

NOTES

STATUTORY RIGHT OF WITHDRAWAL FROM BUILDING AND LOAN ASSOCIATIONS IN NEW JERSEY. The right of withdrawal from building and loan associations is generally governed by statute.¹ In its origin, however, the right resulted from a contractual relationship between shareholders and association,² and the rights and privileges incident thereto were to be found in the constitution and by-laws of the association. At the outset it may be stated that the right of withdrawal is peculiar to building and loan associations.³ The reason for confining

¹ S. C. only provides for incorporation under the general business law. S. C. Civ. Code (1922) Sec. 4301 et seq. The associations in Ga. are governed by the State Securities Commission Ga. Code Ann. (Park. Supp. 1922) Secs. 2909, 2882 et seq. All other states have statutory provisions.

² 9 C. J. (8), p. 923. Building and loan associations were originally unincorporated voluntary associations. In New Jersey they were granted the right of incorporation by P.L. 1847, p. 172 and P.L. 1849, p. 227 but it was not until the enactment of P.L. 1899, p. 357 that there was any legislative attempt to regulate the right of withdrawal:

"The shares of every mutual loan, homestead and building association organized under the laws of this state, or doing business therein, which have not been pledged as collateral security for the repayment of a loan, may be withdrawn at any time after one year by the holder by giving such written notice as may be provided for in the constitution or by-laws, unless withdrawal be otherwise permitted by such constitution or by-laws; the withdrawing shareholder shall be paid the withdrawal value of his accumulations, which shall not be less than the sum of his installments paid in, less all unpaid fines and his proportionate share of any loss sustained by the association, and after the first year a reasonable share of the profits on the accumulations in addition to such withdrawal value shall be paid to the withdrawing shareholder; *provided*, that at no time shall more than one-half of the funds in the treasury be applicable to the demands of withdrawing shareholders without the consent of the board of directors; and *provided further*, that amounts paid for salaries, commissions and other current expenses shall not be considered losses sustained by an association within the meaning of this section."

It was not, however, until 1903 that New Jersey enacted legislation affecting the method of paying withdrawals. 1 N.J. Comp. Stat. (1910) p. 347 Sec. 39:

"Withdrawals shall be paid in the order in which the notices thereof shall have been received, but not more than one-half the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any shareholder who has given the said notice may sue for and recover the withdrawal value of his shares in any such association, in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

This section and section 38 of the 1903 Revision which was an adoption of P.L. 1899, p. 357 *supra*, composed the statutory law of New Jersey as of that time.

³ *Latimer v. Equitable Loan and Inv. Co.*, 81 Fed. 776, 780 (Circ. Ct. W.D. Mo., C.D. 1897):

the right of withdrawal to building and loan associations as distinguished from other corporations, lies in the peculiar nature of such organizations. A building and loan association is a mutual, cooperative body composed of shareholders whose interests are mutual and inter-dependent.⁴ The very definition of a building and loan association, as used in the New Jersey Statute, emphasizes its distinctive character of mutuality.⁵ The members thereof have united for the common aim and purpose of investing in real estate loans for the mutual benefit of all members.⁶

The New Jersey Statute has always required notice of withdrawal to be filed by the withdrawing member. The Statute in effect in 1899 provided that there be "such written notice as may be provided for in the constitution or by-laws."⁷ The corresponding enactment of the

"This right of withdrawal, and thereby ending one's relation to a corporation, is peculiar to building and loan associations. It does not appertain to corporations generally. The holder of stock of ordinary corporations must either transfer his membership to some purchaser of his certificate, or must retain his membership till the end of the corporate life of his company, or to such time as, by unanimous consent of the stockholders, liquidation may be agreed upon. He cannot force his company to purchase it, or otherwise, at his pleasure, withdraw his capital and portion of profits and retire from the corporation.

"The novelty and importance of this right of withdrawal are well expressed in THOMPSON ON BUILDING & LOAN ASSOCIATIONS. He says (page 64) :

"One of the most important rights conferred upon a stockholder is the right of withdrawal. The right is incorporated in all statutes. A distinguishing difference between the stockholders of a building and loan association and the stockholders in an ordinary private corporation is the right of the former upon giving notice, to terminate future liability on his stock. He can arbitrarily divest himself of his membership, cut loose from the association, and end his duties and liabilities. In an ordinary corporation a subscriber for stock cannot obtain a cancellation of his subscription except by the unanimous consent of the other subscribers and then he cannot do it if there were creditors whose rights would be jeopardized. Even a majority of the stockholders cannot withdraw and refuse to proceed further in a corporate enterprise; and these rules are said to be just and based upon a sound public policy. The liberality of the legislative policy can be readily seen in making such a radical change in the law of corporations by investing the building and loan association stockholder with the personal right of withdrawal."

⁴ P.L. 1925, c. 65 p. 189 Sec. 1 On "Purposes"; P. L. 1925, c. 65 p. 224 Sec. 75 On "Building and Loan Associations, defined".

⁵ "Building and Loan Associations, defined", *supra* note 4.

⁶ *Fitzgerald v. State Mutual Building Loan Ass'n.*, 76 N.J. Eq. 137, 79 Atl. 454 (Ch. 1909), at page 143 wherein Vice-Chancellor Leaming said:

"The general Building and Loan Association Act of 1903, of which the sections already referred to touching withdrawals form a part, will be found to contemplate throughout its provisions the central idea of cooperation, equality and mutuality upon the part of the members of the association. That part of section 53, already quoted, which provides that 'all shareholders shall occupy the same relative status as to debts and losses of the association' is but in harmony with the general plan of the Act."

The court in *stone v. Schiller B. & L. Ass'n.*, 302 Pa. 544, 153 Atl. 758 (1931) said:

"A building and loan association is much like a partnership, though possessing corporate rights. *Christians Appeal*, *supra*. Unlike a corporation, its share-

1903 Revision⁸ limited the written notice to thirty days "unless withdrawal be otherwise sooner permitted by such constitution and by-laws." The 1925 Revision of the law now in effect, restricts the written notice of withdrawal to thirty days with no proviso thereto affixed.⁹ Upon the filing of a notice of withdrawal as required by the Statute, certain changes in the relationship between shareholder and association occur, such as the cessation of the duty to pay dues, etc.¹⁰

If, upon the termination of the withdrawal notice, the association fails to pay a withdrawing member, what then is the status of such member? The first legislation enacted in New Jersey, governing methods of paying withdrawals, was passed in 1903.¹¹ It allowed priority of payment to those filing prior notices of withdrawal, limited payments of withdrawal claims to one-half the receipts of any one month, except if otherwise voted by the board of directors and gave any shareholder the right to sue and recover the withdrawal value if his claim was not paid within six months. The 1925 Revision of the Act was a restatement of the 1903 law on this point.¹²

The 1932 Amendment made several changes.¹³ Prior to this amendment, withdrawals were to be paid in the order in which notices thereof were received, while after it, such priority rights to payment were limited to funds allocated by the statute for that purpose and the sum limited to priority was five hundred dollars. The amendment limited the funds to be used for paying withdrawals to one-half the receipts in any month. The amendment gives priority to matured shares over withdrawal shares. The amendment further prohibits withdraw-

holders may withdraw their contributions under certain limitations."

Further see SUNDHEIM, LAW OF BUILDING AND LOAN ASSOCIATION. (1922) Sec's. 7, 17, 21 and 148.

⁷ *Supra* note 2.

⁸ 1 Comp. Stat. (1910) p. 347 Sec. 39.

⁹ P.L. 1925, c. 65 p. 211 Sec. 49. P. L. 1932, c. 92 p. 161 Sec. 49 (A).

¹⁰ THE STATUTORY RIGHT OF WITHDRAWAL FROM BUILDING AND LOAN ASSOCIATIONS, 33 COL. LAW REV. 138, at page 140:

"Assuming a right to withdraw, it becomes important to inquire into the collateral effect of the filing of notice. It is clear that the duty to pay dues is thereby removed. But the corresponding surrender of rights and privileges is, for obvious reasons, not complete. A shareholder may petition for a receiver in the event that the directors fail to provide funds applicable to withdrawals. Similarly, he may object to a merger that would subordinate his rights to those of members of the other association individually, or by proxy, or continuing to pay dues, he has waived his notice and is subject to all the duties of an ordinary member."

See cases cited therein.

¹¹ *Supra* note 2.

¹² P.L. 1925, c. 65, p. 212 Sec. 52.

¹³ P.L. 1932, c. 102, p. 175:

"Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six

ing members from suing the association, so long as available funds are paid out as required by the Statute. In accord with New Jersey, foreign statutes in general grant prior applications for withdrawal priority of payment,¹⁴ and limit the funds properly available for paying out withdrawals.¹⁵

Assuming there are no such funds available for paying withdrawals as permitted by statute, the question arises as to whether the withdrawing member can sue the association as a creditor. The case of *United States Building and Loan Association v. Silverman*,¹⁶ decided in Pennsylvania, is a leading decision on this point. The court held that despite the lack of funds applicable to withdrawal claims, a judgment would be granted against the association on the theory that upon the expiration of notice, the withdrawing shareholder became a creditor,¹⁷ but indicated that execution on the judgment might be stayed in the discretion of the trial court, to prevent a forced sale of frozen assets. In 1902 the Supreme Court of New Jersey, in *Intiso v. Metropolitan Savings and Loan Association* followed the doctrine of the *Silverman* case, but it

hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; *provided, however*, that if, in any one month the funds of the association required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payment in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid so long as the funds in the treasury of such association are applied as required herein."

¹⁴ Ark. Stat. (Castle Supp. 1931) Sec. 750 f; Mont. Laws (1929) c. 163, Sec. 1; N.Y. Banking Law (1931) Sec. 398; N.D. Laws (1931) c. 94, Sec. 7 (8); Cal. Gen. Laws (Deering 1931) art. 986, Sec. 15:13; Ind. Ann. Stat. (Burns 1926) Sec. 5085; Kan. Rev. Stat. Ann. (1923) Sec. 17-1016; Ky. Stat. (Carroll 1930) Sec. 864; Nev. Comp. Laws (Hillyer 1929) c. 51, Sec. 12; N.H. Pub. Laws (1926) c. 266, Sec. 17; Pa. Stat. Ann. (Purdon 1930) tit. 15, Sec. 992; S.D. Comp. Laws (1929) Sec. 9065-72.

¹⁶ N.Y. Banking Law (1931) Sec. 398; Mass. Gen. Laws (1921) c. 170, Sec. 16; Pa. Stat. Ann. (Purdon 1930) tit. 15, Sec. 991.

¹⁷ 85 Pa. St. 394 (1877).

¹⁸ cf. *Englehardt v. Fifth Ward Loan Assoc.* 5 Misc. 518, 25 N.Y. Supp. 835 (Super Ct. 1893) rev'd 148 N.Y. 281, 42 N.E. 710 (1896).

controlled the execution on the judgment rendered, until there were available funds in the association properly applicable to the payment of the withdrawal claim.¹⁸ It may be noted that the court in that case held that the statutory change of 1899, decreeing that a withdrawing member bear certain losses, to be deducted from his withdrawal value, was not retrospective as it would impair a contractual relation between member and association.¹⁹ The doctrine of the *Silverman* case is no longer generally followed, even in Pennsylvania.²⁰

The prevailing theories today are two-fold: (1) A withdrawing member whose notice has matured, becomes a creditor, but his right of action is deferred until the association has funds necessary to pay his withdrawal.²¹ This first theory, in a somewhat modified form, has held that the creditor relationship and the amount of the debt, are both established as of the maturity date of withdrawal but that the debt as so ascertained is not payable until there are available funds on hand.²² (2) A withdrawing member continues to be a member, even after the expiration of his withdrawal notice, until actual payment is made,²³ or until the association has breached the membership contract by failing to pay withdrawals according to the Statute.²⁴

The first theory is more logical than the rule established by the *Silverman* case, insofar as it postpones the bringing of a suit looking towards a judgment and execution, while the more obsolete rule per-

¹⁸ 68 N.J.L. 588, 53 Atl. 206 (1902).

¹⁹ *Supra* note 2.

²⁰ *Christian's Appeal*, 102 Pa. 189 (1883); *Stone v. New Schiller B. & L. Assn.*, *supra* note 6; *Brown v. Victor B. & L. Ass'n.*, 302 Pa. 254, 153 Atl. 349 (Sup. Ct. 1931); *Smith v. Reserve Fund B. & L. Ass'n.*, 156 Atl. 902 (Pa. Super. Ct. 1931); *Publicker v. Pottash Bros. B. & L. Ass'n.*, 159 Atl. 58 (Pa. Super. Ct. 1932); *Miers v. Columbia Mut. B. & L. Ass'n.* 157 Fed. 940 (C.C.S.D.N.Y. 1907); *Synnott v. Iron Belt B. & L. Ass'n.*, 89 Fed. 292 (W.D. Va. 1898); *National Guarantee L. & L. Co. v. Yeatman*, 121 Ala. 594, 25 So. 1003 (1898); *Heinbokel v. National Savings Loan & Bldg. Ass'n.*, 48 Minn. 340, 59 N.W. 1050 (1894); *Englehardt v. Fifth Ward Loan Ass'n.*, cited *supra* note 26; *SUNDHEIM, LAW OF BUILDING AND LOAN ASSOCIATION* (2d ed. 1922) Sec. 152.

²¹ *Heinbokel v. National S.L. & B. Ass'n.*, cited *supra* note 20; *Pawlick v. Homestead Loan Ass'n.* 15 Misc. 427, 37 N.Y. Supp. 164 (Sup. Ct. 1896); *Eastern B. & L. Ass'n. v. Snyder*, 98 Va. 710, 37 S.E. 298; *Miers v. Columbia Mut'l. B. & L. Ass'n.*, cited *supra* note 20; *Englehardt v. Fifth Ward Loan Ass'n.*, cited *supra* note 17; *Stilwell v. Peoples B. & L. Ass'n.* 19 Utah 257, 57 Pac. 14 (1899); *Betz v. Peoples Building Ass'n.*, 22 Utah 149, 61 Pac. 334 (1900); *In Re Guardian B. & L. Ass'n.*, 53 F. (2d) 412 (D. Ore. 1931); *In re Puget Sound Savings & Loan Ass'n.*, 49 F. (2d) 922 (W.D. Wash. 1931); *Maloney v. Real Estate B. & L. Ass'n.*, 57 Mo. App. 384 (1894); *Hoyt v. Harbor & Suburban B. & S. Ass'n.*, 197 N.Y. 113, 49 L.R.A. (N.S.) 1129.

²² *Synnott v. Iron Belt B. & L. Ass'n.*, cited *supra* note 20.

²³ P.L. 1932, c. 90, p. 159:

" . . . ; when the matured or withdrawal value of shares has been paid, the subscribers thereto or owners thereof shall cease to be members, unless they have subscribed for or purchased other shares."

²⁴ *Supra* note 13 and discussion of said statute thereon.

mitted the entering of judgment but deferred execution thereon, a palpable inconsistency. Under the two prevalent theories, there is practical accord, insofar as both demand that there be funds in the treasury of an association available, by statutory provision, for paying withdrawals, in order that a withdrawing member be permitted to sue his association.

Subsequent to the decision of the *Intiso* case,²⁵ there were three cases of importance decided in New Jersey on the question of the status of withdrawing shareholders, all of which cases were decided prior to 1925. *Gaskill v. Polhemus*,²⁶ was submitted for decision prior to the effective date of the 1903 Act.²⁷ A suit was brought by a receiver of an insolvent association on a member's note. The member had applied for withdrawal and his notice had matured prior to insolvency. Subsequent to his application, the member had made a loan on the note in litigation and had pledged his shares as collateral security. The member pleaded his withdrawal claim as a set-off. The court disallowed the set-off stating that it did not consider the defendant a creditor of the association.²⁸ The 1899 law in effect at the date of this case had no provision concerning the methods of paying withdrawal or concerning the right of bringing suit thereon.²⁹

Fitzgerald v. State Mutual Building and Loan Association,³⁰ was decided subsequent to the 1903 Act which, by section 39, gave a shareholder a right of suit if his claim was not paid in six months.³¹ The case involved the distribution of assets by the receiver of an insolvent corporation. Some of the shareholders had given notices which were on file six months at the time of insolvency. The court refused to give these shareholders preferment as to assets. The court did not feel that Section 39 applied to insolvent corporations but said that, even if

²⁵ *Supra* note 18 and discussion thereunder.

²⁶ 70 N.J.L. 251, 57 Atl. 1048 (E. & A. 1904).

²⁷ *Supra* note 2.

²⁸ At. p. 254, the Court said:

"The controlling circumstance is that the defendant did that which, *ex necessitate*, impressed upon him the continuing *status* of a shareholder, a *status* he still held at the time the insolvency of the association was decreed. At that juncture the defendant was clearly a legal debtor to the association, while it is not shown that he had become its creditor in any other capacity than that of a shareholder. The former of these relations affects the creditors of the insolvent association; the latter is of possible concern to the shareholders alone. The defendant's debt, which is now vested in the receiver, is therefore all that can be litigated in a court of law. The validity of any claim he may have against his fellow shareholders must be adjudged elsewhere. Such claim obviously possesses none of the feature of a legal set off. This result, resting as it does, upon the force given to the election of the defendant to remain a shareholder until his debt was adjusted, renders it unnecessary to decide at what period he would, but for such action, have ceased to be a shareholder."

²⁹ *Supra* note 2.

³⁰ 76 N.J. Eq. 137, 79 Atl. 454 (Ch. 1909).

³¹ *Supra* note 2.

Section 39 were held to apply, it would reach the same result.⁸²

French v. Wolfson,⁸³ involved facts similar to those of the *Gaskill* case, and even though it was decided after the 1903 Act became effective, the Court of Errors and Appeals reached the same result. The Court intimated, in a learned opinion by Mr. Justice Kalisch, that Section 39 of the 1903 Act, changed the law and gave withdrawing shareholders a right to sue after six months from notice given as against a solvent association.⁸⁴ However, it cannot be certain as to whether the court meant that the solvent association should be compelled to have the necessary funds in its treasury or not, as the court was merely speaking by way of *dicta*, and did not discuss this phase. It may be noted that the relevant sections of the 1925 Act on the methods and payment of withdrawals are for practical purposes, the same as those in force under

⁸² At page 145 Vice-Chancellor Leaming said:

"The status of a withdrawal notice at dissolution appears to be an open question in this state. In *Silvers v. Merchants Saving Fund and Building Association*, 56 *Atl. Rep.* 294 (not officially reported), Vice-Chancellor Gray gave to a withdrawal notice the effect of constituting the owner of the stock a general creditor of the association and entitling him to preferment at final distribution by a receiver in insolvency. In the later case of *Whitehead v. Commonwealth Building and Loan Association* (file number, 25-302), Vice-Chancellor Pitney reached the contrary conclusion. No opinion was filed by the learned vice-chancellor in the case last referred to, but I am informed that his decision was reached after a full argument and careful review of the adjudicated cases, including the *Silvers* case above referred to. I know of no other case in this state in which the court has been called upon to determine the status of withdrawal notices in the distribution of assets among stockholders.

"My conclusion is that the statutory right of a member of a building and loan association to withdraw from membership and receive the withdrawal value of his shares and the statutory privilege to sue for that amount if it is not paid within the time named in the Statute, is based upon and forms a part of the general plan that each member is entitled to equal participation in the assets, and that the statute does not contemplate that the privilege named shall be exercised to defeat equal participation and that the spirit of the statute being equal participation, the paramount equity is equal participation at all times; . . ."

⁸³ 88 N.J.L. 669, 88 *Atl.* 1092 (E. & A. 1913).

⁸⁴ Justice Kalisch at p. 670 said:

"This question appears to have been fully answered and settled by this court, in *Gaskill v. Polhemus*, 70 N.J.L. 251, which was controlling upon and followed by the court below, and there has been no good reason advanced here which would warrant a departure from the doctrine laid down in that case. But it is claimed by the appellant that *Gaskill v. Polhemus* was decided on a state of facts before the change was made in the statute, by the act of 1903. Pamph. L., p. 471, 39. The argument made is that section 39, among other things, provides that a shareholder who has given notice of withdrawal may sue for and recover the withdrawal value of his shares in any association, in any court of competent jurisdiction. If the same is not paid in six months from the date of the giving of said notice of withdrawal, a provision not contained in the old act, and hence, by reason of this change in the act, *Gaskill v. Polhemus* is not applicable to the case *sub judice*. But we think otherwise. No doubt that this change gave the withdrawing stockholder a right to sue for the book value of his shares at the expiration of six months from the time of giving notice of his withdrawal. This clearly negatives

the 1903 Act,⁸⁵ and thus, the holdings of the three cases discussed would probably have been the same under the later act. Though the three cases dealt with insolvent associations and thus are not binding authority in respect to litigation involving solvent associations, yet the courts adopted the second theory above discussed as a basis for their holdings, and in all three denied the withdrawing share holders the status of general creditors.

In the recent case of *Richman v. Hercules Building and Loan Association*,⁸⁶ the late Chief Justice Gummere showed that the doctrine of the *Intiso* case⁸⁷ does not any longer apply in New Jersey in cases of withdrawals from solvent associations. The suit was instituted under the 1925 Act,⁸⁸ which permitted suits by withdrawing members if a withdrawal claim was not paid in six months after the filing of the withdrawal notice.⁸⁹ The court not only disregarded the holding of the *Silverman* case⁴⁰ but went further and held that the plaintiff, a with-

any right to sue in advance of the expiration of the six months, and as a set-off is, in effect, a counter suit, no such set-off could be permitted until the six months had expired. Now, though the six months have expired, the situation has changed and the dissolution of the association has begun. We think the rights of the parties must be determined as of the time when the stockholders resolved on dissolution, since the statute contemplates that the withdrawals shall be withdrawals from a live concern and not from a defunct one. In *Fitzgerald v. State Mutual B. & L. Ass'n.*, 76 N.J. Eq. 137, Vice Chancellor Leaming, in a luminous opinion, after fully discussing and considering the bearing of section 39 on the status of a stockholder who had given a withdrawal notice in an association which had gone into liquidation, follows *Gaskill v. Polhemus, supra.*" (Italics ours)

⁸⁵ I Comp. Stat. 336 (1910) Sec. 5 and P.L. 1925, c. 65 p. 191 Sec. 5 both provide that "When shares mature and are paid, the subscribers thereto or owners thereof shall cease to be members, unless they have subscribed for or purchased other shares."

I Comp. Stat. (1910) p. 347, Sec. 39 and P.L. 1925, c. 65 p. 212 Sec. 52 both provide that withdrawals be paid in the order in which they are filed and both provide for the privilege of suing the association if a withdrawal claim is not paid within six months.

⁸⁶ Docket 58-132 (no opinion filed).

⁸⁷ *Supra* note 18 and discussion thereunder.

⁸⁸ *Supra* note 12.

⁸⁹ On a motion to strike the answer, the late Chief Justice allowed the seventh defense to stand. Such defense was as follows:

"(1) 'The defendant association' is a corporation under 'an act concerning building and loan Associations' (P.L. 1903, p. 457 [1 Comp. St. 1910, p. 334, Sec. 1 et seq.]), and at all times until 1925, was subject to said act and its amendments and supplements and since March 12, 1925, has been subject to the act as contained in the Revision of 1925.

"(2) That 'the defendant association is a mutual and co-operative association, all the members of which are equally entitled to participate and share in its assets, in the proportion that each member contributes to the common capital thereof.'

"(3) Plaintiff 'has been and still is a member thereof.'

"(4) 'Payment of the alleged withdrawal value of the plaintiff's shares as claimed in this suit, would materially reduce the value of the shares of the remaining, continuing and withdrawing members of the defendant association, would give to the plaintiff more than her proportionate share of the assets of the defendant

drawing member whose notice had been on file for more than six months, did not even then become a creditor of the association.

Fornataro v. Atlantic Coast Building and Loan Association,⁴¹ was decided under the 1932 Revision of the withdrawal provisions of the 1925 Act.⁴² The plaintiffs gave their notices of withdrawals under the 1925 Act. However, before the six months period prescribed by such act had elapsed, the 1932 Amendment was passed, which provided that claims of matured stock be paid first and that withdrawing members have no right of action as long as funds were applied according to the Statute. The plaintiffs were refused payment and brought suit contending that their claims were governed by the 1925 Act. The plaintiffs claimed their rights were vested, and that the 1932 Amendment could not be construed retrospectively, as it would violate both state⁴³ and federal⁴⁴ constitutional provisions against impairing a contractual obligation. The court held that the right of withdrawal was not a contractual right, but a privilege granted by the legislature under a statute, subject to future amendment. The court further said that the association was governed by the General Corporation Act, and that act allowed for the amendment of corporate charters and of the Corporation Act itself.⁴⁵ The court further said that the amendment was valid as a proper exercise of reserved police power. On these theories, the court struck out the complaints.

The 1932 Act⁴⁶ makes it clear that a withdrawing member continues his status as such, "so long as the funds in the treasury of such association are applied as required herein." The question as to the status of a withdrawing shareholder was apparently made academic by the passage of this Statute. However, the *Fornataro* case⁴⁷ raised the delicate question of retroactivity. It seems that the court in deciding that case, had but one valid ground to stand on: Under the exercise of police power it was proper to prevent an upheaval of the foundation of the structure of building and loan associations by stopping runs against such organizations whose assets were frozen as a result of the exigencies of

association, would prevent the remaining members of defendant association from equally participating with plaintiff in the distribution of the assets, would give to plaintiff an undue and illegal preference over the members remaining in the association, would deprive said remaining members of their property without due process of law, and would result in an illegal distribution of the assets of defendant association.⁴⁸

⁴⁰ *Supra* note 16.

⁴¹ N.J. Misc. 1248, 163 Atl. 240 (Sup. Ct. 1932).

⁴² *Supra* note 13.

⁴³ N.J. Const., Art. 4, Sec. 7, par. 3.

⁴⁴ U.S. CONST., Art. 1, Sec. 10.

⁴⁵ Sec. 4 of General Corporation Act, 2 Comp. Stat. (1910) p. 1600.

⁴⁶ *Supra* note 13.

⁴⁷ *Supra* note 41.

the times.⁴⁸ The court's conclusion that the right of withdrawal is purely a statutory right appears erroneous. The court failed to realize that a contract between the shareholder and the association was made under the authority of the 1925 Act. The then existing law became part of such contract.⁴⁹ The contract, after its creation, became independent of the act under which it was created.⁵⁰ The court also seems to have been in error in depending on the reserve power to amend corporate charters as one of the rationale of its holding.⁵¹ Such right of amendment never authorized the impairment of contractual relations. There is authority however, to the effect that contractual relations may be impaired, if done under a proper exercise of police power for the public good.⁵² Any act of the legislature which tends to insure the stability of the building and loan association as an institution in New Jersey, is of such importance and magnitude to the public at large that the courts of this State may well construe such legislation retroactively under a proper exercise of police power, even if existing contractual obligations may be impaired thereby.

The very recent case of *Horowitz v. Guaranty Building and Loan Association*,⁵³ goes even further than the *Forntaro* case,⁵⁴ insofar as in this case the six months period had elapsed prior to the 1932 Act though a suit was started thereafter. The court struck the complaint on the ground it did not set forth that the defendant association had not applied its funds according to the proviso in the amendment, and it did not set forth that the plaintiff was entitled to payment under the amendment. The court assumed the constitutionality of the retroactivity of the 1932 Act in reaching its decision.

Thus, in New Jersey, the law is now by virtue of statute, clear to the effect that a withdrawing shareholder of a building and loan association retains a membership status until there are funds properly applicable to his claim, which have not been paid according to the provisions of the Statute, or until he has actually been paid his claim. The retro-

⁴⁸ *Noble State Bank v. Haskell*, 219 U.S. 104, 31 Sup. Ct. 186 (1911). At page 112, Justice Holmes said:

"Police power extends to all the great public needs."

Further see, *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 248 U.S. 372, 39 Ct. 117.

⁴⁹ *Coombes v. Getz*, 285 U.S. 434 (1932).

⁵⁰ *Supra* note 49, esp. at p. 442.

⁵¹ 18 N.J. Eq., 178 (1867).

⁵² *Holland v. Nakdimen*, 177 Ark. 920, 9 S.W. (2d) 307; *Stone v. Mississippi*, 101 U.S. 814 (1879); *McConville v. Fort Pierce Bank & Trust Co.*, 135 So. (Fla.) 392; *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467; *State v. Massillon Savings & Loan Co.*, 143 N.E. 894 (Ohio); *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, note 48 *supra*; *Mamgoult v. Springs*, 199 U.S. 473, 26 Sup. Ct. 127 (1905); *Egg Harbor B. & L. Ass'n. v. Baake*, 72 N.J. Eq. 603, 65 Atl. 864 (Ch. 1907).

⁵³ No opinion filed.

⁵⁴ *Supra* note 41.

active effect of such statutory provision has been adjudicated and sustained, although the question has never been decided by the Court of Errors and Appeals. It seems, that so long as the structure of the building and loan association is in jeopardy, any legislation necessary for the protection thereof should be passed and the validity of the same sustained, even to the extent of allowing such legislation to affect existing contractual relations to the detriment of the contracting parties. Since the passage of the statutory enactments dealt with herein and since the decisions of the cases treated herein, conditions reached such a point in this State, that certain orders have been issued by the Commissioner of Banking and Insurance in order to further protect building and loan associations in New Jersey.⁵⁵ The validity of these orders,

⁵⁵ Order Number One passed in pursuance of P.L. 1933, c. 48 provides in respect to withdrawals the following:

"A. Until further notice not more than 50% of the dues paid in by any member in your association shall be repaid or advanced on withdrawals, maturities or share loans, nor applied as share credits upon the recasting or reduction of mortgage loans, or upon the repayment of mortgage loans.

"B. In case the funds available for payments to members as provided in sub-paragraph A, are insufficient for payment of all such requests, then such funds shall be paid in the following manner and order:

"First—In payments to members in necessitous circumstances, but in no case to exceed the sum of \$50. to any one member in any one month. The Board of Directors shall determine what circumstances constitute necessitous cases.

"Second—In payments to members whose shares have matured or shall hereafter mature and who have requested or may request payments thereof in accordance with Section 49-B of the General Building and Loan Association Act of New Jersey (Revision of 1925) as amended to date. If the funds available for payments under this sub-paragraph are insufficient to pay each of the members entitled thereto 50% of the dues paid in, then such funds shall be paid so that each such member shall receive the same proportion of the amount due him as the amount available bears to 50% of the total dues paid in on such matured shares.

"Third—In payment of withdrawals on a rotating basis as hereinafter defined, in multiples of \$50. to each member in the order in which requests for withdrawals have been or may be filed.

"The term 'rotating basis' as used herein shall mean the distribution of available funds, in amounts of \$50. or less, if less is due, to members requesting withdrawals, in the order in which such requests have been or may be filed; this procedure to be followed until available funds are exhausted. Upon new funds becoming available payments shall be resumed with the member next following the member who received the last payment.

"D 3. No member shall have a right to sue your association to recover the withdrawal or maturity value of his shares so long as said association complies with this and subsequent orders of the Commissioner of Banking and Insurance."

Order Number One-A passed in pursuance of P.L. 1933, c. 48 provides in respect to withdrawals the following:

"2. Until the further order of the Commissioner of Banking and Insurance your Association shall not receive dues and/or premiums on any shares or make payments of the withdrawal or maturity value of shares or make share loans except in the following manner:

"(a) Dues and/or premiums received by your Association from members either on pledged or unpledged shares shall be segregated from all other receipts and held in a separate trust account for the benefit of such members. Such funds

affecting the right of withdrawal, has not as yet been established by litigation, but as with the statutes and decisions discussed herein such validity will undoubtedly be established under a proper exercise of police power.

MONROE HOLLANDER.

Newark, N. J.

CONSENT DISMISSAL OF APPEAL UPON SETTLEMENT BY THE PARTIES—It is the frequently reiterated policy of the courts to look with favor upon the amicable settlement of claims by litigants, thus obviating the necessity of action by the courts.¹ That it is a wise policy will hardly be controverted; nor will it be contended that it should be entirely unrestrained in its application. Thus, settlements effected on behalf of infants or others not *sui juris* must be made under the scrutiny of the court. However, there can be little doubt that a settlement concurred in by all interested parties, they being competent, and its validity impeached by none, should be given full force and effect.

Little difficulty is experienced when the settlement or compromise is made before the matter has been submitted to a judicial tribunal for adjudication. If the parties make their compromise after suit begun, but before judgment or decree, there is little doubt of their ability to have the action dismissed by their concerted withdrawal.² Is their joint power of control over the litigation lost after an appeal has been taken from the judgment of the lower court and has been argued before the appellate court? If the parties, at this state of the proceedings, before the opinion of the court has been rendered, effect a settlement, may the court disregard the desire of both parties to withdraw the case, and dis-

so held in trust shall not be disbursed or credited to the share accounts until the further order of the Commissioner of Banking and Insurance.

"(b) Payments not in excess of \$50. in any month to any one member may be made where such member in the opinion of the Board of Directors is in extreme necessitous circumstances but the total of such payments to any member shall not exceed 25% of the dues paid in by such member upon his shares and standing to his credit upon the books of the Association on the day and date of this order.

"(c) The Association may grant share loans in lieu of such payments in such extreme necessitous cases but not to exceed the amounts hereinbefore limited.

"4. No member shall have a right to sue your Association to recover the withdrawal or maturity value of the shares so long as your Association complies with this and subsequent orders of the Commissioner of Banking and Insurance."

¹ 12 C. J. 336, 337; 5 R. C. L. 878 §. 3.

² This right may be limited in the case of so-called "class bills" after the intervention of third parties. For a discussion of that and related questions see I MERCER BEASLEY L. REV. 2, p. 71, *Consent Dismissal of Proceedings Brought to Obtain Adjudication of Corporate Insolvency*. We are concerned only with a situation in which all the parties in interest have consented to the dismissal.