Insurance Companies—Reincorporation—Policy, Change Of.

Under the laws of Montana, a fraternal benefit insurance company cannot take its funds as such and apply them to the organization of a legal reserve company.

December 20, 1919.

Hon. George P. Porter,
Commissioner of Insurance,
Building.

Dear Sir:

I have your letter of recent date with which you submit to me the matter of re-incorporation of the fraternal insurance company of Iowa, known as the Mystic Toilers. You ask for an opinion upon the proposition of whether or not the company can reorganize as proposed, and do business in the State of Montana.

The facts as you submit them to me are as follows:

The Mystic Toilers is a society organized to carry on a fraternal and mutual benefit insurance business. It was organized in 1899, in the State of Iowa, under the provisions of Chapter IX, Title 9, of the Codes of Iowa, and has been operating as such company until June 30th, 1919. The company was unable to continue business under its rates, and it was deemed advisable by the officers of that company to change its character of business.

The State of Iowa, at the time, had in force Section 1798-b of its Thirty-sixth General Assembly, providing as follows:

> "Any existing domestic assessment company or association or fraternal beneficiary society may, with the written consent of the commissioner of insurance, upon a majority vote of its trustees or directors, amend its articles of incorporation and by-laws in such a manner as to transform itself into a legal reserve or level premium company, and upon so doing and upon procuring from the commissioner of insurance a certificate of authority, as prescribed by law, to transact business in this state as a legal reserve or level premium company, shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated, and such corporation under its charter as thus amended, shall be a continuation of such original corporation, and the officers thereof shall serve through their respective terms as provided in the original charter, but their successors shall be elected

> and serve as in such amended articles provided; but such amendment or reincorporation shall not affect existing suits, rights or contracts.
>
> "Any assessment company or fraternal beneficiary society reincorporated to transact life insurance business, shall value its assessment policies or certificates or benefit certificates as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state."

From such records as you submit to me I find that the by-laws of the organization permitted its articles to be amended and that authority for such action must be granted by body of its members known as the Supreme Council. The Supreme Council granted authority to the Board of Directors of the Mystic Toilers, and on the 26th day of March, 1919, the said Board of Directors passed a resolution whereby it elected to be reorganized under the name of the Liberty Life Insurance Company. This action was taken under Section 1798-b, as above quoted. The effect of the action taken was and is a complete abandonment of its former organization and character and nature of its business, and the adoption of a life insurance business as a legal reserve insurance company on a level premium plan, and doing such business as a capital stock company. The Board of Directors further provided that not less than $100,000.00, and not more than $100,500.00, be transferred from the bonds and securities of the equalization fund of the Mystic Toilers for the purpose of payment of stock at $1.00 per share in the corporation as reincorporated, to be apportioned to each member in the Mystic Toilers, in good standing on July 1st, 1919, in proportion to such member's payment of benefit assessment to the Mystic Toilers. The president and secretary were directed by resolution to issue stock for such benefit assessments paid by the members as above referred to. The balance of the funds, bonds, and securities of the Mystic Toilers was to be transferred to the surplus fund for use and benefit of said corporation as incorporated.

The Mystic Toilers originally incorporated and operated as a fraternal benefit association, and wrote insurance on a mutual assessment plan. This kind of business under reincorporation has been entirely abandoned. It has become a state corporation, doing an insurance business on the old line or level rate plan.

The question which you submit to me is whether or not under the laws of Montana, you are permitted to license a new company in place of the old company, and permit it to do business as reincorporated.

At the outset it will be observed that the State of Iowa has a special statute under which a fraternal insurance company might reincorporate, changing its nature and plan of business. In Montana we have no such law. It is provided by Section 11, Article XV of the Constitution of Montana as follows:

> "No company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character, created under the laws of the state."

In the case of Criswell v. M. C. R. Co., 18 Mont. 168, 44 Pac. 525, our Supreme Court has held that this section is self-executing. The laws of

our state governing fraternal insurance companies are found in Chapter 140 of the Laws of 1911, as amended by the Session Laws of 1917. Section 4 of Chapter 140 expressly provides:

> "Except as herein provided such societies shall be governed by this act and shall be exempted from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated thereunder."

It is a general rule of law that a corporation has no powers other than such as are conferred upon it by legislative enactment. Anything which a corporation does outside of the powers conferred upon it is null and void, or as the legal phrase expresses it, *"ultra vires."*

> 7 R. C. L. pp. 159-165; 19 R. C. L. p. 1189, Sec. 10 and Sec. 11; National Union v. Keefe, 263 Ill. 453, 105 N. E. 319; Bankers Union v. Crawford, 67 Kan. 449, 73 Pac. 79, 100 A. S. R. 465.

It is not sufficient to authorize a corporation to act that no limitation is found in the law forbidding the act. The right to act must be conferred expressly or by necessary implication, as will enable them to carry out the objects of their original creation. 19 R. C. L. 1190, Sec. 11, Note 9.

Under the circumstances, therefore, the point that we have no law in the State of Montana under which a corporation organized to carry on a fraternal mutual benefit life insurance business can change its entire plan of business from that for which it was originally organized, to one of life insurance on a level rate plan or a legal reserve stock company. It will be noted that in Iowa it was necessary to pass direct legislation permitting this change. This fact is evidenced by Section 1798-b of the Iowa Code. Wherever changes in fraternal insurance companies have been sanctioned by the courts of the various states, in cases presented to them by interested persons, we find the legislature authorizing such changes. It is held quite generally that one fraternal insurance company doing a life insurance business on the mutual assessment plan, cannot merge with another company of like character, unless express legislation exists for the purpose.

> 18 A. S. R. 302; 19 R. C. L. 1189, Sec. 10.

Upon the proposition of consolidation of two fraternal mutual associations we find a thorough discussion in the case of Bankers Union of the World v. Crawford, 67 Kan. 449; 73 Pac. 79, 100 A. E. R. 465. In this case the National Aid Association was a fraternal insurance company organized under the laws of Kansas. The Bankers Union of the World also operated as a fraternal insurance company and organized under the laws of the state of Nebraska. One, William H. Crawford, who was husband of the plaintiff in this case, joined the National Aid Association, and, as a member, received a benefit certificate making his wife beneficiary. It appears that the National Aid Association did not progress in its growth and its assessments were too low to maintain itself. Through its proper officers a resolution was drawn to combine with some company of like character, charging a higher rate and having a larger membership, and it was decided that the Bankers Union of the World was a company with which it should join, all of which was accordingly done. The officers of the Bankers Union of the World agreed to pay the death losses on certificates, of which

the plaintiff's (Crawford's) was one. Suit was started on the certificate and the Bankers Union defended on the ground that its contract with the National Aid Association was *ultra vires* and void, as the laws did not permit consolidation. In the course of the opinion rendered in this case the Court said as follows:

> "We need take small space in the discussion of the universally recognized rule that a corporation has only such power as is conferred upon its charter, either expressly or by implication, to enable it to carry out the objects of its creation, and that the exercise of powers outside and beyond these is an act *ultra vires* and not binding upon the corporation. The implication authorizing the exercise of a power must be one necessarily authorizing from a granted power, as distinguished from what might be convenient or advisable. It is not sufficient to authorize a corporation to act that no limitation is found in the law affecting the act. The right to act must be conferred expressly or by necessary implication, or it does not exist."

The Court during the course of this opinion, on page 470 of the A. S. R. reported as follows:

> "It is further suggested that, even though this contract be *ultra vires*, still the Bankers Union is estopped from so pleading. Authorities are cited supporting the proposition that a corporation may be estopped from pleading the invalidity of its contracts as against one who has made part performance of such contract. We are free to grant the correctness of the principle, but find no opportunity for its application here, because there has been no part performance. There was no consolidation or merger; there could be none under the statute. No authority therefor is given. That four thousand of the members of the National Aid Association chose to become members of the Bankers Union constituted no part performance on the part of the former association. It could not transfer a single member. Each individual acted for himself. The petition contains no allegation that any of the property of the National Aid Association ever came to the possession of the Bankers Union. On the contrary, it does allege that all of the records and assets of the National Aid Association are in the hands of the receiver, Bird. Had the assets of the National Aid Association gone into the hands of the Bankers Union, such assets, perhaps, in a proper action, could have been subjected to plaintiff's claim, but we do not see how an estoppel by reason thereof could be invoked in favor of Mrs. Crawford. She never has paid anything for or lost anything by reason of the agreement upon which she counts. We must hold that the agreement which is sought to be enforced is *ultra vires*, and that the Bankers Union is not estopped so to assert it."

In the case of National Union v. Keefe, 263 Ill. 453, 105 N. E. 319, the question of power of corporation was discussed. In this case it was held that the by-laws of a corporation do no greater power than the laws of the state delegate to it, but by such by-laws it may restrict its activities or authority to less than the statute gives it.

In the case of Wright v. Minn. Mut. L. Ins. Co., 193 U. S. 658, 48 L. Ed. 832, and Polk v. Mut. Res. Fund Ass'n, 207 U. S. 310, 52 L. Ed. 310, the exact situation was presented to the Supreme Court of the United States, which is presented here by the Mystic Toilers. In both of these cases the companies involved changed from the basis of fraternal mutual benefit associations to legal reserve or old line companies. The question there presented was on the members of the fraternal company contesting the

right of the company to make the change under its articles of incorporation. The court in each instance held that a change could be made, but in each instance we find a law enacted by the state permitting the change. The law in each instance was similar to that found in the Iowa statute herein quoted. I have been unable to find a decision of any court on the exact situation as it has been presented to me by your letter and files, but reasoning from general proceedings laid down governing corporations, and having in mind particularly the fact that insurance companies deal iwth trust funds, I am of the opinion that the Mystic Toilers cannot change from its original plan to the plan of an old line company as it desires to do, in the name of Liberty Life Insurance Company. If the company known as the Mystic Toilers is no longer able to continue business, it should wind up its affairs and distribute its assets in accordance with the laws making provisions therefor. As we find the law in Montana, it is not permitted to take the funds which it obtains while doing business as a fraternal insurance company, and apply them to the organization of a legal reserve company.

Respectfully,

S. C. FORD,

Attorney General.

Investment Commissioner, Powers Of—Brokers—Stock, Sale Of By.

A person who sells stock of an investment company which he has acquired in payment of his services, comes within the purview of the investment act, and is subject to investment commissioner.

December 27, 1919.

Hon. Geo. P. Porter,
State Auditor and Investment Commissioner,
Capitol.

Dear Sir:

I have your letter of recent date in which you make inquiry upon the proposition of whether you have supervision over agents of investment companies selling the treasury stock of such company or stock which the agent has obtained from the company in payment of his services.

Subdivision 3 of Section 1 of th Investment Commissioner Act provised as follows:

> "This Act shall not apply to any person, company, corporation, co-partnership or association of Montana selling stock or securities actually onwed by said person, corporation, co-partnership or association, provided that they shall not be engaged in the brokerage business of buying and selling stocks for securities, nor shall this be so construed so as to prevent any corporation, either foreign or domestic, from selling its own stocks, bonds or securities through an officer or agent of such corporation, providing that two-thirds or more of the assets of such corporation shall consist of property situated within the State of Montana."

Section 2 of the Act provides as follows: