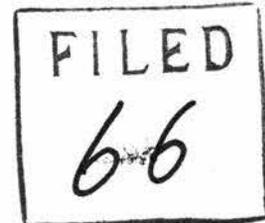


CORPORATIONS - Dissolution: A banking corporation is not dissolved by reason of the sale of its assets or property to another banking corporation.

November 29, 1948



Honorable Edgar C. Nelson
Secretary of State
Jefferson City, Missouri

Attention: Honorable W. Randall Smart
Supervisor of Corporations

Dear Secretary Nelson:

This will acknowledge your letter of recent date requesting an opinion from this Department on the question of the acceptance by your Department of an anti-trust affidavit and an annual registration report for the year 1948, of the Bank of Tina, Carroll County, Missouri, and in which there is involved the further question of whether the Bank of Tina now exists as a corporation. Your letter is as follows:

"For many years, this department has maintained a record of all banks, excepting national banks of this state. Any instruments in connection with the articles of incorporation are first filed and approved by the Finance Department, with the exception of the anti-trust affidavit and annual registration report, which are filed with this department annually.

"The Bank of Tina was incorporated the 25th day of April, 1924 and we are advised that under date of February 22, 1943 that the assets and obligations were taken over by the Farmers and Merchants Bank of Hale, Mo., and, we are advised by the State Finance Department that the bank has had no legal corporate existence since that date and with that information, this department refused to accept the anti-trust affidavit and annual registration report for the year 1948. The State

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Finance Department does not recognize this company as a corporate entity. This company insists that this department accept the filing of these reports and continue this company in good corporate standing.

"We would appreciate if you would kindly advise this department if we may properly accept the filing of these reports under the facts and law."

It appears from your letter that the Bank of Tina was incorporated on April 25, 1924, and that on February 22, 1943, the bank sold and disposed of its assets and the same were purchased by the Farmers and Merchants Bank of Hale, also of Carroll County, Missouri. Your question here is whether, by reason of the circumstances of the said respective sale by the Bank of Tina of its assets and their purchase by the Farmers and Merchants Bank of Hale, Missouri, there was accomplished a disincorporation or dissolution of the said Bank of Tina so that it would not be empowered to make the anti-trust affidavit and pay the annual franchise tax to your Department.

You state in your letter that: "The State Finance Department does not recognize this company as a corporate entity."

It may be, in taking that position, and upon such information your Department appears to have refused to accept the anti-trust affidavit and the annual franchise tax from the Bank of Tina, that the Finance Department is influenced by the terms and provisions of Section 7974, R.S. Mo. 1939. We will discuss that Section and its effect upon the sale of the assets of one bank to another as bearing upon consolidation or merger, or the possibility of the sale of such assets constituting in law a dissolution of a bank which sells its assets--in this case, the Bank of Tina,--later in this opinion.

There are numerous methods which may be employed to institute and carry out proceedings for the dissolution of a corporation under the statutes and decisions of Missouri. The dissolution of a corporation may be undertaken and accomplished, according to the facts existing in each case, upon one of the following grounds, to-wit:

- 1) When the time for which a corporation is organized to exist has expired, unless organized to exist perpetually, without a renewal of the period of its existence.

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2) By electing to dissolve voluntarily without invoking legal procedure as provided in Section 79 of the new Corporation Code of this State, Laws of Missouri, 1943, page 454.

3) By electing to dissolve voluntarily with the approval of the Secretary of State, or by a decree dissolving the corporation entered of record by a court of equity, as provided in Sections 80, 81 and 83 of the new Corporation Code of this State, Laws of Missouri, 1943, pages 454, 455 and 456.

4) By involuntary dissolution upon information filed by the Attorney General for any of the causes mentioned in Section 84, new Corporation Code, Laws of Missouri, 1943, page 457, and following the provisions of Sections 84, 85, 86, 88 and 94 of the new Corporation Code of this State, Laws of Missouri, 1943, pages 457, 458, 459 and 461.

5) By being proceeded against in quo warranto by the State at the relation of the Attorney General for violation of its charter and corporate franchise or for violation of the criminal laws of the State, or for the violation of the Anti-Trust Laws of the State.

6) By being proceeded against in quo warranto by the State at the relation of the Attorney General for failure and refusal to pay its annual franchise tax, or to file the anti-trust affidavit required of any such corporation by law.

The above are the usual, and, so far as we are advised, customary, though not exclusive, methods which may be employed, according to the grounds and facts existing for procedure, in the dissolution of a corporation in this State. There are perhaps other methods, such as the sale of the property of a corporation by the State under a State lien thereby destroying the objects for which the corporation was instituted, (see: 48 Mo. 548), and, no doubt, the sale of the assets of a corporation under a decree of a federal court in re-organization or in bankruptcy

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would accomplish the same result. There may be methods to dissolve a corporation other than those we have mentioned, but we are not concerned with them here.

The corporation here under question--the Bank of Tina--has not itself, according to the facts before us, voluntarily undertaken to dissolve, nor have involuntary proceedings been instituted against it by any authority to accomplish its dissolution upon any of the grounds above enumerated.

There is no statute, decision or rule of text law of which we are advised, which approves or advocates the sale of the assets of a corporation, in and of itself, or the cessation of its business as resulting in the dissolution of such corporation. There is an abundance of sound authority to the contrary. Our Supreme Court has so held in numerous cases, from two of which we herein quote, and so does Corpus Juris as a text authority so hold, citing Missouri Supreme Court cases and cases from many other States. 14A C.J., 1116, on this principle states the following text:

"Since the possession of property is not essential to corporate existence, it follows that the transfer or loss by a corporation of all its property cannot work a dissolution.
* * * ."

Our Supreme Court in the case of Kansas City Hotel Co. vs. Sauer, 65 Mo. 279, on this point, in its decision, l.c. 288, held:

"The sale, however, of the hotel property by plaintiff would not per se accomplish its dissolution (Hill v. Fogg, 41 Mo. 563), nor would a dissolution of corporate existence be implied by mere cessation of active business. * * * ."

The case of State National Bank of St. Joseph vs. Robidoux, et al., was before our Supreme Court, reported in 57 Mo. Rep. 446. One question involved in the case was whether the Bank of Missouri could dispose of its property by sale or assignment to the plaintiff, the State National Bank of St. Joseph, and whether the purchaser, or assignee, of the lien of the Bank of Missouri could sue the defendants on a covenant in regard to the payment of taxes. The Court held that the assignment of its property by the Bank of Missouri to the plaintiff bank was valid and that the plaintiff bank which has succeeded by assignment to the lien sued

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on could maintain the suit, although the plaintiff bank had ceased to carry on its business, and that plaintiff bank was not dissolved by reason thereof. The Court, in so holding, l.c. 451, said:

"* * * It further claimed that the plaintiff has ceased to do business for 18 months before this suit was instituted; and therefore is an extinct corporation and has no right to sue. No evidence was adduced to show that the plaintiff was deprived of the right to sue. Its cessation of active business does not imply a dissolution of the corporation, so as to deprive it of its right of action."

These authorities indicate very clearly that the sale of the assets of one bank to another, such as was had in the transaction between the Bank of Tina and the Farmers and Merchants Bank of Hale, did not amount to the dissolution of the Bank of Tina.

Referring again to the provisions of Section 7974, R.S. Mo. 1939, hereinabove mentioned, as possibly being the grounds upon which the Commissioner of Finance takes the position that because of the sale of its property the Bank of Tina is no longer recognized by that Department as a corporate entity, our attention is called to the case of Mercantile Home Bank & Trust Co. vs. U.S., et al., reported in Volume 96, Federal Reporter, Second Series, page 655, in which the terms of said Section 7974, R.S. Mo. 1939, then Section 5379, R.S. Mo. 1929, were construed and applied, in determining whether the sale of the assets of three banks involved in the facts of the case to another bank constituted a consolidation or a merger of the selling banks and the purchasing bank, and, if a consolidation, incidentally, a dissolution of the consolidating corporation would follow. The case grew out of the controversy over whether the bank purchasing the assets of the three other banks became liable as a merged bank, or a consolidated bank, for federal income taxes due the United States Government from one of the selling banks. The United States Circuit Court of Appeals, 8th Circuit, in its decision in the case discussed fully the questions bearing on consolidation and merger and the attendant question of dissolution because of the sale of the assets of the three banks mentioned in the case to the purchasing bank which was one of the parties to the suit, to-wit: Mercantile Home Bank & Trust Co. The Court held that there was no consolidation or merger of the three banks with the purchasing bank by reason of the sale, under the terms of Section 5379, R.S. Mo. 1929 (now our Section 7974, R.S. Mo. 1939, and that the

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purchasing bank was not liable for the income taxes of one of the selling banks. The Court also held that there was no dissolution of the banking corporation owing the income taxes, and which sold its assets to the Mercantile Home Bank & Trust Co. because of such sale to the purchasing bank. The Court seems to have based its opinion that there was no dissolution largely, if not entirely, upon a set of existing facts which the Court recites, l.c. 658, with respect to the conduct of the Home Trust Company after the sale, which recital is as follows:

"* * * It continued to make such reports as were required by law to the state and federal authorities. It paid its annual franchise taxes to the State of Missouri and its annual state corporation taxes every year since February 25, 1933. The directors of that company since that time held regular meetings and from time to time held informal meetings for the purpose of determining matters of settlement and sale of real estate."

Said Section 7974 under casual reading would seem to indicate that a bank may sell the whole or any part of its assets, or the whole or any part of its business or departments to any other bank or trust company, state or national, only for the purpose of consolidating or merging with the bank or trust company to which such assets are sold. Thus, the terms of said Section 7974 might very well be somewhat misleading to the Department of Finance so that they might believe that if a bank sold its assets to another bank a consolidation would be thereby effected with the purchasing bank by such sale, and the selling bank would be thereby automatically dissolved. This, as we have shown by the above cited authorities would not be the case. The Federal case just cited and here being discussed, construing said Section 7974, then Section 5379, R.S. Mo. 1929, holds definitely that the sale of the assets of one State bank to another State bank under the terms of what is now our present Section 7974, R.S. Mo. 1939, does not and could not result in a consolidation or merger of the banks, and, therefore, no dissolution of the selling bank. The United States Circuit Court of Appeals in said case in its decision, l.c. 660, further said:

"* * * 'But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation.'

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"In Cortland Specialty Co. v. Commissioner, supra, the court was considering the statute with reference to reorganization, merger, or consolidation. In the course of the opinion it is said: 'A sale of the assets of one corporation to another for cash without the retention of any interest by the seller in the purchaser is quite outside the objects of merger and consolidation statutes.'"

We are advised by your Department that the corporation known as the Bank of Tina has, regularly and promptly each year, executed and submitted to your Department the anti-trust affidavit required by the statutes of this State of all such corporations, and that it has promptly paid its annual franchise tax and made its annual registration report, as required by statute, and for the year 1948 tenders such affidavit, report and tax to your Department. This being the case, this bank would come within the terms of the facts described by the Court in the Mercantile Home Bank & Trust Co. case, supra, and is well within its rights by reason thereof to assert that it still has corporate existence.

CONCLUSION

It is, therefore, the opinion of this Department, considering the facts disclosed by your letter and conferences with your Department respecting the sale of the assets of the Bank of Tina to the Farmers and Merchants Bank of Hale, Missouri, that there was no consolidation or merger involved in the transaction. It further appearing that the Bank of Tina having complied with the statutes of this State, or endeavored so to do necessary to maintain its corporate existence, and under the authorities hereinabove cited and quoted, it is our further opinion that the Bank of Tina was not dissolved by reason of the sale of its assets to the Farmers and Merchants Bank of Hale, Missouri, nor for any other cause or reason whatsoever shown by the facts before us but that it still maintains and enjoys its corporate existence under the charter granted it by the State of Missouri. It is the further opinion of this Department that, under the facts and authorities herein contained that you should accept the anti-trust affidavit and annual registration report and the annual corporate franchise tax tendered to your Department by the said Bank of Tina for the year 1948, and for such other years in the future as said corporation may tender them under its present corporate standing.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General