BUILDING AND LOAN ASSOCIATIONS: (1) Effect of voluntary liquidation upon charter; (2) and reorganization of corporation that has voluntarily liquidated but not dissolved.

January 24, 1940 11/26

FILED 58

Honorable J. W. McCammon
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of January 4, 1940, as follows:

> "I. When a building and loan association goes out of business by process of voluntary liquidation, as provided by law, under certain conditions, what is the status of the charter of the aforesaid retiring association?
>
> II. Does the charter automatically die when the association quits business, or does it survive?
>
> III. And if the charter does survive, can it be sold and used by persons who might be interested in organizing a new building and loan association? For more specific example, could the charter of a retiring association be used in starting a new association to operate under a new name?" (numbering of paragraphs ours)

We are presuming that under the request for this opinion that the voluntary liquidation set out therein was not a proceeding either in law or by an agreement of all the stockholders for a complete dissolution. The method for a dissolution of a corporation under the general law was enacted in the Laws of 1921, page 264, now Section 4562, R. S. Mo. 1929, which reads in part as follows:

> "* * * * And whenever, by unanimous vote of all the shareholders, a resolution shall be adopted favoring the dissolution of said corporation, after the payment of all debts, claims or bills, then said corporation may be dissolved without suit by filing an affidavit of dissolution with the secretary of state, setting forth the above facts, and when said affidavit of dissolution is filed it shall be taken as prima facie evidence of such voluntary dissolution."

Under the above section it is noticeable that the procedure of dissolution is not mandatory for the reason that it uses the term "then said corporation may be dissolved without suit." There is no question but that, in order to dissolve a corporation, procedure must be followed as set out by law.

The terms "liquidation" and "dissolution" have been defined thusly:

> "'Dissolution' of a corporation is the termination of its corporate existence in any manner, whether by expiration of the charter, decree of court, act of the Legislature, etc. Cyc. L. Dict. (2d Ed.) p. 318. It becomes civiliter mortuus. 'Liquidation' of a corporation implies the winding up of the affairs of the corporation and settlement with creditors. Lafayette Trust Co. v. Beggs, 213 N. Y. 280, 283, 107 N. E. 644; Assets

> Realization Co. v. Howard, 70 Misc. 651, 676, 127 N. Y. S. 798. Both involve, imply, intend, and contemplate the end of the corporate existence." New York Title & Mortgage Co. v. Friedman, 153 Misc. 697, 276 N. Y. Supp. 72.

In the case of Sunriver Stock and Land Co. v. Montana Trust and Savings Co., 262 Pac. 1039, l. c. 1043, the court made this statement:

> "The grant of the franchise to be a corporation is an exercise of the sovereign power of the state, creating a contract between the state and corporation and its members. 'The consent of the state is expressed in the grant, and that of the corporators in the acceptance of the privilege.' Beyer v. Woolpert, 99 Minn. 475, 109 N. W. 1116. The corporation being granted life by the act of the sovereignty, nothing less than the act of that power, or the lapse of the period of life provided by law, or the dissolution of the corporation by the permission of the sovereignty, can take that life away. And this is true whether the corporation be de jure or de facto. It is true, of course, that under some conditions the functions of a corporation may be in abeyance, but nevertheless its existence as a corporation continues."

In the case of Estel v. Midgard Inv. Co., 46 S. W. (2d) 193, l. c. 195, the court quoted with approval the following:

> "The Legislature may confer jurisdiction on a court of equity to decree the dissolution of a corporation, but

> cannot confer such power upon an executive officer, since such power is judicial and not executive. 7 R. C. L. 724, 733."

And in the same opinion, the court had this to say (l. c. 196):

> "The constitutionality of the statute empowering the secretary of state to declare a forfeiture of a corporate charter has never been passed on by our Supreme Court. Its constitutionality was not questioned, in the present case, in any manner in the court below. It must, therefore, in the disposition of this case, be taken as valid, and given effect according to its true intent and purpose."

Therefore, in examining Chapter 35, Article 2, Revised Statutes of Missouri, 1929, and amendments that have been made by the Legislature from time to time, including the amendments of 1939, we find that the State of Missouri through its Legislature has set up a complete method by which building and loan associations may be formed and it is true that the Laws of Missouri, 1939, at page 268, Section 5627, states that the Supervisor of Building and Loan Associations can take charge of the assets of building and loan associations under the conditions therein set out. This section also provides for the resumption of business whenever according to law it is able to continue business.

Also, under Section 5626, Laws of Missouri, 1939, page 266, assignment of assets is prohibited without first taking the matter up and with the approval of the Supervisor of Building and Loan Associations.

But, from careful study, we are unable to find any statement in the statute which provides that the charter of a building and loan association shall be cancelled or declared void or extinguished in any manner by the Supervisor of Building and Loan Associations. And in the light of the definition

and the very nature of a voluntary liquidation, as differentiated from "dissolution," and in the light of the cases heretofore cited, we are of the opinion that when a voluntary liquidation is had in the manner set forth in your statement, that the functions of the corporation may be in abeyance, but its existence as a corporation continues and the charter does not die; and the only way that complete destruction of the charter can be brought about is that the same shall expire or be dissolved by court action, for it has been said in Section 8002, Fletcher's Cyclopedia, Corporations, Vol. 16, page 766, as follows:

> "But since a corporation may exist without any assets at all, it necessarily follows that it is not dissolved de jure by the mere fact that it is insolvent, and unable to pay its debts,"

and cites the following cases: Title Guaranty Trust Co. v. Sessinghaus, 325 Mo. 420, 28 S. W. (2d) 1001; Ready v. Smith, 170 Mo. 163, 70 S. W. 484; F. G. Oxley Stave Co. v. Butler County, 121 Mo. 614, 26 S. W. 367.

And in the case of Luehrmann v. Lincoln Trust & Title Co., 192 S. W. 1026, l. c. 1031, the court said:

> "Objection is made to the notice by which this meeting was convened. We attach no importance to this; for the law under which it is now claimed the action of the meeting was taken does not authorize the stockholders to dissolve the corporation, but to 'adopt a resolution favoring a dissolution,' upon which the dissolution may be accomplished by the judgment or decree of a circuit court, application for which must be made by petition, and notice given to 'all persons interested in such corporation' by summons. It is evident that no effort was made to proceed under this authority, or in any other way that would bring the appellants into court to assert their claim or try their right. While a corporation of this character may forfeit its charter by misuser or nonuser,

> there is no way by which it may declare itself dissolved, without adjudication, as against a right depending upon its continued corporate capacity. It may, perhaps, under special circumstances, discontinue its business and wind up its affairs with due regard to the rights of all those interested in its assets or activities, but its corporate character remains until the state shall resume it."

I

In conclusion, it is our opinion, in answer to your question No. I, which question is as follows:

> "When a building and loan association goes out of business by process of voluntary liquidation, as provided by law, under certain conditions, what is the status of the charter of the aforesaid retiring association?"

that the charter is in abeyance or stalemated, waiting for the same to be destroyed by appropriate court action, or that all necessary things be done that are required by Chapter 35, Article 2, R. S. Mo. 1929, and subsequent statutes, pertaining to building and loan associations, to the end that the corporation is given strength to carry on the functions, duties and obligations in the light of these statutes, supra, which is under the direction, supervision and acquiescence of the Supervisor of the Bureau of Building and Loan Supervision.

II

In answer to your second question,

> "Does the charter automatically die when the association quits business, or does it survive?"

we are of the opinion that the charter survives for the reasons heretofore set forth.

III

And in answer to your third question,

> "And if the charter does survive, can it be sold and used by perons who might be interested in organizing a new building and loan association?"

we are of the opinion that the answer to this question is "Yes"; provided, however, that it would be within the discretion of the Supervisor of the Bureau of Building and Loan Supervision, and before the organization of a new building and loan association could operate as such, the acquiescence and authority would first have to be obtained from the Supervisor and a strict compliance with the statutes as contained in Chapter 35, Article 2, and subsequent statutes, R. S. Mo. 1929, so that the corporation would be restored to its former condition of successful operation and solvency.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

BRC:EG