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FOREIGN CORPORATIONS LENDING MONEY IN ILLINOIS: CONSTITUTIONAL AND STATUTORY PROBLEMS

by ROBERT KRATOVIL* and DANIEL A. WEILER**

INTRODUCTION

Without exception, every state, as well as the District of Columbia, has a statutory provision penalizing foreign corporations which do business in the state without a license.¹ The applicability of such a provision invariably depends upon a determination of which activities of the foreign corporation constitute "doing business."² Both legislatures and courts have attempted

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1. See, e.g., C.T. CORPORATION SYSTEM, WHAT CONSTITUTES DOING BUSINESS BY A CORPORATION IN STATES FOREIGN TO THE STATE OF ITS CREATION, *passim* (1973) (hereinafter cited as C.T.C.). With respect to ordinary business corporations, the typical penalty is denial of access to local courts. Various other special categories of foreign corporations are subjected to differing requirements and penalties. For example, a mortgage on Illinois land running to a foreign state savings and loan association that has "done business" in Illinois in connection with the transaction is void. See note 160 *infra*. Foreign insurance companies also fall under a special statute in Illinois. See note 160 *infra*.

2. "Doing business" or "transacting business" is used by the courts in three different contexts: (1) activities which subject a foreign corporation to service of process and in personam jurisdiction of the domestic courts; (2) activities which subject a foreign corporation to the state's power to tax; and (3) activities which impose penalties on a foreign corporation if it is not licensed or qualified. The level of activity which will suffice to be considered doing business is different for each of these areas and different tests have been applied by the courts in deciding these questions. One writer has metaphorically described the three concepts as "three concentric circles." The largest circle would include in personam jurisdiction activities, which include almost any minimum contacts with the state as long as service of process does not violate "traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). See ILL. REV. STAT. ch. 110, § 17 (1973). Inside the next largest circle are activities which subject the foreign corporation to both taxation and service of process. The test used by the courts is whether there is a sufficient "nexus" or connection between the foreign corporation's operations and the state. *Northwestern States Portland Cement Co. v. Minnesota*, 385 U.S. 450 (1959); 15 U.S.C. § 381. The smallest circle contains any activity which subjects a foreign corporation to the local penalties imposed for failure to become qualified. Generally the amount of activity falling in this last category must be much greater than the other two and hence the circle is smaller. 2 G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 581 (1959): 1-4. The terms "doing business" and "transacting business" will be used in this article only in the final sense, that is, to describe the amount of activity that will subject a foreign corporation to a penalty for failure to qualify.

to define the term "doing business." Initially the courts acted alone in attempts to concretize the phrase. Subsequently, in more recent times, legislatures have addressed the issue by enumerating specific activities which do not constitute doing business.³ In the absence of such legislative clarification, courts

3. Every state except Colorado, Maine, Massachusetts, Minnesota, New Hampshire, New York, Ohio, South Dakota, and Vermont, has a statute usually relating to ordinary business corporations, that excludes certain activities from the area of doing business. A statute that has been adopted by a majority of the states is 2 ABA-ALI MODEL BUS. CORP. ACT § 106(2) (1971) which reads as follows:

Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purposes of this Act, by reason of carrying on in this State any one or more of the following activities:

(a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(b) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.

(c) Maintaining bank accounts.

(d) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(e) Effecting sales through independent contractors.

(f) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts.

(g) Creating evidences of debt, mortgages or liens on real or personal property.

(h) Securing or collecting debts or enforcing any rights in property securing the same.

(i) Transacting any business in interstate commerce.

(j) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

Illinois has not adopted this portion of the Model Business Corporation Act.

As can be seen, sub-paragraph (g) of the above provision is a masterpiece of ambiguity. Whether it is the borrower or the lender whose activities are exempted from qualification requirements is left entirely to the imagination. A number of states have enacted versions of this provision that speak with clarity. *E.g.*, PA. STAT. ANN. tit. 15, § 2001(7) (1968): "Creating as borrower or lender evidences of debt, mortgages and rights in real or security interests in personal property" (emphasis added). In correspondence between one of the authors (Professor Kratovil) and the American Law Institute (ALI), it has been indicated by ALI that this language will be clarified.

A simple example will illustrate the problem. Suppose that ABC Corporation owns land in all fifty states and is qualified to do business in each of them. ABC applies to XYZ, a large New York City mortgage company, for mortgage loans on real estate in each of the states. The entire transaction, from application for loan to disbursement of the mortgage funds, is handled in New York City. The lender is thus protected under the "insulation method." See section entitled "The Insulation Method" *infra*. However, the lender, XYZ, who is not qualified to do business in any state outside of New York, engages in certain incidental activities in each of the states, such as sending personnel to each of the states to make loan appraisals of the real estate, or making inspections for construction disbursements. If sub-paragraph (g) refers only to the borrower, ABC Corporation, then the lender, XYZ, may be subject to "doing business" defenses on the ground that the lender failed to remain within the confines of the insulation method. Hence the language of sub-

have decided the question on an ad hoc basis, examining each particular factual situation in order to determine whether business is being done. Their inquiries have included consideration of the total amount of activity carried on within the state, whether the activity is part of the corporation's regular course of business, and whether the activity is part of interstate commerce.⁴

The Illinois Business Corporation Act, in its qualification statute, requires a foreign business corporation to procure a certificate of authority from the Secretary of State before transacting business within the state.⁵ The penalty imposed for a corporation's failure to obtain a certificate is the denial of the right to maintain a civil action in any court of the state.⁶

For many years, however, Illinois has singled out one specific activity, carried on by *any* type of foreign corporation, that will not be considered transacting business for purposes of qualification. That activity is lending money in Illinois.⁷ This article will examine this special statutory exception and problems in construing it.⁸ Owing to an amendment in 1953, questions have arisen as to the scope of this statute and its validity. It is the purpose of this article, therefore, to explore the question of whether foreign corporations may legally engage in the business of lending money in Illinois without qualifying to do business.

ORIGINS OF DOING BUSINESS LAW

The Law Prior to Qualification Statutes

In the early days of the republic, a corporation had no existence outside the jurisdiction of its incorporation. It was

paragraph (g) needs to be revised to follow the Pennsylvania version. Obviously the legislative intention is to encourage lending by protecting the foreign lenders.

4. C.T.C., p. 49.

5. ILL. REV. STAT. ch. 32, § 157.102 (1973).

6. ILL. ANN. STAT. ch. 32, § 157.125 (Smith-Hurd Supp. 1975), amending ILL. REV. STAT. ch. 32, § 157.125 (1973). In addition, the foreign corporation is liable in an amount equal to the fees and franchise taxes for the years it acted without a certificate of authority. *Id.*

7. ILL. REV. STAT. ch. 32, § 212 (1973) (foreign corporations lending money in Illinois).

8. Two observations seem relevant at this point. The Illinois Business Corporation Act expressly excludes banks from its scope. ILL. REV. STAT. ch. 32, § 157.102 (1973). See also note 61 *infra*. Also the statute hereafter considered is a specific statute dealing with a specific topic, namely, lending by any foreign corporation. In the absence of an express repealer in the present Illinois Business Corporation Act or its predecessors, the specific statute will be permitted to co-exist with the general corporate legislation. See text at note 38 *infra*. These points are deserving of repetition and emphasis because foreign state banks cannot purge themselves of the "doing business" taint by qualifying in Illinois. The law does not permit this. See text at note 180 *infra*. Moreover, the point has added weight because banks are today a prime source of mortgage funds.

a creature of the law of its state of incorporation.⁹ An early Supreme Court case, *Bank of Augusta v. Earle*,¹⁰ recognized this theory, but refused to extend it. To do so would have established the rule that the existence of the corporation and its power to contract should not be recognized outside the boundaries of the state that created it.¹¹ On the contrary, the Court held that as long as a state had not expressly indicated that contracts made by a foreign corporation were repugnant to its policy or injurious to its interests, the law of comity should be applied and the state should recognize the validity of the contracts and permit the corporation to sue in its courts.¹²

At that time there were only two areas in which the states had attempted to regulate or exclude foreign corporations: banking and insurance.¹³ Prior to the General Incorporation Act of 1872, Illinois had statutes regulating both these areas.¹⁴ There was nothing else to indicate a policy of excluding foreign corporations. Indeed these statutes provided an inference that foreign corporations were welcome in Illinois.

The General Incorporation Act of 1872¹⁵ prohibited foreign corporations in general from purchasing or holding real estate in Illinois and limited the powers of foreign corporations to those possessed by domestic corporations.¹⁶ At one time, the Su-

9. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839); H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS*, §§ 89, 98 (2d ed. 1970). Federal corporations, such as national banks and federal savings and loan associations, present unique problems not within the scope of this article. See, however, text at notes 172, 177, 184, & 187 *infra*.

10. 38 U.S. (13 Pet.) 519 (1839).

11. *Id.* at 588.

12. *Id.* at 589-92.

13. See, e.g., the laws cited in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 592 (1839); see *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) (statute excluding insurance companies that failed to obtain a license).

14. See Act of March 3, 1845, ch. XV, §§ 1-3, [1845] Rev. Stat. of Ill. 84 (repealed 1867) (imposing penalty for passing notes issued by foreign banks of less denomination than five dollars); Act of March 3, 1845, ch. 64, §§ 22-23, [1845] Rev. Stat. of Ill., 344 (repealed 1869) replaced by Act of March 11, 1869, ch. 53a, § 22, [1869] Ill. Laws, 136 (repealed 1879) (statutes requiring agents of foreign insurance companies to comply with certain requirements before carrying on an insurance business in Illinois).

15. Act of April 18, 1872, ch. 32, §§ 1-49, [1871-72] Ill. Laws, 296 (repealed 1919), REV. STAT. ILL. ch. 32, §§ 1-49 (Hurd 1874). ILL. CONST. art. X, § 1 (1870) provided that no corporation could be created by special law. The General Assembly was required to provide for a General Incorporation Statute. The practice of incorporation by special law was subject to much abuse and corruption. See H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* § 12 (2d ed. 1970). The result was the passage of the 1872 law.

16. Act of April 18, 1872, ch. 32, § 26 [1871-72] Ill. Laws 302-03 (now ILL. REV. STAT. ch. 32, § 157.103 (1973)), REV. STAT. ILL. ch. 32, § 26 (Hurd 1874), provided:

Foreign corporations, and the officers and agents thereof doing business in this state, shall be subjected to all liabilities, restrictions and duties that are or may be imposed upon corporations of like

preme Court of Illinois interpreted this section as manifesting a public policy against foreign corporations lending money in Illinois.¹⁷ The court later re-examined this holding and in *Stevens v. Pratt*¹⁸ decided that its former decision resulted from an erroneous reading of the statute.¹⁹ It is clear from *Stevens* that Illinois followed the general rule of *Bank of Augusta v. Earle*²⁰ which allowed for recognition of the validity of foreign corporation contracts and which permitted foreign corporations to sue to enforce them under the principle of comity. It is also clear that, at that time, foreign corporations could lend money in Illinois without violating any state policy.

The Passage of the Lending Statute

The greatest single event which precipitated the passage of the Illinois lending statute²¹ was the great Chicago Fire of 1871. After the fire, a period of feverish building and land speculation took place.²² Much of the new building was financed by eastern money.²³ Interest rates were high and down payments small.²⁴ As a result, the feverish building boom was followed by an inevitable bust. With the bust came declining land values and bank failures.²⁵ By 1875 the rate of foreclosure was soar-

character organized under the general laws of this state, and shall have no greater powers. And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its shareholders or members, shall purchase or hold real estate in this state, except as provided for in this act.

17. *U.S. Mortgage Co. v. Gross*, 93 Ill. 483, 492-93 (1879), *aff'd* 108 U.S. 477 (1883). The court reasoned that since the first section of the act provided that corporations could not be formed under the act for loaning money, and since under § 26 a foreign corporation could have no greater powers than a domestic corporation, lending money by a foreign corporation in Illinois was obnoxious to the policy of the state, *id.* at 493.

18. 101 Ill. 206 (1882).

19. The court decided that the failure of the legislature to provide for a particular class of incorporations (corporations organized to lend money) was equivocal. Since the intention to exclude the foreign corporations could have easily been shown, the court declined to assume that this was the policy of Illinois since it was not clearly expressed. *Id.* at 219-20.

20. 38 U.S. (13 Pet.) 519 (1839). Indeed, *Stevens v. Pratt*, 101 Ill. 206, 222-23 (1882) expressly cited and followed *Bank of Augusta*. The rule of comity still exists in Illinois. *People v. New York Title & Mortgage Co.*, 346 Ill. 278, 282, 178 N.E. 661, 663 (1931).

21. Act of April 9, 1875, ch. 32, § 72, [1875] Ill. Laws 65 (now ILL. REV. STAT. ch. 32, § 212 (1973)), ILL. REV. STAT. ch. 32, § 72 (Underwood (1878)).

22. HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO, 102 (1933) (hereinafter cited as HOYT).

23. *Id.*

24. *Id.* at 104. The interest rate was eight percent per annum and the loans were due in five years. The down-payment was often only a tenth of the purchase price, and a purchase money mortgage trust deed was given for the remainder. *Id.* at 117-18.

25. *Id.* at 119-20. The Panic of 1873 was characterized by the crash of the stock market, bank suspensions and commercial failures. New

ing.²⁶ The plight of the mortgagor who had borrowed eastern money was aggravated by the fact that in the federal courts a redemption period of only one hundred days was permitted, even though Illinois allowed a twelve month redemption period.²⁷

Against this background of scarce mortgage money and harsh federal court procedure, the Illinois General Assembly took action. In 1875 it passed a statute which enabled "any" foreign corporation "to invest or loan money" in Illinois, and declared that foreign corporations had the same rights and access to state courts for purposes of recovering loans or enforcing securities in connection with loans as did citizens of Illinois.²⁸ The legis-

York felt the impact immediately, while the depression affected Chicago more slowly. In the four-year period from 1873 to 1877, twenty-one banks failed in Chicago, including its largest savings and loan. *Id.*

26. *Id.* at 124.

27. See *Brine v. Ins. Co.*, 96 U.S. 627 (1877); see HOYT at 123. This practice was ended in 1877 by the United States Supreme Court in *Brine v. Ins. Co.*, 96 U.S. 627 (1877), which declared that the federal courts must follow the Illinois redemption period in mortgage foreclosures. See also *Sutterlin v. Conn. Mut. Life Ins. Co.*, 90 Ill. 483 (1878).

28. Act of April 9, 1875, ch. 32, § 72 [1875] Ill. Laws 65 (now ILL. REV. STAT. ch. 32, § 212 (1973)); ILL. REV. STAT. ch. 32, § 72 (Underwood (1878)). This law (sometimes herein referred to as "the lending statute"), as originally enacted, read as follows:

AN ACT to enable corporations in other states and countries to lend money in Illinois, to enforce their securities and acquire title to real estate as security.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly, That any corporation formed under the laws of any other state or country, and authorized by its charter to invest or loan money, may invest or loan money in this state. And any such corporation that may have invested or lent money, as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this state; and when a sale is made under any judgment, decree or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might do so in like cases: Provided, however, that all real estate so purchased by any such corporation, in satisfaction of any such liability or indebtedness, shall be offered at public auction, at least once every year, at the door of the courthouse of the county wherein the same may be situated, or on the premises so to be sold, after giving notice thereof for at least four consecutive weeks, in some newspaper of general circulation, published in said county; and if there be no such newspaper published therein, then in the nearest adjacent county where such newspaper is published; and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, cost and other expenses: And, provided, further, that in case such corporation shall not, within such period of five years, sell such lands, either at public or private sale, as aforesaid, it shall be the duty of the state's attorney to proceed by information in the name of the People of the State of Illinois, against such corporation, in the circuit court of the county within which such land, so neglected to be sold, shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate, at such time and place, subject to such rules as the court shall establish. The court shall tax, as the fees of the state's attorney, such sum as shall be reasonable; and the proceeds of such sale, after deducting the said fees and costs of proceedings, shall be paid over to such corporation: And,*

lation was successful. The resulting flow of eastern money to Illinois helped Chicago's economy stage a recovery in 1878 and 1879.²⁹

The cycle was repeated when the resulting period of growth was followed by a second depression in 1896.³⁰ Just as in 1875, the General Assembly passed a second lending statute in 1897. The 1897 legislation was virtually identical with the 1875 law.³¹

Besides the lending statute, there was another law passed during the 1897 session which concerned foreign corporations. It was the first Illinois qualification statute. It required every foreign corporation which intended to transact business within Illinois to maintain an office in the state and to file a copy of its charter with the Secretary of State.³² The penalty for failure to procure a certificate was a fine and the denial of access to state courts to maintain any action.³³

The qualification statute contained a section providing for the repeal of all acts and parts of acts inconsistent with it.³⁴ If lending money in Illinois was considered transacting business, then the lending statute on its face was inconsistent with the qualification law, since, under the lending statute, a foreign corporation neither had to obtain a certificate of authority nor maintain an office in Illinois in order to lend money in the state. However, there was no express repeal of the lending statute, so it could only have been repealed by implication, if at all. Yet,

provided, further, that nothing in this act contained shall be so construed as to confer banking powers or privileges upon any such corporation.

It is significant that the legislature chose to extend the benefits of the statute to "any corporation." The word "any" admits of no exceptions. *Port City Constr. Co. v. Adams & Douglas, Inc.*, 273 A.2d 121 (1971); *Shattuch v. Grider*, 493 P.2d 829 (1972). Foreign money was welcome, regardless of the source.

29. *HOYT* at 128-31.

30. *Id.* at 181.

31. Act of May 24, 1897, ch. 32, § 67a, [1897] Ill. Laws 176 (now ILL. REV. STAT. ch. 32, § 212 (1973)). While the 1897 law was referred to as a "re-enactment" of the 1875 law in *Richardson v. U.S. Mortgage & Trust Co.*, 194 Ill. 259, 265, 62 N.E. 606, 608 (1902), technically it was not, since the 1875 law was not repealed at the same time. In fact, the 1875 statute was published in the Illinois Revised Statutes as ILL. REV. STAT. ch. 32, § 67 and after 1921, as ILL. REV. STAT. ch. 32, § 211. This continued until 1939, when the General Assembly did some wholesale repealing of statutes that had been superseded by other laws. See Act of July 13, 1939 [1939]; Ill. Laws 1175, 1177 (repealing the 1875 law). See note 44 *infra*. In ILL. ANN. STAT. ch. 32, § 211, Commentary at 206 (Smith-Hurd 1970), it is stated, relative to the 1875 Act that "[t]his subject matter is covered by § 212 of this Chapter." At all events, legislation substantially in its original 1875 form was part of the Illinois law, unchanged until it was amended in 1953.

32. Act of May 26, 1897, ch. 32, § 67b-e [1897], Ill. Laws 174 (now ILL. REV. STAT. ch. 32, § 157.102 (1973)); ILL. REV. STAT. ch. 32, § 67b-e (Hurd 1897).

33. *Id.* at § 3, ch. 32, § 67d.

34. *Id.* at § 4, ch. 32, § 67e.

the general rule of statutory construction followed in Illinois is that statutes relating to the same subject matter and passed at the same session of the legislature must be considered in *pari materia* and construed with reference to each other, so that both, if possible, may be given effect.³⁵ This rule restates the presumption that there is no implied repeal where statutes are enacted by the same legislative session.³⁶ Applying these rules, it is unlikely that the General Assembly intended to repeal the 1897 lending statute by passage of the qualification statute only two days later.³⁷

A related rule of construction provides that a particular or specific enactment prevails over a general provision on the same subject in the same or related laws.³⁸ Here, the qualification statute concerned foreign corporations transacting business in general, while the lending statute provided for a particular type of transaction, namely lending. Thus the provisions of the lending statute would seem to take precedence over the qualification statute. Whatever the intention of the legislature may have been in inserting the repealer section in the qualification statute, the inconsistency, if there was one, went unnoticed by the courts. The lending statute was treated as if it were in full force and effect.³⁹

In 1905 another statute was enacted by the General Assembly which required foreign corporations to qualify before transacting business in Illinois.⁴⁰ This statute contained a section repealing the earlier qualification law which had been amended in 1899; it also repealed all acts and parts of acts in conflict with it.⁴¹ Since the repealer section did not specifically mention our lending statute, the lending statute was repealed, if at all, by implication. In Illinois, repeals by implication are not favored.⁴²

35. *People ex rel. Vaughan v. Thompson*, 377 Ill. 244, 249, 36 N.E.2d 351, 353 (1941); *Frank v. Salomon*, 376 Ill. 439, 445-46, 34 N.E.2d 424, 427 (1941); *Hunt v. Chicago Horse & Dummy Ry.*, 121 Ill. 638, 644-45, 13 N.E. 176, 177-78 (1887); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.03, at n.17 (4th ed. C. Sands 1972) [hereinafter cited as SUTHERLAND].

36. 82 C.J.S. *Statutes* § 297 (1953); 2A SUTHERLAND § 51.01 at n.9.

37. The lending statute was enacted May 24, 1897, and the qualification statute was enacted May 26, 1897.

38. *Frank v. Salomon*, 376 Ill. 439, 446, 34 N.E.2d 424, 427 (1941).

39. In *Richardson v. U.S. Mortgage & Trust Co.*, 194 Ill. 259, 265, 62 N.E. 606, 608 (1902), the court noted that the two statutes were passed in the same session but did not discuss any possible repeal or inconsistency between them.

40. Act of May 18, 1905, ch. 32, § 67b-f, [1905], Ill. Laws 121 (now ILL. REV. STAT. ch. 32, § 157.102 (1973)), ILL. REV. STAT. ch. 32, § 67b-f (Hurd 1905).

41. *Id.* at § 67i.

42. *People ex rel. Kerner v. United Medical Service*, 362 Ill. 442, 200 N.E. 157 (1936); *Hunt v. Chicago Horse and Dummy Ry.*, 121 Ill. 638, 644, 13 N.E. 176, 177 (1887). The duty of the courts is to construe the two statutes to avoid repeal by implication. See 1A SUTHERLAND § 23.10.

Moreover, the Illinois Supreme Court interpreted the 1905 qualification statute as a continuation of the 1897 enactment rather than a repeal of it.⁴³ No major changes were made by the 1905 law. In short, our lending statute survived.

Other evidence that the lending statute was not repealed by either the 1897 or the 1905 laws is that it continued to appear in the revisions of the Illinois Revised Statutes.⁴⁴ Even more convincing is the fact that the General Assembly amended it in 1953.⁴⁵ The General Assembly must have deemed the 1897 lending statute as one which had continuing vitality. Thus it seems that from an historic and legislative point of view, the basic provisions found in the original 1875 law remained effective through 1953, and any foreign corporation was allowed to invest or loan money in Illinois without having to qualify.

LENDING MONEY AS "DOING BUSINESS"

The case law of "doing business" is a quagmire. This is due in part to variations in the statutes,⁴⁶ as well as to an evolutionary trend away from the early punitive statutes which made

43. *White Sewing Machine Co. v. Harris*, 252 Ill. 361, 366-67, 96 N.E. 857, 859 (1911). The notion of implied repeal appears in the dissenting opinion in the Appellate Court decision. *White Sewing Machine Co. v. Harris*, 161 Ill. App. 122, 129-32 (1910).

44. The 1897 lending statute was placed by Hurd, the official reviser of the 1874 statutes, in the Illinois Revised Statutes as ILL. REV. STAT. ch. 32, § 67a immediately following the 1875 lending statute (§ 67), and the 1897 qualification law was placed immediately after the lending statutes as ILL. REV. STAT. ch. 32, § 67b-e. In 1919, when the General Corporation Act was enacted, the qualification statute was moved to another part of chapter 32 as ILL. REV. STAT., ch. 32, § 28a52-67. But the lending statutes remained as § 67 and § 67a until 1921, when they were moved to § 211 and § 212 by Burdette J. Smith & Co., who published the Illinois statutes under the authority of the General Assembly. The lending statutes have since remained there. See note 31 *supra*.

The officially authorized publishers of the Illinois statutes correctly concluded that the General Corporation Act of 1919 did not impliedly repeal the statute here discussed. In addition to the fact that our statute is a specific statute that normally prevails over a general statute (see text at note 38 *supra*), our lending statute deals with a variety of foreign corporations not within the scope of the General Corporation Act or its successor, the present Business Corporation Act. Furthermore, the fact that the specific repealers contained in the general acts made no mention of our statute is dispositive of the matter. See Act of June 28, 1919, ch. 32, § 28a126, [1919] Ill. Laws, ILL. REV. STAT. ch. 32, § 28a126 (Hurd 1919) (specific repealer section of the General Corporation Act); ILL. REV. STAT., ch. 32, § 157.167 (1973) (specific repealer section of the Business Corporation Act). Therefore, a version of our original lending statute is in force in Illinois today, even though an erroneous opinion of the Illinois Attorney General takes the view that the Business Corporation Act of 1933 impliedly repealed the lending statute. ILL. ATT'Y GEN. OP. 323 (1940).

45. Act of July 15, 1953 [1953] Ill. Laws 1508, *amending* ILL. REV. STAT. ch. 32, § 212 (1951) (now ILL. REV. STAT. ch. 32, § 212 (1973)).

46. See C.T.C. *passim*; 17 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8464 (1960).

transactions of unlicensed foreign corporations void.⁴⁷ These early statutes compelled courts to resort to evasive devices to avoid punitive statutory results.⁴⁸ Other historical aberrations have also played a part. For example, before the turn of the century, the so-called national building and loan associations roamed the country making imprudent high interest loans. When these mortgages went into foreclosure, the courts turned handsprings to find violations of the "doing business" law. Few of these decisions would be adhered to today.⁴⁹ To explore this morass in depth would be counter productive, and reference is made to other sources.⁵⁰ Few of the Illinois opinions shed any light on the doing business issue, and none fully interpret the lending statute itself.

Illinois Cases

Cases not citing the lending statute

Illinois cases on lending money can be divided into two groups, those in which the court uses authority other than the lending statute, and those interpreting or relying on the lending statute. The cases not relying on the statute decided that a foreign corporation was not doing business for a number of reasons. A foreign corporation was not doing business by lending money when making loans did not constitute the business for which the corporation was organized.⁵¹ Where a promissory note signed by Illinois residents in Illinois was apparently completed in the corporation's Missouri office, the corporation was not doing business in Illinois. The activities constituted

47. Compare *John Hancock Mut. Life Ins. Co. v. Girard*, 57 Idaho 198, 64 P.2d 254 (1936) with *Land Dev. Corp. v. Cannaday*, 74 Idaho 233, 258 P.2d 976 (1953).

48. For example, the courts developed the "isolated transaction" theory. See, e.g., *Charter Fin. Co. v. Henderson*, 60 Ill. 2d 323, 327, 326 N.E.2d 372, 375 (1975); *Plew v. Board*, 274 Ill. 232, 236, 113, N.E. 603, 605 (1916); *Alpena Cement Co. v. Jenkins Co.*, 244 Ill. 354, 91 N.E. 480 (1910); text at note 157 *infra*.

49. See H. RUSSEL, SAVINGS & LOAN ASS'NS 27. For an overview of the strained metaphysical reasoning courts used to invalidate loans made by foreign building and loan associations see Annot., 62 L.R.A. 33, 69-72 (1904). This annotation strives to distinguish the cases as to which law governs the loan in a conflict of laws situation, on the basis of "good faith," an elusive standard. A modern, more satisfactory approach is found in *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158, 162 (1963) in which the court stated: "This court has consistently inclined toward applying the law of the state that will make the contract valid, rather than void." The court, in that case, chose to follow the law of New York, where the loan agreement was executed, which resulted in the loan being valid despite Arkansas' strict usury law.

50. See 17 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 8464-8502 (1960); 20 C.J.S. *Corporations* §§ 1828-42 (1940).

51. *Auto. Material Co. v. Am. Standard Metal Prods. Corp.*, 327 Ill. 367, 375, 158 N.E. 698, 701 (1927).

either an isolated transaction, or a transaction in interstate commerce.⁵² When a corporation without an office in Illinois loaned money and purchased commercial paper at a discount, which was secured by chattel mortgages on automobiles in Illinois, and the documents were accepted outside the state by mail or by sight draft, the foreign corporation was not doing business in Illinois.⁵³ When a loan was made in connection with a transaction that was a matter of interstate commerce, it was found not to be doing business within Illinois.⁵⁴

A Seventh Circuit case, *In re Diversified Development Corp.*,⁵⁵ reports an earlier trial court decision of an Illinois court holding that a mortgage taken by a Missouri banking corporation securing a loan to an Illinois corporation was unenforceable in the Illinois courts.⁵⁶ However, the bankruptcy court held that the foreign corporation was entitled to the rights of a petitioning creditor in reorganization proceedings, since filing a claim in bankruptcy is not the filing of a suit, and a bankruptcy court does not sit as if it were another state court.⁵⁷ Therefore, the Illinois statutory penalties for failure of a foreign corporation to qualify are inapplicable in bankruptcy. The unreported Illinois trial court case relied upon by the bankruptcy court as a statement of state law on the enforceability of the loan seems erroneous. It completely overlooked the Illinois lending statute.⁵⁸

Thus, overall, the Illinois cases decided without citing the lending statute are of little help in determining whether lending money in Illinois, of itself, constitutes doing business. None of them aid in an analysis of the business of lending money.

Cases citing the lending statute

A more fruitful approach in determining whether a foreign corporation is doing business when it is lending money in Illinois is an examination of Illinois cases interpreting the lending statute and the qualification statute, as well as other related statutes. One of the other statutes which is frequently discussed in connection with the lending and qualification statutes was enacted as

52. *Charter Fin. Co. v. Henderson*, 60 Ill. 2d 323, 326 N.E.2d 372 (1975). See text at note 153 *infra*.

53. *Indus. Acceptance Corp. v. Haering*, 253 Ill. App. 97 (3d Dist. 1929). This is the leading Illinois decision on the "insulation theory." See text accompanying note 148 *infra*.

54. *Id.* at 106. See also text at note 153 *infra*.

55. 341 F.2d 58 (7th Cir. 1965).

56. *Id.* at 59; see 1 ILL. BUS. CORP. ACT ANN. § 102 at 544-45 (3d ed. C. Murdock & Chicago Bar Ass'n 1975).

57. *In re Diversified Dev. Corp.* 341 F.2d 58, 60 (7th Cir. 1965).

58. ILL. REV. STAT. ch. 32, § 212 (1973). The unreported decision has been read by the authors and is very unilluminating.

part of the General Incorporation Act of 1872.⁵⁹ The current law, which is very similar to the original section, provides that no foreign corporation shall transact any business in Illinois which a corporation organized within the state is not permitted to transact.⁶⁰ Although the General Incorporation Act of 1872 permitted most corporations for profit to organize for any lawful purpose, it expressly failed to provide for organization of corporations for the purpose of "banking, insurance, real estate brokerage, the operation of railroads, and *the business of loaning money.*"⁶¹ The question arose as to whether these two sections should be read together as prohibiting foreign corporations from lending money in Illinois, since domestic corporations could not be organized for the business of loaning money.

The Illinois Supreme Court originally held in *United States Mortgage Co. v. Gross*⁶² that the sections did prohibit foreign corporations from lending money in Illinois prior to the enactment of the 1875 lending statute. However, three years after the *Gross* decision, the same court, in *Stevens v. Pratt*,⁶³ reconsidered its earlier construction and deemed it erroneous. In so doing, it wrote:

[I]t is not therefore to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes in *another manner, and subject to other regulations and restrictions.* . . . [I]t may be asserted, without fear of contradiction, that the policy of the State has been to allow banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, either independently or in connection with or as incidental to other branches of business by corporations [incorporated under special acts of the legislature].⁶⁴

Since many Illinois corporations organized under special legislation prior to the 1870 Constitution were invested with the

59. It appeared in the first general incorporation act in 1872 as Act of April 18, 1872, ch. 32, § 26, [1871-72] Ill. Laws 302, (now ILL. REV. STAT. ch. 32, § 157.103 (1973)) REV. STAT. ILL. ch. 32, § 26 (Hurd 1874). For text of the section, see note 16 *supra*.

60. ILL. REV. STAT. ch. 32, § 157.102 (1973).

61. Act of April 18, 1872, ch. 32, § 1, [1871-72] Ill. Laws 296 (now ILL. REV. STAT. ch. 32, § 157.3 (1973)) REV. STAT. ILL. ch. 32, § 1 (Hurd 1874) (emphasis added). The current exceptions to the Business Corporation Act are those corporations organized

for the purposes of banking or insurance or the operation of railroads; provided, however, that corporations may be organized under this Act for the purpose of buying, selling, or otherwise dealing in notes (not including the discounting of bills and notes and not including the buying and selling of bills of exchange), open accounts, and other similar evidences of debt.

ILL. REV. STAT. ch. 32, § 157.3 (1973).

62. 93 Ill. 483 (1879), *aff'd*, 108 U.S. 477 (1883). This unfortunate decision died aborning. The timing was poor. See text at note 29 *supra*.

63. 101 Ill. 206 (1882).

64. *Id.* at 217-18.

power to loan money, any foreign corporation which then had the power to loan money would have been of the same character, and therefore would not have had any greater powers than such Illinois corporations organized under the General Corporation Act of 1872.⁶⁵ The court concluded that the passage of the 1875 lending statute was merely a continuation and expression of the public policy of the state to permit foreign corporations to lend money in Illinois.⁶⁶

In *Marks v. Chicago Mortgage Corp.*⁶⁷ the same argument was renewed. It was stated that no foreign corporation could be authorized to transact any business in Illinois which a domestic corporation could not be organized to transact. Since the 1872 General Incorporation Act expressly excluded Illinois corporations being organized for the business of loaning money, it was contended that foreign corporations could not loan money in Illinois. The court refused to read the language of the 1872 statute in such a limited way. The First District Appellate Court stated:

The language has a broader scope. It excludes only those foreign corporations which undertake to transact a business in this state which cannot be incorporated under any of the laws of this State. Corporations formed for the business of loaning money are not unlawful, but are provided for under a number of statutes such as the statutes relating to Banks, Building Loan and Homestead Associations, Pawnners' Societies and Wage Loan Corporations.⁶⁸

The *Marks* case is consistent with the *Stevens* case in giving a broad interpretation to the lending statute.

*American Guaranty Co. v. State Bank of East Lynn*⁶⁹ involved a reading of the qualification provision contained in the General Corporation Act of 1919 together with its penalties. The statute at that time applied to foreign corporations except banking, insurance, building and loan and surety companies.⁷⁰ The exceptions were inserted, the court said, because the power to issue permits to engage in these businesses was vested in departments other than the Secretary of State, the department which

65. *Id.* at 225-29. The court lists eight Illinois corporations which were incorporated under special acts of the legislature and possessed the power to loan money. *Id.* at 225-27.

66. *Id.* at 229.

67. 218 Ill. App. 1 (1st Dist. 1920).

68. *Id.* at 4-5.

69. 244 Ill. App. 16 (3d Dist. 1927).

70. Act of June 28, 1919, ch. 32, § 80, [1919] Ill. Laws 316, 334, (now ILL. REV. STAT. ch. 32, § 157.102 (1973)), ILL. REV. STAT. ch. 32, § 80 (Hurd 1919). The current exclusions are foreign corporations acting as trustee, executor, administrator, administrator to collect, guardian, conservator, or in any other like fiduciary capacity in this State or to transact in this State the business of banking, insurance, suretyship, or a business of the character of a building and loan corporation.

ILL. REV. STAT. ch. 32, § 157.102 (1973).

issued general licenses to business corporations to do business under the qualification statute.⁷¹ In effect, the court held that the penalties imposed on foreign corporations by the General Corporation Act of 1919 for failure to qualify should not be applied to *all* corporations, since this would place unreasonable burdens on certain corporations, such as foreign insurance companies, which would have to obtain licenses under "two separate, independent and executive departments of government for regulation."⁷² Thus, aside from the lending statute, the court set forth an independent basis for sustaining the enforceability of a loan made by a foreign corporation which had been organized for one of the excepted purposes and was not subject to penalties for failure to qualify.

Other Illinois cases cite the lending statute, but none are helpful in analyzing or understanding it.⁷³ It seems clear, therefore, that case law does not serve to solve the problem of whether lending money in Illinois is transacting business. Nonetheless, while none of the cases discussed above directly address the issue, all favor an expansive reading of the lending provision. The next section of this article will focus, therefore, on a textual study of the statute itself and an examination of the 1953 amendment. Inquiry into the statute, as amended, partially answers the question of whether lending money in Illinois is transacting business. The 1953 amendment provided that a foreign corporation will not be deemed to be transacting business by reason of the activities enumerated in the statute.⁷⁴ However, the question is shrouded in grave doubt since the breadth of those protected activities was made uncertain by the restrictive nature of the amendatory language.

THE 1953 AMENDMENT

On March 17, 1953, Illinois Representatives Arrington and Sullivan introduced in the sixty-eighth session of the General

71. *Am. Guar. Co. v. State Bank of E. Lynn*, 244 Ill. App. 16 (3d Dist. 1927).

72. *Id.*

73. *See W. Side R.R. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 103 (1911); *Gross v. United States Mortgage Co.*, 108 U.S. 466, 479-80 (1882) (lending act of 1875 not inconsistent with fourteenth amendment); *Metropolitan Life Ins. Co. v. Whitestone Management Co.*, 77 F.2d 255, 259 (7th Cir. 1935), *cert. denied*, 296 U.S. 632 (1935), *reh. denied*, 296 U.S. 664 (1935) (held that a certificate giving an insurance company authority to carry on a life insurance business inferentially confers a power to make investments, including investments in local mortgages); *Fidelity Inv. Ass'n v. Emmerson*, 318 Ill. 548, 149 N.E. 530 (1925); *Richardson v. U.S. Mortgage Co.*, 194 Ill. 259, 62 N.E. 606 (1902); *Metropolitan Life Ins. Co. v. Kobbeman*, 260 Ill. App. 508 (2d Dist. 1931).

74. *See* lines 49-51 of House Bill 410 in text at note 76 *infra*.

Assembly House Bill 410,⁷⁵ which proposed an amendment to ILL. REV. STAT. ch. 32, § 212. The following portions of the bill will aid in a textual study of the amendment.⁷⁶

A BILL

For an Act to amend Section 1 of "An Act to enable corporations in other states and countries to lend money in Illinois, to enforce their securities and acquire title to real estate as security," approved May 24, 1897.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 1 of "An Act to enable corporations in other states and
 2 countries to lend money in Illinois, to enforce their securities and acquire title
 3 to real estate as security", approved May 24, 1897, is amended to read as fol-
 4 lows:
 5 Sec. 1. [That] Any Corporation formed under the laws of any other state
 6 or country, and authorized by its charter to invest and loan money, may [invest
 7 or loan money in this state.], *without qualifying to transact business in this*
 8 *state, purchase or contract to purchase and acquire notes or other evidences of*
 9 *indebtedness or interests therein, secured by any security instrument, including*
 10 *mortgages or trust deeds in the nature of mortgages conveying real or personal*
 11 *property in the State of Illinois. [And any such] Notwithstanding the provi-*
 12 *sions of any other law of this state, any foreign corporation that may have here-*
 13 *tofore or hereafter [invested or lent money] acquired notes or other evidences*
 14 *of indebtedness as aforesaid, [may] shall have the same rights and powers for*

75. Ill. H. Jour., 68th Gen. Assembly, 1953 Sess., vol. I at 251.

76. The original language of the 1897 lending statute which the 1953 House Bill omitted is indicated in the text by being enclosed in brackets and by being underlined. The new language, proposed by the Illinois Representatives, is italicized in the text. Lines 25 thru 45 are not included in the text above since they are not relevant to the discussion in the article. This section of the bill eliminated the provisions in the 1897 law for a public auction of any real estate purchased by a foreign corporation, but retained the requirement that the foreign corporation must dispose of any such real estate within five years after acquiring title pursuant to the statute.

15 the recovery, *servicing, protection and*
 16 *enforcement, by foreclosure or otherwise,*
 17 *of such notes or other evidences of in-*
 18 *debtedness [thereof] subject to the same*
 19 *penalties for usury, as private persons,*
 20 *citizens of this state [;]. Such foreign*
 21 *corporation shall have power to acquire,*
 22 *hold, lease, mortgage, sell, contract*
 23 *with respect to, or otherwise protect or*
 24 *convey property in this state heretofore*
 25 *or hereafter assigned, transferred, mort-*
 26 *gaged or conveyed to it as security for,*
 27 *or in whole or part satisfaction of, in-*
 28 *debtedness acquired or owned by it. [and]*
 29 When a sale is made under any judgment,
 30 decree or power in a mortgage or
 31 deed, such *foreign* corporation may purchase,
 32 in its corporate name, the prop-
 33 erty offered for sale, and become vested
 34 with the title wherever a natural person
 35 might do so in like cases:
 36 . . . [: And,] "*Corpora-*
 37 *tion*" as used in this act shall be deemed
 38 to include any bank or insurance com-
 39 pany, provided [further], that nothing
 40 in this act contained shall be so construed
 41 as to confer banking powers or privileges
 42 upon any such corporation.
 43 No foreign corporation shall be deemed
 44 to be transacting business in this
 45 state solely by reason of the performance
 46 of any of the acts hereinabove author-
 47 ized.

After being passed by the House,⁷⁷ the bill was sent to the Senate which concurred in its passage along with the following amendments:

AMENDMENT NO. 1

Amend House Bill No. 410 in Senate on
 Page 1, Section 1, Line 8, by strik-
 2 ing the words "and acquire" and
 3 on Page 2, Section 1, Line 13 by striking
 4 the word "acquired" and substituting
 5 in lieu thereof the word "purchased" and
 6 on Page 2, Section 1, Line 21, by striking
 7 the word "acquired" and substituting
 8 in lieu thereof the word "purchased".⁷⁸

77. Ill. H. Jour., 68th Gen. Assembly, 1953 Sess., vol. I at 724.

78. Ill. S. Jour., 68th Gen. Assembly, 1953 Sess., vol. II at 1534.

The bill was sent back to the House which concurred with the Senate in adopting the amendment.⁷⁹ It was approved July 15, 1953.⁸⁰

It was the erroneous feeling of some commentators that the amended bill marked a considerable enlargement in the powers granted to unlicensed foreign corporations. It was argued that the bill allowed both the lending of money on notes or other evidences of indebtedness as well as the taking of security interests in real property within the state without becoming liable for those consequences normally attendant upon the transaction of unlicensed business within the state.⁸¹ In a like manner the Illinois Attorney General interpreted the amendment as a grant of rights and powers to foreign corporations.⁸² It is suggested that both of the above interpretations are incorrect.

Too often in construing a statute, the last place one looks is at the language of the statute itself. This should be the starting point.⁸³ Since there is virtually no legislative history available regarding the amendment, there is no opportunity to resort to such sources for its meaning.⁸⁴ Therefore, the language of the statute itself must be examined and analyzed. Finally, a comparison will be made between our analysis and the Attorney General's Opinion.⁸⁵

79. Ill. H. Jour., 68th Gen. Assembly, 1953 Sess., vol. II at 1937.

80. Laws of Ill. 1508 (1953).

81. *Survey of Illinois Law for the Year 1952-1953*, 32 CHI.-KENT L. REV. 1, 4 (1953).

82. ILL. ATT'Y GEN. OP. 18 (1959). The opinion expressly concedes that "separate and apart from paragraph 212, a foreign corporation may loan money in Illinois, take back security, and foreclose the same, without being compelled to qualify to do business in Illinois." *Id.* at 20. It correctly analyzes the lending statute as one designed to grant powers, not to restrict them. It also emphasizes the word "any" as being an inclusive expression.

83. F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947).

84. The Illinois State Library in Springfield, where the records of the 68th General Assembly are kept, could find no committee reports or floor debates, since they were rarely recorded at that time except for very newsworthy or unusual bills.

85. ILL. ATT'Y GEN. OP. 18 (1959). Besides analyzing the changes in the language of the statute itself, the Attorney General argued that, apart from the statute, the existing state of the law at the time of the amendment was that a foreign corporation was not doing business by lending money to an Illinois resident, if the loan was completed outside of the state. *Id.* at 20. The case that he cited, *Indus. Acceptance Corp. v. Haering*, 253 Ill. App. 97 (3d Dist. 1929) is discussed in the text at note 147 *infra*. Thus, even if the statute was intended to be restrictive, there is authority in Illinois that a foreign corporation may loan money in the state and take back security without qualifying or being penalized. See discussion in the text under heading "The Insulation Method" *infra*. The opinion, of course is unsatisfactory. It simply evades the key question by pointing out the obvious, namely, that under the insulation theory a loan consummated outside of Illinois does not become an Illinois transaction for the simple reason that Illinois land is included as part of the security. See text at note 140 *infra*. Surely no Attorney Gen-

The major change brought about by the amendment was to delete the words "invest or loan money in this state," and to substitute the words "without qualifying to transact business in this state, purchase or contract to purchase notes or other evidences of indebtedness or interests therein." The general rule of statutory construction, according to Sutherland, is that when an amendatory act purports to set out the original act as amended, all matter from the original act that is omitted in the amendment is considered repealed. The new statute thereby becomes a substitute for the original, and only those provisions of the original repeated in the amendment are retained.⁸⁶ If this rule is applied, it appears that the General Assembly intended to repeal provisions for investing and lending money in Illinois and intended to substitute a narrower activity, that of purchasing existing loans.

However, there is an ambiguity involved since the legislature failed to amend the title. It still reads, "An Act to amend Section 1 of 'An Act to enable foreign corporations in other states and countries to lend money in Illinois, to enforce their securities and acquire title to real estate as security', approved May 24, 1897."⁸⁷ It should be noted that the general rule cited above from Sutherland is merely one for determining the intent of the legislature. The rule is not absolute and must yield when a contrary intent of the legislature is indicated.⁸⁸ This contrary intention may be shown

by a consideration of the amendatory act in its entirety, or by a consideration of the amendatory act and the unamended sections of the original act or bill as a whole, or by contemporaneous legislation on the same subject or by other circumstances surrounding the enactment of the amendment.⁸⁹

The Attorney General compared the amendatory language with the unamended sections of the 1897 statute. He pointed out that the title of the act remained the same, and that the act continued "to enable foreign corporations in other states and countries to lend money in Illinois."⁹⁰ However, it is difficult to understand why a careful draftsman would deliberately delete

eral's opinion is needed to draw attention to such an elementary proposition. What the Attorney General refused to face up to is the effect of Illinois law on an Illinois mortgage loan that was not protected by the insulation theory.

86. 1A SUTHERLAND § 22.32. Sutherland points out: "The intent of the legislature to set out the original act or section as amended is most commonly indicated by a statement in the amendatory act that the original law is amended to read as follows." *Id.* That is precisely the language used in the 1953 amendment.

87. Laws of Ill. 1508 [1953]. See discussion in text at note 105 *infra*.

88. 1A SUTHERLAND § 22.32.

89. *Id.*

90. ILL. ATT'Y GEN. OP. 18, 21 (1959).

the words "invest or loan money" from the body of the act and intentionally retain them in the title for the purpose of indicating that the statute still pertained to these activities. The more obvious and clearer method to indicate this would have been to retain the language in the body of the act. If it is conceded that the draftsman *intentionally* left the title unchanged, it would seem that the only possible reason would be to camouflage the restrictive language in the body of the act.⁹¹

The Attorney General interpreted the insertion of the provisions "to purchase or contract to purchase notes or other evidences of indebtedness" as a clarification of the powers of a foreign corporation not only to make direct loans, but also to purchase existing loans. He reasoned that since the language of the 1897 law may have misled one to believe that only direct loans were authorized under the statute,⁹² the expansive amendatory language could be viewed as clarifying language. However, there was no conflict about the language in the Illinois cases, and purchasing notes was never mentioned in any Illinois Attorney General Opinion.⁹³ Certainly, the word "invest," as

91. Although the 1870 Constitution, ILL. CONST. art. IV, § 13 (1870), provided that bills be read aloud in their entirety on three different days in each house, this procedure was not followed, since it was obviously impractical and too time-consuming to read every bill six times before passage. Instead the bills were read by title only on three different occasions in both houses, and fraudulently the journals of the House and Senate indicated that the constitutional requirement was fulfilled. See ILL. COMM'N ON THE GENERAL ASSEMBLY, REPORT ON IMPROVING THE STATE LEGISLATURE ch. 1, at 12-13 (1967); A. ELSON, CONSTITUTIONAL REVISION AND REORGANIZATION OF THE GENERAL ASSEMBLY, 33 ILL. L. REV. 15, 26 (1938). The amendatory act was passed by the Senate on June 17, 1953, and by the House on June 22, 1953, at a time when the bulk of the legislation was passed. This phenomenon of the enormous work load in the last few weeks of each legislative session has been referred to as the "log jam." See ILL. COMM'N ON THE ORGANIZATION OF THE GENERAL ASSEMBLY, REPORT ON IMPROVING THE STATE LEGISLATURE ch. 2, at 23 (1967). In light of these practices, the temptation must have been great to camouflage a bill by using a misleading title. If the amendment in question is read as a restriction, it would be a great benefit to Illinois banks and lending corporations, since the foreign corporation would be compelled to buy Illinois investments from them. This would protect the Illinois banks and corporations from competition and give them more business. See also IND. ANN. STAT. § 23-1-11-1.5 (Burns Supp. 1974) (statute very similar in wording to the Illinois lending statute, clearly indicating an intent to protect Indiana lending and investing institutions).

92. ILL. ATT'Y GEN. OP. 18, 22 (1959).

93. See discussion in text of Illinois cases under heading "Illinois Cases" *supra*. The only Illinois Attorney General Opinion prior to the 1953 amendment which mentioned the statute is ILL. ATT'Y GEN. OP. 91 (1951). One other opinion, ILL. ATT'Y GEN. OP. 323 (1940), overlooked the lending statute even though it referred to two cases which cite the statute (*Stevens v. Pratt*, 101 Ill. 206 (1882) and *Marks v. Chicago Mortgage Corp.*, 218 Ill. App. 1 (1st Dist. 1920)). Neither of these opinions even mentioned purchasing existing loans. Two Illinois Appellate Court cases involved notes that were purchased by a foreign corporation. While *Indus. Acceptance Corp. v. Haering*, 253 Ill. App. 97 (3d Dist. 1929) did not mention the lending statute, *Metropolitan Life Ins. v. Kobbeman*, 260

it appeared in the 1897 law, meant more than merely making direct loans. The word has a broader meaning, which is "to commit [money] for a long period in order to earn a financial return."⁹⁴ Purchasing notes is merely one way to invest money. Lending money is another. Even conceding that the insertion may have clarified this point, the deletion of words "invest or loan money" added more confusion than clarification to the statute as a whole.

The Attorney General also believed that the amendment, by adding the words "secured by any security instrument," clarified the fact that "the corporation could take back security, as a mortgage, trust deed, conditional sale contract or other security instrument, without being deemed to be transacting business in Illinois."⁹⁵ It was already clear from the title of the 1897 statute, that foreign corporations were enabled to enforce their securities and acquire title to real estate as security.⁹⁶ While the body of the statute did not specifically mention security, it did provide that the foreign corporation could purchase property offered for sale under a "judgment, decree or power in a mortgage or deed."⁹⁷ These words clearly contemplated such securities as a mortgage and a trust deed. Thus there was no need for legislative clarification. Also, even conceding that the additional language did clarify the statute, applying well established rules of grammar, the adjectival clause, "secured by any security instrument," must be read together with the noun it modifies, "notes or other evidences of indebtedness." Thus, secured by any security instrument refers only to *purchased* loans, not to *direct* loans.

Another provision which the Attorney General felt clarified matters not covered by the 1897 statute was the one providing for "servicing, protection and enforcement, by foreclosure or otherwise."⁹⁸ This quotation from the statute by the Attorney General, however, should have included the phrase immediately following it, "of such notes or other evidences of indebtedness."⁹⁹ These rights and powers of servicing, protection, and

Ill. App. 508 (2d Dist. 1931) did cite the statute. However, these cases do not seem to be in conflict, since both cases recognized the power of a foreign corporation to purchase notes which were obligations of Illinois residents.

94. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1189 (G. & C. Merriam Co. 1971).

95. ILL. ATT'Y GEN. OP. 18, 22 (1959).

96. Act of May 24, 1897, ch. 32, § 67a, [1897] Ill. Laws 176 (now ILL. REV. STAT. ch. 32, § 212 (1973)), ILL. REV. STAT. ch. 32, § 67a (Hurd 1897).

97. *Id.*

98. ILL. ATT'Y GEN. OP. 18, 22 (1959).

99. ILL. REV. STAT. ch. 32, § 212 (1973).

enforcement clearly pertain only to purchased notes, not to direct loans.

Other indications of legislative intent are the amendments which were made in either house.¹⁰⁰ As pointed out above, the Senate amended the bill to eliminate the words "and acquire" from line 8 in the phrase "purchase or contract to purchase [and acquire] notes."¹⁰¹ The Senate also changed the word "acquired" in lines 13 and 21 to read "purchased." This was done in the section which granted the rights to service, protect, and enforce the "[acquired] *purchased* notes," and the section which granted a corporation the power to

acquire, hold, lease, mortgage, sell, contract with respect to, or otherwise protect or convey property heretofore or hereafter assigned, transferred, mortgaged or conveyed to it as security for . . . indebtedness [acquired] *purchased* or owned by it.¹⁰²

Why was the Senate so concerned about the word acquired? One possible explanation is that "acquire" is a broad word. Acquire is defined as "to come into possession, control, or power of disposal of often by some uncertain or unspecified means."¹⁰³ Presumably this would include a direct loan. On the other hand, "purchase" has a narrower meaning. It is defined as, "to obtain by paying money or its equivalent."¹⁰⁴ It is clear that "acquire," the more general term, includes coming into possession of notes by any means, that is, by purchase, gift, inheritance, theft, direct loan, or any other means. But *purchasing* notes only includes paying money to obtain them. By eliminating the words "and acquire" from the first section and by retaining the word "purchase," the Senate exhibited an intention to have the statute pertain to a much narrower activity. This is also shown by the substitution of "purchased" for "acquired" in the sections enumerating the powers of foreign corporations.

Thus by examining the words used to amend the House Bill itself, the logical conclusion is that the Sixty-Eighth General Assembly intended to restrict the scope of the statute. If so, the courts of Illinois may decide to interpret the 1953 amendment as a restriction on the rights and powers of foreign corporations. If that occurs, there are two areas upon which foreign corporations may rely for relief from the effects of the amendment: the statute's unconstitutionality and the insulation method of lending money.

100. 2A SUTHERLAND § 48.18.

101. See text at note 78 *supra*.

102. *Id.*

103. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 18 (G. & C. Merriam Co. 1971).

104. *Id.*

Constitutional Problems

As pointed out in the previous section, the General Assembly changed the scope of the text of the lending statute without making the appropriate indication in the title. Thus, while the title reads, "An Act to amend Section 1 of 'An Act to enable corporations in other states and countries to lend money in Illinois, to enforce their securities and acquire title to real estate as security', approved May 24, 1897," the statute itself only pertains to purchasing or contracting to purchase notes.¹⁰⁵ This was undoubtedly misleading both to the public and to overworked legislators, many of whom may not have had the time to read the bill carefully.¹⁰⁶

The 1870 Constitution, which was in force at the time of the 1953 amendment, contained a provision concerning legislative titles. It provided that: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."¹⁰⁷ While many courts fail to make the distinction, there are actually two rules combined in that provision. Each has an independent origin and purpose.¹⁰⁸ The first prohibits any act from containing more than one subject. The purpose of this is to prevent the abuses of log-rolling and to eliminate the attachment of "riders" to popular legislation certain to be enacted.¹⁰⁹

The other rule contained in the constitutional provision is that the title must contain an expression of the subject matter of the act.¹¹⁰ It is intended to give notice to the legislature and the people as to the contents of the act.¹¹¹ The Illinois Supreme Court in *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*¹¹² explained this in detail, stating that the purpose of the

105. ILL. REV. STAT. ch. 32, § 212 (1973).

106. See note 91 *supra*.

107. ILL. CONST. art. IV, § 13 (1870).

108. See 1A SUTHERLAND §§ 17.01, 18.01; Comment, *State Statutes: The One-Subject Rule Under the 1970 Constitution*, 6 J. MAR. J. 359 (1973).

109. 1A SUTHERLAND § 17.01; Comment, *State Statutes: The One-Subject Rule Under the 1970 Constitution*, 6 J. MAR. J. 359 (1973). This rule was retained in the 1970 Constitution. ILL. CONST. art. IV, § 8(d): "Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject."

110. 1A SUTHERLAND § 18.02; Comment, *State Statutes: The One-Subject Rule Under the 1970 Constitution*, 6 J. MAR. J. 359, 361-66 (1973). This provision was eliminated by the 1970 Constitution. For an excellent discussion, background, and criticism of the elimination of the title rule see Comment, *State Statutes: The One-Subject Rule Under the 1970 Constitution*, 6 J. MAR. J. 359, 372-75 (1973).

111. *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 332-33, 125 N.E. 310, 313 (1919); *Rouse v. Thompson*, 228 Ill. 522, 528-29, 81 N.E. 1109, 1111 (1907); 1A SUTHERLAND § 18.02; Comment, *State Statutes: The One-Subject Rule Under the 1970 Constitution*, 6 J. MAR. J. 359, 361-62 (1973). T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 173 (5th ed. 1883).

112. 290 Ill. 327, 125 N.E. 310 (1919).

rule is to inform and fully apprise the people of the subject matter of the legislation so that they might be heard thereon, if they so desire, by petition or remonstrance. It also prevents surprise or fraud upon the legislature. It prevents the insertion of provisions into the bill which are not indicated by the title, and thereby prevents a bill from being unintentionally adopted.¹¹³ As a result of a violation of the title rule, the 1953 amendment may have been unintentionally adopted by legislators who were not given notice of the change in the body of the act.

Although the 1970 Illinois Constitution retained the provision on unity of subject matter, the title rule was deleted.¹¹⁴ However, an act which was passed prior to July 1, 1971, while the 1870 Constitution was in effect, must still be judged by the 1870 Constitution, and must meet the title requirements under that constitution.¹¹⁵ Thus, the 1953 amendment which was passed under the 1870 Constitution must meet the title requirements.

The title rule was not meant to make the task of the draftsman an impossibility.¹¹⁶ "Any expression in the title that calls attention to the subject of the act, although in general terms is all that is required."¹¹⁷ It has often been said that the General Assembly must determine for itself how broad and comprehensive the object of the subject of the act shall be and how much particularity shall be employed in the title.¹¹⁸ It is a matter of discretion of the legislature to make the title either general or particular.¹¹⁹ If the General Assembly

113. *Id.* at 332, 125 N.E. at 313.

114. See notes 109-10 *supra*.

115. *People v. Tibbitts*, 56 Ill. 2d 56, 64, 305 N.E.2d 152, 157 (1973); *Dee-El Garage, Inc. v. Korzen*, 53 Ill. 2d 1, 5, 289 N.E.2d 431, 434 (1972); Comment, *State Statutes: The One-Subject Rule Under the 1970 Constitution*, 6 J. MAR. J. 359, 361 n. 14 (1973); cf. *People ex rel. Cairo & St. Louis R.R. v. Trustees of Schools*, 78 Ill. 136, 140 (1875) (act passed while 1848 Constitution was in effect tested by 1848 Constitution even though that Constitution had since been replaced by 1872 Constitution). See also *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 277 N.E.2d 319 (1971) (*semble*); Comment, *Cumulative Voting Under the Illinois Constitution*, 8 J. MAR. J. 327, 341 n. 73 (1974).

116. 1A SUTHERLAND § 18.02.

117. *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 332, 125 N.E. 310, 313 (1919).

118. *People v. Tibbitts*, 56 Ill. 2d 56, 64, 305 N.E.2d 152, 157 (1973); *Dee-El Garage, Inc. v. Korzen*, 53 Ill. 2d 1, 5, 289 N.E.2d 431, 436 (1972); *People ex rel. Sanitary Dist. of Chicago v. Schlaeger*, 391 Ill. 314, 326, 63 N.E.2d 382, 389 (1945); *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, 341, 54 N.E.2d 554, 557 (1944); *People ex rel. Gage v. Village of Wilmette*, 375 Ill. 420, 422, 31 N.E.2d 774, 775 (1941); *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 334, 125 N.E. 310, 313 (1919); *Sutter v. People's Gas Light & Coke Co.*, 284 Ill. 634, 642, 120 N.E. 562, 566 (1918); *Rouse v. Thompson*, 228 Ill. 522, 533, 81 N.E. 1109, 1112 (1907); *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 575, 27 N.E. 217, 218 (1890); 1A SUTHERLAND § 17.02.

119. See note 118 *supra*.

chooses a general title, it may incorporate as many provisions in the act as it deems necessary. The provisions may be diverse as long as they are not inconsistent or unrelated to the general title to the act.¹²⁰

In considering whether all provisions of an amendatory act are embraced within the subject of the title, courts frequently use the word "germane" as a test.¹²¹ This term was defined by the Illinois Supreme Court in *Dolese v. Pierce*.¹²²

Literally, "germane" means "akin," "closely allied." It is only applicable to persons who are united to each other by the common tie of blood or marriage. When applied to inanimate things, it is, of course, used in a metaphorical sense, but still the idea of a common tie is always present. Thus when properly applied to a legislative provision, the common tie is found in the tendency of the provision to promote the object and purpose of the act to which it belongs. Any provision not having this tendency, which introduces new subject matter into the act, is clearly obnoxious to the constitutional provision in question. It is an error to suppose that two things are, in a legal sense, germane to each other merely because there is a resemblance between them, or because they have some characteristics common to them both. One might with just as much reason, contend that two persons are necessarily akin because they are of the same complexion, or in other particulars alike.¹²³

This case applied the test of germaneness to amendatory language in a statute and found that since the language introduced new substantive matter which was not expressed in the title, the act was void and unconstitutional.¹²⁴ Applying this

120. *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, 341, 54 N.E.2d 554, 557 (1944); *People ex rel. Gage v. Village of Wilmette*, 375 Ill. 420, 422, 31 N.E.2d 774, 775 (1941); *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 333, 125 N.E. 310, 313 (1919); *Sutter v. People's Gas Light & Coke Co.*, 284 Ill. 634, 642, 120 N.E. 562, 566 (1918); *Rouse v. Thompson*, 228 Ill. 522, 533, 81 N.E. 1107, 1112 (1907). For an example of an amended act of this type which was held to be valid see *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505 (1922). The title of the act was "An Act to revise the laws in relation to criminal jurisprudence." An amendment adding six sections was held to be within the scope of the title.

121. See, e.g., *Dee-El Garage, Inc. v. Korzen*, 53 Ill. 2d 1, 9, 289 N.E.2d 431, 435-36 (1972); *I.B.M. Corp. v. Dep't of Revenue*, 25 Ill. 2d 503, 507, 185 N.E.2d 257, 260 (1962); *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 333-34, 125 N.E. 310, 313 (1919).

122. 124 Ill. 140, 16 N.E. 218 (1888).

123. *Id.* at 147, 16 N.E. at 220. This definition is quoted by *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 334, 125 N.E. 310, 313 (1919); and *Sutter v. People's Gas Light & Coke Co.*, 284 Ill. 634, 643, 120 N.E. 562, 566 (1918).

124. *Dolese v. Pierce*, 124 Ill. 140, 146, 16 N.E. 218, 219 (1888). The title of the act in question was "An act to amend sections 2, 4, 6, 7, 10, 11, and 12 of art. 3 of an act entitled 'An act to revise the law in relation to township organizations', approved and in force March 4, 1874." Commenting on the title, the court pointed out:

It is difficult to conceive of a title that more effectually concealed the real object and purpose of an act than the present one does. The constitution forbids and condemns all such devices. *Whether intended to be so or not, they are frauds upon the legislature and the*

test, the amendatory language of the 1953 Act introduced new substantive matter into the Act: purchasing notes. The new language did not promote the object and purpose of the Act as expressed in the title. According to the title, the object and purpose of the Act is to enable foreign corporations to loan money in Illinois. While there is a resemblance between lending money and purchasing notes, they are neither the same nor akin.

The legislature may choose to restrict the title of an act so that it covers only a particular branch of a general subject. If so, provisions not within that particular branch, though germane to the general subject, cannot be sustained as being within the scope of the title.¹²⁵ This rule was also expressed in *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*¹²⁶

The court cannot enlarge the scope of the title or uphold the provisions not within that particular branch even though the subjects are germane and are departments or branches of a single subject, so that they might have been included under one title if such title had been made broad enough.¹²⁷

The titles of the 1897 and 1953 lending statutes provide for enabling a foreign corporation "to lend money in Illinois." This is a particular branch of a general subject which could be called investment. Investment is a more generic term. Earlier in this article "to invest" was defined as "to commit [money] for a long period in order to earn a financial return."¹²⁸ If used in the title, the word "invest" would have been broad enough to include both direct lending and purchasing notes. However, the legislature did not use "invest." They used the word "to lend," which is defined as, "to let out [money] for temporary use on condition that it be repaid with interest at an agreed time."¹²⁹ The word

people of the State (emphasis added).
Id. at 149, 16 N.E. at 221.

125. *People v. Tibbitts*, 56 Ill. 2d 56, 64, 305 N.E.2d 152, 157 (1973); *Dee-El Garage, Inc. v. Korzen*, 53 Ill. 2d 1, 9, 289 N.E.2d 431, 436 (1972); *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, 341, 54 N.E.2d 554, 557 (1944); *People ex rel. Gage v. Village of Wilmette*, 375 Ill. 420, 423, 31 N.E.2d 774, 775 (1941); *People ex rel. Stuckart v. Chicago, B. & Q. R.R.*, 290 Ill. 327, 334-35, 125 N.E. 310, 313 (1919); *Sutter v. People's Gas Light & Coke Co.*, 284 Ill. 634, 644, 120 N.E. 562, 566 (1918); *Rouse v. Thompson*, 228 Ill. 522, 531-33, 81 N.E. 1109, 1112 (1907); ILL. ATT'Y GEN. OP. 120, at 123 (1957); 1A SUTHERLAND § 17.02.

126. 290 Ill. 327, 125 N.E. 310 (1919).

127. *Id.* at 334, 125 N.E. at 313. The title of the act in this case was "An Act to authorize the corporate authorities of towns to issue bonds for the completion and improvement of public parks and boulevards, and to provide a tax for the payment of same." Since the title specified that the tax was to be raised to pay bonds and interest, a provision in the act for levying a tax for maintaining and managing the parks and boulevards was not within the title and was declared void. The fact that the objection was raised more than twenty years after the act was passed was held not to be sufficient to invoke the doctrine of estoppel.

128. See text at note 94 *supra*.

129. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1293 (G. & C. Merriam Co. 1971).

"purchase" was defined earlier as, "to obtain by paying money or its equivalent."¹³⁰ Lending money and purchasing notes are two specific branches of the general subject of investment. Even though the two have common characteristics, purchasing notes is not within the scope of the title "to lend money." The amended provisions are not germane to the subject as expressed in the title.

One other standard which occasionally has been used by the courts to test the sufficiency of titles is the reasonable man standard. It asks whether "the ordinary mind" reading the title of the act would conceive of a certain provision as being included in the act.¹³¹ It is here contended that if the title of the 1953 Act is read, the ordinary mind would not conceive from its language ("to lend money") that a provision would follow enabling foreign corporations merely to purchase loans.

While there appears to be no Illinois case discussing the distinction between lending money and purchasing notes, the Oregon Supreme Court considered this in *General Electric Corp. v. State Tax Comm.*¹³² It held that a corporation whose principal business was purchasing conditional sales contracts from retail merchants was not engaged in "lending money" within the meaning of a state excise tax statute.¹³³ The court noted that the purchase of conditional sales contracts is not a loan of money in an ordinary or legal understanding.¹³⁴ It found that a sale of a chose in action does not involve a loan of money within the meaning of the usury law.¹³⁵

Amendatory Acts and the Title Rule

The Illinois Supreme Court has applied the title and subject provisions specifically to amendatory acts. When the title of the original act is repeated in the title of the amendatory act, anything may be included in the amendatory act that is embraced within the title of the original act.¹³⁶ The court has upheld amendatory acts when the title was also amended to increase

130. See text at note 104 *supra*.

131. See, e.g., *People v. Mahumed*, 381 Ill. 81, 84-85, 44 N.E.2d 911, 912 (1942) (the "ordinary mind"); *Rouse v. Thompson*, 228 Ill. 522, 529, 81 N.E. 1109, 1111 (1907) (the "ordinary mind").

132. 231 Or. 570, 373 P.2d 974 (1962).

133. *Id.* at 590, 373 P.2d at 983.

134. *Id.*

135. *Id.* at 591, 373 P.2d at 983.

136. *I.B.M. Corp. v. Dep't of Revenue*, 25 Ill. 2d 503, 507, 185 N.E.2d 257, 260 (1962); *People ex rel. Bentson v. Bowen*, 9 Ill. 2d 69, 73, 136 N.E.2d 806 (1956); *Malloy v. City of Chicago*, 369 Ill. 97, 101, 15 N.E.2d 861, 864 (1938); *City of Evanston v. Wazau*, 364 Ill. 198, 203, 4 N.E.2d 78, 80 (1936); *People v. Bd. of Comm'rs*, 355 Ill. 244, 249, 189 N.E. 26, 28 (1934); *Gage v. City of Chicago*, 203 Ill. 26, 28-29, 67 N.E. 477, 478 (1903); 1A SUTHERLAND § 22.08.

the scope of the title.¹³⁷ However, the court has generally held that amendatory provisions which are not germane to the subject expressed in the title of the original act are unconstitutional when the title of the act has not been amended.¹³⁸

The amendatory Act of 1953 merely repeated the title of the Act of 1897. Applying the rules above, any provision could have been included in the 1953 amendatory Act which could have been embraced in the title of the original 1897 *lending* statute. Since *purchasing* notes is not germane to *lending* money, the amendment attempting to change the scope of the subject matter expressed in the title, without changing the title, is unconstitutional.

To recapitulate, then, the purpose of the 1953 amendment, so framed that it misled both the Illinois Attorney General and a legal periodical commentator, was, it is evident, to strip foreign corporate lenders of their power to make direct loans in Illinois without qualifying to do business in Illinois. This would force them to purchase such investments from local lenders, who it was clear, would receive compensation for their role. However, the action was taken ineptly. The title of the statute was left unaltered. This failure to amend the title, it is clear, invalidated the amendment.

The effect of enacting an invalid amendment to a statute is to leave the law in force as it was prior to the adoption of the amendment.¹³⁹ If the 1953 amendment is found to be unconstitutional, the 1897 statute would be in effect, enabling foreign corporations to lend money in Illinois without having to qualify and without being penalized by being denied access to the state courts.

No one can predict with certainty what the Illinois Supreme Court will decide if presented with this statutory problem. However, if the court upholds the constitutionality of the amendatory Act, there are two other possible constructions which the court may adopt. First, it could agree with the Attorney General's

137. See, e.g., *Zisook v. Maryland-Drexel Neighborhood Redev. Corp.*, 3 Ill. 2d 570, 121 N.E.2d 804 (1954); *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N.E.2d 626 (1953).

138. *Dee-El Garage, Inc. v. Korzen*, 53 Ill. 2d 1, 8, 289 N.E.2d 431, 435 (1972); *I.B.M. Corp. v. Dep't of Revenue*, 25 Ill. 2d 503, 507, 185 N.E.2d 257, 260 (1962); see also *Johnson v. Daley*, 403 Ill. 338, 86 N.E.2d 350 (1949); *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, 54 N.E.2d 554 (1944); *Sutter v. People's Gas Light & Coke Co.*, 284 Ill. 634, 120 N.E. 562 (1918); 1A SUTHERLAND § 22.08.

139. *Dee-El Garage, Inc. v. Korzen*, 53 Ill. 2d 1, 11, 289 N.E.2d 431, 436 (1972); *Van Driel Drug Store, Inc. v. Mahin*, 47 Ill. 2d 378, 381, 265 N.E.2d 659, 661 (1970); *Fiorito v. Jones*, 39 Ill. 2d 531, 541, 236 N.E.2d 698, 704-05 (1968); *People ex rel. Barrett v. Sbarbaro*, 386 Ill. 581, 590, 54 N.E.2d 559, 562 (1944); *People v. Schraeberg*, 347 Ill. 392, 394, 179 N.E. 829, 830 (1932).

Opinion that the 1953 amendment did not restrict the scope of the statute, but rather, the change clarified and granted rights to foreign corporations. If this interpretation is found to be correct (an unlikely result) there will be no constitutional problem and no problem for the foreign corporation. But if the court agrees that the purpose of the amendment was to restrict the powers of foreign corporations, and does not find the amendment to be unconstitutional (also an unlikely result), foreign corporations must rely on case law as authority allowing them to lend money to Illinois residents without qualifying to do business.

THE INSULATION METHOD

If the Illinois Supreme Court finds that the statute is restricted to purchasing notes and is constitutional, a foreign corporation wishing to lend money to an Illinois resident, or wishing to take security for an existing loan, may be able to do so by the "insulation method."¹⁴⁰ The method is based on a combination of the Interstate Commerce Clause and principles of comity requiring each state to respect contracts made under the laws of sister states. The theory states that if an investment contract and all incidental acts are made *outside* the local state such out-of-state acts should not be considered the doing of business locally. Hence, the local state should be bound to honor such contracts.¹⁴¹

The fact that a loan is secured by a mortgage on Illinois real estate does not affect the locality of the business which is being done. The rule is that a foreign corporation is not doing business in Illinois within the meaning of the qualification statute when a contract is made outside the state and is to be performed outside the state.¹⁴² This is so because a mortgage is only incidental to a loan. Therefore, a foreign corporation is not subject to the laws of the state where the real estate is located.¹⁴³

140. See Prather, *What Constitutes Doing Business*, 25 *LEGAL BULL.* 65 (1959).

141. *Id.* at 80. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 311, comment f (1971): "Qualification statutes, almost invariably, apply only to business done in intrastate commerce within the state."

142. *Higgin Mfg. Co. v. Foreman Bros. Banking Co.*, 222 Ill. App. 29 (1921); 20 *C.J.S. Corporations* § 1839 (1940); 36 *AM. JUR. 2d Foreign Corporations* § 147 (1968); *CCH 1 CORP. L.* 1505 (1965).

143. *Union Savings Bank v. DeMarco*, 105 R.I. 592, 254 A.2d 81, 83 (1969); *CCH 1 CORP. L.* 1505 (1965); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 189, comment b (1971):

By way of contrast, the rule [that the law of the situs of the property controls] does not apply to contracts in which one party agrees to lend the other money and the other promises to repay the loan and also to give a mortgage on his land as security. Here the debt is the principal thing in the minds of the parties, and the promise to give the mortgage is accessory to the debt.

See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 195, comment a (1971).

Under the insulation theory a foreign corporation must make sure no activity is performed within the state which could be considered doing business. Within the list of prohibited activities are maintaining an office or agent in Illinois and executing any vital documents within the state.¹⁴⁴

There are few Illinois cases involving the insulation method. In *Higgins Mfg. Co. v. Foreman Bros. Banking Co.*,¹⁴⁵ an agent in Illinois forwarded a contract for the purchase of goods to the foreign corporation for its approval. The appellate court held that the contract was not binding until approved out of state, and thus was not a contract made within the state, but one made

144. Prather lists the following fifteen rules as precautions to be observed if a foreign corporation is relying on the insulation method. Prather, *What Constitutes Doing Business*, 25 *LEGAL BULL.* 65, 81-82 (1959).

(1) First of all, do not negotiate for or enter into any one of these interstate transactions without consulting the association's own legal and tax counsel. In many instances, such counsel, in turn, will consult legal and tax counsel in the state where "doing business" is contemplated.

(2) Maintain no offices, employees, or agents in the local state.

(3) Minimize or avoid, if possible, relationships with originators, servicers, mortgage companies and the like, which might support a finding that they were acting as agent for the manager's institution.

(4) Deal directly with the makers or sellers of the mortgage or participation in question, and not through a broker in that state. Brokers have been held to be agents.

(5) Before any commitment to buy or participate in loans is made, make certain that the maker or seller is obligated to make the loans whether or not a commitment is issued by the manager's institution.

(6) When servicing contracts are entered into, make the servicer an independent contractor and spell this out in the servicing contract.

(7) Do not make initial negotiations and do not make any consummating agreements in the local state.

(8) Make sure that all contracts or commitments for the making, purchase or participation in mortgage loans spell out that the terms thereof shall be governed by the home state of the manager's institution.

(9) Limit, or eliminate, if possible, actual site inspections.

(10) Make certain, where purchasing a loan or participation, that the original lender itself and any and all intervening parties were fully qualified to do business in the local state, and, *that kind of business*.

(11) Make sure that all contracts, commitments and documents are fully executed, in every detail, in the home state of the manager's institution, and that proper evidence of the place of execution is preserved.

(12) Whenever possible, make notes or obligations payable in the home state of the manager's institution.

(13) Make certain that all purchases or participations in loans and all disbursement of the funds are made in such home state.

(14) Bring any necessary foreclosure actions in the federal courts. Here the diversity-of-citizenship ordinarily will justify that court as a forum.

(15) Dispose of all property acquired in foreclosure as promptly as possible, unless the local law permits foreign corporations to own real estate without restrictions. In all events, avoid operation of such properties as money-makers.

145. 222 Ill. App. 29 (1st Dist. 1921).

in interstate commerce. As such, it was enforceable even though the corporation had not qualified to do business in Illinois.¹⁴⁶

In *Industrial Acceptance Corp. v. Haering*,¹⁴⁷ an Indiana corporation purchased commercial paper at a discount. The paper was secured by chattel mortgages on automobiles sold by Illinois Studebaker dealers. The notes had been offered to the corporation for acceptance in Indiana.¹⁴⁸ The appellate court held that since the corporation had not maintained any office in Illinois and had no agent here, the transaction, which was completed in Indiana, did not constitute the transaction of business in Illinois for purposes of the qualification law.¹⁴⁹

Although these cases do not analyze the theory, they show the willingness of the Illinois courts to follow the insulation method.

INTERSTATE COMMERCE AND LENDING MONEY

A fundamental limitation on state qualification statutes which effectively enables foreign corporations to enforce in-state contracts is the commerce clause of the United States Constitution.¹⁵⁰ Foreign corporations engaged solely in interstate commerce in a particular state are not subject to the qualification laws of that state.¹⁵¹ Illinois has both recognized and followed this rule.¹⁵² In a recent decision of the Illinois Supreme Court, *Charter Finance Co. v. Henderson*,¹⁵³ Chief Justice Underwood, writing for a unanimous court, took an extremely liberal view of the application of the commerce clause to loans made by a foreign corporation in Illinois.

In *Charter*, a Missouri finance company, with no office in Illinois, was not subject to a doing business defense in a suit brought on a promissory note of an Illinois resident and his

146. *Id.* at 35-36.

147. 253 Ill. App. 97 (3d Dist. 1929).

148. *Id.* at 99. There were two methods used. One was for the dealer to send the note by mail endorsed to the Indiana corporation and have the chattel mortgage assigned to the same corporation. If accepted, the corporation sent its check to the dealer. The other method was for the dealer to place the endorsed note and assigned mortgage in a draft envelope which was a sight draft drawn upon the Indiana corporation, payable at its Indiana bank. The papers were forwarded through banking channels. The Indiana corporation inspected the papers before accepting and paying. *Id.* at 100-01.

149. *Id.* at 105. The court also pointed out that negotiations for the purchase and assignment of notes and chattel mortgages were carried on in Indiana.

150. U.S. CONST. art. I, § 8, cl. 3.

151. See H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* § 98 (2d ed. 1970); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961).

152. See *Textile Fabric Corp. v. Roundtree*, 39 Ill. 2d 122, 125, 233 N.E.2d 376, 378 (1968).

153. 60 Ill. 2d 323, 326 N.E.2d 372 (1975).

wife.¹⁵⁴ The record was unclear as to whether the note was completed in Illinois or Missouri.¹⁵⁵ While the opinion did not expressly discuss the legal effect of completing the contract in Missouri, it implied that it would render the note fully enforceable.¹⁵⁶

The court discussed two alternate theories on which they would uphold the note if it had been completed in Illinois. First, the transaction could have been considered an isolated transaction which has consistently been held not to be doing business in this state.¹⁵⁷ Secondly, Chief Justice Underwood pointed out that even if Charter's lending activities were to be considered doing business in Illinois, it is arguable that "Charter's transactions with Illinois residents, involving the flow of money across state lines, were contracts made for interstate commerce which . . . Illinois courts cannot refuse to enforce."¹⁵⁸

Chief Justice Underwood prefaced this judicial dictum with the caveat: "Although we need not rule directly on the question, it is at least arguable that . . ." ¹⁵⁹ This caveat, however, does not diminish the effect of the extremely liberal and significant application of the commerce clause to this unsettled area of the doing business law. In fact, the case read as a whole indicates the receptivity of the Illinois Supreme Court to enforcing loans made to Illinois residents by foreign corporations. The court seemed to be deliberately going out of its way searching for arguments which upheld the enforceability of the loan.

FOREIGN CORPORATIONS GOVERNED BY SPECIAL STATUTES

Apart from the doing business provisions of the Business Corporation Act, Illinois has specific statutes dealing with specific foreign corporations which prescribe specific penalties for failure to comply with specific licensing requirements.¹⁶⁰ Whatever the rule may be with respect to these specific corporations, it would seem to follow that foreign corporations governed neither by penalty provisions of the Business Corporation Act nor by other statutes, can engage in business in Illinois except to the extent of the prohibitions of the 1953 amendment.¹⁶¹

154. *Id.* at 326-27, 326 N.E.2d at 375.

155. *Id.*

156. *Id.*

157. *Id.* at 327, 326 N.E.2d at 375.

158. *Id.* at 328, 326 N.E.2d at 376.

159. *Id.*

160. See ILL. REV. STAT. ch. 32, § 997 (1973) (unlicensed foreign savings and loan association is fined and all contracts made in this state are void); *id.* ch. 73, § 733(4) (1973) (unlicensed insurance company cannot maintain any action).

161. See text *supra* at section entitled "THE 1953 AMENDMENT" for a discussion of the scope of the 1953 amendment.

To express this in simpler terms, if the corporation is governed by a specific statute, so that the penalty provisions of the Business Corporation Act are inapplicable, and if the specific statute imposes no doing business penalty overriding the lending statute, then the corporation's lending activities in Illinois are governed only by the lending statute. For example, foreign state banks are specifically excluded from the qualification provisions of the Business Corporation Act.¹⁶² Also, the Illinois Banking Act,¹⁶³ the specific statute governing banks, fails to provide a penalty for unlicensed foreign banks. The result is to subject such a bank only to the general provisions of the lending statute and its 1953 amendment.

BRANCH BANKING AND FOREIGN LENDING

To say that branch banking is prohibited in Illinois is a gross oversimplification and only partially true. It is clear that banks chartered by the state of Illinois or established in other states are prohibited by the Illinois Banking Act from branching in Illinois.¹⁶⁴ The prohibition extends to establishment or maintenance by a bank of a "branch office or agency" to conduct any of its business.¹⁶⁵ This clearly prevents foreign banking corporations from maintaining offices in Illinois to perform such functions as soliciting loans, executing documents necessary for loans, distributing funds, and accepting payments on loans. The statute does not expressly prohibit the lending of money in Illinois by a foreign state bank if it does not do so through an illegal Illinois branch. It seems to be exclusively a branching statute.

However, due to a 1968 amendment, the provision does not apply to banks formed in other countries.¹⁶⁶ The General Assembly provided a limited licensing provision for these banks in 1973 by passing a law which permits banks organized under

162. ILL. REV. STAT. ch. 32, § 157.102 (1973).

163. *Id.* ch. 16½, §§ 101-177.

164. *Id.*, § 106 reads as follows:

No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business.

For a discussion of the federal statutory policy followed by national banks that wish to establish branches in a particular state, see Harth, *Additional Offices and Facilities of Savings Associations*, 40 LEGAL BULL. 95, 98-100 (1974).

165. ILL. REV. STAT. ch. 16½, § 106 (1973).

166. The section was amended in 1968 by eliminating the restriction against branch banking in any other "country" and added the words "of the United States."

the laws of a country other than the United States to establish and maintain a single banking office in the central business district of Chicago upon receipt of a certificate of authority from the Commissioner of Banks and Trust Companies.¹⁶⁷ Many banks from other countries have taken advantage of this law and have branch offices in downtown Chicago.¹⁶⁸ The law contains a reciprocity provision which may have supplied some incentive for the General Assembly to generously open its arms to these banks.¹⁶⁹ There is no reason why the General Assembly could not provide for the licensing of all out-of-state banks, including banks formed in sister states. Such an enactment could include a provision of reciprocity as a condition for obtaining the license.

While the Illinois General Assembly has continually resisted branch banking bills,¹⁷⁰ they have permitted the Illinois Commissioner of Savings and Loan Associations to provide for the establishment of a "facility" by the Illinois state-chartered savings and loan associations "in the case of a supervisory merger, consolidation or bulk sales; or, a single facility in the case of a relocation."¹⁷¹ This amendment to the Savings and Loan Act was enacted in 1971 in response to the competition generated by a change in the Federal Home Loan Bank Board's (FHLBB) policy. That change permitted federally chartered savings and loan associations to open branches in states in which chain or affiliate banking was being practiced, even though the state's policy patently prohibited branching.¹⁷² A "facility" is not a

167. ILL. ANN. STAT. ch. 16½, §§ 501-19 (Smith-Hurd Supp. 1975) ("The Foreign Banking Office Act").

168. According to the Office of the Commissioner of Banks and Trust Companies, as of September 18, 1975, twenty banks from other countries are currently licensed under this act.

169. ILL. ANN. STAT. ch. 16½, § 503 (Smith-Hurd Supp. 1975) provides: No such foreign banking corporation is, however, entitled to a certificate of authority under this Act unless, under the laws of the country under which such foreign banking corporation was organized, a State bank and a national bank may be authorized to maintain a banking office which may engage in a general banking business or may be authorized to own all the shares (except for directors' qualifying shares) of a banking organization organized under the laws of such country.

170. The 1970 Illinois Constitution, ILL. CONST. art. XIII, § 8, provides that the General Assembly may approve branch banking only if each house approves it by three-fifths of the members voting or by a majority of the members elected, whichever is greater.

171. ILL. REV. STAT. ch. 32, § 709(b) (1973); SAVINGS & LOAN REGS., art. X, §§ 1-5 (1974). See note 174 *infra*.

172. See 12 C.F.R. § 556.5(b)(1) (1973); Harth, *Additional Offices and Facilities of Savings Associations*, 40 LEGAL BULL. 95, 97-98 (1974); Lyons Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 377 F. Supp. 11, 18-19 (N.D. Ill. 1974). The FHLBB was attempting to make federal associations competitive with state associations. However, current statistics on savings associations in Illinois cited recently by the outgoing president of the Illinois Savings and Loan League, H. Thomas Dunk, indicate that the "balance has swung toward the federals which claim some \$15.5 billion in assets to \$8.6 billion for state-chartered associations." Chicago

full service office, but it resembles one since it may conduct the business of "receiving deposits, cashing and issuing checks, drafts and money orders, changing money, *processing mortgages* and receiving payments on existing indebtedness."¹⁷³ This section was amended further by the signing into law in September, 1975 of House Bill 1354, which permits state savings and loan associations to establish multiple "facilities" instead of being limited to a single facility.¹⁷⁴

The section on establishment of facilities applies only to Illinois savings and loan associations. Foreign state savings and loan associations clearly cannot establish a facility under the Illinois law. Foreign state savings and loan associations are governed by a separate licensing provision which penalizes associations which transact business in Illinois without a license.¹⁷⁵

Even though federal savings and loan associations located in Illinois can receive approval to establish branches in Illinois, the FHLBB has not generally extended the policy to permit federal associations located in other states to cross state lines in order to open branches in Illinois.¹⁷⁶ There is also a limitation on the lending area of the federal association. It encompasses the area in the state in which the association is located, as well as any area outside the state within 100 miles of the association's home office.¹⁷⁷ Thus a federal savings and loan association located in Iowa, Wisconsin, Indiana, Missouri, Kentucky, or Michigan has authority from the FHLBB to cross state lines to lend money in Illinois if the loan is made within the 100 mile lending area.¹⁷⁸

Sun-Times, Sept. 15, 1975, at 66, cols. 3-5. Mr. Dunk also pointed out that the asset size ratio between the two groups in Illinois shifted from a one to one ratio three years ago to a current two to one ratio in favor of the federal associations. The General Assembly has responded. See note 174 *infra*.

173. ILL. REV. STAT. ch. 32, § 709(c) (1973) (emphasis added). The section was amended in 1973 to permit facilities to process mortgages. Pub. Act 78-943, *amending* ILL. REV. STAT. ch. 32, § 709(c) (1971).

174. The second sentence of ILL. REV. STAT. ch. 32, § 709(b) (1973) was amended by House Bill 1354 to read:

The Commissioner may adopt regulations which provide for the establishment of *facilities* [a facility], as defined by the Commissioner, in the case of *mergers, consolidations* [a supervisory merger, consolidation] or *bulk sales* [sale]; or, *facilities* [a single facility] in the case of *relocations* [a relocation].

House Bill 1354 was signed into law by the Governor on September 12, 1975.

175. ILL. REV. STAT. ch. 32, § 997 (1973). See text at note 183 *infra*.

176. See Harth, *Additional Offices and Facilities of Savings Associations*, 40 LEGAL BULL. 95, 111 (1974).

177. 12 C.F.R. § 545.6-6 (1973).

178. With respect to national banks, because Congress chose to defer to the state's branch banking policies, there has been incessant litigation and bickering over what constitutes "branching." For example, Illinois Attorney General William Scott, in a recent suit filed against The First National Bank of Chicago in the United States District Court (N.D. Ill.),

Because of the general prohibition in Illinois against branching across state lines, state and federally chartered banks and savings and loan associations outside Illinois, beyond the 100 mile lending area, must look to other sources of authority for enforcing loans made to Illinois residents. The insulation method effectively protects a foreign banking corporation or foreign savings and loan association that observes the precautions heretofore suggested.¹⁷⁹ However, for a foreign corporation or association charged with failing to observe one or more of these detailed requirements, the lending statute will provide a sturdy second line of defense.

A CRITIQUE OF THE PRESENT "DOING BUSINESS" SITUATION

The law of doing business in Illinois is a treacherous strait teeming with hidden hazards through which counsel must safely steer the corporate vessel. While safe passage cannot be charted with precision, the more prominent features of the legal topography can be mapped out and some important questions can be asked.

(1) It is obvious that there is more money outside Illinois than in it. Much of it is in banks, both state and national. State banks cannot qualify to do business in Illinois. Since this article presents the first and only challenge to the Amendment of 1953, and since the last word concerning the amendment's validity has yet to be spoken by the courts, foreign state banks lending on Illinois real estate must be content with the insulation method. However, compliance with the requirements of that method is a nightmare.¹⁸⁰ In the case of a multi-million dollar loan, counsel cannot expect forgiveness if he slips and loses his opportunity to enforce foreclosure of the mortgage.¹⁸¹ Thus, elaborate precautions tend to become more and more elaborate.

took the stand that five customer-bank communications terminals (CBCTs), in locations to serve the bank's payroll customers, are illegal branch banks. Chicago Daily News, Sept. 24, 1975, at 60, col. 1. "First National responded in a lashing statement that such a view was 'the most restrictive interpretation to date of Illinois' archaic banking laws and ignores the interest of consumer.'" *Id.* Earlier on July 31, 1975 the Independent Bankers Ass'n of America obtained an injunction invalidating the U.S. Comptroller of the Currency's prior ruling that CBCTs were not branches. *Id.* Judge Hubert L. Will ruled on December 10, 1975 in favor of the Illinois Attorney General, holding that the CBCTs are branch banks. Chicago Daily News, Dec. 10, 1975, at 1, col. 8. It is certainly a legitimate inference that, with this type of experience before it, Congress wisely chose to insulate federal savings and loan associations from state branching laws.

179. See note 144 *supra*.

180. *Id.*

181. The 1953 amendment, to be sure, imposes no penalties for doing a lending business in Illinois. But it is expressive of a legislative intention. See *In re Diversified Dev. Corp.*, 341 F.2d 58 (7th Cir. 1965).

(2) Where a construction loan is executed in Illinois with an Illinois lender who makes the initial construction disbursements, the loan can be assigned to a New York state bank for completion of disbursement. In such a situation legal protection could result from acceptance of the amended version of the lending statute which permits a foreign lender to purchase Illinois loans.

(3) As to foreign state savings and loan associations, Illinois is left with an antiquated statute stemming from the debacle of the national building and loan associations scandal of the nineteenth century.¹⁸² Loans that violate the statute are void.¹⁸³ According to regulations issued by the FHLBB, competing federal savings and loan associations can cross state lines as long as they remain within their lending area.¹⁸⁴ Some states expressly sanction this practice and treat foreign federal associations as if they were domestic savings and loan associations.¹⁸⁵ Although Illinois does not have such a provision, it does give a competitive advantage to foreign federal associations vis-a-vis foreign state associations.¹⁸⁶

(4) When national banks, located outside Illinois, wish to lend money in Illinois, the law is again murky. The published material is inconclusive and lacking in depth. Unpublished memoranda prepared by counsel for large national banks are extant, but also leave the matter shrouded in doubt, as one of the authors (Professor Kratovil) can attest. In consequence, some states have adopted legislation excluding national banks from the requirement of obtaining a certificate as a foreign financial institution before allowing them to make loans and carry on other banking business.¹⁸⁷ As pointed out above, the Illinois qualification statute expressly excludes banks from its scope, and there is no general statute in Illinois under which foreign state or national banks may be certified to do business in Illinois. Therefore, Illinois legislation does nothing to clarify the

182. ILL. REV. STAT. ch. 32, § 997 (1973). See text at note 49 *supra*.

183. *Id.*

184. 12 C.F.R. § 545.6-6 (1973).

185. *E.g.*, IOWA CODE ANN. § 534.31 (West Supp. 1975); S.D. COMP. LAWS § 52-11-8 (1967). These statutes provide that federal savings and loan associations located out of state are not foreign corporations. Further, the statutes give the federals all of the rights, powers and privileges provided to domestic associations.

186. Since the power of the FHLBB has been held to be preemptive over state law, (see *Springfield Institution for Sav. v. Worcester Fed. Sav. & Loan Ass'n*, 329 Mass. 184, 107 N.E.2d 315 (1952), *cert. denied*, 344 U.S. 884 (1952)), and since ILL. REV. STAT. ch. 32, § 997 (1973) apparently only applies to foreign state savings and loan associations, the federal associations are not subject to the penalties of this section when doing business in Illinois without a license.

187. *E.g.*, REV. CODE OF WASH. ANN. §§ 30.04.010, 30.04.290 (Bancroft-Whitney & West 1961).

uncertainty surrounding loans by national banks located outside the state.

(5) The Model Business Corporation Act has attempted to introduce a statutory measure of logic and order into the chaos of court decisions on doing business.¹⁸⁸ Illinois has no such legislation.

(6) Recently the Director of the Illinois Department of Registration and Education, Robert E. Stackler, in response to charges by community groups that out-of-state mortgage firms are involved in "fast foreclosure" of residential real estate mortgages, issued regulations for the licensing and regulation of out-of-state mortgage bankers and brokers.¹⁸⁹ One of the prerequisites of doing a mortgage business in Illinois would be that the firm must have an office in the state. The validity of such regulations when adopted must be tested in court, and even now, the authority of the director to license such firms has come under attack.¹⁹⁰ Regardless of their validity, these regulations would not affect foreign lenders making large commercial loans unrelated to residential real estate.

This outline could be expanded. As it stands, it indicates that the State of Illinois has been neither progressive nor comprehensive in clarifying the doing business problem.

CONCLUSION

It is obvious that the Illinois law on the subject of foreign corporate lending is in need of clarification. A test case is needed to determine the validity of the 1953 amendment to the lending statute. If, as seems extremely probable, the amendment cannot withstand attack, then decisions must be made by the General Assembly. A first step would require the General Assembly to consider adoption of a clarified version of § 106(2) of the Model Business Corporation Act.¹⁹¹

A second step would involve reconsideration of our antiquated legislation on foreign building and loan associations.¹⁹² If a *federal* savings and loan association, operating within its lending area, can operate across state lines, it is difficult to comprehend why a foreign *state* association should be placed at a competitive disadvantage.

188. See note 3 *supra*.

189. Chicago Sun-Times, Aug. 21, 1975, at 126, cols. 1-3; *id.*, Oct. 20, 1975, at 1, cols. 3-4.

190. Mr. Leonard Giblin, president of the Chicago Mortgage Banker's Ass'n has questioned the authority of the department to license mortgage brokers. Chicago Sun-Times, Aug. 21, 1975, at 126, col. 2.

191. See note 3 *supra*.

192. See text at note 182 *supra*.

A third step would require the General Assembly to face up realistically to the economics of the problem. Does Illinois really want to encourage foreign corporate lending? Will it insist on giving local lenders a "piece of the action" so that foreign lenders must buy loans from local lenders and pay tribute for the privilege of lending money to Illinois borrowers? What happens if local sources dry up and foreign lenders are reluctant to pay tribute? The law of 1875 was enacted to lure desperately needed foreign money to Illinois. Is the situation different today? Must we continue playing games by having local lenders disburse their own funds for initial construction loans and thereafter assign the mortgages to foreign lenders for the remaining disbursements? Must we continue the ritual rain dance of the insulation method?

Illinois borrowers as a group are unrelated and disunited, having little or no lobbying power in Springfield. This contrasts sharply with the well-organized and influential lobbying groups of Illinois lenders. It is hoped that the General Assembly will give fair and impartial consideration to the legitimate needs of Illinois borrowers. Their needs are not necessarily opposed to the interests of Illinois lenders. It is submitted that clarification of the law in Illinois and encouragement of out-of-state lenders to make loans to Illinois borrowers will lead to more commercial growth and expansion in Illinois which will ultimately benefit Illinois financial institutions by the money supply and investment income it generates. The General Assembly and Illinois lenders must take a wider view of the ultimate benefits to be gained by encouraging the flow of outside money into Illinois rather than a narrow view designed to protect a particular special interest group.