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1. BUILDING AND LOAN ASSOCIATION — MAY NOT LAWFULLY ACCEPT SUBSCRIPTIONS TO CAPITAL STOCK IN EXCESS OF AUTHORIZED CAPITAL — NO EXCEPTION IF SUMS PAID IN TOTAL LESS THAN AUTHORIZED CAPITAL.

2. NO AUTHORITY TO REDUCE NUMBER OF SHARES WHERE SUBSCRIPTION EXCEEDS AUTHORIZED CAPITAL UNLESS SUBSCRIBER CONSENTS — NO REDUCTION MAY BE MADE IF SUBSCRIPTION HELD OUT AS BONA FIDE FOR FULL AMOUNT TO INDUCE ADDITIONAL STOCK SUBSCRIPTIONS.

SYLLABUS:

1. *A building and loan association incorporated under the laws of Ohio may not lawfully accept subscriptions to its capital stock in excess of the authorized capital as provided in its articles of incorporation, regardless of the possibility that the sums actually paid in on such subscriptions by the members of said company may total less than the authorized capital.*

2. *A building and loan association which has stock subscriptions in an amount exceeding its authorized capital may not reduce the number of shares subscribed for by individual subscribers in order to bring the total amount of stock subscribed for within the limits of its capitalization, unless such reduction be consented to by the subscriber or subscribers affected thereby; provided, however, that such reduction may not be made in either event, if the subscription affected thereby was held out as bona fide for the full amount as an inducement to secure additional stock subscriptions.*

Columbus, Ohio, September 27, 1941.

Hon. Charles S. Merion,
Superintendent of Building and Loan Associations of Ohio,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your letter of recent date which

reads as follows:

> "I wish to propound to you the following question, based on the facts as given, for formal opinion, in order that I may properly administer the affairs of building and loan associations under the same facts.
>
> *Situation*: A building and loan association has a greater amount of stock in volume of dollars subscribed than for which it is capitalized. However, in numerous cases, the full amount of the stock subscribed for has not all been paid in.
>
> *Question:* Is it necessary, under the facts, for the building and loan association to increase the capital stock, or can the building and loan association decrease the number of shares subscribed for by the individual subscribers to equal the amount paid in by such subscribers, where the amount paid in is less than the original amount of his subscription — the effect of which process would be to bring the total stock subscribed within the limits of the capitalization."

Your question relates to the authorized capital of a building and loan association incorporated under the laws of Ohio and whether or not the controlling factor in determining the amount of such authorized capital is the total amount of the subscriptions of the shareholders or the amount actually paid in on said subscriptions by such shareholders.

Capital stock as used in the articles of incorporation of building and loan associations is deemed to refer to the authorized capital of a company, and as provided in Section 9645, General Code:

> " * * * the organization may be completed and business commenced when a sum equal to five per cent thereof is subscribed and paid in * * * . The authorized capital of such corporation shall not be less than three hundred thousand dollars; provided that in cities the population of which exceeds five thousand, such capital shall be not less than five hundred thousand dollars, * * * "

The same section of the General Code requires that books and records shall be kept by every building and loan association in which shall be entered the name and address of each stockholder, the number of shares or fractional shares, or of stock deposits held by each and the time each person became a stockholder.

The issuance of stock to members upon written subscription is provided in Section 9649, General Code, which reads in part as follows:

> "To issue stock to members upon certificates or upon written subscriptions on such terms and conditions, consistent with the provisions of this chapter, as the constitution and by-laws provide, but no initiation or membership fee shall be charged and if the stock is sold at a premium all such premiums shall be placed in the reserve fund of the association. All amounts, excepting fines and premiums, paid in by a member, as such, on any one account, together with all credits thereon, shall be considered payments on a stock subscription, and the aggregate of such payments and credits, less any charges thereto, shall constitute a stock credit of such member for the purposes of this chapter. Each member may vote his stock or fractional part thereof to the extent and in the manner provided by the constitution and by-laws, and each member may accumulate his votes in the election of directors. Nothing herein contained shall be construed to prohibit the issuance of permanent stock."

You will note specifically that all amounts, excepting fines and premiums, thereafter paid in to the association by said members shall be considered as payments on their stock subscriptions and shall constitute a "stock credit" of such member.

Stockholders or members of building and loan associations have the right to withdraw money so paid on their stock subscriptions at any time, as provided by law and the constitution and by-laws of the association. This is called "repurchase of stock credits" and is authorized in Section 9651, General Code, which reads in part as follows:

> "To permit members to have their stock credits repurchased by the association in part or in full, at any time, and to require members to file applications therefor. * * * Stockholders whose stock accounts, or parts thereof, are repurchased, shall thereupon be relieved of all liability with reference thereto. * * * "

Section 9651, General Code, has been passed upon by the Supreme Court of Ohio in the case of Tillie Frederick v. Mutual Building and Investment Co., 128 O.S. 474, decided May 16, 1934, branches 2 and 3 of the syllabus being as follows:

> "2. The right of a stockholder in a building and loan association, to withdraw his stock deposit under the provisions of Section 9651, General Code, depends upon the terms and conditions of the constitution and by-laws of such association and

such withdrawal can be accomplished only in accordance with such terms and conditions.

3. The opportunity of stockholders to withdraw their stock deposits from a building and loan association should be accorded on equal terms to all who are in the same class; and, subject to any rights of other claimants which may be superior, a preference granted to part of such stockholders with regard to such withdrawals creates an equity in the assets in favor of those who have been discriminated against."

Although a member or shareholder in a building and loan association may thus withdraw the payments on his stock account at any time, as provided in Section 9651, General Code, and the constitution and by-laws of such association, there is a Supreme Court decision to the effect that after a "receiver" has been appointed to wind up the affairs of the company, and the member or shareholder has not availed himself of the right to withdraw his "stock deposit" prior to the appointment of such "receiver" he may thereafter be sued by the "receiver" upon his unpaid stock subscription. See Toot v. Beach, 131 O.S. 78, decided April 29, 1936.

I also refer to the case of Clarence Busch v. W. Paul Wagner, Supt., et al., No. 1662, decided by the Court of Appeals of Montgomery County on November 29, 1940. A motion to certify the record to the Supreme Court was overruled June 11, 1941, being Cause No. 28643, and reported in 138 O.S. 415. In this case plaintiff Busch sued the Superintendent of Building and Loan Associations at that time in charge of the liquidation of The Miami Savings and Loan Company of Dayton, Ohio, under Section 687-1, General Code, and asked that his account with that company, in the amount of $3,574.90, be considered a special deposit account and not a running stock account. The evidence disclosed that Busch had signed a subscription for ten shares of stock in this company in 1930 when it was an open and going concern. Before that he had a special deposit account only. At the trial he maintained that it was not his intention to become a stockholder at all, or in any amount. The Court of Appeals affirmed the decision of the lower court and held that:

"While there are certain similarities in some of the facts, yet, no two cases are identical on the factual question. It naturally follows that each case must be determined upon its own particular facts. We arrive at the conclusion * * * that plaintiff subscribed for ten shares of stock of the face value of One Thousand Dollars ($1000.00). As to this amount, no relief may be given the plaintiff."

The Court also found that:

> "So much of the account as exceeds One Thousand Dollars ($1000.00) should be changed to a special deposit account."

You will note especially that the amount of the subscription in this case was the controlling factor in determining how much stock was actually owned by the creditor and what became of the excess of his deposit over and above the amount of the stock subscription.

Hence, the status of a member or shareholder in a building and loan association, although peculiar to this type of corporation, in that it carries with it the right to withdraw so-called stock deposits made in payment of a written stock subscription is a definite one as long as the subscription is in effect and carries with it certain rights as well as possible liabilities. The amount of stock so subscribed is carried on the books of the company in the name of the subscribing member, and is therefore allocated to him. It has been set aside for him or optioned to him according to the terms of his written subscription to be paid for at intervals on what amounts to a partial payment plan. As long as he makes the agreed payments he has the rights of a stockholder on what is sometimes called running stock and may vote his stock up to the amount that has been paid in on the subscription. In my opinion the total of these subscriptions to stock in a building and loan association may not lawfully exceed the amount of authorized capital even though a lesser amount has actually been paid in by the shareholder members. If the total amount of the subscriptions to stock exceeds the authorized capital of the company, it follows that the amount of authorized capital must be increased by amendment of the articles if the building and loan association wishes to continue to operate according to law within its legal charter limits.

In further support of this conclusion, I refer to 10 O. Jur., Sec. 171, page 257, where it is stated as a general proposition of law that "Corporations have no inherent power to increase or diminish their capital stock," and Section 173, at page 259, where the necessity of strict compliance with the statutory authority is stated in the following language:

> "Where an attempt is made to increase or reduce the capital stock of a corporation, there must be a strict compliance with the statutory provisions which regulate that matter; as pointed out, the authority to alter the amount of the capital stock must be

> found in the express provisions of the statutes, and the mode prescribed must be followed strictly; resort to another or different mode amounts to nothing more than an illegal attempt to change the amount of capital stock."

A change in the capitalization of a corporation has always been regarded by the courts as a fundamental change in the affairs of the corporation. See annotation in 44 A.L.R. 11.

Now I come to your next question, as follows: "Can the building and loan association decrease the number of shares subscribed for by the individual subscribers to equal the amount paid in by such subscribers, where the amount paid in is less than the original amount of his subscription — the effect of which process would be to bring the total stock subscribed within the limits of the capitalization?"

Obviously, a stock subscription is a contract between the subscriber and the corporation. It is elementary that one party to a contract cannot rescind or change the same without the consent or agreement of the other. 9 O. Jur. on Rescission of Contracts, Sec. 328, p. 582; 6 O. Jur. on Cancellation of Instruments, at page 489.

It is said in 10 O. Jur. on Corporations, Sec. 209, at page 307:

> "It (a stock subscription) is a several and not a joint contract, — a simple, several, promise to pay which cannot be dissolved at the option of one party; consent of both must be had."

Smith v. Johnson, 57 O.S. 486, Goff v. Flesher, 33 O.S. 107; Jewett v. Valley R.R. Co., 34 O.S. 601.

If the consent of both the subscriber and corporation must be had in order to effect a change in the terms of a stock subscription, in the instant case it would be necessary for the subscriber to agree to a reduction in the number of shares of stock subscribed for by him, before a building and loan association could effect such reduction so as to bring the total stock subscribed for within the limits of its capitalization.

I might also point out, in connection herewith, that an agreement between officers of a corporation and a subscriber, to the effect that the subscriber may take less shares than the number subscribed for, has been

held void by the Supreme Court of this state, as a fraud upon other stockholders, where it appears that the subscription is held out as bona fide for the full amount in order to induce others to subscribe. (Jewett v. Valley R.R. Co., 34 O.S. 601.)

In specific answer to your inquiries, it is my opinion that:

1. A building and loan association incorporated under the laws of Ohio may not lawfully accept subscriptions to its capital stock in excess of the authorized capital as provided in its articles of incorporation, regardless of the possibility that the sums actually paid in on such subscriptions by the members of said company may total less than the authorized capital.

2. A building and loan association which has stock subscriptions in an amount exceeding its authorized capital may not reduce the number of shares subscribed for by individual subscribers in order to bring the total amount of stock subscribed for within the limits of its capitalization, unless such reduction be consented to by the subscriber or subscribers affected thereby; provided, however, that such reduction may not be made in either event, if the subscription affected thereby was held out as bona fide for the full amount as an inducement to secure additional stock subscriptions.

Respectfully,

THOMAS J. HERBERT,

Attorney General.