

action can be brought, the defendant may demur to the petition, on the ground that the petition does not state facts sufficient to constitute a cause of action. But if the objection does not appear on the face of the petition, and the answer does not set up the limitation, it must be deemed waived."

See also syllabus 3 of *Towsley vs. Moore*, 30 O. S. 184, as follows:

"In order to obtain the benefit of the statute of limitations, a defendant must insist on it as a bar in his answer. If instead of so doing he simply denies the allegations of the petition he can not, upon the trial, also insist upon the bar of the statute."

In conclusion, therefore, it is my opinion that when a complaint, duly verified, is filed with your Commission under the provisions of Section 579, a citation should issue forthwith directed to the railroad against which complaint is made and if the defense of Section 11221-1 is properly raised by the railroad in its answer and it appears from such pleadings and affidavits that such complaint was not filed within three years of the date of delivery of the shipment involved, then such claim should be found invalid, and in all other cases brought under Section 579 the Commission should make its findings and certify them accordingly without regard to the provisions of Section 11221-1.

Answering your specific question, the procedure outlined in your letter, whereby a so-called informal complaint is filed with you by a shipper for the purpose of staying the statute limitations, imposes no duty upon the commission to forthwith cite the respondent railroad and is therefore of no force and effect, as section 579, General Code, specifically requires that a complaint filed under the provisions of that section must be verified as a petition in a civil action. The specific complaint cited in your inquiry should therefore be found invalid if the answer of the railroad pleads the statute of limitations as a defense.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4550.

BUILDING AND LOAN—UNAUTHORIZED TO DISTRIBUTE EARNINGS TO UNDIVIDED PROFIT FUND WHEN DIVIDENDS HAVE BEEN OMITTED.

SYLLABUS:

Under Section 9673, General Code, a building and loan association has no authority to distribute a portion of its earnings to the undivided profit fund when dividends have been omitted.

COLUMBUS, OHIO, August 8, 1932.

HON. FRANK F. MCGUIRE, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"I respectfully request your opinion as to the authority of a building association incorporated under the laws of Ohio and under

the jurisdiction of this department to make a distribution of their earnings to the undivided profit fund at a distribution period when the dividend has been omitted.

In this connection I respectfully refer you to Section 9673 of the General Code of Ohio."

The statutory authority for the establishment of an undivided profit fund is contained in Section 9659, General Code, which section provides that building and loan associations shall have power:

"To accumulate from the earnings a 'reserve fund' for the payment of contingent losses, and an 'undivided profit fund', both of which may be loaned and invested as other funds of the association."

Although the foregoing section provides that the reserve fund shall be for the payment of losses, it is evident that either the reserve or undivided profit fund is available for such purpose, Section 9674, General Code, providing as follows:

"All losses shall be assessed in the same proportion and manner on all members after the amounts in the reserve fund and the undivided profit fund have been applied to the payment thereof."

Section 9673, General Code, to which you refer, contains express provision for the payment of earnings into the undivided profit fund. This section reads as follows:

"After payment of expenses and interest, a portion of the earnings to be determined by the board of directors, annually or semi-annually, shall also be placed in the reserve fund for the payment of contingent losses, as hercinbefore provided, and a further portion of such earnings to be determined by the board of directors, shall be transferred as a dividend annually or semi-annually, in such proportion to the credit of all members as the corporation by its constitution and by-laws provides, to be paid to them at such time and in such manner in conformity with this chapter as the corporation by its constitution and by-laws provides. Any residue of such earnings may be held as undivided profits to be used as other earnings, except that such undivided profit fund at no time shall exceed three per cent of the total assets of the association."

The establishment of a reserve fund is mandatory in view of the provisions of Section 9671, General Code, which section provides:

"The amount to be set aside to the reserve fund, for the payment of contingent losses shall be determined by the board of directors, but in all permanent or perpetual associations, at least five per cent of the net earnings shall be set aside each year to such fund until it reaches at least five per cent of the total assets. All losses shall be paid out of such fund until it is exhausted. When the amount in such fund falls below five per cent of the assets as aforesaid, it shall be

replenished by annual appropriations of at least five per cent of the net earnings as hereinbefore provided until it again reaches such amount."

The establishment of an undivided profit fund, however, is apparently not mandatory but shall be made up of any residue remaining after the payment of dividends.

The legislature has in Section 9673, *supra*, set forth the order in which earnings shall be distributed: First, expenses and interest shall be paid; second, a portion of the earnings shall be placed in the reserve fund, if such fund does not contain five per cent of the total assets; third, a portion shall be paid as dividends; fourth, any residue shall be held as undivided profits, which is to say paid into the undivided profit fund, provided that the fund shall not exceed three per cent of the total assets. This provision as to any residue which may be paid into the undivided profit fund obviously refers to any residue remaining after the payment of dividends. If no dividends have been paid, there can be no residue remaining after such payment.

This construction will result, in the event dividends are not paid, in increasing the amount held in the reserve fund and decreasing the amount held in the undivided profit fund. This in my mind is sound accounting practice, since losses should be charged first against the undivided profit fund before being charged against the reserve fund. These views were expressed in Opinion No. 2818, rendered to your predecessor January 12, 1931. The language of this opinion is as follows:

"It does not necessarily follow that because all losses must be paid out of the reserve fund until it is exhausted, such losses must be charged to this fund in the first instance, in the event a building and loan association has an undivided profit fund.

The practice of charging losses first to the reserve fund until it is exhausted and then after having exhausted the reserve fund, to charge losses to the undivided profit fund, results in the undivided profit fund, while perhaps not so called, becoming in fact the reserve fund. This practice further results in building and loan associations using the fund which serves the purpose of a reserve, although called an undivided profit fund, for the payment of dividend."

Specifically answering your question, it is my opinion that under Section 9673 of the General Code, a building and loan association has no authority to distribute a portion of its earnings to the undivided profit fund when dividends have been omitted.

Respectfully,
GILBERT BETTMAN,
Attorney General.