GENERAL BUSINESS CORPORATIONS -- :
SELECTION OF CORPORATE NAME :

A general business corporation organized to handle loans and mortgages may not use the word "bank" in its corporate name under sub-paragraph (b), Sec. 7, of the Corporations Act, Laws of Missouri, 1943.

October 4, 1945

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

Dear Mr. Morris:

Your letter of September 21, inst., requesting an opinion from this Department as to the legality of a corporation, organized for the purpose of handling loans and mortgages, adopting as its corporate name "First Bank Plan, Inc.", has been received.

Your letter states:

> "Application has been filed with the Secretary of State for incorporation to handle loans and mortgages under the name 'First Bank Plan, Inc.' My thought is that the banks doing business in the same city would object to this title and I would like to inquire if there is any legal prohibition in this connection. Paragraph (b), Section 7 of the Corporations Act, Laws, Missouri, 1943, may prohibit the use of the word 'bank' in the corporate name of a company not engaged in the banking business."

Your letter calls special attention to paragraph (b), Section 7 of the Corporations Act, Laws of Missouri, 1943, page 418. Said paragraph (b) in prohibiting the use of certain words and phrases in the name of a business corporation, is as follows:

"The corporate name:

* * * * * * * * *

"(b) Shall not contain any word

> or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized under this Act."

The Legislature of this State in the new Corporations Act of 1943, Laws of 1943, page 410, l.c. 438, Section 51, gives the Secretary of State discretionary power to determine if the Articles of Incorporation of a proposed corporation submitted to him comply with the laws of this State, before he is required to issue a certificate of incorporation to the incorporators. That part of said Section 51 so providing, is as follows:

> "The articles of incorporation, in duplicate, signed, sworn to and acknowledged by all the incorporators as required in section 49 shall be delivered to the office of the Secretary of State. If the Secretary of State finds that the articles of incorporation conform to law, he shall, when the required organization taxes or fees have been paid, file the same, and one of such copies shall be retained by the Secretary of State as a permanent record. The Secretary of State thereupon shall issue a certificate of incorporation under the seal of the State that said corporation has been duly organized, such certificate to set forth the name of the corporation, the amount of its authorized shares, the period of its existence and the address of its initial registered office. * * * "

In the exercise of the discretionary power with which the Secretary of State is clothed, to determine whether incorporators have complied with the laws of this State before he shall be required to issue a certificate of incorporation, he has the power, if they have not so complied with the laws of this State to refuse such certificate. The Legislature in said Act of 1943, page 489, Section 170, gives the Secretary of State broad and

comprehensive discretionary powers reasonably necessary for the enforcement and administration of the Act. Said Section 170, is as follows:

> "In addition to the power and authority heretofore expressly given the Secretary of State by this Act the Secretary of State also shall have such further power and authority as is reasonably necessary to enable him to administer this Act efficiently and to perform the duties therein imposed upon him."

Incident to the evident intention of the Legislature in separating the organization of banks and the carrying on of the business of banking under a separate code, from the laws pertaining to organization and conduct of corporations generally, we cite a part of Section 7890, Article 1, Chapter 39, under the Act creating the Department of Finance of this State. That part of said Section 7890, referred to, is as follows:

> "No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, * * * * or of engaging in any other form of banking; * * *"

Section 7991, R.S. Mo. 1939, also prohibits the use by any person or corporation of any artificial or corporate name including any word or words that would indicate such business is the business of a bank. Said Section is as follows:

> "No person, except a national bank, a federal reserve bank, or a corporation duly authorized by the commissioner to transact a banking business

> in this state, shall make use of any office sign at the place where such business is transacted having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank; nor shall any such person or persons make use of or circulate any letterheads, billheads, blank forms, notes, receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever, having thereon any artificial or corporate name, or other word or words, indicating that such business is the business of a bank. Every person violating this provision shall forfeit the sum of one thousand dollars to the state. "

The text in Volume 7, Corpus Juris, page 473, defines a bank as follows:

> "While the term 'bank' has received a number of definitions differing considerably in language, but all expressing of course the same fundamental ideas, and the sense in which it is intended to be used is largely determined by its connection with other language, perhaps the most concise and at the same time complete definition to be found in the books is that a bank is 'an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, * * *"

Said Volume 7, Corpus Juris, page 477, defines banking as follows:

> "Banking is the business or employment of a bank or banker; and as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making

> loans of money on collateral security, * * * "

Section 7998 of Article 2, Chapter 39, R.S. Mo. 1939, under the title of "Banks" defines a bank as follows:

> "The term 'bank' shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidence by a certificate of deposit, a pass book, a note, a receipt, or other writing."

We find no case in this State where our Courts have passed upon the question of using the word "bank" as a part of the corporate name of a business corporation other than a banking corporation, but we do find some cases in other jurisdictions, and in Missouri, which, in principle, are analagous to the question here, some of which decisions are based upon facts more or less similar to the facts in the case submitted here.

The State of Ohio has a statute numbered 710-2, defining banks in the exact words in which our Section 7998, R.S. Mo. 1939, supra, defines a bank. That State also has a statute numbered Section 710-3 of the General Code of Ohio, confining the word "bank", "banker," "banking," or "trust," to banks as defined in the preceding Section (710-2), which, as above indicated is exactly the same as our Section 7998.

The Supreme Court of the State of Ohio had before it, in the case of Inglis v. Pontius, Superintendent of Banks, et al., 131 N.E. 509, the construction of the two above mentioned Ohio statutes. Those statutes are set out verbatim, l.c. 510, of said volume.

The facts in that case were that a firm of the name of Otis & Co. of Cleveland, Ohio, which conducted the business of brokers and dealers in investment securities, had on their letter-heads and other forms of advertising, the following name: "Otis & Co. Investment

Bankers. Cleveland."

In another advertisement the name appeared as "Otis & Co. Members -- New York Stock Exchange. Investment Bankers. Cleveland."

In still another form of advertising, was the following: "Otis & Co. Cleveland, Ohio, Investment Bankers."

The Superintendent of Banks of the State of Ohio, ordered the firm of Otis & Co. to discontinue the use of the word "bankers" in the conduct of its business, having ruled that the word "bankers" used in the advertising matter of said company constituted a violation of Section 710-3 of the Ohio General Code. It appears that the company requested the Superintendent of Banks to file an injunction against the company to test the matter. The Superintendent refused to bring such an action. Thereupon, one Inglis, one of the partners of the firm of Otis & Co., instituted the above styled suit to enjoin the firm from discontinuing the use of the word "bankers". The Superintendent of Banks was made a part defendant, and injunctive relief was sought restraining the Superintendent from bringing any action against the partnership or the individual members thereof to subject them to the penalties prescribed for the violation of said Section 710-3 of the Ohio General Code. There was a judgment for the plaintiff in the lower Court. The case was appealed to the Supreme Court of Ohio for review. Overruling the defenses made by the firm of Otis & Co., among which defenses that the word "incorporated" does not immediately follow the business title of "Otis & Co.", and, further, that "Otis & Co." had been, and was, investing portions of its funds otherwise than in those securities permissible to banks of deposit. The Court said those defenses were unimportant unless it should be claimed that Otis & Co. was in fact a bank. There was no claim that said company was a bank.

The Court then discussed the value of the word "bank" to a corporation doing a banking business, naming the many protections thrown around the banking business, both on account of the trust and confidence people of the community have, and should have, in a bank, and pointing out that the improper use of the words "bank" and "banker" might be an aid to the practise of the sale of securities of doubtful value. The Court in holding that

the adoption and use in the letter-heads and advertising matter of the firm of the words "Investment Bankers" was unauthorized and in violation of the said statutes of the State of Ohio, l.c. 511, said:

> "It will be seen, therefore, that the use of the word 'bank' or 'banker' is a valuable adjunct to any business, and the protection of the provisions of the Banking Code should therefore be available only to those institutions which are subject to the regulations and restrictions imposed upon such institutions by the Banking Code.
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> "If we are correct in this, then it is no hardship upon any person, firm, or association to be denied the right to use the word 'bank,' or a kindred term, as part of its name or designation. All of the foregoing defines the atmosphere which was being breathed by the General Assembly in framing and adopting section 710-3, General Code, and should therefore aid in ascertaining the legislative intent."

It is true that the statute of Ohio, Section 710-3 prohibited the use of the word "bank", etc., and here in our banking code we have no such statute. But we submit that the protection in the Ohio statute of the use of the word "bank" by a corporation not doing a banking business is no stronger, as a basis for the decision of the Supreme Court of Ohio above cited and quoted, than is our sub-section (b) of Section 7, Laws of Missouri, 1943, page 418, is in prohibiting ordinary business corporations from using <u>any</u> word or phrase in its corporate name which would indicate or imply that it is organized for any other purpose than a purpose for which corporations may be organized under that Act. Corporations organized under the said Act of 1943, cannot do a banking business. To allow one so organized to use as its corporate name "First Bank Plan, Inc.", would, we think, give basis for the belief by the public that such corporation had some lawful financial plan in operation such as

banks, under the banking code, are permitted to employ.

In 14 Corpus Juris, page 310, the text in the latter part of Section 373, recites that in the State of New York, by statute, no corporation can be organized under the laws of the State with the word "trust," "bank," "insurance," etc., as a part of its name, except a corporation formed under the banking or the insurance laws. Under footnote 15, is cited the case of Barker v. Koenig, 119 N.Y.S. 777, in which the Supreme Court, Appellate Division, construed said statute. The opinion states the facts of the case. The opinion is not lengthy. In holding that the use of the word "Lloyds", although not expressly prohibited by the statute as a part of the corporate name of a business corporation not doing an insurance business, should not be used because the word "Lloyds" had become so generally understood and identified with insurance that it would violate the terms of said statute, the Court rendered the following opinion, to-wit:

> "McLAUGHLIN, J. Wendell P. Barker and others, the appellants, desired to form a corporation under the business corporations law of the state of New York to do a general business as insurance agent or broker. They accordingly tendered to the Secretary of State a certificate of incorporation, together with the fees for filing and recording the same. The name of the proposed corporation was stated in the certificate to be 'Lloyds, New York, Incorporated.' The Secretary of State refused to file the certificate or accept the fees, on the ground that certain 'Lloyds' companies were already lawfully doing business in the state. The appellants then applied for a peremptory writ of mandamus to compel him to file and record the certificate. The application was denied, and they appeal.
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> "In opposition to the motion there was submitted an affidavit by the State Superintendent of Insurance, from which it appeared that an unincorporated association or partnership known as 'Lloyds, New York,' was already doing an insurance business in the state of New York. The proposed corporation was to act as agent for this

association, and objections were made, not only because of the similarity of the names, which would be likely to deceive the public, but also on the ground that the association was not lawfully entitled to do an insurance business. The Superintendent of Insurance also objected to the name chosen for the corporation on the ground that the word 'Lloyds' has become synonymous with 'insurance' and that section 6 of the general corporation law (chapter 28, p. 15, Laws 1909 (Consol. Laws. c. 23)) provides that no corporation shall be organized with the name 'insurance' in it, except a corporation formed under the banking or the insurance law. The object of the statute referred to was to prevent any corporation, except one subject to control of the insurance department, from using in its corporate name the word 'insurance' and posing as an insurance company, when it was not in fact.

"It is strenuously urged by the appellants that the word 'Lloyds' is not synonymous with 'insurance.' Nevertheless it is not and cannot be seriously denied that by the use of the word it has come to be so understood by the general public. That being so, if the proposed corporation is allowed to use the word 'Lloyds' as a part of its corporate name, when it is not an insurance corporation and cannot do an insurance business, but simply act as agent, the result necessarily will be to deceive or mislead the public, and that is precisely what the statute was designed to prevent. It is true the statute does not expressly prohibit the use of the word 'Lloyds' as a part of the name of a corporation; but its use would be none the less an imposition upon the public,

> and contrary to public policy, as indicated by the statute.
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> "I am of the opinion, therefore, that the Secretary of State was justified in refusing to file the certificate, and the court did not err in denying the application for a peremptory writ to compel him to do so.
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> "The order appealed from is affirmed, * * * . All concur."

In the enactment of sub-section (b) of Section 7, supra, the evident intention of the Legislature was to point out that the name of a business corporation organized under that Act should not only be confined to the purposes for which corporations might be organized under said Act, but also that it should constitute protection to other classes of corporations organized for entirely different kinds of business, such as banks.

The word "implies" as used in said sub-section (b) supra, is the present tense of the transitive verb "imply". As such verb the word "imply" is defined in Webster's International Dictionary, page 1250, in definition 3, as: "to express indirectly; to suggest; to hint or hint at".

It seems quite likely that the public in observing such a corporate name as "First Bank Plan, Inc." would imply from the name that the corporation was carrying on some plan of financial procedure that partook of banking activities. This proposed corporation, it is said, intends to handle mortgages and loans. This statement of its purpose would indicate that the institution, if incorporated, would do a brokerage and discounting business on such securities. This could become very readily the means of confusion to, and misleading of the public as to the purpose for which the institution was organized, and also lead to the belief it was authorized to do a banking business on some plan.

CONCLUSION.

It is, therefore, the opinion of this Department that the above statutes and authorities point out a legal

prohibition as suggested in your letter to the use of the words "First Bank Plan, Inc.", by a corporation organized to handle loans and mortgages, and that it was the intention of the Legislature of this State in enacting sub-paragraph (b), Section 7, of the Corporation Act, Laws of Missouri, 1943, to prohibit the use of any word such as the word "bank", in the corporate name of a company not engaged in the banking business, and that said sub-paragraph (b) does so prohibit the same.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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