

## Opinion No. 45-4678

March 12, 1945

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. R. W. Heflin Securities Commissioner State Banking Department Santa Fe, New Mexico

{\*38} Replying to your letter of March 7, 1945 in which you request an opinion, refer to and enclose a letter from a "Savings and Building Association" incorporated in the State of Colorado, relating to questions pertaining to the subject corporation making loans in the State of New Mexico.

From the contents of your letter and the letter of the "Savings and Building Association", it is apparently conceded that the subject corporation is a "foreign building and loan association" as defined by New Mexico Statutes: Sections 50-1422 -- Mexico Statutes: Sections 50-1422 50-1425, 1941 Compilation; Sections 18-117 -- 18-120, C. S. 1929.

Question 1.

Can the Colorado "Savings and Building Association" make real estate loans in New Mexico without qualifying as a 'foreign building and loan association' under the New Mexico Building and Loan Laws; they will not sell any stock, shares, or certificates of interest; the borrower becoming a member of the association, but no stock is issued and no charges are made except in connection with the actual expense of processing the loan?"

Section 50-1423 seems to clearly answer this question in the negative:

"50-1423. Foreign associations -- Filing statements with corporation commission -- Fees -- Service of process -- Secretary of State as agent. -- It shall not be lawful for any foreign building and loan association, directly or indirectly, to transact any business in this state without first filing in the office of the state corporation commission a statement sworn to by the president and secretary of the association,"

The case of Goode et al vs. Colorado Investment Loan Company, 16 N.M. 461 was based on "ONE TRANSACTION" and plaintiffs were not incorporated as a building and loan association. To the same effect, see Young v. Kidder, 33 N.M. 651, 275 Pac. 98; Vermont Farm Mach. Co. v. Ash, 23 N.M. 647, 170 Pac. 741; and Niblack et al v. Seaberg Hotel Co. 42 N.M. 281; 76 Pac. 2nd 1156.

We believe the case of State ex rel. v. Corp. Com. 18 N.M. 166 applies to the negative answer given above and we quote:

"There is but one question in this case for our determination, i. e., is appellant subject to our statute relative to foreign building and loan associations because it is 'doing business in a form and character similar to that authorized to be done' by building and loan associations organized, in New Mexico, under the provisions of Chapter 72 of the laws of 1899?" (Section 50-1422, supra)

"In the case of the State of Kansas v. The Standard Real Estate Loan Company, 80 Kans. 695, 103 Pac. 1007, which was a proceeding in the nature of quo warranto against the corporation, resulting in a judgment of ouster, the Supreme Court says:

"The legislature has prescribed a scheme for domestic concerns of this character; but it is not necessary that the plan of a foreign association be identical with that provided for in the statute to subject such an association to the law requiring a license. Neither is it necessary that the scheme of the foreign association should conform to that of any other already in use, provided in essence and effect {39} such association performs the functions and accomplishes the purpose for which building and loan associations are usually organized."

Question two:

Does Section 50-1424, supra, by reason of the "Reciprocal Provisions" prohibit a "foreign building and loan association" from doing business in the State of New Mexico?

Laws 1939, p. 242, Section 15, State of Colorado reads as follows:

**"Selling shares and accounts or making new loans prohibited.** Any foreign building and loan association, which conducts a building and loan business is as defined in section 2 of this chapter shall not, after the effective date hereof, sell its shares, accounts or make new loans in this state." (apposite portion only)

After comparing the two sections, it appears the retaliatory provisions of the two statutes would prohibit the Colorado "Savings and Building Association" from transacting any business in the State of New Mexico.

Sections 3971 and 3972, C. J. 14A, p. 1268 read as follows:

"(3971)n. Retaliatory statutes -- (1) In general. In a number of states statutes of a retaliatory nature have been enacted, which provide, in effect, that foreign corporations shall be subject to the same restrictions, burdens, penalties, etc., as are imposed by the state of their creation upon corporations of the state enacting the statute."

"(3972) (2) Constitutionality. It has been urged that statutes of this nature are unconstitutional as involving an unlawful delegation of legislative power. Or stated in another form, the contention is that their validity depends upon the legislation of some other state, and that they are therefore not in and of themselves a complete expression of the legislative will. This contention has been sustained in one state. But in all other

states where this objection was urged the constitutionality of the statutes in this regard has been upheld. Nor, as applied to corporations seeking the right to do business within a state, are such provisions violative of the 'equal protection of the laws' clause of the Fourteenth Amendment. Such statutes are also upheld against the objection that they violate constitutional provisions against unequal taxation."

Notwithstanding the fact that the Supreme Court of this state has sustained judgments for the recovery by Corporations who have failed to qualify under the "Foreign Corporations" sections 54-801 -- 54-811, on the "One Transaction" basis, Sec. 50-1423, supra, states "It shall be unlawful --", and the Supreme Court would be justified in holding the contract void or assessing the penalty under Section 50-1425 supra.

Trusting the above answers the questions in your letter and accompanying reference, I remain

By THOS. C. McCARTY,

Asst. Atty. General