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Rights of Withdrawing Shareholder in Building & Loan Association

INSOLVENT ESTATES

RIGHTS OF WITHDRAWING SHAREHOLDER IN BUILDING & LOAN ASSOCIATION.

Plaintiff, shareholder in a building and loan association gave

notice of withdrawal as authorized by statute.[1] Five years later the association was declared insolvent and plaintiff's claim still remained unpaid. A decree denying plaintiff priority over remaining stockholders was reversed on appeal.[2] The association having failed to prove insolvency at the time of withdrawal, solvency was presumed.

Solvency of a building and loan association[3] at the time withdrawal notice becomes effective determines the priority status of a withdrawing shareholder.[4] If the association is insolvent at the time, notice of withdrawal becomes effective in accordance with statutory provision, the withdrawing member receiving no preference over his fellow members.[5] If the association is solvent at that time, the withdrawing shareholder is entitled to priority. However, considerable confusion exists in defining the exact status of such withdrawing shareholder.[6] There is substantial authority for the court's position that the withdrawing stockholder of a solvent association becomes a "creditor."[7] Other cases hold that his status remains that of a share-

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[1] IND. STAT. ANN. Burns, 1933) § 18-2109. "Any stockholder . . . whose stock is unpledged for a loan, wishing to withdraw from such association, may do so, upon three months' notice in writing to the board of directors, when such stockholder shall be entitled to receive the full amount of dues paid in upon the stock to be withdrawn, together with . . . , and less . . . "

[2] Fuzy v. Department of Financial Institutions, —— Ind. App. ——, 37 N.E. (2d) 24 (1941).

[3] "A building and loan association is 'insolvent' when its assets have depreciated to a value less than the amount which the association has already received from members as payments for their stock." Note (1933) 42 YALE L.J. 931, 932; see 12 C.J.S. 528 § 110. See also, Wagner v. Farm & Home Saving & Loan Ass'n of Missouri, 138 Mo. 313, 315, 90 S.W. (2d) 93, 97 (1936).

[4] Mott v. Western Savings & Loan Ass'n., 142 Ore. 344, 20 P. (2d) 236 (1933); Fielis v. Henry R. Edmunds Buliding & Loan Ass'n., 336 Pa. Super. 32, 9 A. (2d) 906 (1939).

[5] Allman v. David Berg Building & Loan Ass'n., 100 Pa. Super. 205 (1930); SUNDHEIM, LAW OF BUILDING AND LOAN ASSOCIATIONS (3d ed.) §110; Note (1933) 42 YALE L.J. 931, 938. Insolvency may be interpreted strictly or as in Stone v. New Schiller Building & Loan Ass'n., 302 Pa. Super. 544, 133 Atl. 758 (1931) (If the association has not been declared insolvent, or is not in the hands of a receiver, but is "potentially" insolvent when notice is given, the rule is the same as in the case of actual insolvency).

[6] Enterprise Building & Loan Society v. Balin, 55 Pac. 740 (Calif. 1898). The seeming confusion arises because most states provide that only a fixed percentage of funds on hand may be devoted to withdrawals. *E.g.*, PA. STAT. ANN. (Purdon, 1931) tit. 15, §§911, 991; N.J. COMP. (1910) 347, §§ 38, 39. Under such statutes a withdrawing member may have right to withdraw but still not be entitled to judgment for amount due him. See Freedman, *The Right of Withdrawal From Building and Loan Associations* (1930) 5 TEMPLE L.Q. 79 *passim.*

[7] Gross v. Citizens Mutual Building Associations, Inc., 190 S.E. (2d) 298 (Va. 1937); Griffin v. White, 182 S.C. 225, 189 S.E. 127 (1936); Gilbert v. Beacon Hill Credit Union, 287 Mass. 493, 192 N.E. 25 (1934); Mott v. Western Savings & Loan Ass'n., 143 Ore. 344, 20 P. (2d) 236 (1933).

holder.[8] A more equitable treatment of the withdrawing shareholder places him in an intermediate position between full creditor and mere shareholder.[9] Such individuals have been involved in corporate action to a greater extent than the general creditor and may be said to be in some measure responsible for the insolvent status of the corporation. Yet while the corporation was solvent they withdrew from it. Therefore, such withdrawing shareholders should not be required to bear losses and liabilities arising after their withdrawal.[10]

Since plaintiff's recovery depends on the solvency of the Association at the time of withdrawal, it might seem that he should have the burden of proving solvency as a part of his cause of action.[11] However, in accord with the holding in the instant case,[12] recent deci-

[8] Clardy v. Jefferson Co. Buildin & Loan Ass'n., 234 Ala. 658, 176 So. 368 (1937); State ex rel. Wagner v. Farm & Home Savings & Loan Ass'n. of Missouri, 338 Mo. 313, 90 S.W. (2d) 93 (1936); Petition of Philadelphia Inv. Building & Loan Assn., 121 Pa. Super. 148, 183 Atl. 93 (1936). In a suit to recover the withdrawal value of five shares in a building and loan association the plaintiff obtained judgment. Reversed on appeal. The court said, "It is hardly necessary to state that obtaining of judgment does not give to a withdrawing stockholder a preference over other stockholders in the distribution of the valuable assets of the association. Moreover, the creditors are first entitled to be paid before the stockholders." Sanft v. Fair & Square Building & Loan Ass'n., 313 Pa. 54, 170 Atl. 697 (1934); *accord*, Columbia Finance & Trust Co. v. Tharp, 24 Ind. App. 82, 56 N.E. 265 (1900); Note (1933) 42 YALE L.J. 931, 938. The opinion in the leading case on the subject, Christians' Appeal, 102 Pa. 184 (1882), that even a judgment creditor on withdrawal must prorate with stockholders, should not lead to such a conclusion as a general rule. For there the association was insolvent when notice was given. See Freedman, *The Right of Withdrawal From Building and Loan Associations* (1930) 5 TEMPLE L.Q. 79, 93.

[9] "When a building and loan association becomes insolvent, it may have creditors who have never been shareholders in the association, and it may have creditors who were shareholders, for example, withdrawing stockholders who have not yet been paid. In the liquidation the creditors who have been shareholders are placed, because of the partnership characteristics of such shareholding in a different class from the creditors who have never been shareholders, and are therefore not entitled to take anything until the general creditors are paid." *In re* Beckman, 5 A. (2d) 342 (Pa. 1939); *see* Glenwood-Progressive Building & Loan Ass'n., 129 Pa. Super. 249 (1937); Woods v. Wichita Falls Building & Loan Ass'n., 66 S.W. (2d) 718, 720 (Tex. Civ. App. 1933) *Contra*: Stone v. Schiller Building & Loan Ass'n., 302 Pa. Super. 544, 153 Atl. 758 (1931); Brown v. Victor Building & Loan Ass'n., 302 Pa. 254, 153 Atl. 349 (1931).

[10] *In re* Yonah Building & Loan Ass'n., 133 Pa. Super. 538, 3 A. (2d) 49 (1938) (After stating that a withdrawing shareholder is not a creditor within the meaning of the assignment laws, the case holds that such an individual is entitled to a preference over the stockholders who by their representatives are responsible for the leases which brought about the insolvency of the association.

[11] Pacific Coast Savings Society v. Sturdevant, 163 Cal. 627, 133 Pac. 485 (1913).

[12] Fuzy v. Department of Financial Institutions, —— Ind. App. ——, 37 N.E. (2d) 24 (1941).

sions have shifted the burden of proof from the shareholder to the Association.[13] As a practical matter this is correct. It is the association which has access and control over the records and it should be required to see that they are properly kept and preserved.

LEGISLATION

AMENDATORY ACT EFFECTIVE AFTER LAPSE OF ORIGINAL STATUTE HELD VALID

In 1941 the General Assembly of Indiana attempted to amend the already twice-amended Milk Control Law of 1935. The amendatory act was passed and approved by the Governor while the original law was in force and valid. But the Indiana Constitution expressly provides that a statute, even after being validly passed and approved, does not become effective until it has been published and circulated in the counties of the state by authority, unless it contains an emergency clause. IND. CONST. ART. IV, § 28. The present statute contained no emergency clause, and the Governor did not proclaim its publication until after the original act had expired. *Held*, the amendatory act was valid upon its passage and approval, and became effective upon its publication and proclamation by the Governor. *Milk Control Board v. Pursifull*, 36 N.E. (2d) 850 (Ind. 1941).

The rule is well settled in Indiana that an act seeking to amend a non-existent statute is invalid. *Draper v. Falley*, 33 Ind. 465 (1870); *Kramer v. Beebe*, 186 Ind. 349, 115 N.E. 83 (1917); *Ross v. Chambers*, 214 Ind. 223, 14 N.E. (2d) 1012 (1938). But the court in the instant case pointed out that in previous cases involving such amendments, the legislative machinery had not been put in motion while the original act was in existence. The original act had, on the contrary, been previously repealed or judicially declared invalid before the amendment was attempted. *Straus Bros. Co. v. Fisher*, 200 Ind. 307, 163 N.E. 205 (1928). The court realistically distinguished a case almost in point. *Metsker v. Whitsell*, 181 Ind. 126, 103 N.E. 1078 (1914). That case, which concerned the validity of the first of two amendatory acts passed at the same session of the General Assembly, held that it was invalid because the act passed second in point of time contained an emergency clause and became effective immediately. Therefore, by the time that the first act was to take effect, the original statute had been amended out of existence by the second act. The court also based its decision upon the rule that as between two inconsistent acts passed by the same legislature, the one passed subsequently will prevail. The court in the principal case declared that

[13] *In re* Bell, 339 Pa. 443, 15 A. (2d) 350 (1940); *In re* Yonah Building & Loan Ass'n., 133 Pa. Super. 538, 540, 3 A. (2d) 49, 53 (1938). This latter case is clearly analogous to the *Fuzy* case, *supra*, note 12. More than five years had elapsed between the notice of withdrawal and the insolvency of the association. The court said that the association undoubtedly thought itself solvent during the intervening period, but if it was in fact insolvent then it was the duty of the association to show that the association was actually insolvent. See also, Gilbert v. Beacon Hill Credit Union, 287 Mass. 493, 192 N.E. 25 (1934).