947.

APPROVAL, NOTES OF GRAFTON TOWNSHIP RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO—$2,700.00.

COLUMBUS, OHIO, June 9, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

948.

APPROVAL, LEASE TO RESERVOIR LAND IN INDIAN LAKE, FOR THE RIGHT TO OCCUPY AND USE FOR COTTAGE SITE AND DOCKLANDING PURPOSES—W. J. DILLON.

COLUMBUS, OHIO, June 10, 1933.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—The chief of the bureau of inland lakes and parks, under date of June 9, 1933, submitted to me a reservoir land lease in triplicate executed by the conservation commissioner to one W. J. Dillon of Springfield, Ohio. By this lease, which is one for a term of fifteen years and which provides for an annual rental of forty-eight dollars payable semi-annually, there is granted and demised to the lessee above named the right to occupy and use for cottage site and docklanding purposes that portion of the state reservoir land including Lots Nos. 23 and 24 of the Revised Plat of Minnewauken Island in Indian Lake; said island being a part of Virginia Military Survey No. 12276 in Stokes Township, Logan County, Ohio.

Upon examination of this lease, I find that the same has been properly executed by the conservation commissioner and by the lessee named in the lease. I further find, upon reading the provisions of this lease and the conditions and restrictions therein contained, that the same are in conformity with section 471 and other sections of the General Code relating to leases of this kind.

I am accordingly approving this lease as to legality and form and I hereby enclose said lease and the duplicate and triplicate copies thereof with my approval endorsed thereon.

Respectfully,
JOHN W. BRICKER,
Attorney General.

949.

MUTUAL BUILDING AND LOAN ASSOCIATION—RUNNING STOCK DEPOSITS ACCEPTABLE IN PAYMENT OF MORTGAGE LOANS AND REAL ESTATE SOLD BY ASSOCIATION.

SYLLABUS:

1. *A purely mutual building and loan association which is solvent may accept running stock deposits which, under its constitution and by-laws, are presently*

withdrawable in payment of mortgage loans made to the stock depositor, regardless of whether such mortgage loans are in good standing, past due, or now excessive, due to depreciation in the value of the mortgaged real estate.

2. *Such building and loan association may accept such withdrawable stock deposits of a purchaser in payment for real estate sold by the association.*

3. *Stock deposits otherwise presently withdrawable under the constitution and by-laws of such association, are not rendered non-withdrawable by provisions in the constitution or by-laws requiring withdrawal notice or limiting payment from certain funds, the only effect of such provisions being to delay payment in cash.*

COLUMBUS, OHIO, June 10, 1933.

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

DEAR SIR:—I have your letter of recent date which reads as follows:

"Your opinion is respectfully requested on the following proposition:

In view of present statutes, what right exists in a purely mutual building and loan association to make transfers from running stock credits to loans that are in good standing, as well as to loans that are badly in arrears, or to loans which are now excessive due to depreciation in real estate values?

Does the Board of Directors of such an association have the right to permit such transfers?

May the Board of Directors of the above type of association accept, upon terms satisfactory to them, running stock credits as payment in sale of real estate?

The by-laws of this company have been amended in accordance with the suggestion and approval of the Division of Building and Loan Associations, to provide as follows:

'But the Board of Directors or the Executive Committee may, when in their judgment the best interests of the company, its depositors and stockholders can be served, permit a set-off of any withdrawal account against a mortgage loan where both appear in the same name or belong to the same person or corporation.'

The request for this opinion comes from an association which is considered to be solvent and well managed, and the Board of Directors are very anxious to carry on such transactions in event they are legally protected in exercising their judgment, while the association is requiring withdrawal notices."

Your first question, as I understand it, concerns the right of a mutual building and loan company to accept running stock credits in payment of mortgage loans which are (a) in good standing, (b) past due, and (c) now excessive due to depreciation in the value of the mortgaged real estate.

By a purely mutual building and loan, I understand you to mean one which has no deposits other than stock deposits. From your letter, I understand that the institution in question is solvent.

You quote an amendment to the by-laws empowering the association to "permit a set-off of any withdrawal account against a mortgage loan * * *."

Section 9648 of the General Code empowers building and loan associations

to receive stock deposits. Under section 9648, General Code, such associations are given power "To issue stock to members upon certificates or upon written subscription on such terms and conditions as the constitution and by-laws provide * * *." Section 9651, General Code, grants them the power "To permit members to withdraw all or part of their stock deposits, at such times, and upon such terms, as the constitution and by-laws provide."

I do not have before me the provisions of the constitution and by-laws governing the right of members to withdraw stock deposits. Section 9651 makes that right dependent upon the constitution and by-laws. I am therefore unable to say whether the running stock credits in question are withdrawable.

The term "running stock" is used to describe an arrangement somewhat as follows: A person subscribes to a given number of shares of stock of the building and loan association and is permitted to pay out the face value of the shares in installments, for which payments a receipt is given in a pass book. Whenever the payments equal the face value of the whole or a fraction of a share a certificate is issued. At the same time, however, the person thus subscribing is entitled at any time to withdraw from the association an amount of money equal to his payments and cancel his stock subscription. On such withdrawal he is credited with dividends up to the amount of the fractional share represented by his payments, and charged with the proportionate share of the association's loss, if any, during the time that he was a subscriber.

In an association which has not invoked a provision in its by-laws giving it the right to demand notice of withdrawal for a specified period, a stock depositor, as above pointed out, may withdraw his running stock credits in accordance with the provisions of the constitution and by-laws. These provisions may permit withdrawal at any time or only upon the happening of certain enumerated contingencies. A depositor who has a present right of withdrawal is entitled to be paid the amount of his stock credit, less fines and assessments. In exercising his right to withdraw, if he desires to discharge a debt which he owes the company, the directors may allow him to do so, regardless of whether the loan is one in good standing, past due, or one which is now excessive because of depreciation in the value of the mortgaged real estate.

You state that the building and loan in question is requiring "withdrawal notices." Since the institution is a purely mutual association, I assume that such requirement relates to the withdrawal of running stock credits. Further, I assume that the provision which requires a stock depositor to give notice, stipulates that at a certain time after the filing of such notices the credits shall be withdrawable or that the credits shall be withdrawable in the order of presentation of notices as fast as a certain percentage of the regular receipts, less operating expenses and other obligations, will pay them. The reasonableness of such withdrawal notices was attacked in the case of *Columbian Building and Loan Company* vs. *Burke,* 29 N. P. (N. S.) 499, and their validity upheld by the court. A determination of the validity of such notices was deemed unnecessary by the court in the case of *Leimonas* vs. *Lithuanian Savings & Loan Association,* 38 O. L. R. 81. The following language appears at page 84:

> "Notwithstanding the limitation contained in the rules and regulations or by-laws as to the conditions under which withdrawals may be made by depositors from their savings accounts, *which of course are binding upon all who had notice thereof,* the present case does not involve the question of withdrawal of funds but instead involves the question of the right of such depositor to have the application made of the indebt-

> edness due to him from defendant as against an indebtedness due from him to defendant. If the plaintiff instead of seeking to make such application, sought to compel defendant to pay him the amount on deposit to his credit we would then become deeply concerned with the rules, regulations and by-laws of defendant company and the limitations placed therein upon the right to withdrawal. He is not asking for any money from defendant company. All that he is requesting is the right to apply the indebtedness due to him against the indebtedness due from him. There is clearly a mutual relationship of debtor and creditor between the parties and the statutory right of set-off fully applies." (Italics the writer's.)

It appears from these two cases that the provision in the constitution and by-laws requiring notice in order to make running stock credits withdrawable are reasonable and enforcible.

The distinction between the relationship of a stockholder to his corporation involved in this case and that of debtor and creditor presented in *Leimonas* vs. *Lithuanian Savings & Loan Association, supra,* must be observed. The right of a stock depositor to apply his stock credits upon a debt due him from the company depends upon his right under the constitution and by-laws of the association to withdraw such credits. The question of the right of withdrawal is not involved where a creditor of a building and loan association seeks to set off a debt, such as a certificate of deposit or a savings account against a debt which he owes to the association. Our statutes secure the right of set-off to parties sustaining the relation of debtor and creditor between whom there are cross-demands, the purpose being to ascertain in whose favor a balance, if any, exists. The relation of debtor and creditor does not arise as to a stockholder even after his right to withdraw has accrued. It was held in the Leimonas case, as appears from the second branch of the syllabus:

> "Such a set-off is not a withdrawal of funds and consequently does not constitute a preference over other creditors and depositors of the corporation, *nor is it a violation of its by-laws which limit the time and amount to be withdrawn.*" (Italics the writer's.)

It is important to consider the precise effect of the notice provision as it applies to the situation in question. I believe it may be soundly argued that provisions permitting withdrawal only in the order in which notices are filed, or allowing withdrawal only from a certain portion of the funds on hand, do not prevent a stock credit from being withdrawable where payment is otherwise than by cash. Thus, as to a proviso that at no time should more than one-half of the funds in the treasury be applied to the demands of withdrawing stockholders, the court in *U. S. Building, etc. Assn.* vs. *Silverman,* 85 Pa., 394, took the view that the proviso merely intended that the operations of the society should not be embarrassed by having the whole amount of its cash assets taken in order at once to pay the withdrawing stockholders.

If that is the sole purpose of such a proviso, it does not operate to prevent the association from allowing a member to pay his loan with running stock credits, although not presently entitled to withdraw in cash. The fund for paying non-borrowing members in cash would not thereby be disturbed.

As to the provision that stock depositors are entitled to withdraw only in the order in which notices are filed, it is my opinion that such rule has no

application to the facts in question, i.e., it does not operate to prevent a stock credit from being withdrawable where the funds in the treasury for paying members who must be paid in cash are not disturbed. In brief, it is my opinion that running stock credits, withdrawable under the constitution and by-laws of a building and loan association, may be accepted by the association in payment of a debt owed to it by the stock depositor, even though such credits are not presently payable in cash by virtue of a proviso in the constitution or by-laws permitting payment only in the order of filing withdrawal notices, or only from a certain portion of the funds in the treasury.

In reaching this conclusion I have considered the case of *Ward* vs. *The North Fairmount Building & Savings Co.*, 5 N. P. 133, decided by the Superior Court of Cincinnati in 1897. The facts, as stated by the court, were these:

> "The plaintiff, Catherine Ward, borrowed $2,000. from the defendant, and gave a mortgage to secure the same. Subsequently she purchased from Alto F. Klinke, a non-borrowing member, his withdrawal claim not yet payable, which was equal to the amount due on her mortgage, and thereupon gave notice to the association that she desired to pay off her mortgage with said withdrawal claim. The association refused to cancel the mortgage on the ground that the withdrawal claim of Klinke was not yet payable, inasmuch as it was provided in the constitution of the association, that members giving notice of withdrawal should be paid in the order in which they gave notice, and the time for the payment of the Klinke claim had not yet arrived. The plaintiff prayed that the defendant be required to cancel said mortgage."

The opinion of the court is as follows:

> "The plaintiff is not entitled to the relief prayed for. To allow her to pay off her mortgage with the withdrawal claim of Klinke before it is payable is, in effect, to give the Klinke claim priority over those whose applications for withdrawal had been filed before that of Klinke; because the mortgage could not be paid off except by cash and to allow it to be paid off by the Klinke claim is to treat the claim as cash, in other words, to pay the Klinke claim before the applications which were prior to it have been paid. What is expressly forbidden by the constitution cannot be done by indirection, for in either event the result is a preference in time of payment which the constitution seeks to prevent."

From all that appears, the defendant building and loan company was solvent, nor does the court suggest that the withdrawal claim was not properly assigned. Further, the court's reasoning is applicable where the company voluntarily accepts the withdrawal claim in payment of a debt as well as where it resists the claim. Nevertheless, I am constrained to disregard that case in the belief that the courts at the present time would not follow it. My investigation shows that since its rendition, this decision has been cited in the reported case of this State only once, in *Columbian Building & Loan Company* vs. *Burke, supra.* This reference appears in a discussion in the opinion not material to the decision of the case, which, incidentally, was not followed in *Leimonas* vs. *Lithuanian Savings & Loan Association, supra.* In my opinion, the court in the Ward case incorrectly stated the purpose of the provision in question.

Your second question is whether the board of directors of a purely mutual

building and loan association which is solvent may accept running stock credits in payment of real estate sold by the association. The principles discussed in answering your first question are likewise applicable to this one. Omitting for the moment provisions relating to withdrawal notices, if under the constitution and by-laws of the association, running stock credits are presently withdrawable, the stock depositor is entitled to payment. It follows that if it is mutually agreeable, the association can pay him in real estate. The provision relating to withdrawal notices merely delays payment in cash, but does not alter the fact that the stock credits are presently withdrawable.

In the light of the foregoing and in specific answer to your questions, it is my opinion that:

1. A purely mutual building and loan association which is solvent may accept running stock deposits which, under its constitution and by-laws, are presently withdrawable in payment of mortgage loans made to the stock depositor, regardless of whether such mortgage loans are in good standing, past due, or now excessive, due to depreciation in the value of the mortgaged real estate.

2. Such building and loan association may accept such withdrawable stock deposits of a purchaser in payment for real estate sold by the association.

3. Stock deposits otherwise presently withdrawable under the constitution and by-laws of such association, are not rendered non-withdrawable by provisions in the constitution or by-laws requiring withdrawal notice or limiting payment from certain funds, the only effect of such provisions being to delay payment in cash.

Respectfully,
JOHN W. BRICKER,
Attorney General.

950.

PROBATE JUDGE—SALARY MAY NOT BE REDUCED BY COUNTY COMMISSIONERS BY AMENDED APPROPRIATION MEASURE WHEN REVENUES IN GENERAL FUND SUFFICIENT TO MEET STATUTORY EXPENDITURES.

SYLLABUS:

County commissioners may not reduce the appropriation made for the salary of a probate judge, by means of an amended appropriation measure passed under authority of section 5625-32, *General Code, if at the time such amended appropriation measure is passed there are revenues in the general fund of the county sufficient to meet the total amount of expenditures made imperative by statute.*

COLUMBUS, OHIO, June 10, 1933.

HON. RAY B. WATTERS, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Acknowledgment is made of a communication over the signature of C. B. MacDonald, Assistant Prosecuting Attorney, as follows:

> "In January, 1932, the County Commissioners of Summit County appropriated for the personal salary of the judge of the Probate Court the sum of $5855.00, being the amount of the statutory salary