BUILDING AND LOAN: Manner of electing Directors.
ELECTIONS:

February 18, 1943

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Mr. T. Victor Jeffries
Supervisor, Bureau of
Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of February 9, 1943, on a matter submitted by the Secretary of the Postal Employees Building, Loan & Savings Association of St. Louis, Missouri. The question is how shall directors of a Building and Loan Association be elected.

We are not familiar with the by-laws of the above building and loan association. However, this is not important for the reason said by-laws cannot exceed the constitution and statutes pertaining to said election and if they do, said by-laws are invalid. Sundheim, Third Edition, Building and Loan Associations, Section 91, page 90, lays down the general rule as to voting for directors in such associations and holds that constitutional and statutory provisions relating to the right of stockholders to vote in corporations generally applies to building and loan associations unless they are expressly excepted and when such right is regulated by constitution or statute a by-law cannot change same.

> "The right to vote stock at corporate elections is an incident of ownership, to be exercised, of course, in the mode, and under the restrictions, prescribed by the constitution, and the statutes of the state, and the charter and by-laws of the association. Constitutional provisions and statutes regulating the right to vote in corporations generally apply to building and

> loan associations, unless they are expressly excepted, and when the right to vote is regulated by statute, it cannot be changed by by-law or resolution. When the general law expressly declares who shall be entitled to vote, and how they shall vote, its provisions are controlling, and a by-law in conflict therewith is void. Therefore a by-law limiting the right to vote to stock a year old is invalid, when in conflict with a statute which gives a right to vote to each member."

Section 8207, R. S. Missouri 1939, provides by-laws of such corporations as building and loan associations may adopt by-laws but same shall not be inconsistent with the constitution and laws of this State. Said section reads in part:

> "The shareholders of such corporation may make and adopt all necessary by-laws for the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state. * * * * * * * * * * * * * * * * * * * * * * * * * * * "

Section 8208, R. S. Missouri 1939, provides by-laws may be adopted for certain purposes and may prescribe the qualifications of directors of said association or corporation. Said section reads in part:

> "The number, title and functions of the officers of any coporation created by virtue of this or any previous law, their terms of office, the time of their election,as well as the qualification of electors, and the time of each periodical meeting of the officers and shareholders of such corporation, shall be provided for in the by-laws. No person shall be eligible to become or shall continue a director unless he shall be the owner of at least five shares of capital stock of such corporation, and not delinquent in any manner thereon.* * * * * "

Section 5007, R. S. Missouri 1939, provides the method, which we believe is applicable in the instant case, of electing candidates of a corporation, and reads:

> "In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares of stock so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election, and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute them among two or more candidates; and such directors or managers shall not be elected in any other manner."

Section 6, Article 12 of the Constitution of the State of Missouri provides the procedure which is applicable to the election of directors of any incorporated company, and reads:

> "In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner."

Sundheim, supra, Section 93, page 92, provides that in order to secure minority representation on the board of directors some jurisdictions confer the right of cumulative voting:

> "In order to secure minority representation on the board of directors, the constitution, or statute law, or both, of

> some jurisdictions confer the right of cumulative voting. These provisions apply to buidling and loan associations, and no notice of an intention to cumulate votes need be given."

In an old decision not overruled, Tomlin v. The Farmers & Merchants Bank, 52 Missouri Appeal Reports 430, l. c. 434, the court held the cumulative plan of voting on directors is authorized by the constitution, namely, Section 6, Article 12, supra, and in so holding the court said:

> "* * * * * * * * * The cumulative vote by stockholders is authorized by the constitution and laws of this state. Constitution, art. 12, sec. 6; Revised Statutes, 1889, sec. 2490. By that plan the stockholder may cast a number of votes equal to the number of shares held by him multiplied by the number of directors to be voted for, and he may distribute the total of such vote as he may desire, among the directors to be elected. As stated by the supreme court of Pennsylvania, speaking of a similar provision, in Pierce v. Commonwealth, 104 Pa. St. 154: 'This section to us seems very plain and unambiguous. If there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast those six votes for a single one of the candidates, or he may distribute them to two or more of such candidates as he may think proper. He may cast two ballots of each of three of the proposed directors, three for two, or two for one and one each for four others, or, finally, he may cast one vote for each of the six candidates.'"

In the above case a resolution was introduced and passed which required them to proceed to elect thirteen directors, each shareholder under the resolution to be entitled to one vote for

each share, to vote for thirteen different directors, and the thirteen receiving the highest number and a majority of the shares to be duly elected, which resolution was not in compliance with the cumulative plan. In discussing the legality of said resolution the court said:

> "* * * * * The question then is, is such resolution contrary to the letter, spirit and intention of the constitution and statute on the subject of such elections and the rights of stockholders? A reading of the resolution and the law is a full answer to the question. They are in direct antagonism. The further question then occurs, can a majority of of the stockholders of a corporation control the law as to the corporation, or place it in abeyance? The answer to this is evident from the mere statement. The right is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder, it can be exercised or not by such stockholder as he may himself elect. Pierce v. Commonwealth, 104 Pa. St. 155. It, therefore, cannot be taken from him by a resolution or by-law adopted by a majority of shareholders."

Therefore, it is well settled in this State that such an election should be held under the cumulative plan as provided in the Constitution and statutes of the State of Missouri. That is, that each member may cast as many votes as shall equal the number of shares of stock so held by him, multiplied by the number of directors to be elected and the total sum may be cast for one or more candidates.

In Tomlin v. The Farmers and Merchants Bank, supra, while the court did not specifically determine just what should be done, it did imply that no new election was necessary but that the successful candidate receiving the majority of votes under the cumulative plan should be seated instead of the candidate that was seated by receiving a majority of votes under the system instituted contrary to the cumulative plan, the court said:

> "* * * * * It is, however, held in New Jersey, under a statute substantially

> like ours, that if the legal votes rejected were, together with those cast for the complaining party, a majority of the total outstanding stock of the corporation, no new election would be ordered, and the complainant would be seated. 1 Beach on Private Corporations, sec. 302; In re Cape May & D. B. N. Co. (1889), 15 Atl. Rep. 191; In re Steamboat Co., 44 N. J. Law, 529. The language of the latter case would seem to authorize the installation of a complainant, in some instances where justice seemed to demand it, who had a majority of legal votes counting those cast and tendered, although they were short of a majority of the total stock outstanding."

If the record fails to disclose how shareholders in the association voted under the cumulative plan then it will necessitate another election to comply with the statutes and the Constitution which requires directors be elected under the cumulative plan as hereinabove described.

Respectfully submitted

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APPROVED:

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