BUILDING AND LOAN) Free shares of stock owned by borrowing share-
ASSOCIATION)
holders may not be credited on loan or note at withdrawal value, but such free shares withdrawn and pro-rated according to the statutes.

July 11th, 1933.

Hon. Ira A. McBride
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter of June 15th, which is as follows:

> "Please note the inclosed letter received from Hon. W. H. Meredith, requesting an opinion for the Poplar Bluff Loan and Building Association of Poplar Bluff, Missouri.
>
> Briefly the opinion requested is in regard to the rights of a borrowing shareholder, who is the owner of free shares, to have the withdrawal value of his free shares credited on his note where there are notices of withdrawal on file in such number that the association would be unable to meet the last thereof for some time.
>
> For your information, we are inclosing herewith copy of an opinion in regard to this matter given by the former attorney general. We will appreciate your opinion on this matter at your earliest convenience."

Before answering the question asked, we desire to briefly set out the status relative to shares of stock; stock that is put up as security or collateral to a loan; the payment of the loan; the foreclosure of the loan; and the withdrawal of shares of stock pledged or unpledged.

Section 5593, Laws of Missouri, 1931, page 148, provides in part as follows: (Amended in 1933 by Legislature)

> "* * * and the object of such corporation shall be the accumulation of a capital in money, to be derived from payments by its members in periodical installments or otherwise, at such time and in such manner as shall be provided in the by-laws, and from the profits and accumulation arising from the investment of such payments. The capital so accumulated by any corporation created by virtue hereof shall be divided into shares of equal value; the ultimate value of such shares shall not exceed one thousand dollars. Said capital may be issued in full paid, prepaid or installment shares, in such amounts and at such times and in such manner as may be provided in the by-laws. * * * * * * *"

And further,

> "There shall be issued to every shareholder a certificate signed by the president and secretary of the corporation, and evidenced by its corporate seal, setting forth distinctly and clearly the class of stock for which he has subscribed, the dividends or earnings which it may draw, and the withdrawal value which it may have at any time, and also the time when the said stock shall be withdrawable. Such certificate of stock together with the by-laws and the provisions of this chapter shall at all times determine the liability of the association to the stockholders and the relations of the stockholder and the association."

Section 5594, Laws of 1931, page 149, provides in part as follows:

> "The moneys accumulated from payments on account of stock, interest, premium and fines, as aforesaid, or from any other source whatsoever, after due allowance made for necessary and proper expenses, and subject to the provisions hereinafter set forth respecting the withdrawal and cancellation of shares and accumulation of contingent fund, may, at times provided in the by-laws, be offered to such shareholders or shareholder who shall bid the highest premium for the preference or priority of right to have a loan or advance of a sum equal to the ultimate

value of one or more of his or their respective shares, etc. * * * *."

From a reading of the excerpts from the above sections it will be noted that the building and loan association sells shares of stock to individuals and such are governed by the by-laws and the statutes, and that such shareholders have a right to borrow money up to a sum equal to the ultimate value of his or their shares. We again emphasize this provision above quoted:

"Such certificate of stock together with the by-laws and the provisions of this chapter shall at all times determine the liability of the association to the stockholders and the relations of the stockholder and the association."

Stock thus held by one is governed by the by-laws and the statutes and the value of such shares, the relation of the stockholders and the liability of the association is separate and apart and independent in itself. In other words, a share of stock is a separate and complete agreement within itself.

We now proceed to a loan made by said association to an owner of such shares of stock.

Section 5597, Laws of Missouri, 1931, page 151, reads in part as follows:

"For every loan or advance made as aforesaid, a non-negotiable note or bond secured by first mortgage or deed of trust on real estate shall be given, accompanied by a transfer and pledge of the shares of stock of the member or members so obtaining a loan or advance. Said shares so transferred and pledged shall be held by (the) corporation as additional or collateral security for the performance of the agreements, covenants and conditions of said note or bond and mortgage or deed of trust. Said note or bond and mortgage or deed of trust shall recite and set forth the number of shares transferred and pledged by the particular shareholder so borrowing, and the amount of money advanced thereon, and shall be expressed to be conditioned for the payment at the stated meetings, or at such other times as may be agreed upon, to the corporation of the dues on the number of shares so pledged and advanced upon, and the interest, or interest and premium upon the loan or advance for which said shares are pledged, and said note or bond and mortgage or deed of trust given,

together with all fines chargeable upon arrears of such payment, shall remain in full force and effect until said shares shall reach the ultimate value thereof, and until all payments of dues, interest and fines and all other liens due to such association on account of such shares and loans shall have been fully paid, or said loan shall be otherwise sooner cancelled and discharged: * * * *"

And further at page 152,

"Provided, the association may if authorized in its by-laws, withdraw any part or all of the payments made on said stock and credit the same on the bond or note secured by said deed of trust or mortgage in reduction of said loan."

We have above set out that shares of stock one owns in an association is complete and independent in itself and that a shareholder had the right to a loan or advance equal to the ultimate value of his shares and that upon said owner applying for a loan he would have to give a non-negotiable note or bond secured by first mortgage or deed of trust on real estate and accompany same by a transfer and pledge of the shares of stock he held. It will thus be seen that the giving of the note or bond and the deed of trust is also a separate and distinct transaction. The plan or scheme in which loans are paid being thus; that a member pays into the association on his stock and if, and when, said stock is matured the amount due on such stock will offset the amount such borrower owes on his note. However, in order to effect the set-off as above set out the stock is redeemable according to provisions of the statutes which will be hereinafter set out, the money paid in on stock is never credited to the loan unless as stated in the statute, supra, to-wit:

"Provided, the association may if authorized in its by-laws, withdraw any part or all of the payments made on said stock and credit the same on the bond or note secured by said deed of trust or mortgage in reduction of said loan."

It will thus be observed that if the payments made on the stock are not withdrawn and credited to the bond or note, then, said payment, made on such shares of stock pledged, would not be to the credit of the note.

Section 5601, Laws of Missouri, 1931, page 153, reads as follows:

> "LOANS--WHEN AND HOW CANCELED.--A shareholder may repay a loan at any time upon application to said corporation, upon such terms and conditions as may be prescribed in the by-laws of the association; if there be no such by-laws, then, on settlement of his account, such borrower shall be charged with the full amount of the loan as originally made to him, together with all installments of dues, interest, premium and fines, moneys advanced for taxes, insurance, lien claims, and other sums of money, then remaining due and unpaid, and shall receive and be given credit, if he desires to surrender his shares, for the withdrawal value of the shares pledged and transferred by him as security for said loan, in accordance with the rule hereinafter provided for the withdrawal and cancellation of shares; and where the full amount of the agreed premium bid has been deducted at that time of making the loan or advance, then the borrower shall also be credited with one one-hundred and twentieth part of the amount of the gross premium bid for every month that the series in which the loan was made lacks of being one hundred and twenty months old; and the balance found remaining due, over and above such credit, shall be received by said corporation in full satisfaction and discharge of said loan or advance: Provided, that all settlements made at periods intervening between stated meetings of the directors shall be made as of the date of the stated meeting next succeeding such settlement; and provided further, that a shareholder desiring to retain his shares and membership thereunder may, at his option, repay his loan as above provided, without claiming credit for said shares as part payment of the amount of his debt whereupon said shares ahll be retransferred to him, and he shall assume and be entitled to all privileges of non-borrowing members, free, clear and discharged of and from any claim thereon by reason of said cancelled loan or advance."

Section 5599, Laws of Missouri, 1931, page 152, reads in part as follows:

> "In case any borrowing shareholder shall become delinquent in his obligations to the association

as provided by his loan contract, in a sum equal to or exceeding three months dues and interest, the association may proceed, according to law, to foreclose the mortgage or deed of trust given by such borrower as security for the loan. Etc. * * * *"

We now proceed to the proposition as to the withdrawals by shareholders.

Section 5604, Laws of Missouri, 1931, page 155, reads as follows:

"Any shareholder, or the legal representative of a deceased shareholder, wishing to withdraw from the said corporation, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, delivered to the association at or before a stated meeting of the directors, or at such other time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter. The member so withdrawing, or, if deceased, his legal representative, shall, if his stock be withdrawable according to the terms of the certificate and by-laws of the association, be entitled to receive the amount actually withdrawable at the time of making application for withdrawal according to the by-laws of the corporation and the provisions of the certificate of stock. At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders, whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors; and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of withdrawal upon the following basis: All shares on which notice of withdrawal have been filed for a period of 30 days, shall receive their pro-rata share of the funds available for

> withdrawal at the end of the preceding fiscal month, based upon the withdrawal value of the shares at the time distribution is made. Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

The above section provides the manner of withdrawals and we call your attention particularly to the latter part of such section that provides for the pro-rating of the funds, and particularly this part,

> "Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

From the above it will be noted that shares of stock may be divided for convenience into two classes, viz., first, stock pledged to a loan, and, second, stock not pledged but called "free shares". We have set out that all (both free and pledged) shares of stock are subject to withdrawal in the manner provided in Section 5604, except, that payments made on stock pledged to a loan or advance, and if authorized in association's by-laws, may, when paid, be credited to the bond or note (Section 5597, supra).

The question presented in your letter and enclosures being: The right of a borrowing shareholder, who is the owner of free shares, to have a withdrawal value of such free shares credited on his bond or note when the funds are not available to pay such shares and payment of such is pro-rated as provided in Section 5604, shall the amount received on the pro-rated basis be credited, or shall the entire withdrawal value of such free shares be credited? We think only the pro-rated amount should be credited.

However, at first glance, it would appear that such owner of free shares would have the right of set-off for the full amount of their withdrawal value, and such was the holding of the Court of Appeals of Maryland in the case of Henninghausen and Wolff, Receivers vs. August Tischer, 50 Md. 583, (we do not find where this case was ever cited in any other Maryland case as authority), quoting from the syllabus of the case:

> "A shareholder in a building association who had made a mortgage to it, can set-off, as against the amount due by him to the association under

> the mortgage, certain claims held by him against it, these claims consisting of balances due from the association to members who had withdrawn from the association and assigned them to the mortgagor; and their being nothing in the constitution of the association which made it inequitable to allow the set-off, having due regard to the rights of others.
>
> The appellee could be both shareholder and creditor of the corporation; as shareholder he is liable for his proportion of losses, but as creditor he is entitled to recover the amount due him, independently of all losses, as the balances assigned to him by withdrawing members must be presumed to have been ascertained, after allowing all deductions to which the withdrawing members, (the assignors,) were then subject or liable."

Contrary to this is the recent holding of the Supreme Court of Louisiana of July 20th, 1932, in the case of Conservative Homestead Ass'n. v. Dreyfus, 143 So. 356, wherein the Court in its opinion, l. c. 358, held the following:

> "Relator purchased full paid stock in the association from nonborrowers. By the purchase he acquired no greater right with respect to this stock than his vendors could enforce, and their enforceable rights are clearly fixed in the provisions of law we have quoted. To hold otherwise would subordinate the rights of nonborrowing stockholders and creditors of the association to those of its borrowing members, to the great prejudice of the former and possible liquidation of the association. Such a ruling would be in conflict with the well-recognized principle that the liability of the capital and assets of every corporation is, first, to meet the demands of its creditors. The rights of its stockholders are residuary.
>
> It is shown that, when this suit was filed, there was alarge number of applications on the withdrawal register of the respondent association. These applicants followed the procedure prescribed by law for the withdrawal of membership in the association. We are of the opinion that the only way in which full paid unpledged

stock in a Louisiana homestead building and loan association, as long as there is an unsatisfied list of withdrawals on the association's register, can be surrendered and payment thereof enforced, is by, giving the notice and having the application, as required by section 11 of Act No. 120 of 1902, placed on the association's withdrawal list, for payment in due course. Etc. * * * * * *"

If a borrowing shareholder, who is the owner of free shares, could receive by credit on his note or loan the full withdrawal value of his free shares and not the pro-rated amount nonborrowing members receive then crediting the borrowing shareholder on his note or loan would be an indirect method of paying such free shares their full withdrawal value and discriminates between the owners of such free shares as between borrowing and nonborrowing shareholders.

In the case of Bertche v. Loan & Inv. Ass'n of Mo., 147 Mo. 343 (En Banc) l. c. 359 seq., the Court in its opinion held,

"All members must participate equally in the profits and bear the losses, if any, in the same proportion. This is the fundamental law of building and loan associations organized under the different statutes throughout the Union. The provisions in the borrower's notes and deeds of trust sought to be released, to the effect that the shares of stock pledged to secure their payment shall reach their full par value at the end of one hundred months and the securities canceled and satisfied regardless of the earnings of the association, is clearly subversive of the legislative scheme governing building and loan associations and contrary to the clear letter and spirit of our statutes. Etc. "

And further,

"Besides it would be inequitable and unfair. The rights of the borrowers must be determined from the standpoint of their relation to the non-borrowing stockholders. The former voluntarily applied to and became members of the association, and the by-laws not repugnant to the statute are binding upon them as well as upon the other members of the association. Etc."

And further,

> "The association being organized under a mutual plan must treat all of its members equally, and any contract whereby one stockholder obtains greater share of profits than another would be violative of the principle of mutuality between the stockholders. The plainest principles of justice and honesty clearly forbid that one class of stockholders equally meritorious should be compelled to suffer that others may profit thereby. Etc. * * * *"

See also, case of Reitz, Respondent, v. James Hayward, Assignee Appellant, 100 Mo. App. 216.

From the above and foregoing, it is our opinion that shares of free stock owned by a borrowing shareholder would not be entitled to have such shares credited in the amount of their withdrawal value on his note or obligation, but that such shares owned by him would be withdrawn according to the provisons of Section 5604, supra, and the pro-rated amount realized on such shares, if withdrawn, be placed to the credit, if such borrower directs, to his loan or obligation.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED: Harry G. Waltner Jr (signed)
(Acting) Attorney-General.

JLH:EG