FOREIGN INSURANCE CORPORATIONS-- : Neither foreign insurance corporations
INVESTING FUNDS IN REAL ESTATE. : nor domestic insurance corporations under Sec. 5, Art. XI of our Constitution are authorized or empowered to invest their capital or funds, of any description, in real estate in this State, as an investment, but may only hold real estate for such purposes and for such time as are provided in said Sec. 5, Art. XI of the present Constitution of this State.

March 11, 1947

Honorable Owen G. Jackson
Superintendent
Division of Insurance
Jefferson City, Missouri

FILED
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Attention: Honorable Ralph C. Lashly

Dear Superintendent Jackson:

This will acknowledge your letter requesting the opinion of this Department upon the question of what the authority is, if any, for a foreign insurance company operating in Missouri to make investments of its funds in real estate in Missouri, particularly as to what bearing Senate Bill #323 has upon the question.

Your letter is as follows:

> "Enactment of Senate Bill 323 has prompted an inquiry on the part of a foreign insurance company operating in Missouri, respecting its right to make investments in real estate in Missouri.
>
> "The General Assembly of Connecticut passed a law in 1945 permitting a domestic life insurance company to invest not over 5% of its assets in investments not otherwise authorized. It now develops that Connecticut life insurance companies are seeking investments in income producing real estate. The specific inquiry involves a purchase of a fee interest in such income producing property, the buildings on which would be under long term leases to highly responsible lessees. The Company making inquiry has power under an amendment to its charger of 1887 in addition to the general law applicable to all Connecticut companies, to invest not exceeding 5%

of its assets in productive real estate outside of Connecticut.

"Senate Bill 323 (Section 6032-A, Revised Statutes of Missouri, 1939), effective July 1, 1946, empowers a foreign company to invest its capital reserve and surplus funds as permitted by the charter and domiciliary laws of such company. This bill in itself would seem to indicate a clear right on the part of a Connecticut company to purchase real estate in Missouri for income producing purposes. However, Article XI, Section 5, of the Constitution of the State of Missouri entitled 'Corporation' provides that 'No corporation shall engage in business other than that expressly authorized in its charter by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor.' Further, Section 97 of 'The General Business Corporation Act of Missouri' passed in 1943, provides that a foreign corporation which shall have received a certificate of authority under this Act shall, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority was issued; nor shall it hold any real estate for a period longer than six years except such as may be necessary and proper for carrying on its legitimate business; and, except as in this Act otherwise provided shall be subject to the same duties, restrictions,

penalties and liabilities now or hereafter imposed upon a corporation or like character organized under or subject to this Act. Section 6029, Revised Statutes of Missouri, 1939, restricts real estate purchases by domestic companies to certain specified purposes and conditions. Thus, a question is raised as to what construction is to be placed upon Senate Bill 323 in view of the above current constitutional provision and statutory laws.

"Very truly yours,

"/s/ RALPH C. LASHLY
Ralph C. Lashly
Counsel."

Senate Bill #323 reads as follows:

"Section 1. That Article 10, Chapter 37, Revised Statutes of Missouri, 1939, relating to insurance, be and the same is hereby amended by adding immediately after Section 6032 a new section relating to the investment of funds of life insurance companies organized under the laws of another state, to be known as Section 6032-A, and to read as follows:

"Section 6032-A. Any life insurance company organized under the laws of another state, and admitted to do business in the State of Missouri, shall have power to invest its capital reserve and surplus funds in the same manner, to the same extent and in the same investments as are permitted to domestic life insurance companies organized under the laws of this state; provided, that nothing herein contained shall be so construed as to prohibit any such foreign company from investing its capital, reserve and surplus funds as permitted by its charter and the laws of its domiciliary state."

Senate Bill #323 is an amendment of Article 10, Chapter 37, R.S. Mo. 1939, by adding Section 6032-A in said Senate Bill #323 immediately after Section 6032 in Article 10, Chapter 37, R.S. Mo. 1939.

For the proper solution of this question we believe it necessary to quote at this time, and keep in mind throughout the preparation of this opinion, Section 5 of Article XI of the Constitution of this State, 1945. Said Section 5 reads as follows:

> "No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor."

There are certain sections of the statutes of this State which refer to the right of corporations, some of such statutes including insurance corporations, following very closely the language and effect of said Section 5, Article XI of our present Constitution, except the period of time they may hold real estate.

Section 5 of said Article XI of the Consitution of this State was framed and passed by the last Constitutional Convention to take the place of Section 7, Article XII, Constitution of 1875, which said Section 7, reads as follows:

> "Sec. 7. Corporation business limited by charter--power to hold real estate--. No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business."

Section 6029, R.S. Mo. 1939, is one of the sections in our statutes referred to as following the constitutional

prohibition against corporations holding real estate in this State, except for the purposes pointed out in said Section 5 of Article XI of the Constitution, and the several statutes of this State following said constitutional prohibition.

Section 6029 refers to domestic insurance corporations.

Section 6029 is, in part, as follows:

> "Sec. 6029. Not to deal in real estate, except, etc.--No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, except for the purpose and in the manner herein set forth, to-wit: First, such as shall be necessary for its accommodation in the transaction of its business; * * *".

Section 97, Laws of Missouri, 1943, page 462, reads, in part, as follows:

> "Section 97. No foreign corporation shall transact business forbidden to corporations organized under laws of this state.--No foreign corporation shall transact in this State any business which a corporation organized under the laws of this State is not permitted to transact. * * *".

It appears that in passing Senate Bill #323 the Legislature overlooked the repeal, Laws of Missouri, 1943, page 608, of Section 6032, R.S. Mo. 1939, and re-enacted a new Section in lieu thereof, also denominated Section 6032, Laws of Missouri, 1943, pages 608, 609.

This new Section does not differ materially from the Section -- 6032, R.S. Mo. 1939 -- repealed. It does, however, in one of the provisos, l.c. 609, state the following:

> "* * * and provided further, that such capital, reserve and surplus funds may

> be invested in real estate consistent with the provisions of Section 6029 and Section 6030, Revised Statutes of Missouri, 1939, as the same now is or as the same may be subsequently amended. * * * ".

Since there is reference made in said quotation to said Sections 6029 and 6030, they are again referred to here. Section 6029, with respect to its pertinence and applicability to the matter here being considered, has, in part, been hereinabove cited and quoted. Said quotation of said Section 6029 as will be observed by reading it, limits an insurance company in the owning or holding of real estate to the purposes therein named, none of which permit the purchase, owning or holding of real estate for speculative purposes.

Section 6030, as referred to in said Section 6032, Laws of Missouri, 1943, l.c. 609, in said proviso, which, for the sake of brevity will not be quoted here, provides that, where a life insurance company, benefit societies, or other associations doing business in this State shall have acquired, by foreclosure or in the payment of a debt previously contracted, real estate or personal property in this State or elsewhere, such real estate may be exchanged for stocks and bonds or for other real estate. And the period of six years in which such real estate may be held, by law, may, for good cause shown, be extended by the Superintendent of Insurance for a period of six years in addition to the period now provided by law in which real estate may be held by an insurance company. However, the text of Section 6032, Laws of Missouri, 1943, pages 608, 609, is not out of harmony with that section of the Constitution and the sections of our statutes hereinabove quoted to the effect that real estate may only be held by an insurance corporation, either domestic or foreign, as an aid to the transaction of its business, or where acquired by foreclosure under a loan, or as an exchange for real estate so acquired, and then to be held only for six years, (Section 5, Article XI of the new Constitution says 10 years instead of 6 years), unless such extension be given as is provided for in said proviso of Section 6032, Laws of Missouri, 1943, l.c. 609.

It will readily be seen that legislation must be enacted to change the six year period in Section 6029 and other statutes, as the period real estate may be held by

corporations, to ten years to comply with said Section 5, Article XI of the present Constitution.

Foreign insurance corporations, we assert, such as are identified in the request for this opinion, have no sanction of exception from the terms of said Section 5, Article XI of the Constitution of this State on the ground that the State or States of their domicile, or their charters, or both, permit them to invest their funds in real estate, or because said Senate Bill #323 permits them to do so because, even if any or all of said grounds may exist, said Senate Bill #323, in the proviso thereof, which, in word and effect, states that the capital or surplus funds of any foreign insurance Company may be invested in real estate in this State, if and as permitted by its charter and the laws of its domiciliary State, is in conflict, in that behalf, with our said Section 5 of Article XI of the Constitution of this State, and is therefor void and ineffective.

The Constitution of 1875, Article XII, Section 7, provided for six years as the period in which corporations could hold real estate, except where held in the proper administration of their corporate business. Section 6029, R.S. Mo. 1939, and other sections of our statutes germane to such provision were in harmony with the Constitution of 1875, and must still be held to be in harmony with said Section 5 of Article XI of our new Constitution, except in fixing the same limit of time for corporations to hold real estate at six years, unless such holdings come within the terms of the statutes, or be extended for an additional period farther than said six years under our statutes, or until changed by "general" law, that is, by legislative act, instead of ten years as is provided in said Section 5 of Article XI of the present Consitution. But in any event, real estate under said Section 5, Article XI of our Constitution may not be purchased, nor may any insurance corporation, foreign or domestic, invest its capital funds, or its reserved funds in real estate as an investment.

The case of McWilliams vs. Central States Life Insurance Company, 137 S.W. (2d) 641, was before our St. Louis Court of Appeals in 1940. The case was one where the facts and the law applied to a transaction alleged to be in

violation of Section 5918, R.S. Mo. 1929, which is our present Section 6029, referred to and quoted in part hereinabove, which section prohibited purchasing, holding or conveying realty by insurance companies, except for certain designated purposes.

The facts were that the Lewis-Marr Realty Company, a corporation of the City of St. Louis, Missouri, grantor, on February 10, 1930, executed and delivered its warranty deed to the American National Assurance Company, a corporation of the City of St. Louis, Missouri, grantee.

On March 1, 1932, the American National Assurance Company conveyed the title to said real estate by warranty deed to Edward A. Byrne, who, in turn, on the same day, by warranty deed conveyed title to said real estate to the Lindell Tower Investment Company, a Missouri corporation, with which neither the American National Assurance Company nor the Central States Life Insurance Company had any connection, according to the statement of facts in the opinion. Title to said real estate remained in the Lindell Tower Investment Company until a foreclosure of said property on December 13, 1934.

In June 1933, the Central States Life Insurance Company and the American National Assurance Company were consolidated. Under the agreement and articles of consolidation the consolidated company under the name of Central States Life Insurance Company agreed to assume the outstanding obligations of the American National Assurance Company.

There was some controversy as to the question of fact of what obligations and in what measure of said obligations as to amount the consolidated company agreed to assume. The opinion stating the contents of the warranty deed from the Lewis-Marr Realty Company to the American National Assurance Company, so the opinion states, contained the following paragraphs:

> L.C. 644:
>
> "'Subject to a first deed of trust securing a first mortgage bond issue in the total sum of $650,000.00, now of record.
>
> "'Subject to a second deed of trust securing a second mortgage bond issue in the total

> sum of $25,000.00, now of record, both of which the purchaser assumes and agrees to pay.'"

The case was tried and submitted on an agreed statement of facts on November 30, 1937. On the next day a motion was filed to set aside the submission and praying the Court to reopen the case for the purpose of the introduction of evidence to show that the grantee, American National Assurance Company, was obligated to assume both bond issues, and that the deed of February 10, 1930 was executed and delivered pursuant to and in accordance with such intention on the part of both parties. The Court later sustained the motion and set aside the submission for the purpose of the reception of evidence set out in said motion.

The theory and application of the facts upon which the case was tried was that upon the consolidation of the Central States Life Insurance Company and the American National Assurance Company that the Central States Life Insurance Company, the defendant in the case reported and here being considered, became liable for the obligations of the American National Assurance Company. It was asserted and proven in evidence that there was an exchange of real estate between the Lewis-Marr Realty Company and the American National Assurance Company, upon the consolidation of which last named company with the Central States Life Insurance Company the latter assumed and became obligated for the payment of the obligations of the Assurance Company involving such real estate. The statement of facts and the application of the law thereto, in the case cited is, we believe, a precedent to be applied to the question being considered and determined in this opinion. The facts in that case are somewhat disconnected in position, and we think a proper understanding of the case will be best had to quote, even though it may be rather extensive, much of the opinion itself. We believe the matter will be clarified and the application of the opinion to the question here made appropriate by quoting the following, beginning l.c. 646 to the end of said opinion where the text of the opinion applies. That part of the test of which opinion so applying is as follows:

> "The transaction with which we are concerned here is not only ultra vires in the strict sense, but is also expressly prohibited by statute. It is both ultra

vires and malum prohibitum.

"Section 5918, R.S. 1929, Mo. St. Ann. Sec. 5918, p. 4511, provides as follows: 'No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, excepting for the purpose and in the manner herein set forth, to-wit: First, such as shall be necessary for its accommodation in the transaction of its business; or, second, such as shall have been mortgaged in good faith by way of security for loans previously contracted, or for moneys due; or, third, such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or fourth, such as shall have been purchased at sales upon the judgments, decrees or mortgages obtained or made for such debts. And it shall not be lawful for any company incorporated as aforesaid to purchase, hold or convey real estate in any other case or for any other purpose; and all such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the convenient transaction of its business, shall be sold and disposed of within six years after such company shall have acquired absolute title to the same.'

"The section, for the sake of clarity, may be read as follows: No insurance company formed under the laws of this state shall be permitted to purchase, hold, or convey, real estate, excepting for the purpose and in the manner hereinafter set forth, and it shall not be lawful for any company incorporated as aforesaid to purchase, hold, or convey, real estate in any other case or for any other purpose.

"It is thus seen that the prohibition is twice expressed in the most positive and unyielding language.

"Transactions in violation of the prohibition are illegal, and are not legalized or rendered enforceable by estoppel. This view is not out of accord with cases relied on by plaintiff, but is supported by them. Hall v. Farmers' & Merchants' Bank, 145 Mo. 418, loc. cit. 425, 46 S.W. 1000; Joseph Schlitz Brewing Co. v. Missouri Poultry & Game Co., 287 Mo. 400, 229 S.W. 813, loc. cit. 816; Title Guaranty Trust Co. v. Sessinghaus, 325 Mo. 420, 28 S.W. 2d 1001, loc. cit. 1006; Cass County v. Mercantile Town Mutual Ins. Co., 188 Mo. 1, loc. cit. 14, 86 S.W. 237.

"It should be observed in this connection that insurance companies are not regarded as mere private business corporations. On the contrary, they are regarded as quasi-public corporations. The business of insurance is affected with a public interest, so much so that it is subject to the regulatory power of the state. It has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world. Contracts of insurance are said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of insurance or a credit, the companies being the depositaries of the moneys of the insureds, possessing great power thereby, and charged with a great responsibility. The solvency of such companies manifestly is a matter of grave public concern. State ex rel. Missouri State Life Ins. Co. v. Hall, 330 Mo. 1107, 1116, 52 S.W. 2d 174, loc. cit. 177."

* *

"But plaintiff contends that inasmuch as the assurance company had a right to purchase and sell the farms purchased by it

> at foreclosure sales, it had the right to exchange such farms for other real estate. We doubt that this is so. But it seems certain that the assurance company was not authorized to exchange these farms, worth $100,000, for other real estate valued at $950,000, and account for the difference, by the payment of $175,000 in cash, and the assumption of mortgage bonds aggregating $675,000, more than three times the capital of the company and more than twice its combined capital and surplus.
>
> "It is pertinent to observe that the assurance company did not purchase or take over this real estate for the purpose of obtaining payment of a debt owing it by the real estate company. The transaction was purely a speculative venture."
>
> *
>
> "In view of the conclusion we have arrived at, other questions raised need not be considered.
>
> "The Commissioner recommends that the judgment of the circuit court be affirmed."

One of our Appellate Courts having placed its disapproval upon the purchase or exchange of real property for purposes other than those permitted by the Constitution and the statutes of this State, and having rendered its opinion exactly contrary to the terms and purposes of Senate Bill #323, we may come to only one conclusion in this matter, and that is that said Senate Bill #323 would, if held valid, place the investment of the funds of life insurance companies upon a fluctuating, and at times, a hazardous commercial real estate market. This, as may readily be seen, would affect the ability or lack of ability of any company so investing its funds in real estate, to pay its liabilities and losses under its policies. That is one of the particular things that comes within the prohibitory terms of Section 5 of Article XI of our Constitution and the statutes of this

State above referred to, which might eventuate if insurance companies were permitted to invest their funds in real estate, which hazard said Section 5 of Article XI of the Constitution of our State and the statutes in harmony therewith are designed to prevent, and which was so held by the St. Louis Court of Appeals in the above cited case.

CONCLUSION

It is, therefore, the opinion of this Department that:

1) Under the terms of Section 5, Article XI of the Constitution of this State no foreign insurance corporation shall "hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by a foreclosure or otherwise, and real estate exchanged therefor."

2) It is the further opinion of this Department that a foreign insurance corporation doing business in this State may not invest the capital or funds of any description of such insurance corporations in real estate in this State as an investment, and that to the extent that said Senate Bill #323 provides that foreign insurance corporations may invest any part of their capital, reserve and/or surplus in real estate in this State as an investment, said Senate Bill #323 contravenes said Section 5, Article XI of our Constitution, and is, therefore, void.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General