660.

BUILDING AND LOAN COMPANIES—DOUBLE LIABILITY CONTRACTUAL OBLIGATION—AMENDMENT OF ARTICLE XIII, SECTION 3, OHIO CONSTITUTION—EFFECTIVE ON STOCKHOLDERS OF CLOSED INSTITUTIONS.

SYLLABUS:

1. *Stockholders' double liability under the present provisions of Article XIII, Section 3 of the Constitution of Ohio constitutes a primary contractual obligation.*

2. *The amendment of Article XIII, Section 3 of the Constitution, effective July 1, 1937, eliminating such double liability may have no effect upon the rights of stockholders and creditors of closed banks and building and loan associations now in liquidation in view of the inhibition of the Federal Constitution against any state impairing the obligation of contracts.*

COLUMBUS, OHIO, May 26, 1937.

HON. WILLIAM H. KROEGER, *Superintendent of Building and Loan Associations of Ohio, Columbus, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date requesting my opinion upon the following:

> "At the November election, Section 3 of Article 13 of the Constitution of Ohio was amended. The amendment provided that if adopted it should take effect July 1, 1937. It further provided that the existing Section 3 of Article 13 of the Constitution, in case of the amendment being adopted, should be repealed and annulled.
>
> The amendment having been adopted, and taking effect July 1, 1937, and the existing section thereupon being repealed and annulled, kindly advise me:
>
> 1. In the case of building and loan associations now in liquidation, must liability assessment be made prior to July 1, 1937?
> 2. Must court action be started prior to July 1, 1937?
> 3. Where a building and loan association is now in liquidation and it is not apparent that a double liability should be assessed, but that the future appraisals made

show that there is a liability, should that assessment be made prior to July 1, 1937?"

Section 3 of Article XIII of the Constitution of Ohio now reads:

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank', 'banker' or 'banking', or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

On and after July 1, 1937, Section 3 of Article XIII will read as follows:

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank', 'banker' or 'banking', or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

At common law there was no superadded stockholders' liability. 7 Corpus Juris, 503. However, in a number of states, either under provisions of the Constitution or by legislative enactment, there is created a superadded stockholders' liability. There is a wide divergence of

opinion in the different states that have created such superadded liability. One view holds that the superadded liability is secondary and that the stockholders cannot be sued for the debts of an institution until after the assets of the institution have been exhausted. The other view holds that the superadded liability is a primary obligation. 3 Ruling Case Law, 410.

Ohio is in the latter class, for it appears that in Ohio such liability is not secondary; nor is it required that the assets of the bank be exhausted before recourse is had to the stockholders. The language of the Ohio statute is that the superintendent of banks "may enforce the individual liability of the stockholders." The right of creditors to sue to enforce it is not denied, either expressly or by implication. If the theory advanced that the liability imposed by the present constitutional and statutory provisions is a primary rather than a secondary one, is a correct one, a creditor could sue a stockholder before exhausting the corporate assets. 5. O. Jur., 327.

The superadded liability imposed upon stockholders is a contractual rather than a penal liability. 5. O. Jur., 327, citing *Kulp* vs. *Fleming,* 65 O.S. 321. Inasmuch as the liability imposed is an individual responsibility for "all contracts, debts, and engagements of such corporations", to the extent of the amount of the stock held therein at its par value, in addition to the amount invested in the shares, it would seem to be a primary rather than a secondary liability. 5 O. Jur., 323.

The liability imposed upon bank stockholders by the above constitutional provisions applies to all indebtedness of the bank incurred while such amendment is in effect.

In this opinion the reasoning applicable to banks is also applicable to building and loan associations unless otherwise stated.

It is legal history that after the constitutional amendment of 1903 until Jauary 1, 1913, when the amendment of September 3, 1912, became effective, stockholders were not subject to superadded liability. Thereupon the Constitution entered the domain of legislation and fixed such a liability, which by the recent amendment has again been removed.

Under the statute imposing a superadded liability on stockholders, if one is a stockholder at the time of the enforcement of the liability, it makes no difference as to when he actually became a stockholder. 5 O. Jur., 324, citing *Umsteather* vs. *Bank,* 4 N.P. (N.S.) 150.

The relation *ex contractu* between the stockholder and the depositor is one of pertinent interest, as it arises from a legal view of capital stock. In 7 Corpus Juris, 509, it was pointed out that "the amount of capital stock of a bank is a fund on which creditors have a right to rely, and consequently the stockholders are liable to the creditors for all, or such portions, of the sums remaining unpaid on their subscriptions for stock

or withdrawn from the capital of the bank as may be needed to pay its debts."

It has been pointed out that at common law the stockholders are not liable for the debts. In Ohio, however, the constitution and the statutes imposed not only a liability but a superadded liability. Stockholders were made individually responsible, equally and ratably, and not one for another, for all contract debts and engagements of the corporation, to the extent of the amount of their stock at par value.

The essence of the contract is well emphasized in *Kulp* vs. *Fleming,* 65 O.S., 321. The first branch of the syllabus reads:

> "A provision of statute that the stockholders of a corporation shall be individually liable to creditors for the debts of the company does not alone create the liability. It is rather a legislative requirement that whoever becomes a stockholder shall thereby assume an individual liability, and thus gives effect to the acts of the parties. The actual liability becomes operative by the act of a shareholder in becoming such, being founded on his proposal to become liable which arises from the membership and individual agreement to abide by the organic law of the corporation, and the acceptance thereof by the creditor by extending credit. Such obligation is contractual."

In the opinion it is said:

> "It was an offer to become liable on the part of the stockholders, accepted by the creditor when the credit was given and thus became a contract, made, it is true, not directly with the creditor, rather with the corporation perhaps, but one which was for the benefit of creditors, and to which, upon well settled principles in this state, the creditors would have a right to resort in case the corporation itself should fail to respond. The provision of the statute does not create the liability * * *; it is to declare the legal effects of the acts of the parties, which enables them to contract in a manner not authorized at common law. It is thus in the nature of a guarantee."

The syllabus in this case also says:

> "The construction of a statute of a sister state by its highest court will be followed by this court.
>
> The individual liability of stockholders for debts of a corporation, provision for which is made by the constitution and

statutes of Kansas, is not penal but is contractual. That liability may be enforced in Ohio. * * *"

The Constitutional Amendment of 1913, recently repealed, effective July 1, 1937, was in fact a manifestation of police power. It was intended to throw safeguards around the business of banking and the money entrusted by depositors in banks. In effect, it said to the stockholders that if they chose to engage in banking, through stock ownership, they could do so only by entering into a special class of contracts by which they guaranteed protection of the money of depositors. The creditors, or depositors, relied on that provision. This view is stated in 5 O. Jur., 322, as follows:

> "The present constitutional amendment imposing a superadded liability has been held not to impair the obligation of contracts of those stockholders who acquired their stock prior to the amendment. It may also be upheld as a proper exercise of police power, since experience has demonstrated the necessity of throwing greater safeguards around the administration of private banking corporations, and since this amendment is designed to cause the officials of those corporations to be conservative in their business ventures. *Allen* vs. *Scott,* 104 O.S. 436, 135 N.E. 683; *Allen* vs. *Pontius,* 15 O. App. 251, affirmed in 104 O.S. 436, 136 N.E. 683."

In the decision of *Allen* vs. *Scott,* supra, whatever may be said as to the language of the court, it is observed that this case, holding prior stockholders amenable to the amendment of 1913, was concerned entirely with double liability to protect creditors who became such after such amendment took effect. The case is, accordingly, in no way apposite in this respect to the question here under consideration.

In Braver on Liquidation of Financial Institutions, page 181, the following language is used:

> "The constitutional and statutory liability of stockholders is a definitely limited liability on the part of the stockholders for the benefit of the creditors of the bank, and the weight of authority is that a constitutional provision imposing a double liability on bank stockholders is self-executing, there being a manifest intention that it should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given or the enforcement of the duty imposed."

Numerous cases in support of this view are cited in various states of the Union, to wit, Arizona, California, District of Columbia, Illinois, Indiana, Missouri, Nebraska and South Dakota, and the following Ohio cases are cited:

Lang vs. *Osborn Bank,* 100 O.S., 51; 125 N.E. 105.
Allen vs. *Scott,* 104 O.S., 436; 135 N.E. 683.
Snider vs. *United Banking & Trust Co.,* 124 O.S. 375; 178 N.E. 840.
Baumgardner vs. *State, ex rel. Fulton,* 48 O. App. 5; 192 N.E. 349.

It is also said in Braver on Liquidation of Financial Institutions, page 183:

> "* * * the doctrine is well settled by the overwhelming weight of authority that the statutory liability of stockholders collectable by suit, though statutory, is primarily contractual in its nature, and not penal. Each stockholder voluntarily agrees to incur the liability at the time of his becoming such. It is contractual in its nature to such an extent that the legislature is prohibited by the federal constitutional provision against impairing the obligation of contract from taking away the double liability of stockholders after it has once accrued or attached, *Simons* vs. *Groesbeck,* 268 Mich. 495, 256 N.W. 496."

In view of the law as above cited, it does not seem clear that by the new Constitutional Amendment there could be a destruction of existing contractual rights.

Section 10 of Article I, United States Constitution, reads as follows:

> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, *or law impairing the obligation of contracts,* or grant any title of nobility." (Italics mine.)

There does not seem to be any doubt that the Ohio law makes the obligation of a stockholder primary and that the contract between the stockholders and the creditors was entered into under Section 3, Article XIII of the Ohio Constitution and the statutes enacted in pursuance thereof. The parties had attained their status while the earlier amendment, with supporting statutes, was in effect. The creditors relied on

the requirement that the stockholders must comply with the precedent qualification of accepting the responsibility to guarantee deposits to the extent of a superadded liability. For one party to that contract to withdraw at pleasure would defeat the central purpose of a contract. The Federal Constitution itself declares that laws shall not be passed to impair contracts. It would appear, therefore, that an amendment to the State Constitution is not rightly to be expected to impair the rights of one party to a contract which have arisen under protection of that same Constitution.

Legal reasoning in point is found in *Coffin Bros* vs. *Bennett,* 277 U. S. 29. The superintendent of Banks in Georgia had sought to levy execution to collect assessments made on stockholders of a bank which had closed. Waiving aside objection as to proceedings peculiar to Georgia, Mr. Justice Holmes, in part, said:

> "The plaintiffs in error by becoming stockholders had assumed the liability on which they are to be held. *Hernheimer* vs. *Converse,* 206 U. S., 516."

A case somewhat similar, but concerning a mercantile corporation rather than a bank is that of *Goombes* vs. *Getz,* 285 U. S. 434, which reached the Supreme Court on *certiorari* from California. In that case the plaintiff brought suit to recover from a director of the company the amount of an indebtedness upon an open account for goods sold to the company by the petitioner's assignor.

It was contended in the defense that the power expressly reserved by the Constitution of California to repeal all laws concerning corporations was a part of the implied contractual agreement relied upon by the petitioner. In the State Supreme Court a motion was filed to dismiss on the ground that the cause of action had abated by reason of the repeal of the provisions of law on which it was based.

The plaintiff had contended that cases involving stockholders' liability demonstrate that retroactive effect given to repeal of the constitutional provision impairs the obligation of contracts and had given numerous citations. (See 285 U. S. at page 435.)

Mr. Justice Sutherland, in part, held:

> "It was conceded that the liability created by the constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors. But this contractual liability, it was said, was conditioned by the reserve power over corporate laws by Section 1, Article XII of the constitution.

In substance, the contention of respondent is that the reserve power provisions read into the contract as one of its terms, authorizes an extinction by repeal of the auditor's cause of action, unless previously reduced to final judgment.

The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended and, within limits not now necessary to define, the interrelations of state, corporation, and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. * * * The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor. * * *"

Thus, it was held, that when the provision for liability was repealed the previous right did not fall with the repeal.

It is true that in this latter case Justice Cordozo dissented, but the majority of the court held as stated above.

The language used by the court in *Green* vs. *United States,* 67 F. (2) 846, is also significant:

"If as we conclude the effect of the adoption of the 21st amendment of the Federal Constitution is to withdraw from Congress the power to enact or to continue in force statutes enacted solely in pursuance of the power given by the 18th amendment, it is clear that it could not do so even temporarily as to past offenses by a saving clause enacted by it."

I am therefore of the opinion that in institutions in liquidation the stockholders' superadded liability in Ohio is a primary obligation, is a contract for the benefit of creditors, that the right of creditors to sue became fixed at the time of signing the stock subscription, and that it is a contract, the rights of which cannot be impaired by future constitutional amendment of the State Constitution and that no laws can be passed impairing the obligations of the said contract.

Since it is my opinion, as stated above, that depositors or creditors may sue to enforce superadded liability of stockholders, it follows that the Superintendent of Building and Loan Associations, in his capacity as such, may bring a suit on behalf of depositors or creditors, as a statute of Ohio specifically gives him that authority. Section 687-10, sub-head 9, relative to the powers and duties of the Superintendent, reads as follows:

"If he ascertains that the assets of such association will be insufficient to pay its debts and liabilities, to enforce such in-

dividual liability of each shareholder as may exist. Until an order to declare and pay a final dividend shall be entered in such proceedings the right to enforce such liability for the benefit of all creditors is hereby vested exclusively in the superintendent."

The above quoted section makes the Superintendent of Building and Loan Associations the ministerial agent for the enforcement of the contractual rights of the depositors or creditors as against stockholders until such time as an order to declare and pay a final dividend shall be entered.

Specifically answering your questions in numerical order, I am of the opinion that:

1. In the case of a building and loan association now in liquidation, liability assessments do not have to be made prior to July 1, 1937.
2. The court action does not have to be started prior to July 1, 1937.
3. Therefore liability can be assessed at such time as future appraisals may show necessity for such an assessment.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

661.

TEACHERS INSTITUTE—TEACHERS PAYMENT —ATTENDANCE.

SYLLABUS:

A county board of education having authorized the holding of a teachers' institute, as provided for in Section 7868, General Code, can not substitute a day's attendance at a meeting of the Progressive Education Association in lieu of a day's attendance at its duly authorized county institute, and pay the expenses incurred for attendance of teachers and superintendents at such meeting of the Progressive Education Association.

COLUMBUS, OHIO, May 27, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

"We wish to submit a question concerning the legality