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BUILDING AND LOAN ASSOCIATION, SOLVENT MUTUAL — WHERE BOARD OF DIRECTORS GAVE "NOTICE" FIXING TIME AND AMOUNT, WITHDRAWAL STOCK DEPOSITS, SUCH ASSOCIATION MAY NOT ACCEPT THE WITHDRAWAL OF SUCH STOCK DEPOSITS FOR SALE MUNICIPAL BONDS OWNED BY IT — SAID BONDS IN DEFAULT FOR PAYMENT, PRINCIPAL AND INTEREST.

SYLLABUS:

Where the board of directors of a solvent mutual building and loan association has given notice pursuant to the constitution and by-laws of such association, fixing the time and amount in which stock deposits may be withdrawn, such association may not lawfully accept the withdrawal of such stock deposits for the sale of municipal bonds owned by it, which are in default for the payment of principal and interest.

Columbus, Ohio, June 18, 1942.

Hon. Charles S. Merion,
Superintendent of Building and Loan Associations of Ohio,
Columbus, Ohio.

Dear Sir:

I am in receipt of your letter requesting my opinion, which reads as follows:

"If a building and loan association which is purely a mutual company and solvent, can, as outlined in Attorney General's Opinion 949-1933, accept withdrawal stock deposits of a purchaser in payment for real estate sold by the association (see paragraph two of syllabus of Opinion), can it also accept such withdrawable stock deposits for the sale of other types of assets as well, including municipal bonds which are in default for payment of principal and interest.

I call to your attention the following excerpt from the above mentioned Opinion:

'It follows that if it is mutually agreeable, the association can pay him in real estate.'

The question comes up in my mind that if such stock depositor can be paid by turning over to him one kind of assets, he can as well be paid by receiving all kinds of assets; that there is no distinction between types of assets that can be used in such transactions."

Subsequent to, and in answer to our inquiry for additional facts, you wrote as follows:

"The savings and loan association in question has been requiring notice for withdrawal although, as a matter of fact, I understand that they have none on hand and have had none on hand for a long time. This does not mean, however, that they have been paying out funds freely to their stockholders, but rather they have satisfied their customers by paying out various sums from time to time, so that actually no notices have been filed. But regardless of that, and in the light of Opinion No. 949, when read in its entirety, I am wondering whether the fact that notice of withdrawal might be filed would have any bearing upon the situation.

If all funds were presently withdrawable, the question which I have originally raised could not be raised, because such stockholder could cash in his stock and buy municipal bonds.

As I recall reading Opinion No. 949, that opinion held that such stock could be used for the payment of mortgages, whether delinquent or not, and for the purchase of real estate, whether such stock was presently withdrawable or not, and without regard to the question of application for withdrawal.

The by-laws of the association in question are of the standard type, and copy of the section relating to withdrawals is hereto attached."

Article IV, Section 15 of the by-laws of this association which authorizes "notice of withdrawal," a copy of which is submitted with your second letter, reads as follows:

"Applications to surrender shall be filed in the order received, and paid in the order filed, as fast as one-half of the receipts of the company from payments on the principal of its outstanding mortgages will, in the judgment of the Board of Directors, permit. The directors may, however, apply such further part of the principal or other receipts of the company to the payment of withdrawing members' shares whenever in their judgment the business of the company will not suffer thereby.

The directors may, in their discretion, fix the maximum sum, which shall be paid to any withdrawing member, while other unpaid notices are on file, on which a like amount has not been paid. The Board of Directors may fix a sum not to exceed $100.00, which may be paid to any person in any thirty days, regardless of the order of filing, while other unpaid notices are pending. And the Board of Directors, or the Finance Committee, may, when in their judgment the best interests of the company, and its stockholders can be served, permit a set-off of any withdrawable stock against a mortgage loan where both appear in the same name or belong to the same person or corporation.

Members may, however, withdraw all or any part of their stock, without giving notice in writing, if and when, in the judgment of the Board of Directors, such withdrawals should be permitted.

The directors may, in their discretion, declare and pay dividends out of the earnings of the company, while unpaid notices are on file."

The basic facts therefore appear to be that the association in question is "solvent," but "on notice," i.e., a member may not withdraw all or any part of his stock without giving notice in writing of his intention so to do.

By requiring a notice of withdrawal, the board of directors has assumed complete control of the disbursement of funds and have limited it to such amounts and to such times as they deem proper, whereas in an open, unrestricted, solvent building and loan association, operating without the notice requirement, the stockholders may withdraw all or part of their stock deposits at any time they see fit.

Having placed the above restriction upon the withdrawal of funds, the question is, may the board sell municipal bonds owned by the association, which in this case you say are in default for payment of principal and interest, to a stockholder and accept his withdrawable stock deposits as payment for the defaulted bonds without regard to the notice requirement.

Except for the fact that this association is "on notice," it is clear that a stockholder has a right to cancel his subscription at any time and to be paid back all money paid by him on his stock subscription. This is provided in Section 9651, General Code, and is called "repurchase of stock credits." If he withdraws money paid on his stock subscription, he then stands in the same position as any other prospective purchaser of salable assets of the building and loan association in question. The mere fact that his money came from a stock account which had been repurchased by the association and had been closed out by him in its entirety, or in part, would work no bar against him in any way. Neither would the fact that the asset purchased was a municipal bond in default both as to principal and interest.

However, your second letter states that the association is "on notice" and this I consider the crux of your question. The "on notice" feature applies to all stockholders and must apply to all in the same class. It would be unfair and inequitable, if not a violation of the notice requirement itself, to permit one stockholder to take out or withdraw more of his stock account than others in the same class.

Such a preference if approved by the board of directors or your department might place the association in a position where the liquidation sections of the General Code would apply. I refer to Section 687, General Code, which authorizes the Superintendent of Building and Loan Associations to take possession of the business and property of an association when he finds that "it is conducting its business in whole or in substantial part contrary to law, * * * or that its affairs are not being conducted for the best interests of its depositors, shareholders or creditors."

The duty to treat all stockholders alike who are in the same class has been clearly enunciated by the Supreme Court. In the case of Frederick v. Mutual Building and Investment Co., 128 O.S., 475, decided May 16, 1934, the second and third branches of the syllabus read as follows:

> "2. The right of a stockholder in a building and loan association, to withdraw his stock deposits under the provisions of Section 9651, General Code, depends upon the terms and conditions of the constitution and by-laws of such association and such withdrawal can be accomplished only in accordance with such terms and conditions.

> 3. *The opportunity of stockholders to withdraw their stock deposits from a building and loan association should be accorded on equal terms to all who are in the same class;* and subject to any rights of other claimants which may be superior, a preference granted to part of such stockholders with regard to such withdrawals creates an equity in the assets in favor of those who have been discriminated against." (Emphasis mine.)

See also Schuster v. Mortgage Loan Co., 139 O.S., 315, as to what constitutes a breach of trust.

I have considered Attorney General's Opinion No. 949 for the year 1933, and believe the underlying facts in that opinion are different from the facts presented in your question. In the 1933 opinion the question was whether a stockholder of a solvent mutual building and loan association, but "on notice," could apply his stock deposits on a mortgage loan made to the identical stock depositor, regardless of whether the mortgage was in good standing or past due. The then Attorney General held that the building and loan association could accept running stock accounts in payment of such mortgage loans. You will note that the debtor and creditor in that case were the same person. In the question propounded by you the debtor and creditor are not the same person. The proposed sale of a municipal bond to a stockholder-depositor presents an entirely different situation. There is no possible right of set-off. The bond is an asset belonging to all the stockholders, and the obligor is a municipality. The stock deposit of the prospective purchaser cannot be applied to the bond account. To permit one stockholder of an association "on notice" to acquire this municipal bond by purchase and apply on that purchase his stock deposit account would give him a preferential position over all other stockholder-depositors similarly situated, as stated above.

True, the 1933 opinion above cited in the last paragraph goes on to conclude that the building and loan association having the right to set off a stock account against the mortgage obligation of the stockholder, even though "on notice," may also "pay him in real estate." I do not believe the conclusion on the first question justifies the second as expressed in the second paragraph of the syllabus of that opinion. To pay one stockholder in advance of others even though the consideration be real estate, is in my opinion a preference. Furthermore, the Frederick case cited above was decided after the rendition of the 1933 opinion, and the clear statement of law in that case cannot be disregarded. I believe the case

of Ward v. The North Fairmount Building and Savings Co., 5 N.P., 133, decided by the Superior Court of Cincinnati in 1897, cited in the 1933 opinion, but not followed, is applicable to your question and in accord with the decision in the Frederick case.

Furthermore, the 1933 opinion, to which you refer, was based upon Section 9651, General Code, as it then existed. Said section at that time provided that "members may withdraw all or part of their stock deposits at such times, and upon such terms, as the constitution and by-laws may provide."

Thereafter, effective June 29, 1934, said Section 9651 was amended to its present form which reads as follows:

> "To permit members to have their stock credits repurchased by the association in part or in full, at any time, and to require members to file applications therefor. Upon the receipt of such applications for repurchase, the association shall number and file the same in the order received and shall, within thirty days from the receipt of an application, either pay the holder the amount thereof in part or in full as requested, in the order filed, or apply at least one-third of the cash receipts of the association received thereafter (after making proper provision for the payment of interest on deposits, dividends paid on stock and stock deposits, borrowed money and taxes) from all sources except borrowed money, the proceeds from the sale of assets, and the proceeds derived from foreclosure proceedings where the association is the purchaser, to the retirement of such applications in numerical order. Provided, however, that the board of directors shall have an absolute right to pay out of said one-third of said cash receipts or out of any other funds, in respect of any application, not exceeding one hundred dollars of any one stock account in any one month in any order; and provided further, that if any stockholder applies for the repurchase of more than one thousand dollars of any stock account or accounts he shall not be paid in excess of one thousand dollars in order when reached, subject to the foregoing provisions of this section, and his application shall be charged with such amount and shall be renumbered and placed at the end of the list of applications for repurchase and thereafter, upon again being reached, shall be paid a like amount, but not exceeding the amount of his stock account; and until paid in full shall continue to be so paid, charged, renumbered, and replaced at the end of the list until paid in full. Stockholders whose stock accounts, or parts thereof, are repurchased, shall thereupon be relieved of all liability with reference thereto. Stockholders filing written application for the repurchase of their stock credits shall remain stockholders until paid, and shall not become creditors. Dividends upon the stock credit of any stockholder, to the extent of the amount of the application to repurchase, shall be discontinued while such application remains upon a list for the repurchase of stock credits, provided

that dividends that would otherwise be paid upon such stock credits shall not be discontinued, notwithstanding the application of repurchase, in case said application is withdrawn in consideration of restoration of said dividends. The repurchase value of the stock credit so requested to be repurchased shall be the amount thereof as defined by section 9649 of the General Code. In the event that the stock credit proposed to be repurchased is pledged with the association as collateral security for the payment of a loan, the amount of such loan, plus all interest and lawful charges thereon, shall be deducted from the repurchase value before any amount is paid to the member. No repurchase notice shall be deemed to have been received or to be valid on account of any stock credits which have been transferred on the books of the association within a period of sixty days preceding the date of such notice of repurchase.

Provided, however, that whenever and so long as the association is on notice, it may refuse to repurchase stock credits. Provided further that associations having deposits greater than the aggregate amount of stock credits, reserve, and undivided profits, shall not repurchase stock credits whenever and so long as the association has on file unsatisfied applications for the withdrawal of deposits."

The enactment of Section 9651, General Code, in its present form clearly makes inoperative that portion of the 1933 opinion to which you refer.

Therefore, in specific answer to your question, it is my opinion that:

Where the board of directors of a solvent mutual building and loan association has given notice pursuant to the constitution and by-laws of such association, fixing the time and amount in which stock deposits may be withdrawn, such association may not lawfully accept the withdrawal of such stock deposits for the sale of municipal bonds owned by it, which are in default for the payment of principal and interest.

Respectfully,

THOMAS J. HERBERT
Attorney General.