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BUILDING AND LOAN ASSOCIATION—LIQUIDATION OF SAME AFTER IT HAS ASSUMED ASSETS AND LIABILITIES OF ANOTHER BUILDING AND LOAN ASSOCIATION—CREDITORS OF EACH SHOULD PRO-RATE—STOCKHOLDERS OF EACH HOW LIABLE IF CREDITORS UNSATISFIED.

SYLLABUS:

Where a building and loan association has purchased all the assets and assumed the liabilities of another building and loan association, and the former association subsequently is taken over for liquidation by the Superintendent of Building and Loan Associations, the creditors of the latter association existing at the time of such conveyance, whose claims are unpaid, should prorate with the creditors of the former, in the distribution of its assets.

In the event all the creditors are not paid in full from such distribution and if enough money cannot be realized from the liability of the shareholders of the former association to satisfy the claims of all the creditors, after the entire liability of such shareholders within the jurisdiction of the court has been exhausted, the persons, who were shareholders of the latter association at the time of the conveyance of its assets, would be liable to the creditors of the latter association for the unpaid portion of their claims to the extent of the par value of the shares of stock owned by such shareholders at the time of said conveyance.

COLUMBUS, OHIO, May 19, 1933

HON. PAUL A. WARNER, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a request for my opinion in which it is stated that certain questions have arisen resulting from the Northwestern Ohio Savings Association having taken over the assets and assumed the liabilities of the Federal Savings Association on or about January 1, 1930. These questions relate to the outstanding Federal accounts and certificates, to the liability of the shareholders of the Federal Savings Association, and to the disposition of any funds which might be acquired in payment of Federal shareholders' liability. In this letter it is stated:

> "The Superintendent of Building and Loan Associations states that there is no formal record of approval of this transaction on file in his office.
>
> After the Federal was taken over, about 2500 of its 3000 depositors and certificate holders exchanged their books and certificates for books and certificates of the Northwestern. The other 500 Federal accounts or certificates are still outstanding."

It is also stated:

> "While my information is not definite at this time, the only records which I have been able to examine indicate that there were 1,694½ shares of Federal Stock issued.
>
> The report of the examiner who conducted the examination of The

Northwestern Ohio Savings Association states that there is on file with that Association an agreement executed by holders of 1,094 shares of Federal stock and that by the terms of this agreement, these shareholders consent to the transfer of the Federal assets to the Northwestern Association.

If this agreement is in existence, it would mean that approximately 64½% of the shareholders of Federal had consented to the transfer."

It is stated that no formal agreement executed by the officers of the Federal Savings Association and of The Northwestern Ohio Savings Association at the time of the transfer has been found, but the minutes of a special meeting of the board of directors of The Northwestern Ohio Savings Association held on November 6, 1929, show this:

"Northwestern should take over all of the assets of Federal and assume all of Federal's liabilities except its surplus and undivided profit account, and further excepting undisclosed liabilities. It was provided that Northwestern should be secured by the pledging of certain collateral and otherwise in the following manner:

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(g) All of the stockholders of the Federal were to endorse and deposit with the Northwestern all their stock in the Federal which was unpledged on the Federal books. This was estimated to be approximately $165,000, or 1650 shares, it being further understood that if no loss should accrue by reason of the purchase of the assets of the Federal Savings Association, the stockholders of said association were to receive par for their stock. In the event a loss did accrue, said stockholders were to receive only that part of the value of said stock remaining after the payment of the losses."

The minutes of directors' meetings of the Federal Savings Association show that after a state examiner, who was present at one of the meetings, gave a report of his examination of the Federal Savings Association, the proposition of the Northwestern Ohio Savings Association was accepted and the officers of the company were ordered to turn over all of its assets to the Northwestern Ohio Savings Association, which was done.

Section 693, General Code, reads as follows:

"A building and loan association or a savings association may provide in its constitution and by-laws for the time and terms of its dissolution and for its consolidation with one or more of such corporations on terms and conditions to be determined upon by their board of directors. In case of the dissolution of such a corporation, its board of directors by a majority vote may be authorized to sell and transfer its mortgage securities or other property, or both, to another corporation, person or persons, subject to the vested and accrued rights of the mortgagors."

If there were any provision in the constitution and by-laws of the Federal Savings Association, relating to its dissolution or consolidation with another

building and loan association, such provision would control. Since no such provision is referred to, I assume that there was none, and therefore the general corporation act would apply. Under section 8623-65, in the absence of any provision in the articles of incorporation, a vote of holders of shares entitling them to exercise at least two-thirds of the voting power is required for the sale of all the assets of a corporation. In this case it is said there was not quite a two-thirds vote. However, section 8623-66 reads as follows:

> "An action or suit to set aside a conveyance by a corporation on the ground that the provisions of this act (G. C. §§8623-1 to 8623-138) or of the General Code in effect at the time, relating to the sale, lease, exchange or other disposition of all or substantially all of the assets of such corporation have not been complied with shall be brought within ninety days after such transaction, or the same shall be forever barred."

As the ninety-day period has long since passed and no objection has been made to this transaction, I do not believe that the conveyance to the Northwestern Ohio Savings Association of all the assets of the Federal Savings Association could be successfully attacked.

While no certificate of approval of the Superintendent of Building and Loan Associations has been found, it appears from the correspondence of the Superintendent that he knew of the transaction and concurred therein. In his letter of February 18, 1930, to the secretary of the Northwestern Ohio Savings Association, he said:

> "In reply to your letter of February 15th, you are to be congratulated upon the progress made and I trust that you have not lost any more money than anticipated in taking over The Federal.
>
> I am sure in the long run the acquiring of The Federal will prove a good buy."

I assume also that the conveyance was made in good faith and not with the intent to defraud the creditors of the Federal Savings Association, and that so far as the Northwestern Ohio Savings Association was concerned, the transaction was regular.

In view of all this, I do not believe the Superintendent of Building and Loan Associations would be in a position at this time to attack the transaction. Consequently, I am of the view that the conveyance by the Federal Savings Association of all its assets to the Northwestern Ohio Savings Association and the assumption by the latter of the liabilities of the former should be regarded as a valid transaction, and that since the liabilities of the former were assumed by the latter, the depositors and certificate holders became creditors of the Northwestern Ohio Savings Association and should prorate with the creditors of the Northwestern regardless of whether they exchanged their books and certificates for books and certificates of the latter association. It also follows that since the creditors of the Federal Savings Association became the creditors of the Northwestern Ohio Savings Association, the stockholders of the latter association would be liable for such debts as well as any other debts of the Northwestern to the extent of the par value of their stock. The question also arises as to the liability, if any, of the shareholders of the Federal Savings Association.

> "A stockholder who, in good faith, sells and transfers his stock to one who afterwards becomes insolvent, is liable to creditors of the corporation, for such portion only of the debts existing while he held

the stock, and remaining due, (not in excess of the amount of stcok assigned) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders within the jurisdiction, liable in respect of the same debts, to be ascertained at the time judgment is rendered."

Harpold, et al., vs. *Stobart,* 46 O. S. 397.

"1. Where the holder of stock in a corporation has transferred his stock in good faith to one who, at the time of subjecting the stockholders' liability to the payment of the debts of the corporation, is insolvent, the liability of such assignor of stock may, subject to the rule established in *Harpold* vs. *Stobart,* 46 Ohio St., 397, be subjected to the payment of debts which accrued while he held the stock in case a sufficient fund is not raised by assessment upon solvent stockholders to satisfy all creditors.

2. In such case the fund arising from assessments on solvent persons who are stockholders at the time of the decree should be applied pro rata upon all the debts of the corporation; and funds arising from assessments on persons who had been stockholders, but had assigned their stock in good faith before the insolvency of the corporation, should be applied to the residue, if any, owing to those who were creditors at the time such stock was assigned."

Wick National Bank vs. *Union National Bank, et al.,* 62 O. S. 446.

"One who has been a holder of the stock of an insolvent corporation but has disposed of his stock in good faith prior to such insolvency and prior to the commencement of an action to enforce the statutory liability, cannot be held liable for a debt of the corporation before the full one hundred per cent liability of the existing solvent stockholders within the jurisdiction has been exhausted, although the debt of the creditor against the corporation was incurred before the assignment and the assignee of the stock is insolvent."

Poston vs. *Hull,* 75 O. S. 502.

The following is quoted from the case of *Poston* vs. *Hull, supra,* at page 505:

"The liability of stockholders in favor of a creditor attaches at the time the debt of the corporation is contracted, and is not necessarily discharged by the transfer of the stock, but the assignee of the stock is held to indemnify the assignor on account of such liability. And, in a suit by creditors, the then existing stockholders are severally chargeable with the payment of such liability. If, by reason of insolvency, the amount due from any stockholder who has received his stock by assignment is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency.

The rule that the owners of stock who are such at the time of the commencement of the suit to enforce liability are liable for the debts of the corporation is not varied in favor of a particular stockholder by the fact that his stock may have been issued to him by the company after the creation of the debts.

A stockholder who in good faith transfers his stock to one who afterwards becomes insolvent is liable to creditors for such portion only

of the corporate debts existing at the time of the transfer and remaining unpaid as will be equal to the proportion which the capital stock assigned bears to the entire capital stock held by solvent stockholders within the jurisdiction liable in respect to the same debts, to be ascertained at the time judgment is rendered.

Where a stockholder transfers his stock in good faith to one who afterwards becomes insolvent and is insolvent at the time of the decree, and a sufficient fund cannot be raised by assessment upon solvent existing stockholders to satisfy all creditors, the stockholder who has thus assigned his stock is liable as hereinbefore stated. But, in such case the fund arising from assessments on solvent existing stockholders will be applied pro rata upon all the debts of the corporation, and the funds arising from an assessment upon a person who had so assigned his stock will be applied to the residue, if any, owing to those who were creditors at the time such stock was assigned.

It must be obvious, from the foregoing, that the rule that liability to creditors follows the stock and that the owners of stock who are such at the time of the commencement of the creditors' suit are primarily liable for the debts of the insolvent corporation, is fully established. This being so, it follows with just as much certainty that such liability must first be exhausted before recourse can be had against a former owner of the stock who has in good faith transferred his stock, and that the liability is to the extent only of the residue remaining unpaid of the corporate debts owing at the time of the assignment of the stock."

"Where a new corporation is formed for the purpose of reorganizing an old one and the former agrees to assume all the debts of the latter, the creditors of the old organization may yet subject the liability of the stockholders thereof, and such stockholders must obtain their redress from the stockholders of the new company. But where the stockholders of both companies are before the court in a consolidation of two separate suits to subject their liability, equity would require that the stockholders of the new corporation be first exhausted in paying such claims before judgment would be decreed against stockholders of the old organization, and then such judgment would be for the unpaid balance and for the costs of the suit involving the old company's stockholders."

Marriott vs. *Railway,* 16 O. D. 135.

In view of these authorities, I am of the opinion that in the event enough money cannot be realized from the liability of the shareholders of the Northwestern Ohio Savings Association to satisfy all debts of said company, including those of the Federal Savings Association which were assumed by the Northwestern, after the entire liability of such shareholders within the jurisdiction of the court has been exhausted, the persons who were shareholders of the Federal Savings Association at the time of the conveyance of its assets would be liable to the creditors of the Federal for the unpaid portion of their claims to the extent of the par value of the shares of stock owned at the time of said conveyance by such shareholders.

Respectfully,
JOHN W. BRICKER,
Attorney General.