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1. BANK—GENERAL ASSEMBLY—ENACTMENT OF SECTION 710-40 G. C.—BANK INCORPORATED UNDER LAWS OF ANOTHER STATE TO "LEND MONEY" IN OHIO—TERM "LEND MONEY" NOT EMPLOYED IN SUCH A TECHNICAL SENSE AS TO REQUIRE LOAN TO BE MADE DIRECTLY TO OBLIGOR—GENERAL ASSEMBLY—INTENT—CONSENTED TO BANK PURCHASING COMPLETED LOANS FROM ORIGINAL OBLIGEE.

2. BANKS EXEMPTED UNDER SECTION 8625-3 G. C. FROM PROVISIONS OF SECTION 8625-1 THROUGH 8625-33 G. C.—FOREIGN CORPORATION ACT.

SYLLABUS:

1. The General Assembly, in enacting Section 710-40, General Code, permitting a bank incorporated under the laws of another state to "lend money" in Ohio, did not employ the term "lend money" in such a technical sense as to require the loan to be made directly to the obligor, but, instead, intended to and did consent to such bank purchasing completed loans from the original obligee.

2. Under Section 8625-3, General Code, banks are exempted from the provisions of Sections 8625-1 to 8625-33, General Code (the Foreign Corporations Act.)

Columbus, Ohio, May 14, 1952

Hon. Thurman R. Hazard, Superintendent of Banks
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "A foreign bank, whose course of business provides for the acquiring of Federal Housing Administration guaranteed mortgages and for the recording of their ownership on the proper records in the name of the owner, the servicing of them through an Ohio representative, who would operate under a contract in which he would be designated as an independent contractor, and the institution of foreclosure proceedings in the name of the owner in the event of default, contemplates operation in Ohio.
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> "Since Section 710-40 apparently prohibits a foreign bank from doing any business in Ohio but the lending of money, and also mindful of the opinion of the Attorney General of March 16,

1918, (1918 O.A.G. p. 417), we have felt that such a course of conduct might well be doing business in Ohio. Therefore, we would be pleased to receive from you a specific opinion in the following matters:

"(1) Is a foreign bank acquiring Federal Housing Administration guaranteed mortgages under the course of conduct above set out, doing business in Ohio?

"(2) If in your opinion, the bank would be doing business in Ohio, is there any way in which such a bank can qualify to do business in Ohio and what statutes would be applicable?

"(3) If there is no way for a foreign bank to qualify to do such business in Ohio, what would be the position of such bank attempting to foreclose a mortgage in our courts?"

The term "foreign bank" is used herein to designate a bank incorporated under the laws of another state. For the purpose of this opinion, I am assuming that the foreign bank, in the course of acquiring federal housing administration guaranteed mortgages, is coming into possession of these mortgages in a manner other than that of making the original loan.

Your questions assume that if the foreign bank in question is "doing business" in Ohio, such would be contrary to the provisions of Section 710-40, General Code. The basic question necessarily involved in your request, therefore, is whether Section 710-40 does prohibit a foreign bank from doing such business in Ohio.

Section 710-40, General Code, reads as follows:

"No bank or banking institution incorporated under the laws of any other state shall be permitted to receive deposits or transact *any banking business of any kind* in this state, *except to lend money*, or as otherwise provided by law in relation to trust companies." (Emphasis added.)

The Banking Act contains no express definition of the term "banking business." There are those who contend that any business in which a bank is authorized to engage is the business of the bank and, therefore, "banking business." Others contend that types of business which may be engaged in by others, as well as banks, is not "banking business" within the contemplation of that term as employed in Section 710-40. The latter point out that historically the business of banking had a restricted legal significance, being limited to the express function of

issuing paper money. Exchange Bank of Columbus v. Hines, 3 Ohio St., 1, 31, 32. They also point out that it was not until the enactment of what is now Section 710-40 in 1908 that there was any legal restriction on the receipt of deposits. They maintain that in using the term "banking business" in this section, the General Assembly had reference only to the receipt of deposits and the historical function of issuing paper money, and that the right of a corporation or individual to lend money, discount paper, buy and sell notes and mortgages or securities, remained unimpaired by the Banking Act. In support of this contention, reference is made to National Bank of Washington v. Insurance Company, 41 Ohio St., 1 (1884), to the effect that the making of a loan is a transaction outside of banking business. Reference is also made to Section 710-2, General Code, defining the term "bank" as follows:

> "The term 'bank' shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, trust companies, special plan banks, and unincorporated banks; provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal; nor to building and loan associations or title guarantee and trust companies incorporated under the laws of this state; nor to money or its equivalent received for transmittal by a duly incorporated railroad, steamship, express or telegraph company, All banks, including the trust department of any bank, organized and existing under laws of the United States, unless prohibited by federal law, shall be subject to inspection, examination and regulation as provided by law."

To the contrary, it is claimed that unless the General Assembly had considered that the lending of money, when done by a bank, was a part of the "banking business," there would have been no reason for the reference to the lending of money in Section 710-40, General Code.

While I recognize that a strong argument may be advanced for the proposition that "banking business" is limited to the issuing of paper money and the soliciting, receiving and accepting of deposits, it is not necessary, for reasons hereinafter set forth, to pass on this question.

Section 710-40 gives foreign banks specific authority to lend money in Ohio. In effect, it extends permission to a foreign bank to exercise

within the State of Ohio its corporate powers of lending money to the extent authorized by the state of its incorporation. The extent to which, for the protection of its depositors, it is authorized to lend money necessarily is ascertained by the laws of the state where such deposits are had, and it is quite clear that Section 710-40 does not authorize it to solicit, receive or accept deposits in Ohio. By permitting a foreign bank to lend money in Ohio, the General Assembly evidenced its intent not to restrict the availability of foreign capital to Ohio citizens. This policy was in accord with the interpretation of a former statute in Pickaway County Bank v. Prather, 12 Ohio St., 496.

While it is true that in some instances and for some specific purposes a distinction may be made between lending money and purchasing completed loans. I can not conceive that it was the intention of the Legislature to restrict the exercise of the power "to lend money" to the technical meaning of that term, but, rather, the intention was to allow a foreign bank to exercise this function in accordance with the ordinary customs when the statute was enacted, as well as today, for there has been no fundamental change in such business practices since the original enactment.

I deem it obvious that the Legislature was speaking generally and intended no interference with established commercial practices in the lending of money. It would be difficult, indeed, to conceive that the Legislature, which was obviously seeking to make foreign capital available to Ohio citizens, would intend that such capital could be made available only by means of a direct loan. It is well established that an Ohio borrower may obtain his loan wherever he chooses and it would be an absurd conclusion to say that the foreign bank could lend him money directly, with which he might pay off his note to an Ohio bank, but that a foreign bank was prevented from purchasing the original loan. It would be a distinction wholly upon form and in disregard of the substance.

A primary rule of statutory interpretation is to arrive at the intention of the Legislature. Statutes are to be given a fair and reasonable construction in conformity to their object and purpose and to embrace all situations and transactions fairly coming within their terms that are also within their reason and spirit. It is assumed that the Legislature intended to enact only that which is reasonable, and it has been said that the Legislature is presumed not to have enacted a law producing unreasonable or absurd consequences. 37 Ohio Jurisprudence, Section 352, et seq.

A bank, like other corporations, may exercise those powers which are expressly given, those which may be fairly implied from those expressly given and the power to do those things necessary or incidental thereto. It is, thus, clear that the Legislature intended that Section 710-40 would permit foreign banks to exercise their general corporate powers in lending money in Ohio.

A foreign bank, having the right to lend money in Ohio or to purchase loans already completed must, of necessity, be given the right to have the mortgage investment serviced as set forth in your request for my opinion. The acts which go to make up servicing such a mortgage are incidental to the making of the loans or purchasing completed loans.

Assuming, for the sake of argument, therefore, that the purchase of the mortgage and loan and the servicing of the same by an independent contractor in Ohio would constitute the "doing of business" in Ohio, and further assuming that such would constitute the doing of "banking business" in Ohio, it is my opinion that such action by a bank incorporated under the laws of another state is authorized by Section 710-40, General Code, under the authority "to lend money" in this state.

At this point, it may be well to consider the position occupied by national banks, which differs materially from the position of banks organized and under the supervision of the various other states. The case of North Shaker Boulevard Company, et al. v. Harriman National Bank of the City of New York, Trustee, 22 Ohio App., 487, at page 503, states it concisely:

> "As bearing on the power of national banks, we quote the following authority, which is in line with many others of a similar nature: 'National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a statute, to define their duties or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created.' Davis v. Elmira Savings Bank, 161 U.S. 275, 283, 16 S. Ct. 508, 40 L.Ed., 700."

This is in accord with the decisions in general and there is no necessity for further discussion of national banks in this opinion.

The subject of general regulation of foreign corporations doing business in Ohio is covered by the Foreign Corporation Act, Sections 8625-1 to 8625-33, inclusive, General Code. The language of the applicable section is clear. The section simply does not apply to banks and they are wholly exempt from the operation of the Act and it is not necessary for them to qualify in any way before transacting such business as they are permitted, under Section 710-40, General Code. The section containing the exemption is Section 8625-3, General Code, and reads as follows:

> "This act *shall not apply* to corporations engaged in this state solely in interstate commerce, including the installation, demonstration or repair of machinery or equipment, sold by them in interstate commerce, by engineers or employees especially experienced as to such machinery or equipment, as part thereof, nor *to banks,* trust companies, building and loan associations, title guarantee and trust companies, bond investment companies, insurance companies, nor to public utility companies engaged in this state in interstate commerce." (Emphasis added.)

It should be noted that all of the exempted corporations in the above section are either engaged in interstate commerce and, thus, not the proper subject of regulation by this state, or are corporations of a type strictly regulated by the sovereignty of origin.

An examination of Section 11268, General Code, in the light of the conclusions reached above, indicates clearly that the foreign banks can foreclose mortgages they acquire in the county in which the property is located. Section 8625-25, General Code, prohibiting a foreign corporation which "should have obtained a license to do business in Ohio" from the Secretary of State from maintaining any action until it obtained such license, like the other provisions of the Foreign Corporation Act, does not apply to banks because of Section 8625-3, General Code. Thus, Opinion No. 1078, Opinions of the Attorney General for 1918, page 417, referred to in your le[illegible] is entirely distinguishable from the facts here involved for the reaso[illegible] .iat such opinion did not involve a bank.

In conclusion, it [illegible] my opinion that:

1. The General Assembly, in enacting Section 710-40, General Code, permitting a bank incorporated under the laws of another state to "lend

money" in Ohio, did not employ the term "lend money" in such a technical sense as to require the loan to be made directly to the obligor, but, instead, intended to and did consent to such bank purchasing completed loans from the original obligee.

2. Under Section 8625-3, General Code, banks are exempted from the provisions of Sections 8625-1 to 8625-33, General Code (the Foreign Corporation Act.)

Respectfully,

C. William O'Neill
Attorney General