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CORPORATIONS-APPLICABILITY OF GENERAL CORPORATE DISSOLUTION PROCEDURE TO ASSOCIATIONS ORGANIZED UNDER BUILDING AND LOAN ACT

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COMMENTS

CORPORATIONS—APPLICABILITY OF GENERAL CORPORATE DISSOLUTION PROCEDURE TO ASSOCIATIONS ORGANIZED UNDER BUILDING AND LOAN ACT—Building and loan associations[1] are organizations designed for the general purpose of accumulating by gradual payments of their members a fund to be invested primarily in loans on real estate.[2] At present these organizations almost invariably are corporations for profit. Because of their economic importance[3] these associations have long been regarded as affected with a public interest and therefore subject to a higher degree of regulation than would be sustained in the case of ordinary profit-making corporations.[4] Special legislation is necessary because building and loan associations differ widely from other corporations in financial structure and operation.[5]

In spite of differences, an incorporated association does fall within the larger category, "corporation," and is therefore subject to many of the general corporation laws.[6] Similarly, building and loan associations are financial institutions and are subject to general provisions regulating such organizations.[7]

Obviously, the fact that there may be two, and possibly three, sets of overlapping laws regulating the activities of building and loan associations poses complicated problems as to the law governing particular situations.

[1] Building and loan associations developed from early building societies which were used exclusively as a means of acquiring homes, membership being restricted to home-seekers. Modern institutions, having the twofold purpose of encouraging saving and providing credit for homes, are more accurately termed "savings and loan associations." See generally BODFISH AND THEOBALD, SAVINGS AND LOAN PRINCIPLES 27-45 (1938); SUNDHEIM, LAW OF BUILDING AND LOAN ASSOCIATIONS, §§1-3 (1933); 9 AM. JUR., Building and Loan Associations, §§1-3 (1937).

[2] Ibid.; 5 Words and Phrases 897 (1940). For examples of statutory definitions, see Ariz. Code Ann. (1939) §51-601; N.Y. Banking Law (McKinney, 1942) §2.

[3] In 1946, it was estimated that these associations held 10 billion dollars, or 8% of the savings of the public, and were financing 70% of all veterans' home loans. See SAVINGS AND LOAN ANNALS 3-14, 75, 79 (1946).

[4] 9 AM. JUR., Building and Loan Associations, §8 (1937); 78 A.L.R. 1090 (1932).

[5] Share accounts in building and loan associations occupy a position somewhere between stock investments in ordinary corporations and deposits in savings banks. See generally BODFISH AND THEOBALD, SAVINGS AND LOAN PRINCIPLES 80, 88, 150 et seq. (1938).

[6] Id. at 88.

[7] See, for example, N.Y. Banking Law (McKinney, 1942) §2: "The term, 'banking organizations,' when used in this chapter, means and includes all banks, trust companies, . . . savings and loan associations. . . ." Many statutory provisions refer generally to "banking organizations."

This comment, dealing primarily with one phase of the general problem, will seek to summarize what the courts and legislatures have decided as to the applicability of dissolution provisions in general corporation acts to building and loan associations incorporated under special acts.

A. Legislative Approach to the General Problem

In some states, both the general corporation acts and building and loan (or "special") acts are wholly silent as to the applicability of the general corporation act to building and loan associations incorporated under a special act.[8] In other states, the legislatures have tried to solve the problem in various ways.

1. In some states the legislatures have enacted statutes which in terms except building and loan associations from all or some provisions of the general corporation acts.[9]

2. In other states it has been expressly provided in the special act or the general corporation act that provisions of the latter shall apply to building and loan associations: (a) unless provided to the contrary in either act, or unless the provisions of the general corporation act are inconsistent with corresponding provisions of the special act,[10] and (b) insofar as the powers conferred by the general corporation act shall be necessary in conducting the business of a building and loan association.[11]

3. Some statutes specifically incorporate by reference certain parts of the general corporation act into the building and loan act.[12]

[8] Unless the term "associations" in Ariz. Code Ann. (1939) §53-202 means building and loan associations, the Arizona Code is silent.

[9] In Indiana, the term "corporation," as used in the general corporation act, is defined as "any corporation formed under this act. . . ." Ind. Stat. Ann. (1948) §25-101, but §25-201 states that "corporations may be organized for pecuniary profit under this act for any lawful business purpose *except . . . building and loan business.*" (Italics added).

Pa. Stat. Ann. (Purdon, 1938) tit. 15, §§1074-1302 specifically repeals all dissolution sections in the general corporation act in so far as they relate to building and loan associations. See also, id., tit. 15, §§ 1074-1303 (general repeal of all inconsistent acts).

Other methods of accomplishing the same results are exemplified by N.Y. Gen. Corp. Law (McKinney, 1943) §§100, 71.

[10] Cal. Gen. Laws (Deering, 1944) Act 986, §2.01; Mich. Stat. Ann. (1937) §21.3.

[11] N.Y. Banking Law (McKinney, 1942) §383.

[12] Ohio Gen. Code (Page, 1938) §9665, providing for voluntary dissolution of building and loan associations, incorporates by reference §§8623.80 to 8623.83 of the general corporation act.

B. General Judicial Approach to the Problem

The most important factor (except the wording of the statutes) in determining a court's construction of ambiguous statutes is the legislative purpose behind the enactment of the statutes.[13] Courts seem generally to agree that the primary purposes behind all special legislation pertaining to financial institutions are (1) safeguarding the institutions themselves (because they are affected with a public interest), and (2) safeguarding investors' interests in them. Frequently mentioned methods of executing these purposes are a high degree of statutory regulation of these institutions and a large amount of supervisory control vested in administrative agencies.[14]

Because the same general policy and purpose underlie special statutory treatment of all financial instituitons, some states have undertaken to regulate certain activities (such as dissolution) of such institutions by means of general financial institution provisions.[15] In other states, although each type of financial institution is separately treated by statute, the statutory treatment of all types of financial institutions, and judicial precedent thereunder, will generally be persuasive authority to the courts.[16]

The varying phases of corporate activity of financial institutions require different types and amounts of regulations, supervision, and special treatment. Therefore, so far as applicability to building and loan associations is concerned, each provision in the general corporation act will be treated separately; though in cases where policy considerations are similar, the construction placed upon one will usually be persuasive authority for similar treatment of the other.[17]

C. Judicial Treatment of Various Methods of Dissolution

A general corporation act usually specifies a number of different

[13] This frequently seems synonymous with the court's views on public policy. See dissent in State ex rel. Bettman v. Court of Common Pleas, 124 Ohio St. 269; 178 N.E. 258 (1931). In discovering the legislative purpose it may be necessary to look at the circumstances at the time of the law's enactment, the necessity for it, the evil intended to be cured by it, and especially the consequences of various constructions. CRAWFORD, THE CONSTRUCTION OF STATUTES §160 (1940).

[14] Craughwell v. Mousam River Trust Co., 113 Me. 531, 95 A. 221 (1915); In re Peoples Finance and Thrift Co. of San Diego, 61 Cal. App. (2d) 11, 141 P. (2d) 742 (1943); 12 C.J.S., Building and Loan Associations, §4 (1938).

[15] See note 7, supra; also Ind. Stat. Ann. (1933) §18-901 et seq..

[16] State ex rel. Bettman v. Court of Common Pleas, 124 Ohio St. 269, 178 N.E. 258 (1931).

[17] People v. New York Title and Mortgage Co., 346 Ill. 278, 178 N.E. 661 (1931).

methods of corporate dissolution.[18] Policy considerations, which seem largely to determine the legislative purpose found by the courts, vary widely among the different methods of dissolution.

1. *Involuntary Dissolution.* General Corporation Act provisions, authorizing suits by minority stockholders for compulsory dissolution, are usually found to be inapplicable to associations formed under a building and loan act.[19] Writers admit that this remedy frequently opens the door to vexatious suits which can be a serious annoyance to any type of corporation.[20] Building and loan associations (like banks) are in a business where public confidence is essential to their success, and they are usually said to be "affected with a public interest." Therefore, courts generally find, with or without the aid of a specific statutory provision, that the usual statutes, providing for official initiation (by the building and loan commissioner, etc.) of involuntary dissolution of building and loan associations, are exclusive.[21]

2. *Voluntary Dissolution under a General Act where No Voluntary Dissolution Provision Exists in the Special Act.* The general rule has been stated that in the absence of statute, the unanimous consent of the directors and shareholders of a solvent business corporation is required before it can dissolve voluntarily and wind up its affairs.[22] Occasionally, building and loan acts do not contain provisions authorizing voluntary dissolution. The question then arises whether a building and

[18] Fletcher lists six separate types of dissolution: "(1) By an act of the legislature repealing or withdrawing its charter . . .; (2) by the expiration of a time limited for the continuance of its corporate existence; (3) by the happening of some contingency prescribed in its charter; (4) by the failure or loss of some integral part of the corporation, so that it cannot longer exist; (5) by a surrender of its charter, provided the surrender is authorized or accepted by the state; and (6) by the forfeiture of its charter in a judicial proceeding." 16 FLETCHER, CYC. CORP., perm. ed., §7976 (1942).

Frequently, statutes will provide a number of alternative procedures as subdivisions of each general type. Thus Illinois provides three methods of voluntary dissolution (infra, note 25).

[19] 35 COL. L. REV. 265 (1935), 78 A.L.R. 1090 (1932). Ohio provides an interesting illustration of the general rule. In State ex rel. Bettman v. Court of Common Pleas, 124 Ohio St. 269, 178 N.E. 258 (1931), the Ohio court held that the power to institute proceedings for involuntary dissolution, vested in the superintendent of building and loan associations, is adequate and therefore exclusive. This conclusion was reached without the aid of a statute. In 1933, §687-19 [Ohio Gen. Code (Page, 1938)] became effective, also declaring the above procedure exclusive. In 1935, Slocum v. Mutual Bldg. and Invest. Co., 130 Ohio St. 312, 199 N.E. 175 (1935) reached a conclusion consistent with statute and precedent. In 1936, however, the Ohio court, motivated by policy considerations, wrote an inconsistent exception into Ohio law. See Toot v. Beach, 131 Ohio St. 78, 1 N.E. (2d) 940 (1936).

[20] BALLANTINE, CORPORATIONS, §306 (1946).

[21] Craughwell v. Mousam River Trust Co., 113 Me. 531, 95 A. 221 (1915); cases cited in note 19, supra.

[22] BALLANTINE, CORPORATIONS, §281 (1946). But cf. 16 FLETCHER, CYC. CORP., perm. ed., §8021 (1942).

loan association (a) can dissolve under the voluntary dissolution clause in the general corporation act, (b) can dissolve voluntarily with the unanimous consent of all stockholders and directors, or (c) cannot dissolve voluntarily at all because the provision in the building and loan act for involuntary dissolution is exclusive.[23]

Courts have generally held (where there is no specific statutory provision to the contrary) that financial institutions in a safe and sound condition may accomplish voluntary dissolution under the general corporation act.[24] This result would seem to be in accord with the sound policy of allowing the business judgment of the management to guide the destinies of the association.

3. *Voluntary Dissolution of a Building and Loan Association under a General Corporation Act when the Building and Loan Act also Provides for Voluntary Dissolution.* Frequently, general corporation acts provide a number of alternative procedures for accomplishing voluntary dissolution.[25] Occasionally, no doubt, one or more of these procedures possess advantages not present in the voluntary dissolution provisions in the building and loan act. The question then arises whether, in the absence of clear language making the building and loan act provision exclusive, a building and loan association may voluntarily dissolve according to a procedure in the general act.

As is frequently the case, there are several possible rules of construction equally applicable to the present case and leading to opposite conclusions.[26] Therefore, rules of construction will not be helpful except as a means of justifying a result predicated on other grounds.

A recent Michigan case, *In re St. Johns Building and Loan Assn.*,[27] faced with this problem, held that a building and loan association could

[23] In Moran v. Cobb, (App. D.C., 1941) 120 F. (2d) 16, the dissenting judge vigorously propounded the latter theory. Though this case involved a banking corporation, the similarity of policy considerations makes it relevant to building and loan associations.

[24] Moran v. Cobb, (App. D.C., 1941) 120 F. (2d) 16; Daugherty v. Superior Court, 56 Cal. App. (2d) 851, 133 P. (2d) 827 (1943).

[25] Illinois, for instance, provides three methods of voluntary dissolution: (1) voluntary dissolution by the incorporators of a corporation which has not commenced business; (2) voluntary dissolution by written consent of all record shareholders; and (3) voluntary dissolution by act of the corporation. Ill. Ann. Stat. (Smith-Hurd, 1935) c. 32, §§157-74 to 157-81.

[26] Rule 1 states that statutes in pari materia (such as these) should be construed in harmony as one act. This rule favors a construction allowing all dissolution provisions to apply to associations. Rule 2, stating that where a general act standing alone would also include the same matter covered by the special act, the latter will be construed as an exception to the general act, obviously favors an opposite construction. See CRAWFORD, THE CONSTRUCTION OF STATUTES §§230, 231 (1940).

[27] 321 Mich. 715, 33 N.W. (2d) 129 (1948).

voluntarily dissolve under a general corporation act which provided a judicially supervised dissolution procedure. The court stated that this provision and the one in the building and loan act were not inconsistent but afforded alternative procedures. In view of the wording of the Michigan statutes[28] and the fact that the procedure in the general act provides more supervisory safeguards than does that of the building and loan act, the decision would seem to be a sound one.

This and other opinions indicate that whenever the voluntary dissolution procedure of the general corporation act provides for judicial supervision, the court will be predisposed toward allowing building and loan associations and other financial institutions to utilize it.[29] There seem to be two main reasons for this. The first is a feeling that supervision of the affairs of a liquidating corporation is primarily a judicial function and one which the courts are at least as competent to handle as administrative officers.[30] The second reason, stemming from the first, is the belief that by allowing a building and loan association or other financial institution to dissolve under the protective supervision of a court, the general legislative purpose of providing more supervisory safeguards for such institutions is being furthered.[31]

Therefore, where the general corporation act does not provide judicially supervised voluntary dissolution procedure, the courts are unlikely to hold such procedure applicable to building and loan associations if the building and loan act contains adequate provision for voluntary dissolution.

4. *Other Types of Dissolution, Forfeiture, or Related Provisions.* For many types of statutes in general corporation acts relating to dissolution or forfeiture, there are no reasons based on public policy which require differentiation among the types of corporations. Included in

[28] Mich. Stat. Ann. (1937) §21.3 states: "One or more persons . . . may incorporate under this act for the purpose of carrying on any lawful business except those desiring to incorporate the following: . . . building and loan associations . . .; the provisions of this act shall be applicable to such corporations . . . unless otherwise provided in, or inconsistent with the act under which a particular corporation is . . . formed."

[29] The California statutes [Cal. Corp. Code (Deering, 1944) §119; Cal. Gen. Laws (Deering, 1944) Act 986, §2.01] contain provisions similar to that in the Michigan statutes (supra, note 28). Two recent decisions, Daugherty v. Superior Court, 56 Cal. App. (2d) 851, 133 P. (2d) 827 (1943) and In re Peoples Finance and Thrift Co. of San Diego, 61 Cal. App. (2d) 11, 141 P. (2d) 742 (1943), pertaining to industrial loan corporations organized under a special act substantially the same in provisions and policy as the building and loan act, indicate that California will follow Michigan.

[30] See dissent in State ex rel. Bettman v. Court of Common Pleas, 124 Ohio St. 269, 178 N.E. 258 (1931).

[31] Note 27, supra.

the above are provisions: (a) limiting the duration of corporate life;[32] (b) terminating corporations which fail to organize and commence business within a specified period of time after incorporation;[33] (c) providing for the extension and revival of corporate existence;[34] (d) forfeiting the charter of corporations which maintain a nuisance;[35] and (e) providing a simplified method of voluntary dissolution for the incorporators of corporations which have not commenced business or issued any shares.[36]

Conclusion

Probably the simplest and best solution to the problem would be the adoption by all states of a complete uniform building and loan code which would encompass the entire field of building and loan legislation and would clearly state that none of the provisions of the general corporation act shall be applicable to building and loan associations. Such a solution would provide the legal certainty which business requires.

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[32] The Michigan Constitution states: "No corporation shall be created for a longer period than thirty years. . . ." Constitution of 1908, Art. XII, §3. The Building and Loan Act contains the same limitation. Mich. Stat. Ann. (1937) §23.541.

[33] People v. Stilwell, 157 App. Div. 839, 142 N.Y.S. 881 (1913).

[34] Ariz. Code Ann. (1939) §53-304.

[35] N.Y. Gen. Corp. Law (McKinney, 1943) §230.

[36] Ill. Ann. Stat. (Smith-Hurd, 1935) c. 32, §157.74.