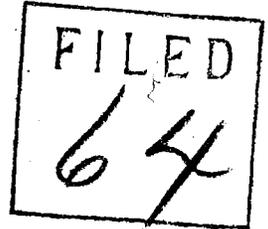


BANKS: -- Increase of capital stock:

The 60 days' notice required by Sec. 7973, Laws of Mo., 1941, page 672, is not necessary, preliminary to the increase of the capital stock of a bank, when all the stockholders of the bank waived in writing the publication thereof, and the records of such bank contain such waiver.

October 20, 1945



Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Morris:

Your letter of October 6, 1945, requesting an opinion from this Department regarding the necessity of the publishing of the 60 days' notice provided for in Section 7973, R. S. Mo. 1939, where the stockholders have unanimously agreed to waive, and as a matter of record have waived the publication of such notice, preliminary to the increase of the capital stock of banks in this State, has been received. Your letter states:

"We have received from a bank under the supervision of this Department certified copy of the record of a stockholders' meeting, which reads as follows:

"We, the undersigned, Oscar D. Kochan, President and Edna Minor, Secretary of The Farmers Bank of Maysville, Maysville, Missouri, hereby certify that at a meeting of the stockholders of said bank held on the 2nd day of October 1945 pursuant to the written consent and waiver of notice of all of the stockholders of said bank as to the time, place and purpose of the meeting, a proposition was duly submitted to increase the capital stock of said The Farmers Bank from \$20,000.00 to \$25,000.00; that upon said proposition the consent of the persons holding the larger amount in value of the stock of said The Farmers Bank was given viz.: 200 votes in favor of and no votes against it; and that, therefore, the capital stock of said The Farmers Bank is hereby increased from \$20,000.00 to \$25,000.00, and that the full amount of said increase is bona fide subscribed and paid up

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in cash to the board of directors of said bank.'

"(Above action was properly signed, notarized and recorded.)"

"Sec. 7973, R.S. Mo. 1939, provides for a published notice of stockholders' meeting for the purpose of increasing the capital stock of a bank. We would appreciate your advice as to whether or not this Department would be justified in issuing certificate increasing the capital of the above bank with the proceedings as set out.

"We have three similar situations pending and would appreciate your comments at the earliest possible date."

Said Section 7973, was repealed by the Legislature of 1941, and re-enacted, Laws of Missouri, 1941, page 672, as Section 7973. The essentials respecting the publication of the notice were not disturbed, but were retained in said Section 7973, Laws of Missouri, 1941, page 672.

We are of the opinion that the provisions of said Section 7973, regarding the publication of such notice before a bank may increase its capital stock are directory and not mandatory.

In the case of State ex rel. vs. Hardware Company, 178 Mo. 189, the Supreme Court of this State had before it the question of the necessity of publishing a 60 days' notice by a corporation preliminary to the increase of its capital stock. The Secretary of State refused to issue a certificate that the corporation had complied with the statutes made and provided governing its increase of capital stock. The Hardware Company case, supra, recited and discussed the previous case of State ex rel., Donnell Mfg. Co. vs. McGrath, reported in 86 Mo. 239, where our Supreme Court had upheld the Secretary of State in refusing to grant a certificate without the publication of such 60 days' notice. The McGrath case, 86 Mo. 239, was overruled by the Supreme Court in the case of Riesterer vs. Land & Lumber Co., 160 Mo. 141. The Supreme Court approved its judgment in the Land & Lumber case, supra, overruling the McGrath case, 86 Mo. 239, in the Hardware Co. case, 178 Mo. 189, l.c. 193, and announced the rule definitely that such 60 days' notice is not necessary when the stockholders express a waiver of such requirement. The Court at the local citation given above in said case, said:

"* * * and so the rule will be here announced, upon authority of the Riesterer case without further repetition of the reasons upon which it had been predicated, that corporations in this State have by the unanimous concurrence of all the stockholders thereof, in meeting assembled, the right to increase their capital stock, or bonded indebtedness, without the necessity of going through the form of giving the sixty days' public notice of the time and place of such meeting, as the Constitution and statute designate, when all the stockholders express a waiver of such requirement. Such notice could have served no useful purpose whatever, under the facts as they are made to appear in this particular, where all stockholders of relator company were present and participated in the meeting called.

"It is our opinion that the sixty days' notice does not apply to conditions like the present, and that the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable. * * * "

The McGrath case involved the increase of the capital stock of a private manufacturing corporation. The Supreme Court in the Land & Lumber case, 160 Mo. 141, supra, exhaustively discussed and reasoned the principles herein involved as to the necessity of the publication of such notice when the stockholders have waived the publication. That was a case where a private business corporation sought the increase of its bonded indebtedness. The Hardware Co. case, 178 Mo. 189, supra, was also a case involving a private corporation in the increase of its capital stock. There is no case in our appellate decisions construing said Section 7973, on the question of the publication of such 60 days' notice therein provided for, preliminary to the increase of a bank's capital stock, when the stockholders have waived it. However, it will be noted in reading the excerpt hereinabove copied, l.c. 193, from the Hardware case, 178 Mo. 189, supra, that the Court includes all

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corporations of this State, which would mean banks as well as other corporations, as being authorized to waive the publication of the 60 days' notice required by the Constitution or any statute of the State, preliminary to an increase of capital stock. We believe the decision of the Supreme Court in the Hardware Co. case, 178 Mo. 189, l.c. 193, supra, permits banks in this State to increase their capital stock without the publication of the 60 days' notice required by said Section 7973, when all the stockholders have signed, and the records of the corporation show a waiver of such requirement.

The construction of these statutes given by the Supreme Court in the Hardware Co. case, supra, that such 60 days' notice need not be published where the stockholders have unanimously agreed to waive such publication seems to be based upon safe and sound reasoning and principle. The increase of the capital stock of a bank undoubtedly would be to the benefit of the depositors of any such bank. It would appear that the rights of all persons dealing with the bank would be benefited and made more secure by an increase of the capital stock. The stockholders themselves would of necessity be required to provide the money necessary for the increase of the capital. It would further appear that the stockholders would be the only ones who could ever, under any conditions, object to the increase of the capital stock of a banking corporation without the 60 days' notice. Having waived the publication of the 60 days' notice provided for in said Section 7973, such stockholders would be estopped to complain or to take advantage of the failure to publish said 60 days' notice as an objection to the legality of the increase of the bank's capital stock.

CONCLUSION.

It is, therefore, the opinion of this Department that where all of the stockholders have signed a written waiver of the publication of the 60 days' notice of a proposed increase of capital required by said Section 7973, Laws of Missouri, 1941, page 673, and the records of said corporation contain such waiver it is not necessary to publish the 60 days' notice provided for in said Section 7973, but that the capital stock may be lawfully increased without the publication thereof.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

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