317.08, Revised Code, places a limit of two per cent of the principal balance of the retail installment contract upon the amount which may be retained or received by or paid to a retail seller who sells, assigns or transfers such contract to a financial institution, but this section does not refer to or control in any way subsequent sales, assignments or transfers of such contracts from one financial institution to another.

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