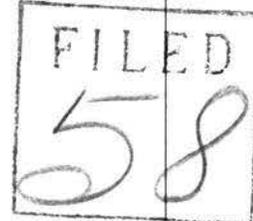


BUILDING & LOAN
ASSOCIATIONS:

Supervisor may, without resorting to legal process, take charge of an association and its assets and manage and conduct its business.

January 25, 1940



Mr. J. W. McCammon
Building and Loan Supervisor
Jefferson City, Missouri

Dear Mr. McCammon:

We are in receipt of your request for an opinion under date of January 22nd, as follows:

"I will appreciate, at your earliest convenience, legal advice from you as to how much scope the law gives the building and loan supervisor in the matter of taking charge of a building and loan association in advance of the appointment of the supervisor as receiver? There seems to be a difference of opinion among building and loan executives as to what the law permits a supervisor to do by way of taking charge of an association unless and until a court order has been issued appointing the supervisor temporary receiver.

"In the case I have in mind, we are hoping to avoid a receivership if we can get the action we deem necessary without going into court."

Section 5626, Laws of Missouri, 1939, page 266, provides when the supervisor of building and loan associations may take charge of an association, in part, as follows:

"No association shall cease to do business or attempt to make a voluntary assignment of its assets or in any other

other manner to liquidate its affairs prior to the maturity of all its stock, except with the consent of two-thirds of its stockholders and the approval of the supervisor of building and loan associations as hereinafter provided. If any association attempts to make such an assignment, the supervisor shall upon his own initiative take charge of the association and of its assets and shall manage and conduct its business. Or if it shall appear to the supervisor from any report of such association or from any examination made or caused to be made by him, or from any knowledge or information obtained from any other source, that such association has committed a violation of its charter or is acting unlawfully, or that such association is conducting its business in an unsafe or unauthorized manner, or that the assets of any such association are insufficient to justify the continuance of business by such association, or it shall appear to the supervisor that it is unsafe or inexpedient for any such association to continue to transact business, the supervisor shall communicate the fact to the officers or directors; such officers or directors shall be allowed sixty days in which to make the assets sufficient or to correct the illegal practices. In case such assets are not made sufficient, or the illegal practices corrected within a time fixed by the supervisor, or if the directors request the supervisor so to do, the supervisor shall take charge of the association and its assets and manage and conduct its business. On taking possession by the supervisor no further payments shall be made to withdrawing shareholders, and all notices of withdrawal filed theretofore or thereafter shall be of no force and/or effect. The possession of the

supervisor in charge of the affairs and assets of such association shall be construed as the possession of the state of Missouri and the placing of said property in the hands of said supervisor by the directors and/or the taking of possession by the supervisor and his appointment as receiver of said property by the circuit court, as provided in this article, shall not be construed as a proceeding on account of insolvency or that said association has committed an act of bankruptcy; but the said supervisor shall promptly proceed and continue to collect dues and interest from the stockholders and borrowers of the association and may bring and/or defend suits in the name of the association and may authorize and direct the foreclosure of deeds of trust and/or mortgages, and pay its operating expenses and in his discretion its debts to its general creditors, employ such help as he needs to manage and operate said association, including, if necessary, a local assistant deputy to represent the supervisor in his absence from the county, and a local attorney to represent him in all legal proceedings: Provided, however, that all payments of dues made by members during the management or control of the association by the supervisor shall be kept in a special trust account, and in case of final liquidation shall be repaid or accounted for to such shareholders or borrowers in full without any reduction. The supervisor shall promptly attempt to reorganize said association, bring about a merger with other building and loan associations and/or seek the assistance of other associations, banks and/or trust companies to dispose of any part of the assets of said association that he deems advisable, keeping in view the resumption of business by said association. * * * **

Under the above section, if an association attempts to make a voluntary assignment of its assets without the consent of the shareholders and the supervisor, the latter, it is provided, "shall upon his own initiative take charge of the association and of its assets and shall manage and conduct its business.

Again, if the supervisor learns from any source that the assets of an association are insufficient, or that it is conducting illegal practices, and upon the giving of notice to the directors or officers of the condition of such association, the latter fail to correct same, it is provided that "the supervisor shall take charge of the association and its assets and manage and conduct its business."

And again, if the directors request the supervisor to do so, he "shall take charge of the association and its assets and manage and conduct its business."

Section 5627, Laws of Missouri, 1939, page 268, provides when the supervisor may ask the court for a receivership, in part, as follows:

"Upon taking charge of an association under any of the provisions of this article, the supervisor shall as soon as practicable, ascertain by a thorough examination of its affairs, and appraisal of its assets, its financial condition; and if from such examination and appraisal it appears to the supervisor that such association is in a condition to safely resume business, he shall return the assets and the conduct of the association to its officers and directors. The supervisor may at any time after he takes charge of the assets and the affairs of an association, institute proceedings in the circuit court in the city or county in which said association has its principal office, and have himself appointed temporary receiver, until it is determined whether or not such association can resume business;

or appointed receiver for the purpose of winding up its affairs, and the court shall upon such application, appoint the supervisor such receiver; and as such receiver the supervisor under order of the court in such proceeding may compromise and settle with the borrowers of such association the amount of credit to be allowed any loans on account of the value of the stock held as collateral to such loan, and on payment of such loan the supervisor may satisfy and release of record the mortgages and/or deeds of trust securing said loans; and in any reorganization may set up reserves to care for any losses theretofore sustained or thereafter suffered, including the costs and expenses of the reorganization or liquidation of the association's affairs to be accounted for pro rata as deductions from the value of the stock of withdrawing members of the association; said supervisor during his administration of the affairs of said association to have all the powers, duties and authority of the board of directors, subject, however, to the order of said court in the event of the sale of any assets of said association; to declare dividends and make partial payments to stockholders in partial or full liquidation of their shares of stock, said dividends or payments to the stockholders, however, shall be made pro rata in proportion to their stock holdings, no preference being given or allowed to any stockholder on account of any notice to withdraw having been filed or on account of the maturity of his stock. The court upon application of the supervisor shall have the right to remove the officers and directors of said association and to call a meeting of the stockholders for the election of new directors upon such notice as the court shall determine. The supervisor may submit to the court any general plan

of reorganization of such association or merger or consolidation of such association with another association, and the court may submit such plan to the stockholders for approval or disapproval, but no such action of the stockholders shall be binding on the court but be advisory only, and the court may approve or reject such plan of reorganization, merger, or consolidation. Any stockholder of the association may be made a party to such proceedings and be heard by the courts as to his objections to such reorganization plan. * * * *"

Under the above section, "the supervisor may at any time after he takes charge of the assets * * * institute proceedings in the circuit court * * * and have himself appointed temporary receiver * * * or appointed receiver * * *."

As pointed out, there are three instances under Section 5626, supra, in which it is declared that the supervisor shall take charge of the association and its assets and manage and conduct its business.

In the case of State v. Wymore, 119 S. W. (2d) 941, l. c. 944, the court in construing the terms "may" and "shall" as used in statutes, said:

"On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They are used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

Thus we find that it is mandatory under three different circumstances for the supervisor to take charge of an association and its assets and to manage and conduct its business. However, when he takes them over, it is permitted, but not mandatory, that he resort to court action for appointment as statutory receiver.

Further evidence in support of our position that the legislature did not contemplate that a receivership be the only manner in which the supervisor could take charge of an association and its assets is revealed when one considers the language of Section 5626 as it appears originally in Laws of Missouri, 1931, page 163:

"The possession of the supervisor in charge of the affairs and assets of such association shall be construed as the possession of the state of Missouri and that the property is in custodia legis * * *."

The underscored portion of Section 5626, supra, was omitted when said section was amended in 1939.

Ballentine's Law Dictionary defines the term "custodia legis" as follows:

"The custody of the law. When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise. See *Gilman v. Williams*, 7 Wis. 329, 334, 76 Am. Dec. 219."

There is a well defined rule of statutory construction that in construing statutes the cardinal rule is to arrive at the legislative intent. *State ex rel. Wabash Ry. Co. v. Shain*, 341 Mo. 19, 106 S. W. (2d) 898. And there is a further rule that to ascertain the true meaning of the language of a statute the court must look at the whole purpose of the act as it was before the enactment and the change in law intended to be made. *Betz v. Columbia Telephone Co.*, 224 Mo. App. 1004, 24 S. W. (2d) 224, 228.

As the section originally read, it contemplated the taking of property by virtue of legal process, and being held in "custodia legis" or in the custody of the law. It is evident that the legislature deemed it desirable that the supervisor be able to take charge of an association and its assets and manage and conduct its business without re-

sort to legal process if in his discretion the best interests of the public would be served.

The constitutionality of a statute is presumed unless the contrary is shown (*City of Springfield vs. Smith*, 322 Mo. 1129, 19 S. W. (2d) 1), and therefore it is not our purpose to raise the constitutionality of Section 5626, supra. However, statutes conferring quasi judicial powers on executive or ministerial officers have been upheld as valid.

In the case of *Shaw v. Lone Star Building & Loan Ass'n.*, 71 S. W. (2d) (Tex.) 863, a statute authorizing the banking commissioner without court action to annul the certificate of authority of a building and loan association for failure to comply was held not violative of the Texas Constitution providing that no citizen shall be deprived of property except by due course of law and the provision vesting judicial power of the state in its courts.

The above court in discussing the validity of vesting quasi judicial authority in an executive or ministerial officer declares that (l. c. 865):

"In this connection when an executive or administrative officer is required to perform certain acts when certain facts exist, he must of necessity ascertain and pass on the facts before he can know how or when to govern his acts. This is sometimes called a quasi judicial function. There is a marked distinction between an act that is quasi judicial and one that is classed strictly as judicial. The vesting of quasi judicial authority in an executive or ministerial officer does not violate the judicial provisions of our Constitution. 34 C. J., p. 1180 et seq., and notes. If this were not so, the government could hardly function. All executive and administrative officers are enjoined or required to perform cer-

tain duties under certain circumstances and conditions. They cannot know when or how to perform until they have ascertained the facts."

866): And, further, the court in its opinion said (l. c.

"In Sanders State Bank v. Hawkins et al., 142 S. W. 84 (writ refused), the Court of Civil Appeals had before it for construction section 40, c. 10, p. 503, Acts 29th Legislature 1905 (1st Called Sess.). That act provided:

"If from an examination made by the superintendent or by one of his examiners, it shall be discovered that any bank or trust company organized under this act is insolvent, or that its continuance in business will seriously jeopardize the safety of its depositors or other creditors, and if the action is taken from an examination by an examiner, such examiner shall recommend the closing of the bank, then it shall be the duty of the superintendent, if he approves such recommendation, by himself or one of his examiners, immediately to close said bank or trust company, and take charge of all the property and effects thereof,' etc.

"The commissioner acted under the above statute, closed the above bank, and took charge of its properties and effects. The opinion clearly upholds the law as valid."

From the foregoing, we are of the opinion that under Section 5626, Laws of Missouri, 1939, page 266, the supervisor of building and loan associations may, without resorting to legal process, take charge of an association and its assets and manage and conduct its business.

Mr. J. W. McCammon

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We are further of the opinion that by virtue of said section the supervisor may proceed and continue to collect dues and interest, bring and defend suits, authorize and direct foreclosures, pay operating expenses, pay debts to general creditors, employ such help as he needs, attempt to reorganize the organization, bring about merger with other building and loan associations, and seek assistance of other associations, banks, etc., keeping in view the resumption of business by said association.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

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