157. The use of the water for hydraulic purposes was only incidental and subordinate to the declared purpose of the state to promote navigation and was expressly made so by the Leasing Act of 1840, which limited all leases to the use of surplus water not required for purposes of navigation and provided for their abrogation whenever the use of the water for hydraulic purposes interfered with navigation. Leases of surplus water, granted under the Act of 1840 and similar in terms to those involved in the present litigation, have been repeatedly construed by the highest court of the state of Ohio, which has uniformly held that they were only incidental to the use and maintenance of the canal for purposes of navigation; that they imposed no obligation on the state to maintain the canal either for navigation or other purposes and when abandoned by the state the right of lessees to surplus water ceased. *Hubbard* vs. *Toledo* (1871) 21 Ohio St. 379; *Little Miami Elevator Co.* vs. *Cincinnati* (1876) 30 Ohio St. 629; *Fox* vs. *Cincinnati* (1878) 33 Ohio St. 492; *Vought* vs. *Columbus, H. V. & A. R. Co.* (1898) 58 Ohio St. 123, 161, 50 N. E. 442."

I am of the opinion therefore that neither the Maumee Valley Electric Company, as the successor in interest under the Pilliod lease, nor any other corporation or person claiming through or under it has now any legal right to take water from the Miami and Erie Canal at this point for hydraulic power purposes. What the disposition of your department may be with respect to the continued use of water from the canal for hydraulic power purposes at this place is, of course, a matter for your determination.

Respectfully,
JOHN W. BRICKER,
Attorney General.

967.

APPROVAL, BONDS OF VILLAGE OF WILLOUGHBY, LAKE COUNTY, OHIO—$3,400.00.

COLUMBUS, OHIO, June 17, 1933.

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

968.

STOCKHOLDER—LIQUIDATION OF BUILDING AND LOAN ASSOCIATION—OWNER OF PAID-UP STOCK OF SUCH ASSOCIATION NOT A CREDITOR BUT STOCKHOLDER NOT REQUIRED TO PROVE CLAIM TO PRESERVE LEGAL RIGHTS AND ENTITLED TO SHARE IN PROCEEDS FROM SALE OF ASSETS IN LIQUIDATION—PAYMENT IN EXCESS OF SUBSCRIPTION ENTITLED TO REPAYMENT.

SYLLABUS:

1. *The claims which are required to be proven to the superintendent of build-*

ing and loan associations in order to be entitled to share in the proceeds derived from the liquidation of a building and loan association, are claims for the payment of money or debts of the association. The owner of paid-up stock or of running stock is not a creditor of such association, but rather a stockholder, and is not required by the provisions of Am. H. B. 263, *enacted by the* 90th *General Assembly to prove such claim in order to preserve his legal rights.*

2. *A member of a building and loan association owning paid-up shares or running shares, is not thereby a creditor of the association, but rather a stockholder and, as such, is entitled to share in the proceeds arising from a sale of its assets in liquidation, pro rata with other stockholders, after all the debts of the association have been paid.*

3. *Where a member of a building and loan association pays to the building and loan association a sum of money in excess of his subscription, there is an implied promise on the part of such association to repay the same, in the absence of a provision of the by-laws to the contrary. Upon liquidation of the building and loan association by the superintendent of building and loan associations such member should be permitted to prove his claim to the extent of such excess in the same manner as other creditors.*

COLUMBUS, OHIO, June 19, 1933.

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

DEAR SIR:—I am in receipt of your request for my opinion which reads in part as follows:

> "The M. B. and I Company has but eight or ten certificate of deposit creditors. They have deposits of approximately $87,000.00. The remainder of its deposits are stock, amounting to approximately $11,500,000, consisting of—
>
> 1. Paid up stock
> 2. Running stock
> 3. Indeterminate stock
>
> This company has no authority, under its constitution and by-laws, to accept the usual savings deposits and none to my knowledge were ever accepted. The question arises regarding the notice to file claims. Who should file claims and what will the form of such claims be? It would seem that the paid up stockholders, running stockholders and indeterminate stockholders are the owners of the company and not, strictly speaking, creditors. There is some question, therefore, of the necessity of Proofs of Claim being presented by paid up stockholders, running stockholders or indeterminate stockholders under the liquidation law.
>
> Section 2 of General Code 687-1 provides for published notice 'upon all persons who have claims against such association' but there is no place in the act where it is indicated that stockholders are persons having claims. The last paragraph of the same General Code section requires a mailed notice only to persons who appear on the books as creditors. This, it would seem, would not include ordinary stockholders.

> I am enclosing a copy of the constitution and by-laws of the M. B. and I Company and two copies of account cards. The old cards provide for a fixed number of shares to be subscribed for, whether payable in installments or in one payment. The new cards provide for an indefinite share subscription depending upon the amount standing to the credit of the depositor at any particular time. There is a question as to the validity of the last type of subscription card as there seems to be no legal justifications for it in the constitution or by-laws. This type of stock depositor I have termed, for want of a better name, 'indeterminate stockholders.' They came into the picture about 1926 at which time the company sent out all new cards. Consequently, most of the old running stock deposit cards have definite fixed amounts which were changed into the indeterminate cards. There are still a number of the old fixed amount subscription cards of those who would not change. As far as I have been able to ascertain, there is no stockholders' resolution or directors' resolution changing the by-laws so as to permit such subscription cards.
>
> I am enclosing forms prepared by my agent, Mr. R. for certificate proof covering the three classes mentioned above.
>
> For your information, I am enclosing copies of the Proof of Claim and Certificate of Claim issued by the deputies in charge of the liquidation of The C. B. and L. Company which, in my opinion, are not applicable to the institution in question."

The language referred to by you as contained in section 687-1, paragraph 2, does not specifically state that it refers to claims for the payment of money, but an examination of the act, of which such section is a part (Am. H. B. 263 of the 90th General Assembly), clearly shows that such language refers to *claims for the payment of money*. Then, in section 687-10, General Code, authority is granted to the Superintendent of Building and Loan Associations, who is liquidating a loan association, to pay "claims". Such word appears through the act as referring to the obligations of the company being liquidated to pay money. It is therefore evident that if such members are creditors of the association they must be notified of the fact that the superintendent of building and loan associations has begun the process of liquidation thereof and an opportunity given them to prove such claim. If, however, they are not such creditors, there does not appear to be any provision of the law requiring them to set up their interest as stockholders.

The stockholders of a corporation, as such, are not creditors of the corporation. *Miller* vs. *Ratterman,* 47 O. S. 141; *In re. Eureka Anthracite Coal Co.* (D. C.) 197 Fed. 216; *Hannon* vs. *Williams,* 34 N. J. Eq. 255; *Curtis* vs. *Dade County Securities Co.* 30 Fed. 2d 325. They become so only when, and to the extent that dividends are declared and are payable. Under the former General Corporation Law a general corporation could not purchase its stock except for the purpose of saving itself from loss. (Former Section 8627, General Code). Under the present act it may purchase it only in the instances and manner provided in the statute. (See Section 8623-41, General Code.) In the case of a general corporation, the shareholders are usually required to pay for their stock at the time of purchase, although I know of no rule of law requiring such practice. Former Sections 8632 and 8633, General Code, required that ten percent of the stock shall have been subscribed and at least ten percent of such subscription paid in before the

corporation commenced functioning. The present act, Section 8623-13, General Code, requires that the amount of money specified in the articles of incorporation as the amount with which the corporation would commence business, be paid in before the corporation begins to function.

In the case of a building and loan association, it would be an unusual practice for it to commence doing business with its stock fully subscribed and fully paid. Such practice would be contrary to the basic theory of such type of corporation. See *Sundheim, Building & Loan Associations,* Section 3; *Endlich on Building Associations,* 2d Ed. Section 16; *Thompson on Building Associations,* page 2; *Seibel* vs. *Building Association,* 43 O. S. 371, 373.

The usual, if not general practice of such corporations is to accept subscriptions to their capital stock payable in small weekly or monthly installments, as specified in the subscription agreement or the by-laws of the corporation, the subscriber becoming a member at the time of the execution of the subscription agreement.

It would therefore appear that members of a building and loan association who have agreed to purchase shares of stock and pay therefor in monthly or weekly installments, are similar as to rights and liabilities as are purchasers of stock in a general corporation unless such rights have been changed by the provisions of the statutes with specific reference to building and loan associations. (§§9643 to 9675, General Code.) See *Hinman* vs. *Ryan,* 3 O. C. C. 529; *State* vs. *Hinkle,* 134 Wash. 216. Section 9645, General Code, provides that a building and loan association may commence business when five percent of its stock has been subscribed and paid in, and the approval of the Superintendent of Building and Loan Associations has been obtained. Section 9649, General Code, authorizes such corporations "to issue stock to members upon certificates or upon written subscription *on such terms and conditions as the constitution and by-laws provide* * * *. Each member may vote his stock to the extent and in the manner provided by the constitution and by-laws, but no member shall cumulate his votes."

Section 9651, General Code, authorizes a building and loan company,

> "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. Any member, however, who withdraws his entire stock deposit, or whose stock has matured, shall be entitled to receive all dues in and dividends declared thereon, less all fines or other assessments, and less the pro rata share of all losses, if any have occurred."

Section 9653, General Code, authorizes a building and loan company,

> "To cancel shares and parts of shares of stock upon which the credits have been withdrawn, or upon which loans have been repaid, and re-issue them as new stock."

Section 9654, General Code, authorizes a minor to become a shareholder in a building and loan association and to deal with his shares to the same extent in so far as the company is concerned, as could an adult, and with the same liabilities. Section 9671, General Code, requires the establishment and maintenance out of the earnings of the company, of a "reserve fund for contingent losses," which, in the case of permanent or perpetual associations, must be five percent of the total assets.

Section 9673, General Code, provides for the distribution of net earnings to "all members" of the corporation as a dividend, and further provides that the undivided profits fund of the corporation shall never exceed three percent of the assets.

The above sections appear to be the only sections of the building and loan law that affect the relation of the shareholder to a building and loan association otherwise than the general corporation law. The major differences set forth in such provisions are those contained in Section 9651, General Code, which authorizes a building and loan association to permit members to withdraw any or all of their payments on stock at the time and in the manner provided by the regulations of the company, or when his stock is paid in full to receive the par value of his shares less his pro rata share of the company's losses, if any; also in Section 9653, supra, wherein it is provided that when such shares have been surrendered the company may re-issue them as new stock.

In effect, these sections authorize the building and loan association to deal in its own shares and stock subscriptions at a determinable price, which power the general corporation act does not grant to general corporations.

It might be urged that such members of a building and loan association are in certain respects similar to creditors of the corporation. The same argument might well be raised concerning the nature of holders of preferred shares in a general corporation whose stock is "callable", in a general corporation, with greater weight than in favor of the members of a building and loan association, for such shareholders are entitled to a definite dividend from the earnings of the company, before other shareholders are entitled to any dividend, and are generally entitled to share in the assets of the corporation in the event of its insolvency, to the exclusion, if necessary, of the common shareholders. Yet it has been held generally that such shareholders are not creditors of the corporation. As stated by Spear, J., in *Miller, Exr.* vs. *Ratterman, Treas.,* 47 O. S. 141, 154:

> "The relation of a holder of preferred stock is, in some of its aspects, similar to that of a creditor, but he is not a creditor save as to dividends after the same are declared. He is neither a stockholder or a creditor; he cannot, by virtue of the same certificate, be both. If the former, he takes the risk in the concerns of the company, not only as to dividends and a proportion of the assets on the dissolution of the company, * * if the latter, he takes no interest in the company's affairs, is not concerned with its property, or its profits as such, but his whole right is to receive agreed compensation for the use of the money he furnishes, and the return of the principal when due. Whether he is the one or the other depends upon a proper construction of the contract he holds with the company."

In your inquiry you refer to three classes of stock in the building and loan company in question: "paid up stock", "running stock" and "indeterminate stock."

"Paid-up stock", from the description contained in Sections 10, 11 and 12 of such company's by-laws, might be defined as shares for which the member has paid in full the purchase price at the time of his subscription or upon which all installments have been fully paid. Such shares are, pursuant to Section 12 of the by-laws, callable by the board of directors.

"Running stock" is that type of stock referred to in Section 9 of such by-laws; that is, a subscription for stock by virtue of which the member agrees to

pay at least $1.00 per month on each $200.00 share or at least $2.50 per month on each $500.00 share until the purchase price therefor has been fully paid, which stock then becomes "paid-up stock."

The members referred to by you as "indeterminate stockholders" are those stockholders who have continued to make monthly payments after their written stock subscription has been paid, which, together with the dividends credited, are in excess of the written subscription, but upon which payments the member is entitled to receive dividends pursuant to section 9 of such by-laws.

The provisions of the by-laws of such company require the payment of dividends to all members in proportion to the amount of money credited as payments on stock, whether or not certificates have been issued.

"Members" of such building and loan company are defined in Article V of its Constitution as anyone who is the owner of, or subscriber for one or more shares of the capital stock of the company. Such article reads:

> "Any person subscribing for, or becoming the owner by transfer or otherwise, either in his own name or as trustee for another or others, of one or more shares of the capital stock of this Company, shall become a member thereof, and as such shall be entitled to all the benefits and privileges, and subject to all the duties and liabilities of membership as provided by law and prescribed in this constitution and the by-laws of the Company."

From an examination of the regulations and by-laws in connection with the statutes with reference to building and loan associations it is evident that there is no relation of debtor and creditor between such building and loan association and its members; that the members do not become creditor's of such corporation until a dividend has been declared or possibly after the share of stock of such company has been called for redemption pursuant to Sections 9 and 12 of its by-laws; that the members have no other property interest in the corporation except to share in the distribution of the net proceeds derived from its assets after payment of its debts.

This view appears to be established by the courts in other states; thus in the third paragraph of the headnotes of the case of *Stone* vs. *Schiller Building & Loan Association,* 302 Pa. 544 (1931):

> "A withdrawing stockholder of an association is at no time a creditor of the association, as that term is usually understood."

And in the first branch of the syllabus of *Simsohn* vs. *Southern Co-operative B. & L. Association* (1931) D. & C. Rep. (Pa.) it is stated:

> "A stockholder in a building and loan association who has given thirty days notice of his withdrawal in writing, upon which the secretary of the association has made the proper endorsement, in accordance with the by-laws, and who is awaiting his turn to receive payment, remains subject to a stockholder's liability and retains the rights of a stockholder, having only limited rights as a creditor."

In such case the court holds that a stockholder is not a creditor of the corporation, even though his notice to withdraw has been approved by the secretary of the company in compliance with the by-laws of the corporation.

In *Coltrane* vs. *Baltimore B. & L. Association,* 110 Fed. 272 (1901) it is stated:

> "1. A matured notice of withdrawal given by a member of a building association holding paid up stock, as permitted by the terms of his contract, does not operate to terminate his membership and convert him into a creditor entitled to preference of payment over the other members in the distribution of the assets of the association in insolvency, contrary to the express provisions of the by-laws.
>
> * * * *
>
> 3. Even where the by-laws of a building association giving a holder of paid-up stock the right to withdraw and receive the amount of his stock upon giving a stated notice, a member who has given such notice as to stock which has matured, but not been paid, is entitled to no preference in payment over other members when the assets of the association are taken in charge by a court of equity for distribution in insolvency proceedings. The provisions of the by-laws prescribing the order in which payments shall be made to different classes of members in the regular course of business apply only so long as the association is a going concern, and do not govern the distribution of its assets in insolvency, and a member who has given notice of withdrawal is not by that fact given any superior equity which entitles him to a preference over others who have not."

It has been held in the following cases, among others, that a member or stockholder of a building association is not a creditor of such corporation. *In re. Puget Sound B. & L. Assn.* 49 Fed. 2d, 922; *Cook* vs. *Emmet P. & M. Building Assn. of Baltimore,* 90 Md. 289; *Missouri Cattle Loan Co.* vs. *Alexander* (O. O. A.) 276 Fed. 266.

Such holdings are consistent with the ordinary conception of a debt, which is an obligation arising out of an agreement, express or implied, for the payment of money. The interest of a shareholder is a right to share in the profits of the corporation when and as available, and to share in the management of the company by virtue of his voting power. As stated by Mr. Justice Blatchford, in *Warren* vs. *King,* 108 U. S. 589; 27 L. Ed. 769, 773:

> "Claims of stockholders, as such, on the corpus of the company in which they are stockholders, do not arise until the debts of the company are paid, until then, the shares confer rights merely as regards profits and voting power."

If such be the correct conclusion, it is evident that members owning only paid-up or installment shares have no provable claim against such corporation which could be proven at the time the superintendent of building and loan associations takes possession of such corporation for liquidation, pursuant to the provisions of Sections 687 et seq. General Code, Section 687-1, General Code, in describing claims to be proven, uses the expression, "have claims against such association", however, a reading of the other sections enacted as a part of the same act (Am. H. B. 263 of the 90th General Assembly) clearly shows that such expression refers to, and means *claims for the payment of money;* thus, in Section 687-10, General Code, authority is granted to pay "claims".

What is the relation of the company to those parties referred to by you

as "indeterminate members"? Those members who have paid into the company sums of money in excess of their stock subscriptions? Since there is no written contract between the member making the payments and the company, the provisions of the by-laws are the evidence of the contract of payment. In Section 9 of such by-laws is contained the following language:

> "Whenever the credits of a member from payments and dividends amount to more than the face value of the shares of stock subscribed for by such member, the company may require such member either to withdraw the excess or to subscribe for sufficient additional stock to cover such excess, as the member may elect; but if he shall fail to elect or to subscribe for such additional stock within ten days after written notice from the company to do so, he shall not be entitled to dividends upon such excess thereafter."

It appears from the language of such section that in the contemplation of the company and likewise the member, such excess payments were to be treated as money erroneously received until the company required "such members either to withdraw the excess or to subscribe for sufficient additional stock to cover such excess."

Since there appears to be nothing illegal or contrary to public policy in such by-law, such agreement must be construed according to the intent of the parties. I am inclined to the view that when a member has paid to a building and loan association on a stock subscription a sum of money in excess of the agreed purchase price of such shares as to such excess so paid the law would infer a promise on the part of the building and loan association to repay it to the member in the absence of a provision of the by-laws which negatives such inference and that Section 9 of the by-laws of the M. B. & I. Company is not such a provision.

In specific answer to your inquiry it is my opinion that:

1. The claims which are required to be proven to the superintendent of building and loan associations in order to be entitled to share in the proceeds derived from the liquidation of a building and loan association, are claims for the payment of money, or debts of the association. The owner of paid-up stock or of running stock is not a creditor of such association but rather a stockholder, and is not required by the provisions of Am. H. B. 263, enacted by the 90th General Assembly, to prove such claim in order to preserve his legal rights.

2. A member of a building and loan association owning paid-up shares or running shares, is not thereby a creditor of the association but rather a stockholder and, as such, is entitled to share in the proceeds arising from a sale of its assets in liquidation, pro rata with other stockholders, after all the debts of the association have been paid.

3. Where a member of a building and loan association pays to the building and loan association a sum of money in excess of his subscription, there is an implied promise on the part of such association to repay the same, in the absence of a provision of the by-laws to the contrary. Upon liquidation of the building and loan association by the superintendent of building and loan associations such member should be permitted to prove his claim to the extent of such excess in the same manner as other creditors.

Respectfully,
JOHN W. BRICKER,
Attorney General.