

OFFICIAL OPINION NO. 30

April 30, 1958

Hon. Frank A. Lenning  
Secretary of State  
201 State House  
Indianapolis, Indiana

Dear Mr. Lenning:

You have requested an Official Opinion concerning the admission of a foreign corporation to do business in this state. Your letter making this request is as follows:

“I am hereby requesting an official opinion upon the following legal problem:

“Can a foreign corporation, not otherwise prohibited by any other Indiana law, be admitted to do business in the State, when its sole purpose is “To process, acquire, own, hold, and assign mortgages on real estate in this State?” See Section (a) and (b) of the first paragraph and the second paragraph of section 57, Acts of 1929, chapter 215.

“Can such a foreign corporation be admitted to do business in this State when its sole purpose is to loan money and to accept mortgages on Indiana real estate to secure payment thereof?”

It is the rule in Indiana as well as in most other jurisdictions that under the rule of comity a foreign corporation admitted to do business may do all things authorized in its charter not expressly or impliedly prohibited by Indiana statutes, including the ownership of real property.

MacMurray v. Sidwell (1900), 155 Ind. 560, 38 N. E. 722;

Elston v. Pigott (1883), 94 Ind. 14;

Wright v. Bundy (1858), 11 Ind. 398;

17 Fletcher, Cyclopedia of the Law of Private Corporations, Sec. 8344.

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I therefore conclude that a foreign corporation may be admitted to do the acts specified in your letter unless there is specific statutory prohibition as to those acts.

In the second paragraph of your letter, you mention the Acts of 1929, Ch. 215, Sec. 57. This section is found in Burns' (1948 Repl.), Section 25-302, and is as follows:

“No foreign corporation shall be admitted (a) for the purpose of transacting any kind of business in this state the transaction of which by domestic corporations is not permitted by the laws of this state, or (b) for the purpose of acquiring, owning, holding or leasing real estate in this state except such as may be necessary and incidental to the carrying on of some other business, or (c) for the purpose of conducting an agricultural, forestry or live stock business. No foreign corporation admitted to do business in this state shall hold any real estate in this state except such as may be necessary for the proper carrying on of its legitimate business.

“Any foreign corporation may receive and hold, for a period not exceeding five [5] years, title to real estate in this state in payment of, or as security for, a debt due and owing such corporation when such debt shall not have been created for the purpose of enabling such foreign corporation to obtain title to real estate in this state.

“Except as hereinabove provided, a foreign corporation admitted to do business in this state shall have the same, but no greater, rights and privileges, and be subject to the same liabilities, restrictions, duties and penalties, now in force or hereafter imposed upon domestic corporations of like character, and to the same extent as if it had been organized under this act to transact the business for which its certificate of admission is issued.”

The above-quoted section contains certain limitations on the powers that may be exercised by a foreign corporation. Under its language a foreign corporation may acquire title to only such real estate as is necessary and incidental to the carrying on of some *other* business. I emphasize the word “other”

because implicit in the use of the word is the answer to one of your questions.

I conclude that the Legislature in using the word "other" meant other than the business of acquiring, owning, holding or leasing real estate. In short, the limitation set out in the act was intended to prevent the business of land owning being conducted in this state by foreign corporations. It would be purposeless to catalogue here the many valid reasons why the Legislature in its wisdom might desire to exclude foreign "land" companies from operating in this state. It is sufficient to say that the limitation is proper and valid so far as it goes, but should not be extended by interpretation.

It is well settled in this state that a mortgage is not an "interest in land."

Gross Income Tax Div. v. Colpaert Realty Corp.  
(1952), 231 Ind. 463, 469, 109 N. E. (2d) 415;

Oldham v. Noble (1946), 117 Ind. App. 68, 66 N. E.  
(2d) 614.

Thus, Indiana is aligned with the great majority of American jurisdictions which consider a mortgage as nothing more than a lien, encumbrance, or security for a debt which passes no title or estate to the mortgagee.

59 C. J. S. Mortgages § 1;

37 Am. Jur., Mortgages, § 917.

Since a mortgagee does not own land, I conclude that the language in the above-quoted statute which denies the right of foreign corporations to be admitted to do business in this state when their sole purpose is to acquire, own or hold real estate in this state does not prevent the admission of foreign corporations whose purpose, among others, is to act as mortgagee of real property in this state, provided that there is no statutory limitation elsewhere which prohibits this activity, and provided that domestic corporations may also have the same power.

There is a specific prohibition against domestic corporations organizing as mortgage loan guarantee companies. Acts of 1933, Ch. 40, Sec. 356, as amended by the Acts of 1937, Ch. 33,

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Sec. 41, as found in Burns' (1950 Repl.), Section 18-2405 is as follows:

“From and after the taking effect of this act, no private bank, mutual savings bank, rural loan and savings association, guaranty loan and savings association, or mortgage guarantee company shall be incorporated or organized under any law of this state.”

In view of the above, if the corporation which is the subject of your inquiry is a mortgage loan guarantee company, it may not be admitted to do business in this state. Mortgage loan guarantee companies are not specifically defined by statute, but provision for this type of corporation was made by the Acts of 1913, Ch. 78, as found in Burns' (1950 Repl.), Sections 18-2901 to 18-2917. Subsection (c) of Section 18-2912 is set out below:

“To loan and invest its funds, or funds deposited with it, in bonds, notes or other instruments secured by mortgage, deed of trust or other instrument, whether in favor of said corporation directly or as trustee for itself or others, and to purchase, own, hold, sell, negotiate, guarantee and deal in bonds, notes and other evidences of indebtedness payment of which is wholly or partially secured by mortgage, deed of trust or other instruments on real estate, to issue, own, hold, negotiate, sell, guarantee and deal in certificates based on a deposit of bonds, notes or other instruments secured by mortgage, deed of trust or other instrument creating a lien on real estate, which certificate shall be payable at such times and in such manner and under such conditions and stipulations and with such rate of interest as its board of directors or trustees may prescribe.”

I cannot tell from your written request whether or not the corporation you inquire about comes within the meaning of this act; however, I note that all of the powers which the corporation you inquire about seeks to exercise are contained in the above-quoted act. If your examination of the powers of the applicant corporation as contained in its Articles of Incorporation indicate that it is a mortgage guarantee company, then in my opinion it may not be admitted to do business in this state.

If the corporation has powers which it may legitimately exercise in this state without violating Indiana law, then it may be admitted, even though not all the powers granted by its state of domicile would have been granted it had it incorporated in Indiana. Such a corporation admitted to do business in this state could exercise only those of its powers which might also be exercised by a domestic corporation.

In summary, a foreign corporation may be admitted to do business in this state when its purpose is to loan money secured by mortgage on Indiana real estate. In Indiana a mortgage is not of such a nature as to make the mortgagee a holder of interest in real property and the provisions in the Indiana General Corporation Act which denies the right of foreign corporations, whose sole purpose is to act as "land companies," to be admitted in this state to do business does not include corporations whose purpose is to loan money secured by mortgage. Indiana law forbids domestic corporations from being organized as mortgage guarantee companies and, therefore, foreign corporations whose sole purpose is to engage in such business could not be admitted to do business in Indiana. Foreign corporations which have powers, some of which may not be exercised by domestic corporations may, nonetheless, exercise those powers which a domestic corporation might also exercise subject to specific statutory limitations to the contrary.