SAVINGS & LOAN ASSOCIATIONS: Savings & Loan Associations under Sections 2, 42 and 47 of House Bill #481 may enact and enforce a by-law to retain as a withdrawal fee a reasonable sum, perhaps to the extent of 50% of the dividends earned, where an account is withdrawn within one year after the investment thereof, and after the enactment of such by-law.

April 18, 1947

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Honorable F. M. Horton
Supervisor
Division of Savings and Loan
Supervision of Missouri
Jefferson City, Missouri

Dear Mr. Horton:

This will acknowledge your request for the opinion of this Department on the validity of Section 25, as it is identified in the by-laws of the Excelsior Springs Savings and Loan Association of Excelsior Springs, Missouri.

Your letter requesting this opinion and containing a verbatim copy of said Section 25 of said by-laws, is as follows:

> "Please let us have your opinion as to the legality of the following provision in a set of by-laws submitted to this office:
>
> "'WITHDRAWAL FEES. On accounts withdrawn within one year after date of investment thereof the Association may retain as a withdrawal fee a sum equal to fifty percent of the dividends declared thereon. The Board of Directors may eliminate withdrawal fees or reduce the amount of dividends to be retained upon withdrawal.'"

There is contained in your correspondence with the Secretary of said savings and loan association, the statement that the by-laws submitted by said association for the approval of your Department "appear acceptable", except that said Section 25 seems to you to be in conflict with Section 42 of the Savings and Loan Act, by which reference you mean of course, House Bill #481.

Inasmuch as a copy of said Section 25 is contained in your letter we will not recopy it here.

We think it proper here, for the purposes of comparison of said by-law 25 with the terms of said Section 42 of House Bill #481 to recite the text of said Section 42, which is as follows:

> "Dividends shall be credited to accounts on the books of the association as of the first business day following the close of the semi-annual period for which the dividend was declared unless an account holder shall have requested and the board of directors shall have agreed to pay dividends upon all or any part of an account in cash. Except as otherwise provided in this Act, dividends shall be calculated on the participation value of each account at the beginning of the dividend period, plus payments made thereon during the dividend period (less amounts withdrawn and notice for withdrawal, which, for dividend purposes, shall be deducted from the latest previous payment thereon) computed at the dividend rate for the time invested; provided, that no association shall be required to compute, credit or pay any dividend on any amount withdrawn during the dividend period."

Section 42 of House Bill #481 states, as will be observed in the quotation in full of said Section hereinabove, in the last proviso thereof, "provided, that no association shall be required to compute, credit or pay any dividend on any amount withdrawn during the dividend period."

This proviso, we believe authorizes the exercise of the discretionary power of a savings and loan association to prescribe in its by-laws the method of computation of dividends where an account is withdrawn during the first year of its investment.

There are other sub-sections of said House Bill #481 which we think it necessary to refer to and quote as

determinative of the right of the Board of Directors of a Savings and Loan Association to pass and enforce a by-law such as said by-law 25 of the association referred to. One of such sections is Section 2 of House Bill #481, which defines the participation value of an account in a savings and loan association. It states, in part, as follows:

> "* * *'Participation value' shall mean the aggregate of payments by a member on an account, plus dividends credited thereto, less redemptions and withdrawals, * * * ".

Section 47 of said House Bill #481 in fixing the terms of the value of an account upon withdrawal, and stating that the value may be determined by the Board, and referring back to the quoted part of said Section 2 defining "participation value" states, in part, as follows:

> "* * * Upon withdrawal, an association shall pay the value of an account, as determined by the board, but not in excess of the participation value thereof. * * * * ".

There is text authority, and at least one opinion by one of the Appellate Courts of Missouri, supporting the right of savings and loan associations to enact a by-law in the terms and having the effect of said by-law 25 in the case being considered. 12 C.J.S., pages 446 and 447, under the title of "Building and Loan Associations" states the following general legal principal, to-wit:

> "Whatever provisions exist in statutes, charters, or by-laws as to the amount payable on withdrawal are binding on the members; but a member is not bound by an irregularly adopted amendment to a by-law of this character. Also, vested rights as to the amount payable on withdrawal cannot be affected by a change in the statute, by-laws, or articles of incorporation, at least where the stock certificate in effect specifies that it is subject to the existing by-laws and articles of incorporation, unless the stockholder estops himself from questioning their validity.

> "The withdrawal value of building and loan association stock is a price at which the association will redeem it before maturity; it is the amount actually paid, in addition to such proportion of the profits, or such rate of interest, as may be prescribed by statute or the by-laws. While prima facie it is the amount paid in by the stockholder with legal interest, and is sometimes considered to be the amount paid in together with the declared dividends in the absence of evidence of its actual value, it is not generally fixed on that basis, but is determined by considering the amount paid in together with the assets and liabilities of the association. * * * ".

We find cases from other States cited in the foot-notes to the text above quoted in 12 C.J.S., pages 446 and 447, particularly the case of B. & L. of Newark vs. Weissberg, cited under note 52, page 447. This case, a New Jersey Equity case, is cited in 115 N.J.Eq. 487, 170 Atl. 662 and 98 A.L.R. 134, the used quotation here being 98 A.L.R. 134. That was a case involving the precise question raised here respecting the validity of said by-law 25, heretofore mentioned. In holding that a building and loan association -- by our statutes now named savings and loan associations -- have the discretionary right to establish a by-law fixing and limiting the withdrawal value of an account, otherwise called accrued profits or earned dividends, and that the right of a withdrawal does not exist at all except by a statute or by-law, and that when so existing it is but a privilege, the New Jersey Equity Court, l.c. 140, 141, said:

> "The right of withdrawal does not exist, except as conferred by a by-law or statute, and when so conferred the right will be restricted to the terms of the by-laws or statute. Fitzgerald v. State Mutual Building & Loan Association, 76 N.J. Eq. 137, 141, 79 A. 454, 130 Am. St. Rep. 743.

And a defaulting member has no right to the inclusion of a portion of the profits in the ascertainment of the withdrawal value of his shares, unless it is conferred by statute or by-law. Watkins v. Workmen's Building & Loan Ass'n, 97 Pa. 514; Endlich on Building Associations, pp. 459, 460, 461. A borrower's claim to have all items, including profits, which go to swell the general fund of the association, taken into account, and to be given credit therefor, 'at any intermediate stage, has no foundation in law or equity.' He is, in the first place, a member, and only in the second place a borrower. In the former capacity he has no right to an account of profits except upon termination of the scheme, unless such right is expressly conferred by statute or the contract. Mechanics' Building & Loan Association of New Brunswick v. Conover, 14 N.J.Eq. 219, reversed, but not as to this point. Herbert v. Mechanics' Building & Loan Ass'n of New Brunswick, 17 N.J.Eq. 497, 90 Am. Dec. 601; Endlich on Building Associations, 461.

"The right to withdraw, without the forfeiture of the money paid in, is in its essence a privilege. In becoming a member of the association, the shareholder does so, ostensibly, at least, with the purpose of remaining in it to the end, bearing his part of all its burdens, and finally sharing all its profits in the same proportion. His failure to continue in the concern, therefore, is essentially in the nature of a breach of contract, upon which the loss of his previous contribution might, not unreasonably, be held to follow. But circumstances, unforeseen at the time of his assumption of membership, may, without any wrong on his part, make a severance of his connection with the

association desirable, if not imperative. Endlich on Building Associations, 82, 83.

"And therefore the statute confers the right of withdrawal, but only upon the terms therein prescribed. It recognizes and gives effect to the well-established principle that the withdrawing shareholder is not entitled to all the profits apportioned to his shares, but only to a reasonable part thereof. We find no warrant therein for appellants' claim to the profits apportioned to their shares at the annual meeting of the shareholders. There is evident a legislative purpose to give to a defaulting member who is a borrower on bond and mortgage the status of a withdrawing member, in respect of credit for the withdrawal value of his pledged shares. Section 55 of the act of 1925 provides that such member 'shall be allowed the withdrawal value of his pledged shares as a credit on such mortgage loan less any arrearages or charges in connection therewith.' Section 49, as amended, provides that after the first year 'a reasonable share of the profits, less unpaid fines, shall be included in the withdrawal value.' It should be observed that the statute does not direct the inclusion of a proportionate share of all profits, but a reasonable share of the profits only. And this is significant in view of the employment of the word 'proportionate' in the preceding clause relating to 'losses sustained.'

"The right of withdrawal springs from the statute, and not from contract. The shareholders could not, of course, by constitution or other agreement, override the statute. Campbell, Rec'r, v. Perth Amboy Loan Association, 67 N.J.Law, 71, 50 A. 444. There is not, in the instant case, any basis for the contention that the statute impairs the obligation of appellants' contract, nor is such claim made.

"The 'withdrawal value' should not be confused with the 'book value!' The 'withdrawal value' is the amount actually paid, in addition to such proportion of the profits, or such rate of interest, as may be prescribed by statute or the by-laws. The 'book value' is the proportionate amount of the net amount of the net assets, including profits or losses, of the association, applied to a share of its stock, taking into consideration the amount actually paid in, and the length of time the association has had the use of the money. A member is entitled to 'book value' only upon the maturity of his stock. Sundheim on Building and Loan Associations, Sec. 164.

"There is likewise a clearly manifested legislative purpose to vest in the board of directors a liberal discretion in determining the portion of profits to be included in ascertaining the withdrawal value. It is a discretion that must be reasonably, and not arbitrarily, exercised, to promote the financial integrity of the association. The act of 1925, by Section 7, as amended by P.L. 1929, p. 463 and P.L. 1930, p. 26 (Comp. St. Supp. Sec. 27--R(7), provides that the business and affairs of every such association shall be managed and directed by a board of directors, and it clearly contemplates that the board shall determine the withdrawal value of the shares, subject to the limitations imposed by statute, and the provisions of its by-laws not inconsistent therewith, and that in such action, as in all others of a discretionary character, it shall be guided by the general purpose to effect and maintain the economic security of the association. The proper exercise of the power to determine what is a reasonable share of the profits to be

> apportioned to the withdrawn shares, in settling their withdrawal value, is vitally essential, if the fundamental requirement of equal participation at all times is to be observed and the economic safety and stability of the association maintained. This is an authority that naturally and logically should reside in the body that is charged with the responsibility of the management and direction of the association's affairs and business, and neither the statute nor the Constitution places it elsewhere.
>
> "Such discretion is consequently to be exercised in the light of existing conditions, and regard must of necessity be had to the absorption of future losses reasonably to be anticipated. Such discretion shall not, of course, be exercised capriciously, unreasonably, or oppressively. The shareholder is entitled, at the maturity of his shares, to receive the full amount of the profits apportioned thereto, but before maturity he can claim, in addition to the dues paid in, only a reasonable share of the profits earned thereon. * * * ".

Our St. Louis Court of Appeals had before it the case of Reitz vs. Hayward, 100 Mo. App. Rep. 216, on the question, among other features of fact and law considered, of the right to withdraw after an account has been established in a building and loan association, and before maturity, and the computation of the withdrawal value. The Court, l.c. 226, 227, on these questions, said:

> "The withdrawal value of the shares must be computed, therefore, and the shareholder allowed a credit for what they are actually worth; for the underlying idea of building and loan associations is mutuality of losses and profits by all shareholders, who are, in a sense, partners, as has been many times decided. Hohenshell v. Ass'n, 140 Mo. 566;

Bertche v. Ass'n, 147 Mo. 343; Shell v. Ass'n, 150 Mo. 103. * * *

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"* * * The withdrawal of stock and payment of loans before the shares mature, are privileges not contemplated in the scheme of a building and loan association, but are departures from it tolerated for practical reasons. Members are permitted to withdraw their shares instead of being compelled to hold them until maturity, because the privilege has been found necessary to enable associations to secure a sufficient membership. So, borrowers are permitted to pay loans at their pleasure, instead of by installments until their stock matures and the loan is thereby discharged in the normal evolution of the association, because the exigencies of business have shown that privilege to be necessary. Both privileges are opposed to the central idea of the building and loan association scheme and can not fail to work injustice if an association becomes insolvent; for it may continue going, with its insolvency unknown for a long time except to the inner management; meanwhile withdrawals occur by which some members get back all they paid in, when, on account of losses, they are entitled only to part. The law, therefore, does not in theory permit withdrawals after an association is insolvent. But if the surrender of stock was perfected while it was still a going concern though, in fact, insolvent, it is an executed transaction and the proceeds may be retained, unless fraud can be imputed to the withdrawing stockholder. * * * ".

Giving due respect to the above cited and quoted authorities we believe that savings and loan associations, in the exercise of a reasonable discretion, since the right of withdrawal of an account is a privilege only, may enact a by-law such as by-law 25 of the Excelsior Springs Savings

and Loan Association, and enforce the same under said Sections 2, 42 and 47 of said House Bill #481.

Such a by-law, however, must be prospective and not retrospective. It must affect accounts only which are established after the passing of such by-law, and which accounts are withdrawn within one year after the establishment of such accounts.

An investor, with such a by-law as said by-law 25 being outstanding, would, by making his investment, waive any objection to the withholding of a percentage of his dividends which may have accrued if he withdrew his account within the first year of its investment. In other words, the doctrine of estoppel would apply.

Under said Sections 2, 42 and 47 of House Bill #481 a savings and loan association, we believe, would be entitled to withhold a percentage of the dividends due if an account were withdrawn within one year after its establishment, on the first six months period of that year, but would not be entitled to withhold such percentage of the dividends as a withdrawal fee for the last dividend period of six months of such year.

CONCLUSION.

It is, therefore, the opinion of this Department that Savings and Loan Associations have the discretionary power under said Sections 2, 42 and 47 of said House Bill #481, to adopt and enforce a by-law retaining a withdrawal fee in a reasonable sum, perhaps to the amount of 50% of the dividends due on accounts established with them and withdrawn within one year after the investment of such account. Such withdrawal fees should, and would, only affect accounts established with a Savings and Loan Association after the enactment of such a by-law.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

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