IN THE

SUPREME COURT

CENTRAL GRAND DIVISION, STATE OF ILLINOIS.

JUNE TERM, 1896

THE PEOPLE, ETC., EX. REL.
DAVID GORE, *Auditor*, ETC.

vs.

THE NATIONAL HOME, BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

ABSTRACT OF RECORD.

M. T. MOLONEY, *Attorney General.*

T. J. SCOFIELD,
AND
M. L. NEWELL,
Of Counsel.

SPRINGFIELD, ILL.
ED. F. HARTMAN, STATE PRINTER.
1895.

Bill on page 27 and 28 &
all that need be examined
Omit what precedes.

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Record page.

1 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss.
McLEAN COUNTY. }

Pleas begun and held at the court house in the city of Bloomington, before the Hon. Thomas F. Tipton, one of the Judges of the Circuit Court of the Eleventh Judicial Circuit of the State of Illinois, in a certain cause in the Circuit Court of McLean County, in said State, wherein People, ex rel., &c., were complainants, and the National Home Building and Loan Association was defendant.

Be it remembered that heretofore, to-wit, on the 18th day of January, 1896, said complainant, by the Attorney-General of the State of Illinois, came and filed, in the office of the clerk of this court, his certain notice and bill, which are in the words and figures following, to-wit:

SPRINGFIELD, ILL., January 16, 1896.

To the National Home Building and Loan Association, of Bloomington, Illinois, and F. J. Fitzwilliam, its president, and W. R. Fitzwilliam, its secretary:

You are hereby notified that on Saturday, the 18th day of January, 1896, I shall commence a proceeding in the Circuit Court of McLean County to dissolve said, the National Home Building and Loan Association, and for the appointment of a receiver to take charge of the
2 affairs and assets of said association under the direction of the court; you are also hereby notified that on said 18th day of January, 1896, at the hour of nine o'clock a. m. on said day, or as soon thereafter as counsel can be heard, I shall enter a motion in the cause so to be commenced, as aforesaid, before the Hon. Thomas F. Tipton in the room usually occupied as a court room in the court house at Bloomington, in said McLean County, for a rule upon said association to show cause why it should not be dissolved; at which time and place you can appear and take such steps as may be proper in the premises.

M. T. MOLONEY,
Attorney General.

Upon the back of said notice appears the following endorsement:

STATE OF ILLINOIS, } ss.
McLEAN COUNTY. }

Executed the within notice this 17th day of January, 1896, by delivering a true copy thereof to F. J. Fitzwilliam and to W. R. Fitzwilliam, and delivering a true copy to W. R. Fitzwilliam as secretary of the National Home Building and Loan Association of Bloomington, Illinois.

JAMES STONE,
Sheriff.

By W. J. BISHOP,
Deputy.

SHERIFF'S FEES.

Service	$2 25
Six miles	30
Return	10
Total	$2 65

Received the above fees, being two dollars and sixty-five cents, from T. J. Scofield, this 18th day of January, 1896.

JAMES STONE,
Sheriff of McLean County, Illinois.

By W. J. BISHOP,
Deputy.

3 STATE OF ILLINOIS, } In the Circuit Court of said County.
COUNTY OF McLEAN. } ss. To the February Term, A. D. 1896.

To the Honorable, the Presiding Judge of said Court:

In Chancery Sitting:

And now comes the people of the State of Illinois, upon relation of David Gore, Auditor of Public Accounts of

said State, by Maurice T. Moloney, Attorney General, and in the name and by the authority of the People of the State of Illinois, gives the Court here now to understand and be informed that the National Home Building and Loan Association is a body corporate, duly organized under an Act of the General Assembly of the State of Illinois, entitled, "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of said association," in force July 1, 1879, and all Acts amendatory thereof; that the said National Home Building and Loan Association was duly incorporated and authorized to do business on the 11th day of January, A. D. 1890, and under and by virtue of said authority, said association commenced business as such corporation, and as required by its charter has maintained its principal office and place of business at the City of Bloomington, in the County of McLean and State of Illinois.

Relator further avers, that it became and was his duty under and by virtue of the laws of the State of Illinois, as Auditor of Public Accounts, to cause an examination to be made of the financial condition of said association and of its methods of doing business, and in the discharge of said duty he caused such examination to be made by regularly appointed and duly authorized ex-
4 aminers; that the report of said examination with reference to the condition of said Association was rendered to relator on the 18th day of May, A. D. 1895; that the examination so made and reported to relator, as afore-

said, was made with reference to its condition on the morning of April 6, A. D. 1895; that the official examiners so having examined said Association as aforesaid, were not, nor was either of them, officers or agents, or in any manner interested in said Association; that the report of said examination is now on file in the office of relator as Auditor of Public Accounts of said State.

Relator avers that such examination shows that said Association has conducted its business in an illegal and unsafe manner; that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate to be proper, and that the money so paid out by it as expenses was largely in excess of the amount which such an Association could afford to expend, when considered in connection with the actual earning capacity of the money invested by it, and that such expenses under such conditions were contrary to safe and conservative business methods; that said Association paid to its president a compensation for his services in violation of the laws of the State of Illinois; that said Association has loaned large sums of money upon security wholly inadequate, and that the shareholders of said association, by reason of the inadequacy of said security, have sustained great financial loss; that said Association has in many instances, loaned large sums of money, paid to it by its shareholders, on real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association, have resulted in great finan-

cial injury to the shareholders of said Association; that said Association has made loans of amounts of money largely in excess of the value of the real estate mortgaged to the Association to secure the same, and that by reason thereof, a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of its shareholders; that in the investment of the moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted that only a small per cent. of the charges thereon which have accrued from month to month have been regularly or promptly paid, and that such charges upon a very large per cent. of loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a large sum of money; that said Association has at different times, and to different persons, loaned large sums of money on real estate, which real estate was not used or occupied as a homestead, and was not intended to be used or occupied as a homestead, in violation of the laws of the State of Illinois; that said Association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states of the United States of America, hundreds of miles from

its principal place of business, and has loaned money paid to it by its stockholders for investment in accordance with the statutes of the State of Illinois, to persons
6 residing at different places in the State of Illinois and in other states of the United States of America, through agents representing it, for the purpose of making such loans, in violation of the laws of the State of Illinois; that it has enacted a by-law, the effect of which is to change its contracts with its shareholders in such manner as to depreciate the value of its shares of stock to its withdrawing shareholders, without the consent of such shareholders, and against their protest; that the assets of said Association are not such as to justify a continuance of business by it; that hundreds of its shareholders have filed with it notices of withdrawal, and that said Association has not been able to pay the withdrawal value of such shares of stock to such withdrawing shareholders, as contemplated and required by the laws of the State of Illinois; that said Association has refused to pay the withdrawal value of shares of stock to withdrawing shareholders under and by virtue of and in accordance with the contract made with said shareholders, but has offered to pay a certain proportion of said amounts upon condition that such shareholders would receipt in full to said Association, and surrender their respective shares of stock to it for cancellation; that its Secretary has offered to discount the claims of shareholders upon withdrawal of their shares of stock, which has injured the reputa-

tion of said Association to such an extent that the confidence of its shareholders and the public in the integrity of said Association and its ability to maintain itself as an Association as required by law is destroyed; and that by reason of the loss of confidence in it, as aforesaid, large numbers of its shareholders have filed with it withdrawal applications, and are continuing to do so, thereby rendering the further transaction of business by
7 it unprofitable to its shareholders.

That in consideration of the premises, relator on the 24th day of October, 1895, prepared, signed, sealed and mailed, postage prepaid, a notice to the president and secretary of said association, addressed to said president and secretary, at Bloomington, Illinois, which notice is in the words and figures as follows, to wit:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
BUILDING AND LOAN ASSOCIATION DEPARTMENT,
October 24, 1895.

"*To F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary of the National Home Building and Loan Association, of Bloomington, Illinois:*

"WHEREAS, It appears from an examination of the affairs of the National Home, Building and Loan Association, of Bloomington, Illinois, that the said Association is conducting its business in an unsafe manner, and contrary to law, as follows, to-wit:

1. "That it attempts, under cover of amendment to its charter to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due them by the terms of the contract, so at-

7. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

8. "In that its loans have been selected with so little care that only a small per cent. of the charges thereon are regularly or promptly paid.

9. "In that compensation is paid to its president, contrary to the provisions of the statute.

10. "In that its assets are insufficient to justify a continuance of business by it.

11. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would
9 dictate as proper, and largely in excess of what such Association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now, therefore, I, David Gore, Auditor of Public Accounts, do hereby notify you, the said F. J. Fitzwilliam, president, and W. R. Fitzwilliam, secretary, of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty days from the date hereof, I shall report the said National Home Building and Loan Association to the Attorney General, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

[SEAL] "DAVID GORE,

Auditor of Public Accounts."

Relator avers and states the fact to be, that the officers of said Association have conducted its business in an illegal and unsafe manner, and have paid to its officers, agents and others as salaries and for expenses incurred, sums of money which have exceeded what the services of its said officers were worth, and what the business of said Association and its earning capacity would justify it in expending; that the effect of this extravagant and unnecessary expenditure of money paid into or earned by said Association has been to decrease the value of the shares of stock held by its shareholders; that said Association, on October 15, 1894, fixed the salary of its secretary at the sum of seven thousand dollars per annum, which sum was in excess of the value of the services of said secretary to said Association, and was largely in excess of the ability of said Association to pay by reason of its unsatisfactory financial condition and the comparatively small income which it was receiving from the investments which it had made; that said Association paid a salary to its president which is not authorized or warranted by the laws of the State of Illinois, and the payment of which salary to its president was a direct violation of the law under which said Association was created.

Relator further avers and charges the fact to be, that said Association has loaned large sums of money upon security wholly inadequate, and that the shareholders of said Association, by reason of the inadequacy of said security, have sustained great financial loss, and that said Association has, in many instances, loaned large sums of money paid to it by its shareholders upon real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association have resulted in great financial injury to the shareholders of said Association; that said Association has made loans of large amounts of money, which loans were in excess of the value of the real estate mortgaged to the Association to secure the same, and that, by reason thereof, a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate in many instances, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of its shareholders; that in the investment of the
11 moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted that only a small per cent. of the charges thereon, which have accrued from month to month, have been regularly or promptly paid, and that such charges upon a very large

per cent. of the loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a large sum of money.

Relator avers and charges the fact to be, that on the morning of April 6, 1895, said Association held mortgages upon real estate, securing eight hundred and ninety-four loans made by it, representing to said Association $598,547.69; that of these loans thirty-three, amounting to $32,775.00, were paid in advance; that two hundred and forty-one of these loans, amounting to $156,480.81 were paid to date; and that six hundred and twenty of these loans, amounting to $409,291.88, were delinquent; that the delinquency upon said loans represented the interest and charges due thereon to said Association for periods of time running from one to twenty-seven months; that a very large portion of said loans, so delinquent as aforesaid, were made upon security entirely inadequate and that upon a foreclosure of the mortgages given to secure said loans that said Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

Relator further avers and states the fact to be, that on
12 the morning of said 6th day of April, 1895, said Association was the owner of ninety-one pieces of real estate, nearly, if not all of which it had been forced to accept

in satisfaction of unproductive loans, and said real estate has remained an uproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are dimished in value; that these ninety-one pieces of real estate were given as security to said Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive upon the part of the borrowers to pay the interest and other charges accruing to said Association by reason of said loans, and that said loans represent to said Association at the present time, the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by said Association, in satifaction of said debts, it, the said Association, is deriving an income from only thirty-seven thereof, and that the remaining pieces of said real estate are entirely unproductive; and relator avers that the income which said Association realizes from said thirty-seven pieces of real estate amounts only to the sum of $273.72 per month.

Relator further avers, and states the fact to be, that by reason of said unsafe methods in the investment of the funds of said Association it has been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other states, and that said Association will ultimately be compelled to accept said properties in discharge of the debt to said Association, which said pieces of property were, respectively, mortgaged to secure;

13 that at the time said foreclosure proceedings were respectively brought, there was due said Association, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional charges against said real estate; that the foreclosure of said mortgages will, respectively, entail a large expense to said Association in attorney's fees, cost of proceedings in court and the necessary expenses incident thereof, which said costs, added to the principal, interest and premiums due said Association by reason of said loans, will exceed the aggregate of the amounts loaned by said Association by the sum of, to-wit, many thousand dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association are dimished, and the value of the shares of stock issued by said Association are correspondingly diminished.

Relator further avers, that said Association, in making real estate loans, has not regarded the provisions of the statute, and the financial interests of its shareholders; that it is provided by law that such associations shall require as security for loans made by it, good and ample real estate, unincumbered, except by prior loans of such association. Relator avers, and charges the fact to be, that said Association has disregarded this provision of law, and has loaned large amounts of money, and as security therefor, has accepted mortgages upon real estate against which there were other and prior liens existing

at the time such loans were made, and which liens were not held or owned by said Association. That as a result of this unwarranted action upon the part of the officers of said Association, subsequently thereto, it became
14 necessary for said Association, in order to protect the loans so made by it as aforesaid, to purchase the outstanding first liens aforesaid, and said Association did so purchase said liens, and in purchasing the same used the money paid into it for investment by its shareholders, and by reason of the premises was, in a number of instances, compelled to accept the property, so given as security as aforesaid, in satisfaction of the amount of money loaned upon said property, together with the interest and premiums which had accumulated by reason of said loans, and the amount expended by it in purchasing said outstanding first liens, and to the extent that said Association lost money by reason of the premises and acquired unproductive realty, the assets of said Association were diminished, and its shareholders thereby made to suffer a corresponding depreciation in the actual value of their respective shares of stock.

Relator further avers and charges, that said Association has at different times and to different persons throughout the State of Illinois and elsewhere loaned large sums of money paid to it by its shareholders upon their respective shares of stock, for investment in accordance with law, on real estate, which said real estate was not at the time used or occupied as a homestead, and was not intended to be used or occupied as a homestead, and that the loans

so made were secured by real estate which was in many instances vacant and unoccupied, and in other instances used for business purposes, and that the money so loaned on said real estate was not intended by the borrowers for use in building a home for the borrower or for the purpose of improving a homestead; that said act of said Association in so making said loans as aforesaid, was in violation of the laws of the State of Illinois relating to and governing such associations, in that said law requires said associations to invest the moneys accumulating from month to month for the purpose of building and improving homesteads. Relator avers that in making such loans as aforesaid that said Association acted without warrant or authority of law.

Relator further avers and charges, that the laws of the State of Illinois providing for the creation of such associations and for their government and control authorize the creation of such associations for the mutual benefit of its shareholders to assist them in acquiring and owning homesteads, and that said laws do not authorize the creation of such associations for the purpose of doing business as an association throughout the United States, but that the spirit and purpose of the said law confines said associations to the localities in which they are respectively created; that said Association has entirely disregarded the law of its creation in this regard, and in violation of said law has engaged in selling and disposing of shares of stock throughout the State of Illinois and throughout many other states of the United States of

America, and has loaned money through agents representing it in many states, and has not confined its business to the locality in which it was authorized to do business as such an association; that as a result of its unwarranted action in the premises, its shareholders have been made to suffer by reason of its careless methods, and the character and value of securities which it has accepted for loans made it, and the assets of said Association have been greatly diminished thereby.

Relator further avers and charges, that prior to the 15th day of January, 1895, that the by-laws of said Association concerning the withdrawal by its shareholders
16 of the withdrawal value of shares of stock held by them respectively, provided, among other things, that members whose shares of stock were not pledged to said Association might withdraw all or any part of their shares by giving the secretary thirty days' notice of their desire to do so, and that the Board of Directors should refund to such withdrawing members all that they had paid into such Association, excepting their membership fees and fines; that said by-laws further provided that withdrawing shareholders should be entitled to receive interest on installments of stock paid in by them as follows: On stock from one to two years old, six per cent. per annum; on stock two to three years old, seven per cent. per annum, and on stock three years old or over, eight per annum; that on or about the 15th day of January, A. D. 1895, at a meeting of the shareholders of said Association a majority of its shareholders amended said by-law

relating to the withdrawal value of its shares of stock, and in and by said amendment provided, that the Board of Directors of said Association should refund to its withdrawing members all that they had respectively paid into said Association, except membership fees, fines and their respective proportionate shares of expenses, to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the withdrawal application, and said by-law declared such fees, fines and expenses to be a lien upon the stock of each member. It was further provided by said amendment that withdrawing members should be entitled to receive interest on the installments of stock paid in by them in accordance with the provisions of said amendment, which provisions were identical with the provisions of the old by law relating to interest; that a large number of the share-
17 holders of said Association protested against the adoption of said amendment, on the ground that they had not consented to said amendment, and the enforcement of the same against them would be to violate the conditions of the contract entered into between them and said Association at the time they became members of said Association and purchased shares therein. That notwithstanding the fact that said Association cannot violate the rights of its shareholders so as to reduce the amount of money which they would be respectively entitled to receive under the provisions of the law, as they existed at

the time the shares of stock were respectively issued without the consent of such members, nevertheless said Association, has insisted, and still insists, forcing its withdrawing stockholders to accept the amounts of money which they are respectively entitled to, less their proportion of the expenses of said Association, in accordance with the provisions of said amended by-law. Relator further avers, and charges the fact to be, that said Association has refused to settle with withdrawing shareholders upon any other basis than that provided by said amended by-law, and has forced its withdrawing shareholders to accept the amount provided under and by virtue of said amended by-law, in full and complete satisfaction of all their claims against said Association; and relator avers that by reason of the premises withdrawing shareholders have been made to suffer large financial loss, and that said Association in so forcing the effect of said by-law upon members who did not consent thereto, but who were opposed to the adoption of said amendment, has violated its duty to such members, and has withheld from them amounts of money which said Association was not entitled to retain, to their financial detriment.

18 Relator further avers that the statutes of the State of Illinois governing such associations make it the duty of said associations to pay to withdrawing shareholders the respective amounts due them upon their stock, upon the expiration of a period of thirty days after the withdrawal notice was given; that the said Association has not re-

garded this provision of law, but has permitted many months to expire after the expiration of said thirty days, without paying back to the withdrawing shareholder the amount of money to which he was entitled by virtue of said withdrawal notice, and the shares of stock theretofore issued to him by said association; that large numbers of shareholders have filed applications for withdrawal from said association, and that in some instances a period of more than six months have elapsed, as relator is informed and believes, from the expiration of said thirty days, and the stock of such withdrawing shareholders has not been redeemed in accordance with the requirements of law and the provisions of the by-laws of said Association. Relator further avers that the secretary of said Association has, in a number of instances, either directly or indirectly, offered to discount, and in a number of cases has actually discounted the claims of such withdrawing shareholders, and has caused their said shares of stock to be assigned directly to himself, or to some person designated by him, and that such methods upon the part of the secretary of said Association has injured its reputation to such an extent that the confidence of its shareholders and of the public in the integrity of said Association and in its ability to maintain itself as an association, and as required by law, has been practically destroyed, and that by reason of the loss of confidence in it, as aforesaid, its
19 shareholders to a large extent have filed with it with-

drawal applications, and are continuing to do so, and have thereby rendered the further transaction of business by it unprofitable to its shareholders.

Relator avers and charges the fact to be, that the expenses of said Association during its history have been far in excess of the necessities of said Association; that the secretary of said Association has withdrawn large amounts of money from the funds thereof, and appropriated the same to his own personal use, to an unnecessary and unjustifiable extent; that during the first three years of the history of said Association its secretary withdrew from the moneys paid into said Association by its shareholders over $119,000. This amount was withdrawn under and by virtue of a by-law which permitted him to use five cents per share per month of fifty-five cent stock, and ten cents per share per month of one dollar and ten cent stock, for the purpose of an expense fund; that the secretary has assumed that amount to be intended for his personal use, and out of which to defray the expenses of the office at Bloomington, Illinois; out of this amount during said period he paid the rent, light, heat, expense of clerks and incidentals, and the books of said Association show that during the first three years of the history of said Association that the said $119,000 netted the said secretary the sum of over $50,000; that during the first year it netted the said secretary the sum of $11,622.56, the second year the sum of $18,439.07, and the third year the sum of $21,536.96. That this fund was not applied to the payment of expenses which accrued from time to time in the transaction of business by said Association in differ-

ent parts of the State of Illinois and in the different states in which it transacted business; that upon the foreclosure of mortgages the attorney's fees and costs were paid by said Association out of other funds than said expense fund, and was carried into the real estate account of said Association. Relator avers, that the retention by said secretary of said amounts of money, as aforesaid, was an outrage upon the shareholders of said Association; relator avers and charges that this extravagance upon the part of the officers of said Association and their carelessness as to the character of security which they accepted for loans made by said Association has so far shaken the confidence of the shareholders of said Association in the integrity and good business judgment of its officers, that the affairs of said Association cannot be so operated as to enable it to carry out the contracts entered into between it and its shareholders; that by reason of the fact that the large number of pieces of real estate which it holds and owns are unproductive, and that there are in process of foreclosure over two hundred additional pieces of real estate which must become, and which relator avers will be, unproductive in the hands of said Association, and by reason of the fact that a large proportion of the loans made by said Association are not profitable to said Association, but that interest and premiums due thereon have been permitted to remain unpaid and to accumulate for periods ranging from one to twenty-seven months; that the assets of said Association are gradually, but certainly, growing less and less, from year to year,

and that the best interests of its shareholders will be subserved by a dissolution of said Association and the distribution of its assets in accordance with the order of this Honorable Court.

21 Relator further avers, and charges the fact to be, that said Association is insolvent, and that its assets are not sufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained by reason of losses upon loans a loss of $121,895.71; and that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14, that its total liabilities amount to the sum of $1,332,603.70, and that its total liabilities exceed its total assets by the sum of $65,635.13. Relator, therefore, charges that the condition of said Association requires its dissolution, and a forfeiture of its corporate rights to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

Relator, therefore, prays that a summons may be issued for the said National Home Building and Loan Association, and that said Association, which is hereby made defendant to this bill, be required to answer the same, but not under oath, answer under oath being hereby waived. Relator prays that said Association may be enjoined and restrained by the order of this Honorable Court from doing any business under its charter, and that the officers of said Association be respectively enjoined from

receiving or paying out any moneys belonging to said Association, and that it, the said Association, may be required to show cause why its business as such Association shall not be closed and its charter dissolved.

Relator further prays that, on the hearing hereof, that said corporation may be dissolved and a receiver ap-
22 pointed to take charge of the affairs and assets of said Association, and that said receiver be directed to take possession of all moneys, securities, notes, evidences of indebtedness, books, papers, properties, effects, assets, all things soever belonging to said Association, and to collect all moneys, property and things of value owned by and due said Association, and that the officers of said Association be directed to turn over the said property of said Association, as aforesaid, to said receiver, and that said officers be restrained from any way interfering with said receiver in the discharge of his receivership, and that the said Association and its officers be respectively restrained from receiving through the mails or otherwise, and opening the same, letters or communications addressed to said Association, and that said Association and its officers be required to turn over to the said receiver all letters, communications, moneys, books and property of every nature and kind whatsoever, which may, at any time, come into the possession of said Association or said officers respectively, and which were intended for and belong to said Association, or which, in any way, relate to the assets or liabilities of said Association, or the winding up

of its business and affairs, and that the said Association and its officers, and all persons indebted to said Association or having any kind of property belonging to said Association be required to pay to and deliver the same to the receiver.

Relator further prays that a writ of temporary injunction may issue herein, restraining said Association and its officers, as they are herein respectively prayed to be perpetually enjoined; that all restraining orders prayed for herein may be made perpetual, and that the said
23 National Home Building and Loan Association may be dissolved and its franchise forfeited, and its assets collected and distributed in accordance with law, and that a receiver be appointed for said Association, and that the writ of injunction may issue herein, and for such other and further relief in the premises as may be equitable and just.

And relator will ever pray, etc.

DAVID GORE,

Auditor of Public Accounts of the State of Illinois.

MAURICE T. MOLONEY,

Attorney General.

STATE OF ILLINOIS, }
COUNTY OF SANGAMON. } ss.

David Gore, having been first duly sworn, on oath, says, that he is the Auditor of Public Accounts of the State of Illinois; that he has read or heard of the foregoing

bill, and is familiar with its contents; that he has investigated the truth of the contents of said bill, and believes the same to be true.

DAVID GORE.

Subscribed and sworn to before me this 17th day of January, A. D., 1896.

[SEAL.] BRAND WHITLOCK,
Notary Public.

24 IN VACATION AFTER NOVEMBER TERM, 1895.

SATURDAY, JANUARY 18, 1896.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. DAVID GORE, AUDITOR PUBLIC ACCOUNTS, 6906 vs. NATIONAL HOME BUILDING AND LOAN ASSOCIATION. } *To Appoint Receiver.*

And now on this day comes the People of the State of Illinois, by Maurice T. Moloney, Attorney, and T. J. Schofield, Assistant Attorney General, and moves the Court for a rule upon said Association to show cause why it should not be dissolved.

And it appearing to the Court that the notice of this application for said rule was duly served upon F. J. Fitzwilliam and W. R. Fitzwilliam, the President and Secretary of said Association; and the Court having heard said bill read and proof that the notice was duly served on the 17th day of January, 1896, by delivering true copies thereof to the said Frank J. Fitzwilliam and

W. R. Fitzwilliam, President and Secretary of said Association, that the rule to show cause, as prayed for in said bill, be and is hereby entered.

It is further ordered by the Court that if the defendant desires to demur to said bill, that it shall have leave to do so. Said demurrer to be filed so that the same may be heard on Saturday, the 25th of January, 1896, at 9 o'clock a. m.

It is further ordered that if said Association does not desire to demur to said bill, but desires to plead to or answer the same, that it shall file its said plea or answer by the 1st day of the next term of this Court. Ordered further that the complainant have leave to amend the bill by next Tuesday.

[SEAL.] THOMAS F. TIPTON,
Judge.

And afterwards, to-wit: On the 21st day of January, 1896, said complainant, by the Attorney General, came and filed in the office of the clerk of this court, his certain amended bill, which is in the words and figures following, to-wit:

STATE OF ILLINOIS, } ss. *In the Circuit Court of said County.*
COUNTY OF McLEAN. } *To the Term, A. D. 1896.*

To the Honorable, the Presiding Judge of said Court, In Chancery Sitting:

And now comes the People of the State of Illinois, upon relation of David Gore, Auditor of Public Accounts, of said State, by Maurice T. Moloney, Attorney General, and in the name and by the authority of the People of

the State of Illinois, gives the court here now to understand and be informed, that the National Home Building and Loan Association is a body corporate, duly organized under an act of the General Assembly of the State of Illinois, entitled, "An act to enable associations of persons to become a body corporate to raise funds to be loaned among the members of said association," in force July 1, 1879, and all acts amendatory thereof; that the said National Home Building and Loan Association was duly incorporated and authorized to do business on the 11th day of January A. D. 1890, and under and by virtue of
26 said authority of said association commenced business as such corporation, and as required by its charter has maintained its principal office and place of business at the city of Bloomington, in the County of McLean, and State of Illinois.

Relator further avers, that it became and was his duty under and by virtue of the laws of the State of Illinois, as Auditor of Public Accounts, to cause an examination to be made of the financial condition of said Association and of its methods of doing business, and in the discharge of said duty he caused such examination to be made by regularly appointed and duly authorized examiners; that the report of said examination with reference to the condition of said Association was rendered to relator on the 18th day of May, A. D. 1895; that the examination so made and reported to relator as aforesaid, was made with reference to its condition on the morning of April 6, A. D. 1895; that the official examiners so

having examined said Association as aforesaid, were not nor was either of them officers or agents, or in any manner interested in said Association; that the report of said examination is now on file in the office of relator as Auditor of Public Accounts of said State.

Relator avers that such examination shows that said Association has conducted its business in an illegal and unsafe manner; that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate to be proper, and that the money so paid out by it as expenses was largely in excess of the amount which such an Association could afford to expend, when considered in connection with the actual earning capacity of the money invested by it, and that such expenses, under
27 such conditions were contrary to safe and conservative business methods; that said Association paid to its president a compensation for his services in violation of the laws of the State of Illinois; that said Association has loaned large sums of money upon security wholly inadquate, and that the shareholders of said Association, by reason of the inadequacy of said security, have sustained great financial loss; that said Association has, in many instances, loaned large sums of money, paid to it by its shareholders, on real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association have resulted in great financial injury to the shareholders of said Association; that said Association has made loans of amounts of money largely in ex-

cess of the value of the real estate mortgaged to the Association to secure the same, and that by reason thereof a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of of its shareholders; that in the investment of the moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted that only a small per cent. of the charges thereon which have accrued from month to month have been regularly or promptly paid, and that such charges upon a very large per cent. of loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a
28 large sum of money; that said Association has, at different times, and to different persons, loaned large sums of money on real estate, which real estate was not used or occupied as a homestead, and was not intended to be used or occupied as a homestead, in violation of the laws of the State of Illinois; that said Association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states of the United States of America, hundreds of miles from its principal place of business, and has loaned money, paid to it by its shareholders for investment in accordance with the

statutes of the State of Illinois, to persons residing at different places in the State of Illinois and in other states of the United States of America, through agents representing it, for the purpose of making such loans in violation of the laws of the State of Illinois; that it has enacted a by-law the effect of which is to change its contracts with its shareholders in such manner as to depreciate the value of its shares of stock to its withdrawing shareholders, without the consent of such shareholders and against their protest; that the assets of said Association are not such as to justify a continuance of business by it; that hundreds of its shareholders have filed with it notices of withdrawal, and that said Association has not been able to pay the withdrawal value of such shares of stock to such withdrawing shareholders, as contemplated and required by the laws of the State of Illinois; that said Association has refused to pay the withdrawal value of shares of stock to withdrawing shareholders under and by virtue of and in accordance with the contracts made said shareholders, but has offered to pay a certain proportion of said amounts upon condition that such shareholders would receipt in full to said Association and surrender their respective shares of stock
29 to it for cancellation; that its secretary has offered to discount the claims of shareholders upon withdrawal of their shares of stock, which has injured the reputation of said Association to such an extent that the confidence of its shareholders and the public in the integrity of said

Association and its ability to maintain itself as an association, as required by law, is destroyed; and that, by reason of the loss of confidence in it as aforesaid, large numbers of its shareholders have filed with it withdrawal applications, and are continuing to do so, thereby rendering the further transaction of business by it unprofitable to its shareholders.

That in consideration of the premises relator, on the 24th day of October, 1895, prepared, signed, sealed and mailed, postage prepaid, a notice to the President and Secretary of said Association, addressed to said President and Secretary, at Bloomington, Illinois, which notice is in words and figures, as follows, to-wit:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
"BUILDING AND LOAN ASSOCIATION DEPARTMENT.
"October 24, 1895.

"*To F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary, of the National Home Building and Loan Association, of Bloomington, Illinois:*

1. "Whereas, it appears from an examination of the affairs of the National Home Building and Loan Association of Bloomington, Illinois, that the said Association is conducting its business in an unsafe manner, and contrary to law as follows, to-wit:

2. "That it attempts under cover of an amendment to
30 its charter to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due them by the terms of the contract, so attempted to be changed, without the assent and against the protest of such shareholders, thereby injuring

the reputation of said Association for fair dealing, and constituting an unsafe and illegal manner of doing business.

3. "In that its Secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

5. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the Association, to the great loss of its shareholders, and against the provisions of the law.

6. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made application to withdraw therefrom, and continue to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

7. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

8. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

9. "In that its loans have been selected with so little care that only a small per cent. of the charges thereon
31 are regularly or promptly paid.

10. "In that compensation is paid to its president, contrary to the provisions of the statute.

11. "In that its assets are insufficient to justify a continuance of business by it.

12. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate as proper, and largely in excess of what such Association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now, therefore, I, David Gore, Auditor of Public Accounts, do hereby notify you, the said F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty (60) days from the date hereof, I shall report the said National Home Building and Loan Association to the Attorney General, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

"DAVID GORE,

[SEAL] "*Auditor of Public Accounts.*"

32 Relator avers, that thereafter, and on the 28th day of December A. D. 1895, he made a supplemental examination of the condition of the said National Home Building and Loan Association of Bloomington, Illinois, for the purpose of determining whether or not the requirements of said notice so given to it as aforesaid, had or had not been complied with, and that he avers and states the fact to be, that the financial condition of said Association has not been improved since the giving of said notice to the Association, and that the conditions which existed at the time said notice was so given to said Association on said 24th day of October, 1895, still continue to exist, and that the financial condition of said Association is still insufficient to justify a continuance of business by it. Relator further avers that the said amendment to the by-laws of said Association, referred to in said notice of October 24, 1895, and hereinafter referred to at length, still exists, and that said Association so continued to insist upon the legality of said by-law, and still continues to settle with its withdrawing shareholders, under and by virtue of its provisions. Relator avers, that the officers of said Association agreed to discontinue the illegal practices of which it has been guilty, but relator avers and charges the fact to be, that said illegal practices have resulted in rendering the business of said Association unprofitable to its shareholders, and that its condition is still, financially, such as not to justify a continuance of business by it, and that its said financial condition is such as to render it impossible for its officers to correct the effect of their

said illegal practices, and relator avers that its financial condition has not been improved by said Association.

33 Relator avers and states the fact to be, that the officers of said Association have conducted its business in an illegal and unsafe manner, and have paid to officers, agents and others, as salaries and for expenses incurred, sums of money which have exceeded what the services of its officers were worth, and what the business of said Association and its earning capacity would justify it in expending; that the effect of this extravagant and unnecessary expenditure of money paid into or earned by said Association has been to decrease the value of the shares of stock held by its shareholders; that said Association, on October 15, 1894, fixed the salary of its secretary at the sum of seven thousand dollars per annum, which sum was in excess of the value of the services of said secretary to said Association, and was largely in excess of the ability of said Association to pay by reason of its unsatisfactory financial condition and the comparatively small income which it was receiving from the investments which it had made; that said association paid a salary to its president which is not authorized or warranted by the laws of the State of Illinois, and the payment of which salary to its president was a direct violation of the law under which said Association was created.

Relator further avers and charges the fact to be, that said Association has loaned large sums of money upon security wholly inadequate, and that the shareholders of said Association, by reason of the inadequacy of said se-

curity, have sustained great financial loss, and that said Association has, in many instances, loaned large sums of money, paid to it by its shareholders, upon real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association
34 have resulted in great financial injury to the shareholders of said Association; that said Association has made loans of large amounts of money, which said loans were in excess of the value of the real estate mortgaged to the Association to secure the same, and that, by reason thereof, a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate in many instances, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of its shareholders; that in the investment of the moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted, that only a small per cent. of the charges thereon, which have accrued from month to month, have been regularly or promptly paid, and that such charges upon a very large per cent. of the loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a large sum of money.

Relator avers and charges the fact to be, that on the morning of April 6, 1895, said Association held mortgages upon real estate, securing eight hundred and ninety-four loans made by it, representing to said Association $598,-547.69; that of these loans, thirty-three, amounting to $32,775.00 were paid in advance; that two hundred and forty-one of these loans amounting to $166,480.81, were paid to date; and that six hundred and twenty of these loans amounting to $409,291.88 were delinquent; that the delinquency upon said loans represented the interest and
35 charges due thereon to said Association for periods of time running from one to twenty-seven months; that a very large proportion of said loans, so delinquent as aforesaid, were made upon security entirely inadequate, and that upon a foreclosure of the mortgages given to secure said loans that said Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

Relator further avers and states the fact to be, that on the morning of the said 6th of April, 1895, said Association was the owner of ninety-one pieces of real estate, nearly if not all of which it had been forced to accept in satisfaction of unproductive loans, and said real estate has remained an unproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are diminished

in value; that these ninety-one pieces of real estate were given as security to said Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive upon the part of the borrowers to pay the interest and other charges accruing to said Association by reason of said loans, and that said loans represent to said Association at the present time, the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by said Association, in satisfaction of said debts, it, the said Association, is deriving an income from only thirty-seven thereof, and that the remaining pieces of said real estate are entirely unproductive; and relator avers that the income which said Association realizes from said thirty-seven pieces of real estate amounts only to the sum of $273.72 per month.

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Relator further avers and states the fact to be, that by reason of said unsafe methods in the investment of the funds of said Association it has been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other states, and that said Association will ultimately be compelled to accept said properties in discharge of the debt to said Association, which said pieces of property were, respectively, mortgaged to secure; that at the time said foreclosure proceedings were respectively brought, there was due said Association, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional

charges against said real estate; that the foreclosure of said mortgages will, respectively, entail a large expense to said Association in attorney's fees, costs of proceedings in court and the necessary expense incident thereof, which said costs added to the principal, interest and premiums due said Association by reason of said loans will exceed the aggregate of the amounts loaned by said Association by the sum of, to-wit: many thousands of dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association are diminished, and the value of the shares of stock issued by said Association are correspondingly diminished.

Relator further avers that said Association in making real estate loans has not regarded the provisions of the statute, and the financial interest of its shareholders; that it is pro-
37 vided by law that such associations shall require as security for loans made by it, good and ample real estate, unincumbered, except by prior loans of such association. Relator avers, and charges the fact to be, that said association has disregarded this provision of law, and has loaned large amounts of money, and as security therefor has accepted mortgages upon real estate, against which there were other and prior liens existing at the time such loans were made, and which liens were not held or owned by said association. That as a result of this unwarranted action upon the part of the officers of said association, subsequently thereto it became necessary for said association, in order to protect the loans so made by it as

aforesaid, to purchase the outstanding first liens aforesaid, and said association did so purchase said liens, and in purchasing the same used the money paid into it for investment by its shareholders, and by reason of the premises was, in a number of instances, compelled to accept the property, so given as security as aforesaid, in satisfaction of the amount of money loaned upon said property, together with the interest and premiums which had accumulated by reason of said loans, and the amount expended by it in purchasing said outstanding first liens, and to the extent that said association lost money by reason of the premises, and acquired unproductive realty, the assets of said association were diminished, and its shareholders thereby made to suffer a corresponding depreciation in the actual value of their respective shares of stock.

Relator further avers and charges that said association has, at different times and to different persons throughout
38 the State of Illinois and elsewhere, loaned large sums of money paid to it by its shareholders upon their respective shares of stock, for investment in accordance with law, on real estate, which said real estate was not at the time used or occupied as a homestead, and was not intended to be used or occupied as a homestead, and that the loans so made were secured by real estate which was in many instances vacant and unoccupied, and in other instances used for business purposes, and that the money so loaned on said real estate was not intended by the

borrowers for use in building a home for the borrower or for the purpose of improving a homestead; that said act of said association in so making said loans as aforesaid was in violation of the laws of the State of Illinois relating to and governing such associations, in that said law requires said associations to invest the moneys accumulating from month to month for the purpose of building and improving homesteads. Relator avers that in making such loans as aforesaid that said association acted without warrant or authority of law.

Relator further avers and charges that the laws of the State of Illinois providing for the creation of such associations and for their government and control, authorize the creation of such associations for the mutual benefit of its shareholders to assist them in acquiring and owning homesteads, and that said laws do not authorize the creation of such associations for the purpose of doing business as an association throughout the United States, but that the spirit and purpose of said law confines said associations to the localities in which they are respectively created, that said association has entirely disregarded the law of its creation in this regard, and in violation of said law has engaged in selling and disposing of shares of stock throughout the State of Illinois and throughout many other states of the United States of America, and has loaned money through agents representing it in many states, and has not confined its business to the locality in which it was authorized to do business as such an association;

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that as a result of its unwarranted action in the premises, its shareholders have been made to suffer by reason of its careless methods, and the character and value of securities which it has accepted for loans made by it, and the assets of said association have been greatly diminished thereby.

Relator further avers and charges, that prior to the 15th day of January, 1895, that the by-laws of said Association concerning the withdrawal by its shareholders of the withdrawal value of shares of stock held by them, respectively, provided, among other things, that members whose shares of stock were not pledged to said Association might withdraw all or any part of their shares by giving the Secretary thirty days notice of their desire to do so, and that the Board of Directors should refund to such withdrawing members all that they had paid into such Association, excepting their membership fees and fines. That said by-laws further provided, that withdrawing shareholders should be entitled to receive interest on installments of stock paid in by them as follows: On stock from one to two years old, six per cent. per annum, on stock two to three years old, seven per cent. per annum, and on stock three years old or over, eight per cent. per annum; that on or about the 15th day of January, A. D., 1895, at a meeting of the shareholders of said Association, a majority of its shareholders amended said by-law relating to the withdrawal value of its shares of stock, and in and by said amendment provided that the Board of Directors of said Association should refund

to its withdrawing members all that they had respectively paid into said Association, except membership fees, fines and their respective proportionate shares of expenses, to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the withdrawal application, and said by-law declared such fees, fines and expenses to be a lien upon the stock of each member. It was further provided by said amendment that withdrawing members should be entitled to receive interest on the installments of stock paid in by them in accordance with the provisions of said amendment, which provisions were identical with the provisions of the old by-law relating to interest. That a large number of the shareholders of said Association protested against the adoption of said amendment, on the ground that they had not consented to said amendment, and the enforcement of the same against them would be to violate the conditions of the contract entered into between them and said Association at the time they became members of said Association and purchased shares therein. That notwithstanding the fact that said Association cannot violate the rights of its shareholders so as to reduce the amount of money which they would be respectively entitled to receive under the provisions of the law, as they existed at the time the shares of stock were respectively issued without the consent of such members, nevertheless said Association has insisted, and still insists, forcing its withdrawing shareholders to accept the amounts of money which they are respectively entitled to, less their propor-

tion of the expenses of said Association, in accordance with the provisions of said amended by-law. Relator
41 further avers, and charges the fact to be, that said Association has refused to settle with withdrawing shareholders upon any other basis than that provided by said amended by-law, and has forced its withdrawing shareholders to accept the amount provided under and by virtue of said amended by-law, in full and complete satisfaction of all their claims agains' said Association; and relator avers, that by reason of the premises withdrawing shareholders have been made to suffer large financial loss, and that said Association in so forcing the effect of said by-law upon members who did not consent thereto, but who were opposed to the adoption of said amendment, has violated its duty to such members, and has withheld from them amounts of money which said Association was not entitled to retain, to their financial detriment.

Relator further avers that the statutes of the State of Illinois governing such associations make it the duty of said associations to pay to withdrawing shareholders the respective amounts due them upon their stock, upon the expiration of a period of thirty days after the withdrawal notice was given; that the said Association has not regarded this provision of law, but has permitted many months to expire after the expiration of said thirty days, without paying back to the withdrawing shareholder the amount of money to which he was entitled by virtue of said withdrawal notice, and the shares of stock theretofore issued to him by said Association; that large num-

bers of shareholders have filed applications for withdrawal from said Association, and that in some instances a period of more than six months have elapsed, as relator is informed and believes, from the expiration of said thirty days, and the stock of such withdrawing share-
42 holders has not been redeemed in accordance with the requirements of law and the provisions of the by-laws of said Association. Relator further avers that the Secretary of said Association has, in a number of instances, either directly or indirectly offered to discount, and in a number of cases has actually discounted the claims of such withdrawing shareholders, and has caused their said shares of stock to be assigned directly to himself, or to some person designated by him, and that such methods upon the part of the Secretary of said Association has injured its reputation to such an extent that the confidence of its shareholders and of the public in the integrity of said Association and in its ability to maintain itself as an association, and as required by law, has been practically destroyed, and that by reason of the loss of confidence in it, as aforesaid, its shareholders to a large extent have filed with it withdrawal applications, and are continuing to do so, and have thereby rendered the further transaction of business by it unprofitable to its shareholders.

Relator avers and charges the fact to be, that the expenses of said Association during its history have been far in excess of the necessities of said Association; that the Secretary of said Association has withdrawn large

amounts of money from the funds thereof, and appropriated the same to his own personal use, to an unnecessary and unjustifiable extent; that during the first three years of the history of said Association its Secretary withdrew from the moneys paid into said Association by its shareholders, over $119,000.00. This amount was withdrawn under and by virtue of a by-law which permitted him to use five cents per share per month of fifty-five cent stock, and ten cents per share per month of one
43 dollar and ten cent stock, for the purpose of an expense fund; that the Secretary has assumed that amount to be intended for his personal use, and out of which to defray the expenses of the office at Bloomington, Illinois; out of this amount during said period he paid the rent, light, heat, expense of clerks and incidentals, and the books of said Association show that during the first three years of the history of said Association that the said $119,000.00 netted the said Secretary the sum of over $50,000.00; that during the first year it netted the said Secretary the sum of $11,622.56; the second year the sum $18,439.07; and the third year the sum of $21,536.96. That this fund was not applied to the payment of expenses which accrued from time to time in the transaction of business by said Association in different parts of the State of Illinois and in the different states in which it transacted business; that upon the foreclosure of mortgages the attorneys' fees and costs were paid by said Association out of other funds than said expense fund, and was carried into the real estate account of said Association. Relator

avers that the retention by said Secretary of said amounts of money, as aforesaid, was an outrage upon the shareholders of said Association. Relator avers and charges that this extravagance upon the part of the officers of said Association and their carelessness as to the character of security which they accepted for loans made by said Association, has so far shaken the confidence of the shareholders of said Association in the integrity and good business judgment of its officers that the affairs of said Association cannot be so operated as to enable it to carry out the contracts entered into between it and its shareholders; that by reason of the fact that the large number
44 of pieces of real estate which it holds and owns are unproductive, and that there are in process of foreclosure over two hundred additional pieces of real estate which must become, and which relator avers will be unproductive in the hands of said Association, and by reason of the fact that a large proportion of the loans made by said Association are not profitable to said Association, but that interest and premiums due thereon have been permitted to remain unpaid and to accumulate for periods ranging from one to twenty-seven months, that the assets of said Association are gradually, but certainly, growing less and less from year to year, and that the best interests of its shareholders will be subserved by a dissolution of said Association and the distribution of its assets in accordance with the order of this Honorable Court.

Relator further avers and charges the fact to be, that said Association is insolvent, and that its assets are not

sufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained, by reason of losses upon loans, a loss of $121,895.71; and that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14; and that its total liabilities amount to the sum of $1,332,603.70; and that its total liabilities exceed its total assets by the sum of $65,635.13. Relator, therefore, charges that the condition of said Association requires its dissolution and a forfeiture of its corporate right to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

Relator, therefore, prays that a summons may be issued for the said National Home Building and Loan Association, and that said Association, which is hereby made defendant to this bill, be required to answer the same, but not under oath, answer under oath being hereby waived. Relator prays that said Association may be enjoined and restrained by the order of this Honorable Court from doing business under its charter, and that the officers of said Association be respectively enjoined from receiving or paying out any moneys belonging to said Association, and that it, the said Association, may be required to show cause why its business as such an Assotion shall not be closed and its charter dissolved.

Relator further prays that, on the hearing hereof, that

said corporation may be dissolved and a receiver appointed to take charge of the affairs and assets of said Association, and that said receiver be directed to take possession of all moneys, securities, notes, evidences of indebtedness, books, papers, property, effects, assets and all things soever belonging to said Association, and to collect all moneys, property and things of value owned by and due said Association, and that the officers of said Association be directed to turn over the said property of said Association, as aforesaid, to said receiver, and that said officers be restrained from any way interfering with the said receiver in the discharge of his receivership; and that the said Association and its officers be respectively restrained from receiving through the mails or otherwise, and opening the same, letters or communications addressed to said Association, and that said Association and its officers be required to turn over to the said receiver all letters, communications, moneys, books and property of every nature and kind whatsoever which may, at any time, come into the possession of said Association or said officers respectively and which were intended for and belong to said Association, or
46 which in any way relate to the assets or liabilities of said Association, or the winding up of its business and affairs, and that the said Association and its officers, and all persons indebted to said Association, or having any kind of property belonging to said association, be required to pay to and deliver the same to the receiver.

Relator further prays that a writ of temporary injunction may issue herein, restraining said Association and its officers, as they are herein respectively prayed to be perpetually enjoined; that all restraining orders prayed for herein may be made perpetual, and that said National Home Building and Loan Association may be dissolved and its franchise forfeited, and its assets collected and distributed in accordance with law, and that a receiver be appointed for said Association, and that the writ of injunction may issue herein, and for such other and further relief in the premises as may be equitable and just.

And relator will ever pray, etc.

DAVID GORE,

Auditor of Public Accounts of the State of Illinois.

M. T. MOLONEY,

Attorney General.

STATE OF ILLINOIS, } ss.
COUNTY OF MACOUPIN. }

David Gore, having been first duly sworn, on oath, says, that he is the Auditor of Public Accounts of the State of Illinois; that he has read or heard the foregoing bill, and is familiar with its contents; that he has investigated
47 the truth of the contents of said bill, and believes the same to be true.

DAVID GORE.

Subscribed and sworn to before me this 20th day of January, A. D. 1896.

[SEAL.] A. J. DUGGAN,

Notary Public.

And afterwards, to-wit: On the 25th day of January 1896, said defendant, by its solicitors, came and filed in the office of the clerk of this court its certain demurrer and plea, which are in the words and figures following, to-wit:

STATE OF ILLINOIS, } ss. *In the Circuit Court.*
McLEAN COUNTY. } *To the February Term, 1896.*

THE PEOPLE, ETC., EX REL, ETC.
vs.
NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

GENERAL AND SPECIAL DEMURRER TO BILL, EXCEPT AS TO THAT PART CHARGING INSOLVENCY AND INSUFFICIENCY.

This defendant by protestation, not confessing or acknowleding all or any of the matters and things in said bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, except that part charging insolvency and insufficiency of assets, generally and specially, and for causes of demurrer, shows to the court the following matters:

48 1st. Because all of the allegations in the bill beginning with the second paragraph on page 2 and including page 5 are repeated in substance on page 10, and the pages following; and some of said allegations are repeated three different times in the bill.

2nd. That the allegations on page 3 and on page 11 of the bill, "that said association has made loans of money illegally in excess of the real estate mortgaged to secure the same, etc.," is not included in the notice given by the Auditor to the officers of said association.

3rd. That the allegations on page 4, "that said association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states in the United States of America, etc.," is not included in the notice given by the Auditor to the officers of said association; and the doing of the same is not contrary to law.

4th. That the allegations in the paragraph beginning on page 16 is not included in the notice given by the Auditor to said association.

5th. That the notice given by the Auditor was wholly insufficient to apprise defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business.

6th. That the only possible way of complying with many of the requirements of said notice was by making good any deficiency of assets that might exist, and the notice given did not state what amount, if any, was required to make the assets sufficient to justify a continuance of business.

7th. The paragraph on page 10 does not show that any sums were unlawfully expended except that a salary was paid to the president, and the amended bill shows
49 this requirement was complied with by the said association, nor is it alleged that said salary was paid to the president for services as president.

8th. That the allegations on pages 11 and 14, that "said association has made loans on previously incum-

bered real estate," is wholly insufficient, in that it does not allege that such loans were so made knowingly, and that said allegation is set forth three different times in the bill, nor is it alleged that it was a practice of said association to loan on encumbered real estate.

9th. That the allegation on page 15, that "said association has loaned money on real estate other than homesteads," etc., does not show a violation of any law.

10th. That the allegations in the paragraph beginning on page 17 show that the by-law complained of was legally passed, and is binding on all shareholders, and its constitution affects only those who are shareholders, and is a matter in which the State has no interest.

11th. That by the amended bill it is admitted that all the requirements of the Auditor's notice were complied with in so far as it was possible for the association to comply with the same, except the requirement that the assets should be made sufficient to justify the continuance of business. It shows compliance with all matters except those affecting the rights of shareholders already in, and are matters in which the State has no interest.

12th That the allegation on page 20, that "said association has not paid to its withdrawing shareholders the amount due them upon the expiration of a period of thirty days after notice was given," is not a violation of any law.

13th. That the further allegation on the same page, "that the secretary did discount the claims of some with-

drawing shareholders, etc.," is shown by the amendment to the bill to have been corrected within the sixty days, and it is not alleged that the said acts were done with the knowledge and consent of the said Association.

14th. That the allegations contained in the paragraph beginning on page 21, do not charge any unlawful disbursements of the funds of said Association.

15th. That the charging of the interest as a liability is unwarranted by law.

16th. That part of the statute under which the Auditor's examination was made, and this proceeding is had, is unconstitutional.

17th. That all of the complaints in the Auditor's notice, except those charging insolvency and a want of insufficient assets to justify a continuance of business, are not of such a character as to rightly concern the Auditor or the State.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, as to so much thereof as before is set forth, this defendant demurs, and prays the judgment of this honorable Court whether it shall be compelled to make any further answer to such parts of the said bill so demurred to as aforesaid.

J. R. LONG,
FIFER & BARRY,
Solicitors for Defendant.

51 STATE OF ILLINOIS, McLEAN COUNTY. } ss. *In the Circuit Court: To the February Term, 1896.*

PEOPLE, ETC, EX REL. ETC. vs. NATIONAL HOME BUILDING AND LOAN ASSOCIATION. } No.

PLEA TO A PART OF THE BILL.

Defendant by protestation not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for a plea to so much and such part of said bill as charges that said Association is insolvent, and that its assets are not sufficient to justify a continuance of business by it, says, that its gross assets are $1,266,968.57; that its liabilities are $1,007,236.85, which leaves its net assets $260,000, and defendant avers that on, to-wit, the 6th day of April, 1895, the time when it was alleged in said bill the Auditor made his examination of said Asso-tion, this defendant had, and now has, net assets of the amount last stated.

Defendant avers that prior to the 15th day of January, 1895, the following by-laws were in force:

"Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving the Secretary thirty days' notice of such desire. The Board of Directors shall refund to such withdrawing members all that they have paid into the Association except membership fees and fines, provided that at no time shall more than one-half of the funds of the treasury of the

corporation be applicable to the demands of withdrawing shareholders without consent of the Board of Directors."

"Art. 3. Sec. 2. This Association will pay to withdrawing shareholders, interest on the installments paid in by them as follows: On stock six months old and over,
52 6 per cent. per annum; on stock two years old and over, 7 per cent. per annum; on stock three years old and over, 8 per cent. per annum; interest to be computed for the average time the money has been in use by the Association."

"Art. 5. Sec. 1. The by-laws of this Association may be amended by a majority vote of the shares represented at any annual meeting."

Defendant avers that on, to wit: after the examination of it by the said Auditor in the year 1894, the said Auditor notified this defendant that said by-law was too liberal to the withdrawing members; that it was a discrimination in favor of the withdrawing members and against the persistent members, and that all members should bear their proportionate share of the expenses, and that a change should be made in that regard, which notice was as follows:

"In that it, the Association has paid to its withdrawing members the full amount of installments paid by them, together with a certain amount of interest thereon, without regard to the fact that a certain part of such installments had been deducted and disbursed in the payment

of expenses, such practice resulting in serious loss to its remaining and persistent stockholders, contrary to safe business methods."

Defendant avers that in compliance with the request of the Auditor in that regard, and believing that it was for the best interest of the Association, the said by-law was amended at a regular annual meeting of the stockholders held on, to-wit, the 15th day of January, 1895, in which meeting a majority of the whole number of shares in force was present in person and by proxy, and the same was amended by a majority vote of the stock represented. The by-law, as amended, is as follows:

"Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving the secretary thirty days' notice of such desire. The Board of Directors shall refund to such withdrawing members all that they have paid into the Association except membership fees and fines and their proportionate share of the expenses to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the application to withdraw, and such fees, fines and expenses are hereby declared to
53 be charges and liens upon the member's stock, provided that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of the withdrawing shareholders without the consent of the Board of Directors. Such withdrawing members shall be entitled to receive interest on the install-

ments of stock paid in by them as follows: On stock one to two years old, 6 per cent. per annum; on stock two years to three years old, 7 per cent. per annum; on stock three years old or over, 8 per cent. per annum, interest to be computed for the average time the money has been in use by the Association, but no interest will be paid on installments paid on stock after application is made to withdraw."

Defendant avers that after said by-law was amended as aforesaid, the same was filed in the office of the Secretary of State, and by that officer submitted to the Attorney General of the State of Illinois, and was approved by him, and the same was duly filed and recorded in the office of the Recorder of Deeds in the County of McLean, in the State of Illinois, in which the principal office of this defendant is located. And defendant avers that after the said by-law was amended as aforesaid, the said Auditor then complained that this defendant had attempted to modify the contracts of its members, and that it did not pay to withdrawing members what they were entitled to under the by-law as it stood before the amendment; and defendant avers that in the charge made in the bill that the general liabilities of this defendant amount to the sum of $1,107,236.85; there is the sum of, to-wit, $100,000, charged to this defendant as a liability, by reason of the change in the by-law as aforesaid, on the theory, as claimed by the Auditor as aforesaid, that the by-law is not binding upon any stockholder who was not present and voted for the same, or who did not assent thereto;

and defendant avers that under the allegations in the bill that if the by-law as amended is binding on all shareholders, then the said Association is solvent and has sufficient assets to justify a continuance of business.

54 Defendant further avers that in order to charge this defendant with $100,000 as a liability under the by-law as aforesaid, the said Auditor figures that the said by-law is not binding upon any stockholder, whether he voted for the amendment or not, or whether he has since assented thereto, whereas defendant avers the fact to be that more than a majority of the entire stock in force was present in person and by proxy and that there was no dissenting vote to the adoption of said amendment, and that even under the construction of the by-law as contended for by the Auditor, he has charged the Association with a liability by reason of said amendment of at least double what it should be.

Defendant avers that the charge made by the said Auditor of losses upon loans, to-wit, $122,000, is reached, not by actual closing out of the different loans and transactions, but by the appointment of inspectors sent by him to different parts of the country where loans were made, and by other persons; and defendant avers that such inspection, examination and appraisement of property so made by said Auditor as aforesaid was not, and is not, contemplated by the statute under which the said Association is created, and this proceeding had, and such inspection, examination and appraisement of the property

so made was unauthorized by law, and this defendant should not be charged with any losses on real estate by reason thereof.

Defendant further avers that the charge made by the Auditor that this defendant is liable for interest upon withdrawal of its shares of stock for the sum of, to-wit, $103,000 by reason of the by-laws aforesaid, and that said sum of interest is calculated as the interest alleged to be due on the entire stock in force whether the same has
55 been presented for withdrawal or not; and defendant avers that it is not legally chargeable with said interest on stock not filed for withdrawal, and avers that of the sum aforesaid the sum of, to-wit, $33,000 is charged as a liability on stock in force on which notice of withdrawal has not been given.

Defendant avers that the by-law as amended is lawful and binding upon all members of the Association, and that it should not be charged with the sum of $100,000, or any part thereof, by reason of said by-law, and that if not so charged, it is solvent under the allegations made in the bill.

Defendant avers that the interest charged on the installments of stock aforesaid as a liability against it, is not a liability under the law, and defendant should not be charged with the sum of $103,000 as a liability for said interest or for any other sum on account thereof in excess of, to-wit, $20,000.

Defendant avers that by reason of the matters herein set forth it is solvent, and has sufficient assets to justify a continuance of business.

Therefore this defendant doth plead the same in bar to so much of the said complainant's bill as hereinbefore is particularly mentioned, and prays the judgment of this Honorable Court, whether he should be compelled to make any further answer to so much of the said bill as is hereinbefore pleaded to, and prays to be dismissed with his costs and charges in this behalf most wrongfully sustained.

J. R. Long,
Fifer & Barry,
Solicitors for Defendant.

56 At a regular term of the Circuit Court of the Eleventh Judicial Circuit of the State of Illinois, begun and held at the court house in Bloomington, in and for the County of McLean, on Monday, the 3d day of February, in the year of our Lord, One Thousand Eight Hundred and Ninety Six, being the first Monday of said month.

Present, Hon. Thomas F. Tipton,
One of the Judges of said circuit, presiding.
James H. Leaton, Clerk.
John A. Sterling, State's Attorney.
James Stone, Sheriff.
Clayton C. Herr, Official Reporter.

On the chancery docket of said court the following proceedings were had:

TUESDAY, MARCH 17, 1896.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. DAVID GORE, AUDITOR OF PUBLIC ACCOUNTS,
6906 vs.
NATIONAL HOME BUILDING AND LOAN ASSOCIATION.
To Appoint Receiver.

This cause having come on to be heard upon the bill of complaint herein, and the demurrer of the defendant thereto, and the demurrer being sustained, and the complainant standing by its said bill of complaint and declining to amend the same, the said bill of complaint of the complainant be and the same is hereby dismissed, without costs to the defendant.

57 And now said complainant, by the Attorney General of the State of Illinois, prays an appeal from the decree of this court to the Supreme Court, Central Grand Division of this State, which is by the court allowed.

STATE OF ILLINOIS, } ss.
McLEAN COUNTY. }

I, James H. Leaton, Clerk of the Circuit Court of McLean County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all proceedings had of record in our said court, in a certain cause lately therein pending, on the the chancery side thereof, wherein People ex rel. David Gore, Auditor, etc., were complainant, and National Home Building and Loan Association was defendant.

In testimony whereof, I have hereunto set my hand and [SEAL] affixed the seal of said Court, at Bloomington, Ill., this 18th day of AprilA. D. 1896. J. H. LEATON,
Clerk.

M. T. MOLONEY, *Attorney General.*

With him:

T. J. SCOFIELD
AND
M. L. NEWELL,

IN THE

SUPREME COURT

CENTRAL GRAND DIVISION, STATE OF ILLINOIS.

JUNE TERM, 1896

THE PEOPLE, ETC., EX. REL.
DAVID GORE, *Auditor*, ETC.

vs.

THE NATIONAL HOME, BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

ABSTRACT OF RECORD.

M. T. MOLONEY, *Attorney General.*

T. J. SCOFIELD,
AND
M. L. NEWELL,
Of Counsel.

SPRINGFIELD, ILL.
ED. F. HARTMAN, STATE PRINTER.
1895.

IN THE

SUPREME COURT

CENTRAL GRAND DIVISION, STATE OF ILLINOIS.

JUNE TERM, 1896.

DAVID GORE, *Auditor*, ETC., EX REL., M. T. MOLONEY, *Attorney General.*

vs.

THE NATIONAL HOME, BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

ABSTRACT OF RECORD.

Record page.

1

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss.
McLEAN COUNTY. }

Pleas begun and held at the court house in the city of Bloomington, before the Hon. Thomas F. Tipton, one of the Judges of the Circuit Court of the Eleventh Judicial Circuit of the State of Illinois, in a certain cause in the Circuit Court of McLean County, in said State, wherein People, ex rel., &c., were complainants, and the National Home Building and Loan Association was defendant.

Be it remembered that heretofore, to-wit, on the 18th day of January, 1896, said complainant, by the Attorney-General of the State of Illinois, came and filed, in the office of the clerk of this court, his certain notice and bill, which are in the words and figures following, to-wit:

SPRINGFIELD, ILL., January 16, 1896.

To the National Home Building and Loan Association, of Bloomington, Illinois, and F. J. Fitzwilliam, its president, and W. R. Fitzwilliam, its secretary:

You are hereby notified that on Saturday, the 18th day of January, 1896, I shall commence a proceeding in the Circuit Court of McLean County to dissolve said, the National Home Building and Loan Association, and for the appointment of a receiver to take charge of the
2 affairs and assets of said association under the direction of the court; you are also hereby notified that on said 18th day of January, 1896, at the hour of nine o'clock a. m. on said day, or as soon thereafter as counsel can be heard, I shall enter a motion in the cause so to be commenced, as aforesaid, before the Hon. Thomas F. Tipton in the room usually occupied as a court room in the court house at Bloomington, in said McLean County, for a rule upon said association to show cause why it should not be dissolved; at which time and place you can appear and take such steps as may be proper in the premises.

M. T. MOLONEY,
Attorney General.

Upon the back of said notice appears the following endorsement:

STATE OF ILLINOIS, } ss.
McLEAN COUNTY. }

Executed the within notice this 17th day of January, 1896, by delivering a true copy thereof to F. J. Fitzwilliam and to W. R. Fitzwilliam, and delivering a true copy to W. R. Fitzwilliam as secretary of the National Home Building and Loan Association of Bloomington, Illinois.

JAMES STONE,
Sheriff.

By W. J. BISHOP,
Deputy.

SHERIFF'S FEES.

Service	$2 25
Six miles	30
Return	10
Total	$2 65

Received the above fees, being two dollars and sixty-five cents, from T. J. Scofield, this 18th day of January, 1896.

JAMES STONE,
Sheriff of McLean County, Illinois.

By W. J. BISHOP,
Deputy.

3 STATE OF ILLINOIS, } In the Circuit Court of said County.
COUNTY OF McLEAN. } ss. To the February Term, A. D. 1896.

To the Honorable, the Presiding Judge of said Court:

In Chancery Sitting:

And now comes the people of the State of Illinois, upon relation of David Gore, Auditor of Public Accounts of

said State, by Maurice T. Moloney, Attorney General, and in the name and by the authority of the People of the State of Illinois, gives the Court here now to understand and be informed that the National Home Building and Loan Association is a body corporate, duly organized under an Act of the General Assembly of the State of Illinois, entitled, "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of said association," in force July 1, 1879, and all Acts amendatory thereof; that the said National Home Building and Loan Association was duly incorporated and authorized to do business on the 11th day of January, A. D. 1890, and under and by virtue of said authority, said association commenced business as such corporation, and as required by its charter has maintained its principal office and place of business at the City of Bloomington, in the County of McLean and State of Illinois.

Relator further avers, that it became and was his duty under and by virtue of the laws of the State of Illinois, as Auditor of Public Accounts, to cause an examination to be made of the financial condition of said association and of its methods of doing business, and in the discharge of said duty he caused such examination to be made by regularly appointed and duly authorized ex-
4 aminers; that the report of said examination with reference to the condition of said Association was rendered to relator on the 18th day of May, A. D. 1895; that the examination so made and reported to relator, as afore-

said, was made with reference to its condition on the morning of April 6, A. D. 1895; that the official examiners so having examined said Association as aforesaid, were not, nor was either of them, officers or agents, or in any manner interested in said Association; that the report of said examination is now on file in the office of relator as Auditor of Public Accounts of said State.

Relator avers that such examination shows that said Association has conducted its business in an illegal and unsafe manner; that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate to be proper, and that the money so paid out by it as expenses was largely in excess of the amount which such an Association could afford to expend, when considered in connection with the actual earning capacity of the money invested by it, and that such expenses under such conditions were contrary to safe and conservative business methods; that said Association paid to its president a compensation for his services in violation of the laws of the State of Illinois; that said Association has loaned large sums of money upon security wholly inadequate, and that the shareholders of said association, by reason of the inadequacy of said security, have sustained great financial loss; that said Association has in many instances, loaned large sums of money, paid to it by its shareholders, on real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association, have resulted in great finan-

cial injury to the shareholders of said Association; that said Association has made loans of amounts of money largely in excess of the value of the real estate mortgaged to the Association to secure the same, and that by reason thereof, a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of its shareholders; that in the investment of the moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted that only a small per cent. of the charges thereon which have accrued from month to month have been regularly or promptly paid, and that such charges upon a very large per cent. of loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a large sum of money; that said Association has at different times, and to different persons, loaned large sums of money on real estate, which real estate was not used or occupied as a homestead, and was not intended to be used or occupied as a homestead, in violation of the laws of the State of Illinois; that said Association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states of the United States of America, hundreds of miles from

its principal place of business, and has loaned money paid to it by its stockholders for investment in accordance with the statutes of the State of Illinois, to persons
6 residing at different places in the State of Illinois and in other states of the United States of America, through agents representing it, for the purpose of making such loans, in violation of the laws of the State of Illinois; that it has enacted a by-law, the effect of which is to change its contracts with its shareholders in such manner as to depreciate the value of its shares of stock to its withdrawing shareholders, without the consent of such shareholders, and against their protest; that the assets of said Association are not such as to justify a continuance of business by it; that hundreds of its shareholders have filed with it notices of withdrawal, and that said Association has not been able to pay the withdrawal value of such shares of stock to such withdrawing shareholders, as contemplated and required by the laws of the State of Illinois; that said Association has refused to pay the withdrawal value of shares of stock to withdrawing shareholders under and by virtue of and in accordance with the contract made with said shareholders, but has offered to pay a certain proportion of said amounts upon condition that such shareholders would receipt in full to said Association, and surrender their respective shares of stock to it for cancellation; that its Secretary has offered to discount the claims of shareholders upon withdrawal of their shares of stock, which has injured the reputa-

tion of said Association to such an extent that the confidence of its shareholders and the public in the integrity of said Association and its ability to maintain itself as an Association as required by law is destroyed; and that by reason of the loss of confidence in it, as aforesaid, large numbers of its shareholders have filed with it withdrawal applications, and are continuing to do so, thereby rendering the further transaction of business by
7 it unprofitable to its shareholders.

That in consideration of the premises, relator on the 24th day of October, 1895, prepared, signed, sealed and mailed, postage prepaid, a notice to the president and secretary of said association, addressed to said president and secretary, at Bloomington, Illinois, which notice is in the words and figures as follows, to wit:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
BUILDING AND LOAN ASSOCIATION DEPARTMENT,
October 24, 1895.

"To F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary of the National Home Building and Loan Association, of Bloomington, Illinois:

"WHEREAS, It appears from an examination of the affairs of the National Home, Building and Loan Association, of Bloomington, Illinois, that the said Association is conducting its business in an unsafe manner, and contrary to law, as follows, to-wit:

1. "That it attempts, under cover of amendment to its charter to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due them by the terms of the contract, so at-

tempted to be changed, without the assent, and against the protest of such shareholders, thereby injuring the reputation of said Association for fair dealing, and constituting an unsafe and illegal manner of doing business.

2. "In that its secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at
8 a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

3. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the association, to the great loss of its shareholders, and against the provisions of the law.

5. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made applications to withdraw therefrom, and continue to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

6. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

7. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

8. "In that its loans have been selected with so little care that only a small per cent. of the charges thereon are regularly or promptly paid.

9. "In that compensation is paid to its president, contrary to the provisions of the statute.

10. "In that its assets are insufficient to justify a continuance of business by it.

11. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would
9 dictate as proper, and largely in excess of what such Association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now, therefore, I, David Gore, Auditor of Public Accounts, do hereby notify you, the said F. J. Fitzwilliam, president, and W. R. Fitzwilliam, secretary, of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty days from the date hereof, I shall report the said National Home Building and Loan Association to the Attorney General, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

[SEAL] "DAVID GORE,

Auditor of Public Accounts."

Relator avers and states the fact to be, that the officers of said Association have conducted its business in an illegal and unsafe manner, and have paid to its officers, agents and others as salaries and for expenses incurred, sums of money which have exceeded what the services of its said officers were worth, and what the business of said Association and its earning capacity would justify it in expending; that the effect of this extravagant and unnecessary expenditure of money paid into or earned by said Association has been to decrease the value of the shares of stock held by its shareholders; that said Association, on October 15, 1894, fixed the salary of its secretary at the sum of seven thousand dollars per annum, which sum was in excess of the value of the services of said secretary to said Association, and was largely in excess of the ability of said Association to pay by reason of its unsatisfactory financial condition and the comparatively small income which it was receiving from the investments which it had made; that said Association paid a salary to its president which is not authorized or warranted by the laws of the State of Illinois, and the payment of which salary to its president was a direct violation of the law under which said Association was created.

Relator further avers and charges the fact to be, that said Association has loaned large sums of money upon security wholly inadequate, and that the shareholders of said Association, by reason of the inadequacy of said security, have sustained great financial loss, and that said Association has, in many instances, loaned large sums of money paid to it by its shareholders upon real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association have resulted in great financial injury to the shareholders of said Association; that said Association has made loans of large amounts of money, which loans were in excess of the value of the real estate mortgaged to the Association to secure the same, and that, by reason thereof, a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate in many instances, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of its shareholders; that in the investment of the
11 moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted that only a small per cent. of the charges thereon, which have accrued from month to month, have been regularly or promptly paid, and that such charges upon a very large

per cent. of the loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a large sum of money.

Relator avers and charges the fact to be, that on the morning of April 6, 1895, said Association held mortgages upon real estate, securing eight hundred and ninety-four loans made by it, representing to said Association $598,547.69; that of these loans thirty-three, amounting to $32,775.00, were paid in advance; that two hundred and forty-one of these loans, amounting to $156,480.81 were paid to date; and that six hundred and twenty of these loans, amounting to $409,291.88, were delinquent; that the delinquency upon said loans represented the interest and charges due thereon to said Association for periods of time running from one to twenty-seven months; that a very large portion of said loans, so delinquent as aforesaid, were made upon security entirely inadequate and that upon a foreclosure of the mortgages given to secure said loans that said Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

Relator further avers and states the fact to be, that on
12 the morning of said 6th day of April, 1895, said Association was the owner of ninety-one pieces of real estate, nearly, if not all of which it had been forced to accept

in satisfaction of unproductive loans, and said real estate has remained an uproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are dimished in value; that these ninety-one pieces of real estate were given as security to said Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive upon the part of the borrowers to pay the interest and other charges accruing to said Association by reason of said loans, and that said loans represent to said Association at the present time, the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by said Association, in satifaction of said debts, it, the said Association, is deriving an income from only thirty-seven thereof, and that the remaining pieces of said real estate are entirely unproductive; and relator avers that the income which said Association realizes from said thirty-seven pieces of real estate amounts only to the sum of $273.72 per month.

Relator further avers, and states the fact to be, that by reason of said unsafe methods in the investment of the funds of said Association it has been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other states, and that said Association will ultimately be compelled to accept said properties in discharge of the debt to said Association, which said pieces of property were, respectively, mortgaged to secure;

13 that at the time said foreclosure proceedings were respectively brought, there was due said Association, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional charges against said real estate; that the foreclosure of said mortgages will, respectively, entail a large expense to said Association in attorney's fees, cost of proceedings in court and the necessary expenses incident thereof, which said costs, added to the principal, interest and premiums due said Association by reason of said loans, will exceed the aggregate of the amounts loaned by said Association by the sum of, to-wit, many thousand dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association are dimished, and the value of the shares of stock issued by said Association are correspondingly diminished.

Relator further avers, that said Association, in making real estate loans, has not regarded the provisions of the statute, and the financial interests of its shareholders; that it is provided by law that such associations shall require as security for loans made by it, good and ample real estate, unincumbered, except by prior loans of such association. Relator avers, and charges the fact to be, that said Association has disregarded this provision of law, and has loaned large amounts of money, and as security therefor, has accepted mortgages upon real estate against which there were other and prior liens existing

at the time such loans were made, and which liens were not held or owned by said Association. That as a result of this unwarranted action upon the part of the officers of said Association, subsequently thereto, it became
14 necessary for said Association, in order to protect the loans so made by it as aforesaid, to purchase the outstanding first liens aforesaid, and said Association did so purchase said liens, and in purchasing the same used the money paid into it for investment by its shareholders, and by reason of the premises was, in a number of instances, compelled to accept the property, so given as security as aforesaid, in satisfaction of the amount of money loaned upon said property, together with the interest and premiums which had accumulated by reason of said loans, and the amount expended by it in purchasing said outstanding first liens, and to the extent that said Association lost money by reason of the premises and acquired unproductive realty, the assets of said Association were diminished, and its shareholders thereby made to suffer a corresponding depreciation in the actual value of their respective shares of stock.

Relator further avers and charges, that said Association has at different times and to different persons throughout the State of Illinois and elsewhere loaned large sums of money paid to it by its shareholders upon their respective shares of stock, for investment in accordance with law, on real estate, which said real estate was not at the time used or occupied as a homestead, and was not intended to be used or occupied as a homestead, and that the loans

so made were secured by real estate which was in many instances vacant and unoccupied, and in other instances used for business purposes, and that the money so loaned on said real estate was not intended by the borrowers for use in building a home for the borrower or for the purpose of improving a homestead; that said act of said Association in so making said loans as aforesaid, was in violation of the laws of the State of Illinois relating to and governing such associations, in that said law requires said associations to invest the moneys accumulating from month to month for the purpose of building and improving homesteads. Relator avers that in making such loans as aforesaid that said Association acted without warrant or authority of law.

Relator further avers and charges, that the laws of the State of Illinois providing for the creation of such associations and for their government and control authorize the creation of such associations for the mutual benefit of its shareholders to assist them in acquiring and owning homesteads, and that said laws do not authorize the creation of such associations for the purpose of doing business as an association throughout the United States, but that the spirit and purpose of the said law confines said associations to the localities in which they are respectively created; that said Association has entirely disregarded the law of its creation in this regard, and in violation of said law has engaged in selling and disposing of shares of stock throughout the State of Illinois and throughout many other states of the United States of

America, and has loaned money through agents representing it in many states, and has not confined its business to the locality in which it was authorized to do business as such an association; that as a result of its unwarranted action in the premises, its shareholders have been made to suffer by reason of its careless methods, and the character and value of securities which it has accepted for loans made it, and the assets of said Association have been greatly diminished thereby.

Relator further avers and charges, that prior to the 15th day of January, 1895, that the by-laws of said Association concerning the withdrawal by its shareholders
16 of the withdrawal value of shares of stock held by them respectively, provided, among other things, that members whose shares of stock were not pledged to said Association might withdraw all or any part of their shares by giving the secretary thirty days' notice of their desire to do so, and that the Board of Directors should refund to such withdrawing members all that they had paid into such Association, excepting their membership fees and fines; that said by-laws further provided that withdrawing shareholders should be entitled to receive interest on installments of stock paid in by them as follows: On stock from one to two years old, six per cent. per annum; on stock two to three years old, seven per cent. per annum, and on stock three years old or over, eight per annum; that on or about the 15th day of January, A. D. 1895, at a meeting of the shareholders of said Association a majority of its shareholders amended said by-law

relating to the withdrawal value of its shares of stock, and in and by said amendment provided, that the Board of Directors of said Association should refund to its withdrawing members all that they had respectively paid into said Association, except membership fees, fines and their respective proportionate shares of expenses, to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the withdrawal application, and said by-law declared such fees, fines and expenses to be a lien upon the stock of each member. It was further provided by said amendment that withdrawing members should be entitled to receive interest on the installments of stock paid in by them in accordance with the provisions of said amendment, which provisions were identical with the provisions of the old by law relating to interest; that a large number of the share-
17 holders of said Association protested against the adoption of said amendment, on the ground that they had not consented to said amendment, and the enforcement of the same against them would be to violate the conditions of the contract entered into between them and said Association at the time they became members of said Association and purchased shares therein. That notwithstanding the fact that said Association cannot violate the rights of its shareholders so as to reduce the amount of money which they would be respectively entitled to receive under the provisions of the law, as they existed at

the time the shares of stock were respectively issued without the consent of such members, nevertheless said Association, has insisted, and still insists, forcing its withdrawing stockholders to accept the amounts of money which they are respectively entitled to, less their proportion of the expenses of said Association, in accordance with the provisions of said amended by-law. Relator further avers, and charges the fact to be, that said Association has refused to settle with withdrawing shareholders upon any other basis than that provided by said amended by-law, and has forced its withdrawing shareholders to accept the amount provided under and by virtue of said amended by-law, in full and complete satisfaction of all their claims against said Association; and relator avers that by reason of the premises withdrawing shareholders have been made to suffer large financial loss, and that said Association in so forcing the effect of said by-law upon members who did not consent thereto, but who were opposed to the adoption of said amendment, has violated its duty to such members, and has withheld from them amounts of money which said Association was not entitled to retain, to their financial detriment.

18 Relator further avers that the statutes of the State of Illinois governing such associations make it the duty of said associations to pay to withdrawing shareholders the respective amounts due them upon their stock, upon the expiration of a period of thirty days after the withdrawal notice was given; that the said Association has not re-

garded this provision of law, but has permitted many months to expire after the expiration of said thirty days, without paying back to the withdrawing shareholder the amount of money to which he was entitled by virtue of said withdrawal notice, and the shares of stock theretofore issued to him by said association; that large numbers of shareholders have filed applications for withdrawal from said association, and that in some instances a period of more than six months have elapsed, as relator is informed and believes, from the expiration of said thirty days, and the stock of such withdrawing shareholders has not been redeemed in accordance with the requirements of law and the provisions of the by-laws of said Association. Relator further avers that the secretary of said Association has, in a number of instances, either directly or indirectly, offered to discount, and in a number of cases has actually discounted the claims of such withdrawing shareholders, and has caused their said shares of stock to be assigned directly to himself, or to some person designated by him, and that such methods upon the part of the secretary of said Association has injured its reputation to such an extent that the confidence of its shareholders and of the public in the integrity of said Association and in its ability to maintain itself as an association, and as required by law, has been practically destroyed, and that by reason of the loss of confidence in it, as aforesaid, its
19 shareholders to a large extent have filed with it with-

drawal applications, and are continuing to do so, and have thereby rendered the further transaction of business by it unprofitable to its shareholders.

Relator avers and charges the fact to be, that the expenses of said Association during its history have been far in excess of the necessities of said Association; that the secretary of said Association has withdrawn large amounts of money from the funds thereof, and appropriated the same to his own personal use, to an unnecessary and unjustifiable extent; that during the first three years of the history of said Association its secretary withdrew from the moneys paid into said Association by its shareholders over $119,000. This amount was withdrawn under and by virtue of a by-law which permitted him to use five cents per share per month of fifty-five cent stock, and ten cents per share per month of one dollar and ten cent stock, for the purpose of an expense fund; that the secretary has assumed that amount to be intended for his personal use, and out of which to defray the expenses of the office at Bloomington, Illinois; out of this amount during said period he paid the rent, light, heat, expense of clerks and incidentals, and the books of said Association show that during the first three years of the history of said Association that the said $119,000 netted the said secretary the sum of over $50,000; that during the first year it netted the said secretary the sum of $11,622.56, the second year the sum of $18,439.07, and the third year the sum of $21,536.96. That this fund was not applied to the payment of expenses which accrued from time to time in the transaction of business by said Association in differ-

ent parts of the State of Illinois and in the different states in which it transacted business; that upon the foreclosure of mortgages the attorney's fees and costs were paid by said Association out of other funds than said expense fund, and was carried into the real estate account of said Association. Relator avers, that the retention by said secretary of said amounts of money, as aforesaid, was an outrage upon the shareholders of said Association; relator avers and charges that this extravagance upon the part of the officers of said Association and their carelessness as to the character of security which they accepted for loans made by said Association has so far shaken the confidence of the shareholders of said Association in the integrity and good business judgment of its officers, that the affairs of said Association cannot be so operated as to enable it to carry out the contracts entered into between it and its shareholders; that by reason of the fact that the large number of pieces of real estate which it holds and owns are unproductive, and that there are in process of foreclosure over two hundred additional pieces of real estate which must become, and which relator avers will be, unproductive in the hands of said Association, and by reason of the fact that a large proportion of the loans made by said Association are not profitable to said Association, but that interest and premiums due thereon have been permitted to remain unpaid and to accumulate for periods ranging from one to twenty-seven months; that the assets of said Association are gradually, but certainly, growing less and less, from year to year,

and that the best interests of its shareholders will be subserved by a dissolution of said Association and the distribution of its assets in accordance with the order of this Honorable Court.

21 Relator further avers, and charges the fact to be, that said Association is insolvent, and that its assets are not sufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained by reason of losses upon loans a loss of $121,895.71; and that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14, that its total liabilities amount to the sum of $1,332,603.70, and that its total liabilities exceed its total assets by the sum of $65,635.13. Relator, therefore, charges that the condition of said Association requires its dissolution, and a forfeiture of its corporate rights to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

Relator, therefore, prays that a summons may be issued for the said National Home Building and Loan Association, and that said Association, which is hereby made defendant to this bill, be required to answer the same, but not under oath, answer under oath being hereby waived. Relator prays that said Association may be enjoined and restrained by the order of this Honorable Court from doing any business under its charter, and that the officers of said Association be respectively enjoined from

receiving or paying out any moneys belonging to said Association, and that it, the said Association, may be required to show cause why its business as such Association shall not be closed and its charter dissolved.

Relator further prays that, on the hearing hereof, that said corporation may be dissolved and a receiver ap-
22 pointed to take charge of the affairs and assets of said Association, and that said receiver be directed to take possession of all moneys, securities, notes, evidences of indebtedness, books, papers, properties, effects, assets, all things soever belonging to said Association, and to collect all moneys, property and things of value owned by and due said Association, and that the officers of said Association be directed to turn over the said property of said Association, as aforesaid, to said receiver, and that said officers be restrained from any way interfering with said receiver in the discharge of his receivership, and that the said Association and its officers be respectively restrained from receiving through the mails or otherwise, and opening the same, letters or communications addressed to said Association, and that said Association and its officers be required to turn over to the said receiver all letters, communications, moneys, books and property of every nature and kind whatsoever, which may, at any time, come into the possession of said Association or said officers respectively, and which were intended for and belong to said Association, or which, in any way, relate to the assets or liabilities of said Association, or the winding up

of its business and affairs, and that the said Association and its officers, and all persons indebted to said Association or having any kind of property belonging to said Association be required to pay to and deliver the same to the receiver.

Relator further prays that a writ of temporary injunction may issue herein, restraining said Association and its officers, as they are herein respectively prayed to be perpetually enjoined; that all restraining orders prayed for herein may be made perpetual, and that the said
23 National Home Building and Loan Association may be dissolved and its franchise forfeited, and its assets collected and distributed in accordance with law, and that a receiver be appointed for said Association, and that the writ of injunction may issue herein, and for such other and further relief in the premises as may be equitable and just.

And relator will ever pray, etc.

DAVID GORE,

Auditor of Public Accounts of the State of Illinois.

MAURICE T. MOLONEY,

Attorney General.

STATE OF ILLINOIS, }
COUNTY OF SANGAMON. } ss.

David Gore, having been first duly sworn, on oath, says, that he is the Auditor of Public Accounts of the State of Illinois; that he has read or heard of the foregoing

bill, and is familiar with its contents; that he has investigated the truth of the contents of said bill, and believes the same to be true.

DAVID GORE.

Subscribed and sworn to before me this 17th day of January, A. D., 1896.

[SEAL.] BRAND WHITLOCK,
Notary Public.

24 IN VACATION AFTER NOVEMBER TERM, 1895.

SATURDAY, JANUARY 18, 1896.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. DAVID GORE, AUDITOR PUBLIC ACCOUNTS,
6906 vs.
NATIONAL HOME BUILDING AND LOAN ASSOCIATION.
To Appoint Receiver.

And now on this day comes the People of the State of Illinois, by Maurice T. Moloney, Attorney, and T. J. Schofield, Assistant Attorney General, and moves the Court for a rule upon said Association to show cause why it should not be dissolved.

And it appearing to the Court that the notice of this application for said rule was duly served upon F. J. Fitzwilliam and W. R. Fitzwilliam, the President and Secretary of said Association; and the Court having heard said bill read and proof that the notice was duly served on the 17th day of January, 1896, by delivering true copies thereof to the said Frank J. Fitzwilliam and

W. R. Fitzwilliam, President and Secretary of said Association, that the rule to show cause, as prayed for in said bill, be and is hereby entered.

It is further ordered by the Court that if the defendant desires to demur to said bill, that it shall have leave to do so. Said demurrer to be filed so that the same may be heard on Saturday, the 25th of January, 1896, at 9 o'clock a. m.

It is further ordered that if said Association does not desire to demur to said bill, but desires to plead to or answer the same, that it shall file its said plea or answer by the 1st day of the next term of this Court. Ordered further that the complainant have leave to amend the bill by next Tuesday.

[SEAL.] THOMAS F. TIPTON,
Judge.

And afterwards, to-wit: On the 21st day of January, 1896, said complainant, by the Attorney General, came and filed in the office of the clerk of this court, his certain amended bill, which is in the words and figures following, to-wit:

STATE OF ILLINOIS, } ss. *In the Circuit Court of said County.*
COUNTY OF McLEAN. } *To the Term, A. D. 1896.*

To the Honorable, the Presiding Judge of said Court, In Chancery Sitting:

And now comes the People of the State of Illinois, upon relation of David Gore, Auditor of Public Accounts, of said State, by Maurice T. Moloney, Attorney General, and in the name and by the authority of the People of

the State of Illinois, gives the court here now to understand and be informed, that the National Home Building and Loan Association is a body corporate, duly organized under an act of the General Assembly of the State of Illinois, entitled, "An act to enable associations of persons to become a body corporate to raise funds to be loaned among the members of said association," in force July 1, 1879, and all acts amendatory thereof; that the said National Home Building and Loan Association was duly incorporated and authorized to do business on the 11th day of January A. D. 1890, and under and by virtue of
26 said authority of said association commenced business as such corporation, and as required by its charter has maintained its principal office and place of business at the city of Bloomington, in the County of McLean, and State of Illinois.

Relator further avers, that it became and was his duty under and by virtue of the laws of the State of Illinois, as Auditor of Public Accounts, to cause an examination to be made of the financial condition of said Association and of its methods of doing business, and in the discharge of said duty he caused such examination to be made by regularly appointed and duly authorized examiners; that the report of said examination with reference to the condition of said Association was rendered to relator on the 18th day of May, A. D. 1895; that the examination so made and reported to relator as aforesaid, was made with reference to its condition on the morning of April 6, A. D. 1895; that the official examiners so

having examined said Association as aforesaid, were not nor was either of them officers or agents, or in any manner interested in said Association; that the report of said examination is now on file in the office of relator as Auditor of Public Accounts of said State.

Relator avers that such examination shows that said Association has conducted its business in an illegal and unsafe manner; that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate to be proper, and that the money so paid out by it as expenses was largely in excess of the amount which such an Association could afford to expend, when considered in connection with the actual earning capacity of the money invested by it, and that such expenses, under
27 such conditions were contrary to safe and conservative business methods; that said Association paid to its president a compensation for his services in violation of the laws of the State of Illinois; that said Association has loaned large sums of money upon security wholly inadquate, and that the shareholders of said Association, by reason of the inadequacy of said security, have sustained great financial loss; that said Association has, in many instances, loaned large sums of money, paid to it by its shareholders, on real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association have resulted in great financial injury to the shareholders of said Association; that said Association has made loans of amounts of money largely in ex-

cess of the value of the real estate mortgaged to the Association to secure the same, and that by reason thereof a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of of its shareholders; that in the investment of the moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted that only a small per cent. of the charges thereon which have accrued from month to month have been regularly or promptly paid, and that such charges upon a very large per cent. of loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a
28 large sum of money; that said Association has, at different times, and to different persons, loaned large sums of money on real estate, which real estate was not used or occupied as a homestead, and was not intended to be used or occupied as a homestead, in violation of the laws of the State of Illinois; that said Association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states of the United States of America, hundreds of miles from its principal place of business, and has loaned money, paid to it by its shareholders for investment in accordance with the

statutes of the State of Illinois, to persons residing at different places in the State of Illinois and in other states of the United States of America, through agents representing it, for the purpose of making such loans in violation of the laws of the State of Illinois; that it has enacted a by-law the effect of which is to change its contracts with its shareholders in such manner as to depreciate the value of its shares of stock to its withdrawing shareholders, without the consent of such shareholders and against their protest; that the assets of said Association are not such as to justify a continuance of business by it; that hundreds of its shareholders have filed with it notices of withdrawal, and that said Association has not been able to pay the withdrawal value of such shares of stock to such withdrawing shareholders, as contemplated and required by the laws of the State of Illinois; that said Association has refused to pay the withdrawal value of shares of stock to withdrawing shareholders under and by virtue of and in accordance with the contracts made said shareholders, but has offered to pay a certain proportion of said amounts upon condition that such shareholders would receipt in full to said Association and surrender their respective shares of stock
29 to it for cancellation; that its secretary has offered to discount the claims of shareholders upon withdrawal of their shares of stock, which has injured the reputation of said Association to such an extent that the confidence of its shareholders and the public in the integrity of said

Association and its ability to maintain itself as an association, as required by law, is destroyed; and that, by reason of the loss of confidence in it as aforesaid, large numbers of its shareholders have filed with it withdrawal applications, and are continuing to do so, thereby rendering the further transaction of business by it unprofitable to its shareholders.

That in consideration of the premises relator, on the 24th day of October, 1895, prepared, signed, sealed and mailed, postage prepaid, a notice to the President and Secretary of said Association, addressed to said President and Secretary, at Bloomington, Illinois, which notice is in words and figures, as follows, to-wit:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
"BUILDING AND LOAN ASSOCIATION DEPARTMENT.
"October 24, 1895.

"*To F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary, of the National Home Building and Loan Association, of Bloomington, Illinois:*

1. "Whereas, it appears from an examination of the affairs of the National Home Building and Loan Association of Bloomington, Illinois, that the said Association is conducting its business in an unsafe manner, and contrary to law as follows, to-wit:

2. "That it attempts under cover of an amendment to its charter to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due them by the terms of the contract, so attempted to be changed, without the assent and against the protest of such shareholders, thereby injuring

the reputation of said Association for fair dealing, and constituting an unsafe and illegal manner of doing business.

3. "In that its Secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

5. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the Association, to the great loss of its shareholders, and against the provisions of the law.

6. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made application to withdraw therefrom, and continue to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

7. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

8. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

9. "In that its loans have been selected with so little care that only a small per cent. of the charges thereon
31 are regularly or promptly paid.

10. "In that compensation is paid to its president, contrary to the provisions of the statute.

11. "In that its assets are insufficient to justify a continuance of business by it.

12. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate as proper, and largely in excess of what such Association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now, therefore, I, David Gore, Auditor of Public Accounts, do hereby notify you, the said F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty (60) days from the date hereof, I shall report the said National Home Building and Loan Association to the Attorney General, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

"DAVID GORE,

[SEAL] "*Auditor of Public Accounts.*"

32 Relator avers, that thereafter, and on the 28th day of December A. D. 1895, he made a supplemental examination of the condition of the said National Home Building and Loan Association of Bloomington, Illinois, for the purpose of determining whether or not the requirements of said notice so given to it as aforesaid, had or had not been complied with, and that he avers and states the fact to be, that the financial condition of said Association has not been improved since the giving of said notice to the Association, and that the conditions which existed at the time said notice was so given to said Association on said 24th day of October, 1895, still continue to exist, and that the financial condition of said Association is still insufficient to justify a continuance of business by it. Relator further avers that the said amendment to the by-laws of said Association, referred to in said notice of October 24, 1895, and hereinafter referred to at length, still exists, and that said Association so continued to insist upon the legality of said by-law, and still continues to settle with its withdrawing shareholders, under and by virtue of its provisions. Relator avers, that the officers of said Association agreed to discontinue the illegal practices of which it has been guilty, but relator avers and charges the fact to be, that said illegal practices have resulted in rendering the business of said Association unprofitable to its shareholders, and that its condition is still, financially, such as not to justify a continuance of business by it, and that its said financial condition is such as to render it impossible for its officers to correct the effect of their

said illegal practices, and relator avers that its financial condition has not been improved by said Association.

33 Relator avers and states the fact to be, that the officers of said Association have conducted its business in an illegal and unsafe manner, and have paid to officers, agents and others, as salaries and for expenses incurred, sums of money which have exceeded what the services of its officers were worth, and what the business of said Association and its earning capacity would justify it in expending; that the effect of this extravagant and unnecessary expenditure of money paid into or earned by said Association has been to decrease the value of the shares of stock held by its shareholders; that said Association, on October 15, 1894, fixed the salary of its secretary at the sum of seven thousand dollars per annum, which sum was in excess of the value of the services of said secretary to said Association, and was largely in excess of the ability of said Association to pay by reason of its unsatisfactory financial condition and the comparatively small income which it was receiving from the investments which it had made; that said association paid a salary to its president which is not authorized or warranted by the laws of the State of Illinois, and the payment of which salary to its president was a direct violation of the law under which said Association was created.

Relator further avers and charges the fact to be, that said Association has loaned large sums of money upon security wholly inadequate, and that the shareholders of said Association, by reason of the inadequacy of said se-

curity, have sustained great financial loss, and that said Association has, in many instances, loaned large sums of money, paid to it by its shareholders, upon real estate already encumbered by prior liens held by different persons, in direct violation of the laws of the State of Illinois, and that said loans so made by said Association
34 have resulted in great financial injury to the shareholders of said Association; that said Association has made loans of large amounts of money, which said loans were in excess of the value of the real estate mortgaged to the Association to secure the same, and that, by reason thereof, a large proportion of the entire assets of said Association are unproductive of profit, and the interest due said Association upon said loans has not been paid, and the same has been permitted to accumulate in many instances, thereby still further reducing the adequacy of the security given to said Association, to the financial injury of its shareholders; that in the investment of the moneys paid into said Association by its shareholders said Association has exercised so little care and diligence as to the value of the security which it accepted, that only a small per cent. of the charges thereon, which have accrued from month to month, have been regularly or promptly paid, and that such charges upon a very large per cent. of the loans so made by said Association have not been collected by said Association, and that said charges which have been so permitted to remain unpaid aggregate a large sum of money.

Relator avers and charges the fact to be, that on the morning of April 6, 1895, said Association held mortgages upon real estate, securing eight hundred and ninety-four loans made by it, representing to said Association $598,-547.69; that of these loans, thirty-three, amounting to $32,775.00 were paid in advance; that two hundred and forty-one of these loans amounting to $166,480.81, were paid to date; and that six hundred and twenty of these loans amounting to $409,291.88 were delinquent; that the delinquency upon said loans represented the interest and
35 charges due thereon to said Association for periods of time running from one to twenty-seven months; that a very large proportion of said loans, so delinquent as aforesaid, were made upon security entirely inadequate, and that upon a foreclosure of the mortgages given to secure said loans that said Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

Relator further avers and states the fact to be, that on the morning of the said 6th of April, 1895, said Association was the owner of ninety-one pieces of real estate, nearly if not all of which it had been forced to accept in satisfaction of unproductive loans, and said real estate has remained an unproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are diminished

in value; that these ninety-one pieces of real estate were given as security to said Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive upon the part of the borrowers to pay the interest and other charges accruing to said Association by reason of said loans, and that said loans represent to said Association at the present time, the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by said Association, in satisfaction of said debts, it, the said Association, is deriving an income from only thirty-seven thereof, and that the remaining pieces of said real estate are entirely unproductive; and relator avers that the income which said Asso-
36 ciation realizes from said thirty-seven pieces of real estate amounts only to the sum of $273.72 per month.

Relator further avers and states the fact to be, that by reason of said unsafe methods in the investment of the funds of said Association it has been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other states, and that said Association will ultimately be compelled to accept said properties in discharge of the debt to said Association, which said pieces of property were, respectively, mortgaged to secure; that at the time said foreclosure proceedings were respectively brought, there was due said Association, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional

charges against said real estate; that the foreclosure of said mortgages will, respectively, entail a large expense to said Association in attorney's fees, costs of proceedings in court and the necessary expense incident thereof, which said costs added to the principal, interest and premiums due said Association by reason of said loans will exceed the aggregate of the amounts loaned by said Association by the sum of, to-wit: many thousands of dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association are diminished, and the value of the shares of stock issued by said Association are correspondingly diminished.

Relator further avers that said Association in making real estate loans has not regarded the provisions of the statute, and the financial interest of its shareholders; that it is pro-
37 vided by law that such associations shall require as security for loans made by it, good and ample real estate, unincumbered, except by prior loans of such association. Relator avers, and charges the fact to be, that said association has disregarded this provision of law, and has loaned large amounts of money, and as security therefor has accepted mortgages upon real estate, against which there were other and prior liens existing at the time such loans were made, and which liens were not held or owned by said association. That as a result of this unwarranted action upon the part of the officers of said association, subsequently thereto it became necessary for said association, in order to protect the loans so made by it as

aforesaid, to purchase the outstanding first liens aforesaid, and said association did so purchase said liens, and in purchasing the same used the money paid into it for investment by its shareholders, and by reason of the premises was, in a number of instances, compelled to accept the property, so given as security as aforesaid, in satisfaction of the amount of money loaned upon said property, together with the interest and premiums which had accumulated by reason of said loans, and the amount expended by it in purchasing said outstanding first liens, and to the extent that said association lost money by reason of the premises, and acquired unproductive realty, the assets of said association were diminished, and its shareholders thereby made to suffer a corresponding depreciation in the actual value of their respective shares of stock.

Relator further avers and charges that said association has, at different times and to different persons throughout
38 the State of Illinois and elsewhere, loaned large sums of money paid to it by its shareholders upon their respective shares of stock, for investment in accordance with law, on real estate, which said real estate was not at the time used or occupied as a homestead, and was not intended to be used or occupied as a homestead, and that the loans so made were secured by real estate which was in many instances vacant and unoccupied, and in other instances used for business purposes, and that the money so loaned on said real estate was not intended by the

borrowers for use in building a home for the borrower or for the purpose of improving a homestead; that said act of said association in so making said loans as aforesaid was in violation of the laws of the State of Illinois relating to and governing such associations, in that said law requires said associations to invest the moneys accumulating from month to month for the purpose of building and improving homesteads. Relator avers that in making such loans as aforesaid that said association acted without warrant or authority of law.

Relator further avers and charges that the laws of the State of Illinois providing for the creation of such associations and for their government and control, authorize the creation of such associations for the mutual benefit of its shareholders to assist them in acquiring and owning homesteads, and that said laws do not authorize the creation of such associations for the purpose of doing business as an association throughout the United States, but that the spirit and purpose of said law confines said associations to the localities in which they are respectively created, that said association has entirely disregarded the law of its creation in this regard, and in violation of said law has engaged in selling and disposing of shares of stock throughout the State of Illinois and throughout many other states of the United States of America, and has loaned money through agents representing it in many states, and has not confined its business to the locality in which it was authorized to do business as such an association;

that as a result of its unwarranted action in the premises, its shareholders have been made to suffer by reason of its careless methods, and the character and value of securities which it has accepted for loans made by it, and the assets of said association have been greatly diminished thereby.

Relator further avers and charges, that prior to the 15th day of January, 1895, that the by-laws of said Association concerning the withdrawal by its shareholders of the withdrawal value of shares of stock held by them, respectively, provided, among other things, that members whose shares of stock were not pledged to said Association might withdraw all or any part of their shares by giving the Secretary thirty days notice of their desire to do so, and that the Board of Directors should refund to such withdrawing members all that they had paid into such Association, excepting their membership fees and fines. That said by-laws further provided, that withdrawing shareholders should be entitled to receive interest on installments of stock paid in by them as follows: On stock from one to two years old, six per cent. per annum, on stock two to three years old, seven per cent. per annum, and on stock three years old or over, eight per cent. per annum; that on or about the 15th day of January, A. D., 1895, at a meeting of the shareholders of said Association, a majority of its shareholders amended said by-law relating to the withdrawal value of its shares
40 of stock, and in and by said amendment provided that the Board of Directors of said Association should refund

to its withdrawing members all that they had respectively paid into said Association, except membership fees, fines and their respective proportionate shares of expenses, to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the withdrawal application, and said by-law declared such fees, fines and expenses to be a lien upon the stock of each member. It was further provided by said amendment that withdrawing members should be entitled to receive interest on the installments of stock paid in by them in accordance with the provisions of said amendment, which provisions were identical with the provisions of the old by-law relating to interest. That a large number of the shareholders of said Association protested against the adoption of said amendment, on the ground that they had not consented to said amendment, and the enforcement of the same against them would be to violate the conditions of the contract entered into between them and said Association at the time they became members of said Association and purchased shares therein. That notwithstanding the fact that said Association cannot violate the rights of its shareholders so as to reduce the amount of money which they would be respectively entitled to receive under the provisions of the law, as they existed at the time the shares of stock were respectively issued without the consent of such members, nevertheless said Association has insisted, and still insists, forcing its withdrawing shareholders to accept the amounts of money which they are respectively entitled to, less their propor-

tion of the expenses of said Association, in accordance with the provisions of said amended by-law. Relator
41 further avers, and charges the fact to be, that said Association has refused to settle with withdrawing shareholders upon any other basis than that provided by said amended by-law, and has forced its withdrawing shareholders to accept the amount provided under and by virtue of said amended by-law, in full and complete satisfaction of all their claims against said Association; and relator avers, that by reason of the premises withdrawing shareholders have been made to suffer large financial loss, and that said Association in so forcing the effect of said by-law upon members who did not consent thereto, but who were opposed to the adoption of said amendment, has violated its duty to such members, and has withheld from them amounts of money which said Association was not entitled to retain, to their financial detriment.

Relator further avers that the statutes of the State of Illinois governing such associations make it the duty of said associations to pay to withdrawing shareholders the respective amounts due them upon their stock, upon the expiration of a period of thirty days after the withdrawal notice was given; that the said Association has not regarded this provision of law, but has permitted many months to expire after the expiration of said thirty days, without paying back to the withdrawing shareholder the amount of money to which he was entitled by virtue of said withdrawal notice, and the shares of stock theretofore issued to him by said Association; that large num-

bers of shareholders have filed applications for withdrawal from said Association, and that in some instances a period of more than six months have elapsed, as relator is informed and believes, from the expiration of said thirty days, and the stock of such withdrawing share-
42 holders has not been redeemed in accordance with the requirements of law and the provisions of the by-laws of said Association. Relator further avers that the Secretary of said Association has, in a number of instances, either directly or indirectly offered to discount, and in a number of cases has actually discounted the claims of such withdrawing shareholders, and has caused their said shares of stock to be assigned directly to himself, or to some person designated by him, and that such methods upon the part of the Secretary of said Association has injured its reputation to such an extent that the confidence of its shareholders and of the public in the integrity of said Association and in its ability to maintain itself as an association, and as required by law, has been practically destroyed, and that by reason of the loss of confidence in it, as aforesaid, its shareholders to a large extent have filed with it withdrawal applications, and are continuing to do so, and have thereby rendered the further transaction of business by it unprofitable to its shareholders.

Relator avers and charges the fact to be, that the expenses of said Association during its history have been far in excess of the necessities of said Association; that the Secretary of said Association has withdrawn large

amounts of money from the funds thereof, and appropriated the same to his own personal use, to an unnecessary and unjustifiable extent; that during the first three years of the history of said Association its Secretary withdrew from the moneys paid into said Association by its shareholders, over $119,000.00. This amount was withdrawn under and by virtue of a by-law which permitted him to use five cents per share per month of fifty-five cent stock, and ten cents per share per month of one
43 dollar and ten cent stock, for the purpose of an expense fund; that the Secretary has assumed that amount to be intended for his personal use, and out of which to defray the expenses of the office at Bloomington, Illinois; out of this amount during said period he paid the rent, light, heat, expense of clerks and incidentals, and the books of said Association show that during the first three years of the history of said Association that the said $119,000.00 netted the said Secretary the sum of over $50,000.00; that during the first year it netted the said Secretary the sum of $11,622.56; the second year the sum $18,439.07; and the third year the sum of $21,536.96. That this fund was not applied to the payment of expenses which accrued from time to time in the transaction of business by said Association in different parts of the State of Illinois and in the different states in which it transacted business; that upon the foreclosure of mortgages the attorneys' fees and costs were paid by said Association out of other funds than said expense fund, and was carried into the real estate account of said Association. Relator

avers that the retention by said Secretary of said amounts of money, as aforesaid, was an outrage upon the shareholders of said Association. Relator avers and charges that this extravagance upon the part of the officers of said Association and their carelessness as to the character of security which they accepted for loans made by said Association, has so far shaken the confidence of the shareholders of said Association in the integrity and good business judgment of its officers that the affairs of said Association cannot be so operated as to enable it to carry out the contracts entered into between it and its shareholders; that by reason of the fact that the large number
44 of pieces of real estate which it holds and owns are unproductive, and that there are in process of foreclosure over two hundred additional pieces of real estate which must become, and which relator avers will be unproductive in the hands of said Association, and by reason of the fact that a large proportion of the loans made by said Association are not profitable to said Association, but that interest and premiums due thereon have been permitted to remain unpaid and to accumulate for periods ranging from one to twenty-seven months, that the assets of said Association are gradually, but certainly, growing less and less from year to year, and that the best interests of its shareholders will be subserved by a dissolution of said Association and the distribution of its assets in accordance with the order of this Honorable Court.

Relator further avers and charges the fact to be, that said Association is insolvent, and that its assets are not

sufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained, by reason of losses upon loans, a loss of $121,895.71; and that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14; and that its total liabilities amount to the sum of $1,332,603.70; and that its total liabilities exceed its total assets by the sum of $65,635.13. Relator, therefore, charges that the condition of said Association requires its dissolution and a forfeiture of its corporate right to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

Relator, therefore, prays that a summons may be issued for the said National Home Building and Loan Associa-
45 tion, and that said Association, which is hereby made defendant to this bill, be required to answer the same, but not under oath, answer under oath being hereby waived. Relator prays that said Association may be enjoined and restrained by the order of this Honorable Court from doing business under its charter, and that the officers of said Association be respectively enjoined from receiving or paying out any moneys belonging to said Association, and that it, the said Association, may be required to show cause why its business as such an Assotion shall not be closed and its charter dissolved.

Relator further prays that, on the hearing hereof, that

said corporation may be dissolved and a receiver appointed to take charge of the affairs and assets of said Association, and that said receiver be directed to take possession of all moneys, securities, notes, evidences of indebtedness, books, papers, property, effects, assets and all things soever belonging to said Association, and to collect all moneys, property and things of value owned by and due said Association, and that the officers of said Association be directed to turn over the said property of said Association, as aforesaid, to said receiver, and that said officers be restrained from any way interfering with the said receiver in the discharge of his receivership; and that the said Association and its officers be respectively restrained from receiving through the mails or otherwise, and opening the same, letters or communications addressed to said Association, and that said Association and its officers be required to turn over to the said receiver all letters, communications, moneys, books and property of every nature and kind whatsoever which may, at any time, come into the possession of said Association or said officers respectively and which were intended for and belong to said Association, or
46 which in any way relate to the assets or liabilities of said Association, or the winding up of its business and affairs, and that the said Association and its officers, and all persons indebted to said Association, or having any kind of property belonging to said association, be required to pay to and deliver the same to the receiver.

Relator further prays that a writ of temporary injunction may issue herein, restraining said Association and its officers, as they are herein respectively prayed to be perpetually enjoined; that all restraining orders prayed for herein may be made perpetual, and that said National Home Building and Loan Association may be dissolved and its franchise forfeited, and its assets collected and distributed in accordance with law, and that a receiver be appointed for said Association, and that the writ of injunction may issue herein, and for such other and further relief in the premises as may be equitable and just.

And relator will ever pray, etc.

DAVID GORE,

Auditor of Public Accounts of the State of Illinois.

M. T. MOLONEY,

Attorney General.

STATE OF ILLINOIS, }
COUNTY OF MACOUPIN. } SS.

David Gore, having been first duly sworn, on oath, says, that he is the Auditor of Public Accounts of the State of Illinois; that he has read or heard the foregoing bill, and is familiar with its contents; that he has investigated
47 the truth of the contents of said bill, and believes the same to be true.

DAVID GORE.

Subscribed and sworn to before me this 20th day of January, A. D. 1896.

[SEAL.] A. J. DUGGAN,

Notary Public.

And afterwards, to-wit: On the 25th day of January 1896, said defendant, by its solicitors, came and filed in the office of the clerk of this court its certain demurrer and plea, which are in the words and figures following, to-wit:

STATE OF ILLINOIS, } ss. *In the Circuit Court.*
McLEAN COUNTY. } *To the February Term, 1896.*

THE PEOPLE, ETC., EX REL, ETC.
vs.
NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

GENERAL AND SPECIAL DEMURRER TO BILL, EXCEPT AS TO THAT PART CHARGING INSOLVENCY AND INSUFFICIENCY.

This defendant by protestation, not confessing or acknowleding all or any of the matters and things in said bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, except that part charging insolvency and insufficiency of assets, generally and specially, and for causes of demurrer, shows to the court the following matters:

48 1st. Because all of the allegations in the bill beginning with the second paragraph on page 2 and including page 5 are repeated in substance on page 10, and the pages following; and some of said allegations are repeated three different times in the bill.

2nd. That the allegations on page 3 and on page 11 of the bill, "that said association has made loans of money illegally in excess of the real estate mortgaged to secure the same, etc.," is not included in the notice given by the Auditor to the officers of said association.

3rd. That the allegations on page 4, "that said association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states in the United States of America, etc.," is not included in the notice given by the Auditor to the officers of said association; and the doing of the same is not contrary to law.

4th. That the allegations in the paragraph beginning on page 16 is not included in the notice given by the Auditor to said association.

5th. That the notice given by the Auditor was wholly insufficient to apprise defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business.

6th. That the only possible way of complying with many of the requirements of said notice was by making good any deficiency of assets that might exist, and the notice given did not state what amount, if any, was required to make the assets sufficient to justify a continuance of business.

7th. The paragraph on page 10 does not show that any sums were unlawfully expended except that a salary was paid to the president, and the amended bill shows
49 this requirement was complied with by the said association, nor is it alleged that said salary was paid to the president for services as president.

8th. That the allegations on pages 11 and 14, that "said association has made loans on previously incum-

bered real estate," is wholly insufficient, in that it does not allege that such loans were so made knowingly, and that said allegation is set forth three different times in the bill, nor is it alleged that it was a practice of said association to loan on encumbered real estate.

9th. That the allegation on page 15, that "said association has loaned money on real estate other than homesteads," etc., does not show a violation of any law.

10th. That the allegations in the paragraph beginning on page 17 show that the by-law complained of was legally passed, and is binding on all shareholders, and its constitution affects only those who are shareholders, and is a matter in which the State has no interest.

11th. That by the amended bill it is admitted that all the requirements of the Auditor's notice were complied with in so far as it was possible for the association to comply with the same, except the requirement that the assets should be made sufficient to justify the continuance of business. It shows compliance with all matters except those affecting the rights of shareholders already in, and are matters in which the State has no interest.

12th That the allegation on page 20, that "said association has not paid to its withdrawing shareholders the amount due them upon the expiration of a period of thirty days after notice was given," is not a violation of any law.

13th. That the further allegation on the same page, "that the secretary did discount the claims of some with-

drawing shareholders, etc.," is shown by the amendment to the bill to have been corrected within the sixty days, and it is not alleged that the said acts were done with the knowledge and consent of the said Association.

14th. That the allegations contained in the paragraph beginning on page 21, do not charge any unlawful disbursements of the funds of said Association.

15th. That the charging of the interest as a liability is unwarranted by law.

16th. That part of the statute under which the Auditor's examination was made, and this proceeding is had, is unconstitutional.

17th. That all of the complaints in the Auditor's notice, except those charging insolvency and a want of insufficient assets to justify a continuance of business, are not of such a character as to rightly concern the Auditor or the State.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, as to so much thereof as before is set forth, this defendant demurs, and prays the judgment of this honorable Court whether it shall be compelled to make any further answer to such parts of the said bill so demurred to as aforesaid.

J. R. LONG,
FIFER & BARRY,
Solicitors for Defendant.

51 STATE OF ILLINOIS, McLEAN COUNTY. } ss. *In the Circuit Court: To the February Term, 1896.*

PEOPLE, ETC, EX REL. ETC. vs. NATIONAL HOME BUILDING AND LOAN ASSOCIATION. } No.

PLEA TO A PART OF THE BILL.

Defendant by protestation not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for a plea to so much and such part of said bill as charges that said Association is insolvent, and that its assets are not sufficient to justify a continuance of business by it, says, that its gross assets are $1,266,968.57; that its liabilities are $1,007,236.85, which leaves its net assets $260,000, and defendant avers that on, to-wit, the 6th day of April, 1895, the time when it was alleged in said bill the Auditor made his examination of said Assotion, this defendant had, and now has, net assets of the amount last stated.

Defendant avers that prior to the 15th day of January, 1895, the following by-laws were in force:

"Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving the Secretary thirty days' notice of such desire. The Board of Directors shall refund to such withdrawing members all that they have paid into the Association except membership fees and fines, provided that at no time shall more than one-half of the funds of the treasury of the

corporation be applicable to the demands of withdrawing shareholders without consent of the Board of Directors."

"Art. 3. Sec. 2. This Association will pay to withdrawing shareholders, interest on the installments paid in by them as follows: On stock six months old and over,
52 6 per cent. per annum; on stock two years old and over, 7 per cent. per annum; on stock three years old and over, 8 per cent. per annum; interest to be computed for the average time the money has been in use by the Association."

"Art. 5. Sec. 1. The by-laws of this Association may be amended by a majority vote of the shares represented at any annual meeting."

Defendant avers that on, to wit: after the examination of it by the said Auditor in the year 1894, the said Auditor notified this defendant that said by-law was too liberal to the withdrawing members; that it was a discrimination in favor of the withdrawing members and against the persistent members, and that all members should bear their proportionate share of the expenses, and that a change should be made in that regard, which notice was as follows:

"In that it, the Association has paid to its withdrawing members the full amount of installments paid by them, together with a certain amount of interest thereon, without regard to the fact that a certain part of such installments had been deducted and disbursed in the payment

of expenses, such practice resulting in serious loss to its remaining and persistent stockholders, contrary to safe business methods."

Defendant avers that in compliance with the request of the Auditor in that regard, and believing that it was for the best interest of the Association, the said by-law was amended at a regular annual meeting of the stockholders held on, to-wit, the 15th day of January, 1895, in which meeting a majority of the whole number of shares in force was present in person and by proxy, and the same was amended by a majority vote of the stock represented. The by-law, as amended, is as follows:

"Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving the secretary thirty days' notice of such desire. The Board of Directors shall refund to such withdrawing members all that they have paid into the Association except membership fees and fines and their proportionate share of the expenses to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the application to withdraw, and such fees, fines and expenses are hereby declared to
53 be charges and liens upon the member's stock, provided that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of the withdrawing shareholders without the consent of the Board of Directors. Such withdrawing members shall be entitled to receive interest on the install-

ments of stock paid in by them as follows: On stock one to two years old, 6 per cent. per annum; on stock two years to three years old, 7 per cent. per annum; on stock three years old or over, 8 per cent. per annum, interest to be computed for the average time the money has been in use by the Association, but no interest will be paid on installments paid on stock after application is made to withdraw."

Defendant avers that after said by-law was amended as aforesaid, the same was filed in the office of the Secretary of State, and by that officer submitted to the Attorney General of the State of Illinois, and was approved by him, and the same was duly filed and recorded in the office of the Recorder of Deeds in the County of McLean, in the State of Illinois, in which the principal office of this defendant is located. And defendant avers that after the said by-law was amended as aforesaid, the said Auditor then complained that this defendant had attempted to modify the contracts of its members, and that it did not pay to withdrawing members what they were entitled to under the by-law as it stood before the amendment; and defendant avers that in the charge made in the bill that the general liabilities of this defendant amount to the sum of $1,107,236.85; there is the sum of, to-wit, $100,000, charged to this defendant as a liability, by reason of the change in the by-law as aforesaid, on the theory, as claimed by the Auditor as aforesaid, that the by-law is not binding upon any stockholder who was not present and voted for the same, or who did not assent thereto;

and defendant avers that under the allegations in the bill that if the by-law as amended is binding on all shareholders, then the said Association is solvent and has sufficient assets to justify a continuance of business.

54 Defendant further avers that in order to charge this defendant with $100,000 as a liability under the by-law as aforesaid, the said Auditor figures that the said by-law is not binding upon any stockholder, whether he voted for the amendment or not, or whether he has since assented thereto, whereas defendant avers the fact to be that more than a majority of the entire stock in force was present in person and by proxy and that there was no dissenting vote to the adoption of said amendment, and that even under the construction of the by-law as contended for by the Auditor, he has charged the Association with a liability by reason of said amendment of at least double what it should be.

Defendant avers that the charge made by the said Auditor of losses upon loans, to-wit, $122,000, is reached, not by actual closing out of the different loans and transactions, but by the appointment of inspectors sent by him to different parts of the country where loans were made, and by other persons; and defendant avers that such inspection, examination and appraisement of property so made by said Auditor as aforesaid was not, and is not, contemplated by the statute under which the said Association is created, and this proceeding had, and such inspection, examination and appraisement of the property

so made was unauthorized by law, and this defendant should not be charged with any losses on real estate by reason thereof.

Defendant further avers that the charge made by the Auditor that this defendant is liable for interest upon withdrawal of its shares of stock for the sum of, to-wit, $103,000 by reason of the by-laws aforesaid, and that said sum of interest is calculated as the interest alleged to be due on the entire stock in force whether the same has
55 been presented for withdrawal or not; and defendant avers that it is not legally chargeable with said interest on stock not filed for withdrawal, and avers that of the sum aforesaid the sum of, to-wit, $83,000 is charged as a liability on stock in force on which notice of withdrawal has not been given.

Defendant avers that the by-law as amended is lawful and binding upon all members of the Association, and that it should not be charged with the sum of $100,000, or any part thereof, by reason of said by-law, and that if not so charged, it is solvent under the allegations made in the bill.

Defendant avers that the interest charged on the installments of stock aforesaid as a liability against it, is not a liability under the law, and defendant should not be charged with the sum of $103,000 as a liability for said interest or for any other sum on account thereof in excess of, to-wit, $20,000.

Defendant avers that by reason of the matters herein set forth it is solvent, and has sufficient assets to justify a continuance of business.

Therefore this defendant doth plead the same in bar to so much of the said complainant's bill as hereinbefore is particularly mentioned, and prays the judgment of this Honorable Court, whether he should be compelled to make any further answer to so much of the said bill as is hereinbefore pleaded to, and prays to be dismissed with his costs and charges in this behalf most wrongfully sustained.

J. R. Long,
Fifer & Barry,
Solicitors for Defendant.

56 At a regular term of the Circuit Court of the Eleventh Judicial Circuit of the State of Illinois, begun and held at the court house in Bloomington, in and for the County of McLean, on Monday, the 3d day of February, in the year of our Lord, One Thousand Eight Hundred and Ninety Six, being the first Monday of said month.

Present, Hon. Thomas F. Tipton,
One of the Judges of said circuit, presiding.
James H. Leaton, Clerk.
John A. Sterling, State's Attorney.
James Stone, Sheriff.
Clayton C. Herr, Official Reporter.

On the chancery docket of said court the following proceedings were had:

TUESDAY, MARCH 17, 1896.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. DAVID GORE, AUDITOR OF PUBLIC ACCOUNTS,
6906 vs.
NATIONAL HOME BUILDING AND LOAN ASSOCIATION.
To Appoint Receiver.

This cause having come on to be heard upon the bill of complaint herein, and the demurrer of the defendant thereto, and the demurrer being sustained, and the complainant standing by its said bill of complaint and declining to amend the same, the said bill of complaint of the complainant be and the same is hereby dismissed, without costs to the defendant.

57 And now said complainant, by the Attorney General of the State of Illinois, prays an appeal from the decree of this court to the Supreme Court, Central Grand Division of this State, which is by the court allowed.

STATE OF ILLINOIS, } ss.
McLEAN COUNTY. }

I, James H. Leaton, Clerk of the Circuit Court of McLean County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all proceedings had of record in our said court, in a certain cause lately therein pending, on the the chancery side thereof, wherein People ex rel. David Gore, Auditor, etc., were complainant, and National Home Building and Loan Association was defendant.

In testimony whereof, I have hereunto set my hand and [SEAL] affixed the seal of said Court, at Bloomington, Ill., this 18th day of AprilA. D. 1896. J. H. LEATON,
Clerk.

M. T. MOLONEY, *Attorney General.*

With him:

T. J. SCOFIELD
AND
M. L. NEWELL,

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IN THE

SUPREME COURT

CENTRAL GRAND DIVISION.

STATE OF ILLINOIS.

JUNE TERM, 1896.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL., DAVID GORE, *Auditor, etc.*

vs.

THE NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

BRIEF AND ARGUMENT.

M. T. MOLONEY, *Attorney General.*

T. J. SCOFIELD AND

M. L. NEWELL, *Of Counsel.*

SPRINGFIELD, ILL.,
ED. F. HARTMAN, STATE PRINTER.
1896.

IN THE

SUPREME COURT

CENTRAL GRAND DIVISION.

STATE OF ILLINOIS.

JUNE TERM, 1896.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL., DAVID GORE, *Auditor, etc.*

VS.

THE NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

BRIEF AND ARGUMENT.

May it Please the Court:

The National Home Building and Loan Association, of Bloomington, Illinois, was organized under the laws of the State of Illinois, and was authorized to do business on the 11th day of January, A. D. 1890. By virtue of its authority it commenced business as a building and loan association, and in accordance with the requirements of its charter, maintained its principal office at the city of Bloomington, in McLean county.

Pursuant to the law which requires the Auditor of Public Accounts to examine into the affairs and financial condition of building and loan associations organized under the laws of Illinois, the Auditor conducted an examination of said National Home Building and Loan Association. Upon the examination it was found that said Association had been guilty of illegal practices, the result of which had so far reduced the value of its assets and securities that its financial condition was such as to no longer justify a continuance of business by it. Upon the completion of said examination, and in accordance with the requirements of the law in such cases, the Auditor, on the 24th day of October, 1895, mailed a notice to the president and secretary of said association, setting forth its condition and the causes which gave rise thereto, which said notice was in the words and figures following, to-wit:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
BUILDING AND LOAN ASSOCIATION DEPARTMENT,
October 24, 1895.

"*To F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary of the National Home Building and Loan Association, of Bloomington, Illinois:*

"WHEREAS, It appears from an examination of the affairs of the National Home Building and Loan Association, of Bloomington, Illinois, that the said Association is conducting its business in an unsafe manner, and contrary to law, as follows, to-wit:

1. "That it attempts, under cover of amendment to its charter, to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due

them by the terms of the contract, so attempted to be changed, without the assent, and against the protest of such shareholders, thereby injuring the reputation of said Association for fair dealing, and constituting an unsafe and illegal manner of doing business.

2. "In that its secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

3. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the Association, to the great loss of its shareholders, and against the provisions of the law.

5. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made application to withdraw therefrom, and continue to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

6. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

7. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

8. "In that its loans have been selected with so little care that only a small per cent. of the charges thereon are regularly or promptly paid.

9. "In that compensation is paid to its president, contrary to the provisions of the statute.

10. "In that its assets are insufficient to justify a continuance of business by it.

11. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate as proper, and largely in excess of what such Association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now, therefore, I, David Gore, Auditor of Public Accounts, do hereby notify you, the said F. J. Fitzwilliam, president, and W. R. Fitzwilliam, secretary, of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty days from the date hereof, I shall report the said National Home Building and Loan Association to the Attorney General, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

[SEAL] "DAVID GORE,

"Auditor of Public Accounts."

That thereafter, and on the 28th day of December, A. D. 1895, the Auditor of Public Accounts, for the purpose of ascertaining whether the Association had ceased its illegal practices, and placed its finances in a condition to justify a continuance of business by it, conducted a supplemental examination thereof. As a result of such examination he ascertained that the condition of said Association continued to be practically the same as on the 24th of October, 1895, and that its financial condition had not been improved in any respect, and was not such as to justify a continuance of business by it. It was further found that the amendment to the by-laws of the Association, referred to in the notice of October 24, 1895, and hereinafter referred to at length, still existed, and that the officers of the Association continued to insist upon its legality, and continued to settle with withdrawing shareholders in accordance with its provisions. It was further found, that although the officers of the Association agreed to discontinue many illegal practices, of which it had been guilty, such discontinuance could not affect its financial condition, and the Auditor therefore transmitted the examinations, and his conclusions thereon, to me, with a request that an information be filed against said Association, for the purpose of dissolving its charter, appointing a receiver to take charge of its assets, to collect moneys due it and distribute the same in accordance with the order of the Court. Accordingly on the 18th day of January, 1896, I filed an information in chancery against said Association, for the purpose of dissolving its charter, and distributing its assets. On the same day I took leave to amend the bill. The amended bill was filed on the 21st day of January, 1896. It appears in the ab-

stract of the record from pages 28 to 52 inclusive. To the amended bill the Association filed a demurrer, both general and special, and also a special plea to a part thereof. The demurrer to the information was heard and sustained by the Court. The People refused to amend the information, but abided by the same, and the Court thereupon entered a decree dismissing the information. From this decree an appeal was taken to this Court. The special plea filed related to its financial condition. The sufficiency of the information was disposed of upon the argument of the demurrer. The Court in sus'aining the demurrer, filed a written opinion. The following quotation from the opinion shows that the contentions of the respective parties were disposed of on the demurrer:

"To this bill the defendant has interposed a demurrer which challenges, either directly or indirectty, every allegation of the bill.

"The defendant also filed a plea which technically may waive one or two of the grounds of demurrer; but the Attorney-General does not insist upon this waiver, and asks that the sufficiency of the bill be determined on the demurrer, and in this opinion I shall not discuss or pass upon any of the questions involved in the plea, but shall confine myself solely to the sufficinncy of the bill."

THE INFORMATION.

The amended information sets forth the facts relating to the organization and examination of the condition of said Association, and recites the filing of the report of such examination in the office of the Auditor of Public Accounts. The informa-

tion contains a summary of the contents of said report, and the conclusions which the Auditor drew therefrom, and upon which he based the notice of October 24th, 1895, which notice is set forth in said information in *hec verba*. The information also alleges that a supplemental examination was conducted upon the expiration of the sixty days allowed by law to such associations to correct their impaired financial condition and to cease their illegal practices. It is alleged that the financial condition of said Association had not been materially changed during said sixty days.

Thereafter it is directly charged in said information as causes which led to its unsatisfactory financial condition that said Association has paid to its officers, agents and other individuals, salaries and for expenses alleged to have been incurred sums of money which greatly exceeded the value of the services rendered, and which were largely in excess of the amount which its earning capacity justified it in so expending, and that the extravagant expenditure of the money belonging to its stockholders had decreased the value of the shares of stock held by them. That the secretary of said Association, commencing with October 15th, 1894, received a salary of $7,000.00 per year, that said sum was in excess of the value of his services and that said Association paid a salary to its president which was not authorized or warranted by law. That said Association had loaned large sums of money upon security wholly inadequate, and had loaned money upon real estate already encumbered by prior liens not held by said Association, in direct violation of law. That the security given to said Association for many loans made by it was so inadequate that the borrower preferred to

part with his property rather than to pay his interest and dues, and that such loans were unproductive. That the investment of the moneys of said Association had been so carelessly managed and the security taken by it so wholly inadequate that only a small per cent. of the charges accruing upon its loans, from month to month, were regularly and promptly paid, and that such charges upon a very large per cent of its loans had not been collected by said Association, and had been permitted to accumulate until the unpaid aggregate was a very large sum of money.

That on the morning of April 6, 1895, said Association held mortgages upon real estate, securing eight hundred and nine-four loans made by it, representing to said Association $598,-547.69; that of these loans, thirty-three, amounting to $32,775.00 were paid in advance; that two hundred and forty-one of these loans amounting to $166,480.81 were paid to date, and six hundred and twenty of these loans, amounting to $409,291.88 were delinquent; that the delinquency upon said loans represented the interest and charges due thereon to said Association for periods of time running from one to twenty-seven months; that a very large proportion of said loans, so delinquent were made upon security entirely inadequate, and that upon a foreclosure of the mortgages given to secure said loans that said Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

That on the morning of the said 6th of April, 1895, said Association was the owner of ninety-one pieces of real estate, nearly if not all of which it had been forced to accept in satisfaction of unproductive loans, and said real estate has remained an unproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are diminished in value; that these ninety-one pieces of real estate were given as security to said Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive upon the part of the borrowers to pay the interest and other charges accruing to said Association by reason of said loans, and that said loans represent to said Association at the present time, the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by said Association, in satisfaction of said debts, the said Association is deriving an income from only thirty-seven thereof, and that the remaning pieces of said real estate are entirely unproductive; and that the income which said Association realized from said thirty-seven pieces of real estate amounted only to the sum of $273.72 per month.

That by reason of said unsafe methods in the investment of the funds of said Association it had been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other States, and that said Association will ultimately be compelled to accept said properties in discharge of the debt to said Association, which said pieces of property were, respectively, mortgaged to secure; that at the time said foreclosure proceedings were respectively brought, there was due said As-

sociation, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional charges against said real estate; that the foreclosure of said mortgages will, respectively, entail a large expense to said Association in attorney's fees, costs of proceedings in court and the necessary expense incidental thereto which said costs added to the principal, interest and premiums due said Association by reason of said loans will exceed the aggregate of the amounts loaned by said Association by the sum of many thousands of dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association have been diminished, and the value of the shares of stock issued by said Association have been correspondingly diminished.

That by reason of the fact that the Association had accepted second liens upon property, with first liens not held by the Association, it became necessary for it to buy said first liens, and that it did so, and was compelled in a number of instances to accept said property to its great financial loss and detriment. That it loaned large sums of money paid in by its stockholders to stockholders who did not intend to use the same, for the purpose of procuring or improving homesteads and that such moneys were not used by the borrowers for the purpose of buying and improving homesteads but were used for other purposes.

That it did business in nearly all the States of the Union, that its loans were scattered throughout said States and that

in doing business outside of the State of Illinois, and the reasonable territory around its principal place of business, it violated the spirit of the law of its creation

That prior to the 15th day of January, 1895, the by-laws of said Association concerning the withdrawal by its shareholders of the withdrawal value of shares of stock held by them, respectively, provided, among other things, that members whose shares of stock were not pledged to said Association might withdraw all or any part of their shares by giving the secretary thirty days' notice of their desire to do so, and that the board of directors should refund to such withdrawing members all that they had paid into such Association, excepting their membership fees and fines. That said by-laws further provided that withdrawing shareholders should be entitled to receive interest on installments of stock paid in by them as follows: On stock from one to two years old, six per cent. per annum; on stock two to three years old, seven per cent. per annum, and on stock three years old or over, eight per cent. per annum; that on or about the 15th day of January, A. D 1895, at a meeting of the shareholders of said Association, a majority of its share holders amended said by-law relating to the withdrawal value of its shares of stock, and in and by said amendment provided that the board of directors of said Association should refund to its withdrawing members all that they had respectively paid into said Association, except membership fees, fines and their respective proportionate shares of expenses, to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the withdrawal application, and said by-law declared such fees, fines and ex-

penses to be a lien upon the stock of each member. That it was further provided by said amendment that withdrawing members should be entitled to receive interest on the installments of stock paid in by them in accordance with the provisions of said amendment, which provisions were identical with the provisions of the old by-law relating to interest. That a large number of the shareholders of said Association protested against the adoption of said amendment on the ground that they had not consented to said amendment, and the enforcement of the same against them would be to violate the conditions of the contract entered into between them and said Association at the time they became members of said Association and purchased shares therein. That notwithstanding the fact that said Association cannot violate the rights of its shareholders so as to reduce the amount of money which they would be respectively entitled to receive under the provisions of the law, as they existed at the time the shares of stock were respectively issued without the consent of such members, nevertheless said Association has insisted, and still insists, upon forcing its withdrawing shareholders to accept the amounts of money which they are respectively entitled to, less their proportion of the expenses of said Association, in accordance with the provisions of said amended by-law. That said Association has refused to settle with withdrawing shareholders upon any other basis than that provided by said amended by-law, and has forced its withdrawing shareholders to accept the amount provided under and by virtue of said amended by-law, in full and complete satisfaction of all their claims against said Association; and that by reason

of the premises withdrawing shareholders have been made to suffer large financial loss, and that said Association in so forcing the effect of said by-law upon members who did not consent thereto, but who were opposed to the adoption of said amendment, violated its duty to such members, and withhheld from them amounts of money which said Association was not entitled to retain.

That the law requires such Associations to pay withdrawing stockholders the amounts due them within a period of thirty days after the filing of withdrawal notices. That large numbers of the shareholders of said Association filed applications of withdrawal, and that six months had elapsed from the expiration of said thirty days, and said shareholders still remained unpaid. That the Association in a number of instances discounted the claim of such withdrawing shareholders, and that its Secretary had such discounted shares assigned to himself or to a person or persons designated by him. That such conduct had shaken the confidence of its shareholders in the integrity of the Association and its ability to maintain itself by reason of the premises had been practically destroyed. That by reason of such loss of confidence its shareholders had filed and were at the date of said supplemental examination continuing to file large numbers of withdrawing applications and its further transaction of business was thereby rendered unprofitable to its shareholders. That the Secretary of said Association withdrew large amounts of money from the funds thereof, and appropriated the same to his own personal use, to an unnecessary and unjustifiable extent; that during the first three years of the history of said Association its Secretary withdrew from the

moneys paid into said Association by its shareholders, over $119,000.00. This amount was withdrawn under and by virtue of a by-law which permitted him to use five cents per share per month of fifty-five cent stock, and ten cents per share per month of one dollar and ten cent stock, for the purpose of an expense fund; that the Secretary assumed that amount to be intended for his personal use, and out of which to defray the expenses of the office at Bloomington, Illinois; out of this amount during said period he paid the rent, light, heat, expense of clerks and incidentals, and the books of said Association show that during the first three years of the history of said Association that the said $119,000.00 netted the said Secretary the sum of over $50,000.00; that during the first year it netted the said Secretary the sum of $11,622.56; the second year the sum of $18,439.07; and the third year the sum of $21,536.96. That this fund was not applied to the payment of expenses which accrued from time to time in the transaction of business by said Association in different parts of the State of Illinois and in the different states in which it transacted business; that upon the foreclosure of mortgages the attorneys' fees and costs were paid by said Association out of other funds than said expense fund, and was carried into the real estate account of said Association.

That said Association is insolvent and its assets are insufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained, by reason of losses upon loans, a loss of $121,895.71; that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14;

that its total liabilities amount to the sum of $1,332,603.70; that its total liabilities exceed its total assets by the sum of $65,635.13; and that the condition of said Association requires its dissolution and a forfeiture of its corporate right to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

The prayer of the information is in the usual form, and asks that the Association be enjoined from doing any business; that it be dissolved, its assets converted into cash, its debts paid, and the remainder thereof be distributed among its shareholders in accordance with law.

DEMURRER.

That on the 25th day of January said Association filed a demurrer to the information in words and figures following:

"This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, except that part charging insolvency any insufficiency of assets, generally and specially, and for causes of demurrer, shows to the court the following matters:

"1st. Because of all of the allegations in the bill beginning with the second paragraph on page 2 and including page 5 are repeated in substance on page 10, and the pages following; and some of said allegations are repeated three different times in the bill.

"2nd. That the allegations on page 3 and on page 11 of the bill, 'that said association has made loans of money illegally

in excess of the real estate mortgaged to secure the same, etc.,' is not included in the notice given by the Auditor to the officers of said association.

"3rd. That the allegations on page 4, 'that said association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states in the United States of America, etc.,' is not included in the notice given by the Auditor to the officers of said association; and the doing of the same is not contrary to law.

"4th. That the allegations in the paragraph beginning on page 16 is not included in the notice given by the Auditor to said association.

"5th. That the notice given by a Auditor was wholly insufficient to apprise defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business.

"6th. That the only possible way of complying with many of the requirements of said notice was by making good any deficiency of assets that might exist, and the notice given did not state what amount, if any, was required to make the assets sufficient to justify a continuance of business.

"7th. The paragraph on page 10 does not show that any sums were unlawfully expended except that a salary was paid to the president, and the amended bill shows this requirement was complied with by the said association, nor is it alleged that said salary was paid to the president for services as president.

"8th. That the allegation on pages 11 and 14, that 'said association has made loans on previously incumbered real estate,' is wholly insufficient, in that it does not allege that such loans were so made knowingly, and that said allegation is set forth

three different times in the bill, nor is it alleged that it was a practice of said association to loan on encumbered real estate.

"9th. That the allegation on page 15, that 'said association has loaned money on real estate other than homesteads,' etc., does not show a violation of any law.

"10th. That the allegations in the paragraph beginning on page 17 show that the by-law complained of was legally passed, and is binding on all shareholders, and its constitution affects only those who are shareholders, and is a matter in which the State has no interest.

"11th. That by the amended bill it is admitted that all the requirements of the Auditor's notice were complied with in so far as it was possible for the association to comply with the same, except the requirement that the assets should be made sufficient to justify the continuance of business. It shows compliance with all matters except those affecting the rights of shareholders already in, and are matters in which the State has no interest.

"12th. That the allegation on page 20, that 'said association has not paid to its withdrawing shareholders the amount due them upon the expiration of a period of thirty days after notice was given,' is not a violation of any law.

"13th. That the further allegation on the same page 'that the secretary did discount the claims of some withdrawing shareholders, etc.,' is shown by the amendment to the bill to have been corrected within the sixty days, and it is not alleged that the said acts were done with the knowledge and consent of the said Association.

"14th. That the allegations contained in the paragraph beginning on page 21, do not charge any unlawful disbursements of the funds of said Association.

"15th. That the charging of the interest as a liability is unwarranted by law.

"16th. That part of the statute under which the Auditor's examination was made, and this proceeding is had, is unconstitutional.

"17th. That all of the complaints in the Auditor's notice, except those charging insolvency and a want of insufficient assets to justify a continuance of business, are not of such a character as to rightly concern the Auditor or the State.

"Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, as to so much thereof as before is set forth, this defendant demurs, and prays the judgment of this honorable Court whether it shall be compelled to make any further answer to such parts of the said bill so demurred to as aforesaid."

Alleged Repetitions

The first special cause of demurrer is that the charges and complaints made against the defendant association are repeated in the bill. This objection is not well taken. The information contains no repetition of charges or grounds of complaint. It first sets out the allegations contained in the report of the examiners to the Auditor of Public Accounts. It is alleged that upon this report the Auditor gave the Association the notice set out in the information. And then the charges and complaints

found in the report are made against the Association by direct, positive and formal averments in the information, and it is in this connection that they are again found in the bill.

CONSTITUTIONALITY OF THE ACT.

The 16th special cause of demurrer is as follows: "That part of the statute, under which the Auditor's examination was made, and this proceeding had, is unconstitutional."

From an examination of the Acts relating to building, loan and homestead associations I am unable to discover anything which would suggest their unconstitutionality. The special cause, however, does not seem to relate to the Acts as a whole, but to only certain parts thereof. Having heard the arguments of counsel below, and similar arguments in other cases, I take it that it will be said that sections 16 and 17 are unconstitutianal. It is urged that section 16 confers power upon the Auditor of Public Accounts to make an examination of the books and papers of a corporation organized under this law, and that under the laws of Illinois the same power is not conferred upon the Auditor with relation to any other class of corporations, and therefore the Act is repugnant to the constitution as special legislation. This position is not tenable. Building and loan associations organized under the laws of Illinois are the objects of a special solicitude on the part of the State. The act was created in the interest of the poor to the end that they might become owners of homesteads. To prevent a diversion of their funds from the purpose which they are intended to subserve the power of visitation and examination was conferred upon the Auditor. This power is the power so aptly approved and commended by Judge

Grosscup in the opinion in Towle v. American Building, Loan & Investment Society referred to and quoted from at length hereafter.

It is unnecessary, however, to discuss at length the question of the right of the state to confer the power of visitation and examination upon the Auditor, as is done by this Act, for the question has been settled by the Supreme Court of this State, in upholding and affirming to be constitutional the laws of Illinois relating to mutual benefit societies, which contain provisions very similar to sections 16 and 17 of this Act. These insurance laws provide for a visitation by the Auditor and an examination of the condition of such societies and a report to the Attorney General based thereon, and for action by the Attorney General, in chancery, in certain contingencies, and the Supreme Court of Illinois has said that said Act is constitutional.

Ward v. Farwell et al., 97 Ill., 594;

Hunt v. Chicago Mutual Life Indemnity Ass.: 127 Ill., 257;

Chicago Life Ins. Co. v. Auditor, 101 Ill., 86.

The Supreme Court has also held that where the power conferred upon questions of practice is applicable to all in a particular class, the act conferring such power is not special legislation, and is not unconstitutional on that account.

Chicago Life Ins. Co. v. Auditor, 101 Ill., 87;

People v. Harper, et al., 91 Ill., 369.

If it be said that section 16 of the act is a violation of article 2, section 6 of the constitution, which provides that, "the right of the people to be secure in their persons, houses, papers

and effects against unreasonable searches shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized," it must be remembered that this section of the constitution has application to proceedings for the suppression of crime, or the detection and punishment of criminals. Only such searches as are instituted and pursued upon the complaint of or suggestion of a party to a litigation into the house or possessions of another, in order to secure a personal advantage, and not with a design to afford aid in the administration of justice, are held to be unreasonable. So far as our own courts have discussed this section of the constitution, it has been in relation to violations and enforcements of penal laws.

Meyers v. The People, 67 Ill., 303;
Housh v. The People, 75 Ill., 487;
Hawthorne v. The People, 109 Ill., 307.

The declaration of rights of the State of Massachusetts, Article XIV, is very similar to this section of our Constitution, and assures to all citizens of that State immunity from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. In discussing the provisions of this article, and the searches which may be reasonable under its provisions, the Supreme Court of Massachusetts, in the case of Robertson and another v. Richardson, 13 Gray 456, use the following language:

"Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere

private right; but their use was confined to cases of public prosecution instituted and pursued for the suppression of crime, or the detection and punishment of criminals. Even in those cases, if we may rely upon the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because, without them, felons and other malfactors would escape detection. Entick v. Carrington, 19 Howells' State Trials, 1067; 1st Chitty Criminal Law, 64. The principles upon which the legality of such warrants could be defended, and the use and purpose to which, by the common law, they were restricted, were well known to the framers of our Constitution. Commonwealth v. Dana, 2 Met. 336. Having this knowledge, it cannot be doubted that by the adoption of the fourteenth article of the declaration of rights, it was tended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants of that character to the general class of cases in and to the furtherance of the objects of which they had been recognized and allowed as justifiable and lawful processes, and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used, or to make them legal and available in the course or for the maintenance of civil proceedings. All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice, in reference to acts or

offenses in violation of penal laws, must be held to be unreasonable, and consequently, under our Constitution, unwarrantable, illegal and void."

The language here used is applicable to the State of Illinois. The provisions of the respective constitutions of the two States are practically the same. It cannot be said that the object of the examination of the condition of building and loan associations by the Auditor of Public Accounts is intended to gain or secure for the State any advantage for any purpose; but it is rather to see to the proper application and investment of moneys contributed by shareholders of such associations under the provisions of their respective by-laws and the laws of the State. Therefore, the examination provided for by said Section 16 is not in conflict with this provision of our Constitution. It may be added that the class of searches to which this section of the Constitution is applicable is such as may be made by the authority of warrants issued upon affidavits filed showing probable cause, and particularly describing the place to be searched, and the person or things to be seized. It may also with propriety be suggested that the examination which is conducted by the Auditor under the provisions of Section 16 is not in any sense of the word a seizure reasonable or unreasonable. The laws of this State relating to such associations and under which they are incorporated provide for the accumulation of funds to be invested for certain purposes, in certain ways, and upon certain securities. If the law is not conformed to in all these particulars the result may be disastrous to the financial interests of shareholders; and such examination as said section provides for is in the interest of the shareholders in order that they may

be advised of its exact condition. The right of the Auditor to make such examination under a proper law is well established in this State; and the legality of the laws which provide for such examinations has been uniformly upheld. The statutes relating to insurance companies and State banks organized under the laws of Illinois, contain similar provisions, and these laws have been unformly upheld and declared to be constitutional. If it be said that insurance companies and State banks fall within the class of corporations sometimes denominated *quasi* public corporations and for that reason the State has a power of examination and visitation which it cannot extend to private corporations, it must be remembered that our own court and the courts of the United States have said, that banks, insurance companies and railroad companies are not *quasi* public corporations, and that while they owe duties to the public, and in the exercise of the powers conferred upon them by their respective charters must discharge those duties, they are nevertheless strictly private corporations.

Directors, etc. v. Houston, 71 Ill., 319;
Chicago Dock Co. v. Gar., 115 Ill., 166;
Dartmouth College v. Woodward, 4 Wheat., 668;
Osborne v. United States Bank, 9 Wheat., 738.

If it be said that by section 16 the Auditor of Public Accounts is allowed a compensation, in addition to and beyond his salary, to be paid by building and loan associations for such examinations, and that therefore said section is in conflict with article V, paragraph 3 of the constitution which prohibits the Auditor from receiving on his own account, or to his own use, any fees, costs, perquisites of office, or other compensation,

it must be remembered that in practice the Auditor of Public Accounts only receives for such examinations the actual expenses which he incurs in conducting the same. This is undoubtedly in accordance with the spirit and intention of this section of the law. Any attempt upon the part of the Auditor to collect compensation over and above the expenses necessarily incurred in said examinations would be a violation of the constitution and could not be tolerated; nor would such course upon his part find any justification in said section. It would seem to be the duty of an Association in settling with the Auditor for such an examination to pay to the Auditor his reasonable expenses and no more. If the Auditor, in his examination of defendant Association, charged for his services in connection with such examination an amount in excess of his actual expenses, the Association was under no legal obligation to pay the same. If, however, the Court should feel upon a consideration of this subject, that this portion of section 16 is unconstitutional, it must be remembered that it is the law of this State recognized in a long list of opinions, that where parts of a law conflict with the constitution, the entire act is not necessarily unconstitutional; but that if the unconstitutional portion is so disconnected from the remainder of the act that the constitutional portion may stand, without materially affecting the purpose of the entire act, the unconstitutional portion may be declared inoperative, and the remainder of the act stand; and this is true, although the constitutional and unconstitutional provisions may be contained in the same section.

Cooley's Const. Lim., 178;

Reid, et al v. Morton, 119 Ill., 118.

These constitute the only grounds, so far as I can see, which can be urged against the constitutionality of section 16 of this act; and I feel confident that the authorities cited herein upon this subject are sufficiently explicit and in point to relieve this section of the faintest suspicion of unconstitutionality. Its enactment was undoubtedly intended to subserve the interests of the thousands of shareholders of building associations in this State, and was not intended to be, and is not, antagonistic to their financial interests or to the constitution of Illinois.

Upon an examination of section 17 of this act I am at a loss to know upon what defendant may base its unconstitutionality, unless it be that portion of the section which confers upon chancery jurisdiction to dissolve building and loan associations. It is true that at common law there was no jurisdiction in chancery for such a purpose. It is also true in this State that under the laws in force chancery has no jurisdiction, excepting as it is conferred upon it by the statutes of the State. It cannot, in the line of the holdings of our Supreme Court, be said that the legislature is without authority to confer such jurisdiction upon chancery. There is no reason why chancery may not entertain this jurisdiction in every case where the power is conferred upon it by the legislature. It is useless to extend the argument upon this proposition, because this contention of the People has been expressly upheld and affirmed by the Supreme Court of Illinois in a number of decisions, among which I may cite the following:

Chicago Life Ins. Co. v. Auditor, 101 Ill., 86.

Ward v. Farwell et al., 97 Ill., 594.

Hunt v. Chicago Mutual Life Ind. Ass., 127 Ill., 257.

Republic Life Ins. Co. v. Swigert, 135 Ill., 160.

Wheeler v. P. I. Steel Co., 143 Ill., 197.

Where the power so conferred upan chancery is applicable to all in a particular class, it is not special legislation, and is therefore constitutional.

Chicago Life Ins. Co. v. Auditor, 101 Ill. 87.

This disposes of the constitutional question, in my judgment, so far as section 17 of the Act is concerned.

These two sections invest the auditor with power to examine building and Loan Associations in Illinois, for the purpose of ascertaining whether or not the assets of such associations are insufficient to justify their continuance of business, or whether they are conducting their business in whole or in part contrary to law, or in an unsafe manner. If, upon such examination, he believes that their assets are insufficient, or that they are conducting their business, in whole or in part, contrary to law or in an unsafe manner, by notice he suggests these facts to the association, and if upon the expiration of sixty days they have not conformed to his views, he reports the fact to the Attorney General, whose duty it is to proceed in chancery for the purpose of obtaining a judicial determination of the questions involved. Upon the presentation of the facts involved in each case, the Court then determines the question between the People and the association, and if upon this determination the Court is of the opinion that the interest of the shareholders and the laws of the State require a dissolution of its charter, a decree is entered accordingly, and the affairs of the association closed, and its assets distributed according to law.

Upon a consideration of these two sections they seem to be reasonable, just and eminently proper. They are in my judgment constitutional, and as Judge Grosscup has said, are in the interests of the shareholders of such associations, and they should be enforced and no obstructions thrown in the way of their execution under the directions of the public officers of the State.

Can an association do a national business or lend money for other than homestead purposes?

The information states that upon the supplemental examination the officers of said Association expressed a willingness to comply with the requirements of the Auditor, so far as the same related to illegal practices upon its part, but the 17th special ground of demurrer charges, that all of the complaints in the Auditor's notice, except those charging insolvency and a want of insufficient assets to justify a continuance of business are not of such a character as to rightly concern the Auditor or the State. The just inference from this special cause of demurrer is, that the State in the opinion of the Association has no right to insist that the Association cease the practices designated as illegal in the notice sent to it by the Auditor. Nearly all of the charges set forth in the notice mailed to said Association by the Auditor and declared by him to be illegal practices upon the part of the Association, by reason of the fact that they had respectively been practiced by the Association during its entire life, were directly responsible for its financial condition at the time the Auditor made the original and supplemental examination. It therefore follows that if the

financial condition of the Association is such as not to justify a continuance of business by it, although the Association should comply with the request of the Auditor that it cease said illegal practices, its financial condition would not be thereby improved; and it would nevertheless be the duty of the Court to decree its dissolution, and a distribution of its assets. Very many of the charges made by the Auditor are so apparently illegal that it will not be necessary to consider them with particularity. Others are of such a nature, when considered in connection with the history of building and loan associations of this State and in their consequences are so important to the stockholders of similar institutions, that a decision of this Court upon their legality is necessary and important in order that, if illegal, associations may have the benefit of the knowledge of the fact.

The information challenges the right of a building and loan association to extend its business to the different States of the Union, and engage in the building and loan association business, denominated "National." As a matter of history it is important to notice that the calamities which have befallen building and loan associations organized under the laws of this State have been largely confined to such associations. Among others it may not be improper to cite the American, the National, the Continental, the Inter-Ocean, and the Illinois, of Bloomington. These associations operated in many different States, and by reason of the fact that the lending of money was necessarily entrusted to agents in the locality in which the loan was made, there was a lack of that careful examination of securities which is so essential in lending the money paid by

shareholders for investment under the law. In each of these cases it was found that the securities accepted by the Association for loans made in different States was entirely inadequate and in foreclosing mortgages given to said associations, respectively, an average loss of fifty per cent. of the loans so made by said associations was sustained. The information in this case sets up a condition which, if true, shows that the history of such loans in the associations above referred to has been repeated in the National Home.

I am not aware of any decision of our Court passing upon the right of building and loan associations to thus extend their business beyond the immediate locality in which their principal offices are respectively located, but I earnestly insist that there is no warrant or authority of law which justifies associations organized under the laws of the State of Illinois in so extending their business. In this connection I may be permitted to quote from an opinion filed by the Honorable John Gibbons, in the case of The People v. Continental Building and Loan Association. Upon this subject the quotation is explicit, apt and pertinent, and, in my judgment, expresses a legal restriction which controls homestead and loan associations in selecting the locality in which they may do business:

"It is universally conceded, because attested by the experience of ages, that the stability and durability of government and the happiness and well-being of society are best secured when the bulk of the property is in the hands of the many, owned and controlled by the subordinate holders of power. Home-owners are the strength and bulwark of the commonwealth, and as homestead associations are doing more than all

other factors to make men frugal, industrious and saving, and as a consequent building up a stable and loyal citizenship, they ought to be regarded by those who make and enforce the laws as peculiarly under the fostering care and paternal solicitude of the State.

These associations were local in their origin, their membership being confined to a particular societyor guild, and their aims and ultimate ends the procurement of homes for their members. It never was their aim or purpose to branch out beyond the confines of the town or hamlet in which the members resided, or to embark in speculations of a pecuniary character endangering the safety of the investment of these members."

This undoubtedly expresses the origin and the purpose of building and loan associations, and the laws in force in the State of Illinois relating to and governing such associations contain nothing which would justify an inference that such an association has a right to extend its business to other localities than the locality of its creation. It is important that the Court give expression to its opinion upon this question in order that if the contention of The People in this case be the law, the great misfortunes which have befallan similar associations by reason of extending their business beyond the locality to which they are by operation of law confined may be avoided in the future.

It is insisted by the information that building and loan associations are not authorized to lend money excepting for the purpose of improving and procuring homesteads. This is the object and purpose of the law. It was not intended to give

capital an opportunity to invest surplus money, and the purpose of the law cannot be extended to accommodate and subserve the purpose of the wealthy. While there is no restriction upon the right of any individual to become a member of such associations, yet it is undoubtedly true that the spirit and the purpose of the law confines associations in lending money to making loans to individuals who are desirous of procuring for themselves homesteads or for the purpose of improving the same. It is denied that an association has authority under the law to lend money for any other purpose.

The information charges that this Association loaned money to different shareholders for other purposes, and that the money so borrowed was invested in the erection of business blocks and for speculative purposes, and it is insisted by the State that much of the misfortune which has befallen this Association is directly traceable to such unauthorized loans. It was insisted by the Association, on the argument of the demurrer, that it had a right to lend its money to any stockholder who might apply for the same and comply with the requirements of the Association regulating loans. It was said that the law does not require an association to inquire of a borrower as to how he proposed to invest the money.

In support of its contention that it had a right to lend money for other than the purpose of building and improving homesteads, it cited the case of Kadish et al. v. G. C. E. L. & B. Assn. et al., 151 Ill., 531, as holding that there is no express prohibition in the statute against corporations becoming members of homestead and loan associations, or against such associations loaning money for other than building purposes. This

case does not establish or announce such a doctrine as between The People and the corporation. It goes no further than to assert that where a homestead and loan association had made a loan to two of its members for the use of a brewing company, which gave its deed of trust to the association to secure the loan, there being no fraud in the loan and nothing to mislead the parties in whose names the loan was made, that as the brewing company could not avoid its deed of trust under the plea of *ultra vires*, such parties were also estopped from availing of the defense and that the deed of trust might be foreclosed as against them and other creditors of the brewing company having notice of the rights of the loan association. Throughout the opinion in this case the Court confines itself in every statement and in every citation to the facts upon which the case was submitted, and carefully avoids giving any expression to the right of such an association to make such loans where its right to do so is called in question by The People. This is manifest from the closing paragraph of the opinion, commencing on page 539, which is as follows:

"The question as to whether, under a proper construction of our statute, corporations for manufacturing purposes should be allowed to become members of homestead loan associations and whether such association should be allowed to loan money for general business purposes are very important ones, but the decision of them not being necessary to the determination of this case, we have purposely avoided deciding them."

It is thus apparent that the question has not been decided by the Supreme Court of this State, and that the authority cited by defendant upon the argument of this demurrer does not es-

tablish the right of an Association to lend money for general business purposes, but only that where an Association has made such a loan the individual cannot, when the Association seeks to enforce its contract by foreclosure or otherwiss, set up the doctrine of *ultra vires*. It does not, however, hold that the people may not insist that it has no right to engage in such business; and the language just quoted from said opinion is significant of the duty of the People where associations assume to make such loans, in this that the Court raises a question as to whether such Associations should be allowed to make such loans. Allowed by whom? By the authority which conferred its powers upon it, recognizing the right of some power to control its action in this regard. This power is the State. The doctrine of *ultra vires* has two phases. These two phases are explicitely set forth in the case Higgins v. Lansingh, 154 Ill., page 301. In the opinion, on page 392, Judge Carter said in referring to the opinion in Kent v. Quick-Silver Mining Co., 78 N. Y., 159: "That the application of the doctrine of *ultra vires* has two phases: one in which the public is concerned and the other which concerns the company and its stockholders only; that as to the first the assent of the stockholders to the unauthorized act is of no avail, but that when it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholders may in many cases be denied on the ground of his express assent or his intelligent, though tacit, consent to the corporate action."

Here the distinction between the two phases of acts which are *ultra vires* is distinctly drawn, and in this case the first phase is important because it is the creator which seeks to restrain

such associations in the transaction of business and the lending of money to the powers which they may rightfully enjoy under the law.

The only other case cited by defendant in support of its contention that it had a right to make loans for ordinary business purposes to its members was the case of Junita Building & Loan Association v. Mixell, 84 Pa., 315. This case, like the case of Kadish, et al., v. G. C. E. L. & B. Assn., et al., supra, was decided under what Judge Carter termed the second phase of *ultra vires* acts, and is therefore no authority in support of defendant's contention.

When we consider the scope of the organization of such associations, we cannot but reach a conclusion that the purpose and object of this law does not extend beyond the procurement of homesteads, and that in lending money paid into it by shareholders, it becomes the duty of the Association to inquire into the purpose for which a loan is sought.

It is provided by section 1 of the Act relating to building, loan and homestead associations "that whenever any number of persons not less than five may desire to become incorporated as a mutual building, loan and homestead association for the purpose of building and improving homesteads and loaning money to the members thereof only" they shall make a certain statement and do certain things required by the residue of said section and other sections of the Act. The sole and only purpose expressed in the Act as a reason for the creation of such corporations is the building and improving of homesteads. The lending of money to the members thereof is but a means to the end; in other words, it is by lending money collected from

month to month to its shareholders that they may be enabled to build and improve homesteads. This idea cannot be more plainly and forcibly conveyed than by the following illustration: Two members of a building and loan association are desirous of procuring a loan of $1,000 each. One desires to build or improve a homestead, and the other to erect a store room. The association has in its treasury only $1,000 for the purpose of being loaned. It is apparent, from a consideration of the scope and the purpose of the organization of such associations, that there would be absolutely no power to lend the money to the member who desires to build a store-room. The association would have no election in the matter. It would be its plain duty to lend the money to the member who desired it for the purpose of building or improving a homestead. If this conclusion be correct it follows that the object of lending money by such associations is to build and improve homesteads, and for no other purpose. Members who desire to borrow money for the purpose of speculation are not entitled to loans for such purpose, but the association must lend it to its members who desire to use the same for the purpose expressed in the statute, and in harmony with the spirit of the law.

It is therefore insisted by the People that the lending of money for speculative purposes, and business investments, by Loan Associations, is an *ultra vires* act upon their part, and that the State has a right to insist that Associations organized under its laws shall not violate the law in this particular. And it is further insisted by the People that the defendant is in error when it insists that this is a matter in which the People

of the State of Illinois have no right to interfere. It is the duty of the People of this State to protect those whom this law was intended to benefit, and by its supervision to confine such Associations to its spirit and plain provisions.

The duty of the State to see to it that such Associations are carefully supervised and inspected and confined to the legitimate purpose of their creation, is so aptly stated in an opinion by Judge Grosscup in Towle v. American Building Loan & Investment Society, 60 Fed. Rep., page 131, that I cannot refrain from quoting the same here, from page 136 of the opinion:

"The Building Associations of Illinois have become institutions of great magnitude and consequence. They are practically savings institutions, and invite the deposit of large numbers of people whose frugality enables and whose forethought impels them to lay by a store for the future. These are at once among the most deserving of our citizens and the least skilled in ascertaining a safe depository for their savings. Seventy million dollars have thus already been gathered into the hands of these socities. I know of no institutions, except perhaps savings banks, that have a greater title to be regarded as quasi public institutions. I know of no institutions that ought to be regulated and inspected with greater care and subjected to more rigid scruntity than these treasuries of the poor. The officers of these institutions carry a great trust, and ought when derelict, especially when intentionally derelict, to be subjected to instant and severe punishment. The State ought to watch them with a vigilant eye to see that cupidity or treachery do not succeed, or if they do succeed, are speedily corrected. I regard the recent legislation of this State as a beneficent step in that

direction. The Auditor of Public Accounts and the Attorney General are thereby created public agents to see that no harm or wrong creeps into these institutions of the People, and to seize and close them up the moment any malfeasance appears. It would be intolerable to throw any obstacle in the way of these officers of the public or to deprive them of a potent voice in the selection of the agents intended to carry out these purposes. There is not one but many of these societies whose affairs have become honeycombed with maladministration."

When we realize the fact that the history of such Associations confirms the assertion that the great misfortunes which have befallen them is largely confined to National Associations lending money in almost all the States of the Union for any and all purposes, speculation, business and procuring homesteads as well, and that their misfortunes are directly tracable to improper and careless loans, the State insists that it would be a great misfortune for the Court to hold in the absence of an express power conferred by the statute upon such Associations, that they may either do business outside of the reasonable locality in which they are respectively created, or lend money for other purposes than the purposes of procuring and building homesteads. Where a doubt exists as to the power of a corporation to do a certain act in a proceeding between the corporation and the State, calling that power in question, it is fundamental that the right to exercise such power is resolved in favor of the public and against the corporation. It was said by the Court in an able opinion in Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. st., 339, that there never was a doubtful charter; that to be in doubt is to be resolved; that if a

corporation claims a power it must be able to show that power in its charter or in the laws of its creation, and that nothing but plain English will answer the purpose.

If the contention of the People be correct regarding the propositions that building, loan and homestead associations must confine their operations to the reasonable locality in which they are respectively organized, and that in lending money they have no power to do so for any other purposes than that of building and improving homesteads, it follows that any association engaging in one or both of these illegal practices, and insisting upon a right to continue therein, and refusing to comply with the law in this particular, is liable to a forfeiture of its charter, regardless of any other consideration. If the contention of the People in this regard be the law, the information upon these two charges is sufficient, without considering anything else, and will warrant and justify a forfeiture of the defendant's charter.

It was said by the defendant in argument below, and doubtless will be repeated here, that the right of such an association to do a notional business was not assigned as one of the llegal practices in which the defendant had engaged in the notice sent to it by the Auditor of Public Accounts, and that the People cannot, therefore, be heard to insist upon the charge of the information based thereon.

The law confers upon equity jurisdiction to forfeit the charter of snch associations in proper cases, at the suit of the Attorney General. When this jurisdiction is invoked by the Attorney General he has the right to insist upon the conditions of each case as they actually exist, and where such asso-

ciations are guilty of *ultra vires* acts the Attorney General would be derelict in his duty if he failed to direct the attention of the Court to such *ultra vires* acts, and to invoke the assistance of the Court in suppressing them. The power of the Attorney General to proceed against such associations in chancery, jurisdiction having been conferred upon chancery by law, is not confined to the simple statutory proceedings designated in the act relating to building, loan and homestead associations.

In Chicago Mutual Life Indemnity Ass. et al. v. Hunt, 127 Ill., page 257, a case heard and decided upon a statute very similar to this, but relating to the business of life insurance, the Court used the following language:

"We are of the opinion that the power of the Attorney General to file the information in no way depended upon the communication made to him by the Auditor, but came within the purview of those powers which are inherent in his office. See Hunt v. Chicago Horse and Dummy Railway Co., 20 Ill. App., 282; same case, 121 Ill., 638. The section of the statute under consideration conferred no new powers upon him, but vested the Auditor with the supervision of associations organized under the statute, and made it the duty of the Attorney General to take proper legal proceedings whenever the Auditor should communicate to him the fact that an association or its officers had so conducted as to give occasion for the removal of the officers from their offices, or the closing of the business of the association."

It is, therefore, undoubtedly the law that in a case like the one at bar, where an information is filed in chancery, under a notice given by the Auditor of Public Accounts to the association, that acts which are plainly *ultra vires* upon the part of the association, as between the association and the People, may be included within the information with perfect propriety, and without injustice to the association itself.

I therefore insist that if my view of the law upon this subject is correct, said association should be ousted of its franchise by reason of these violations, without regard to its financial condition, which constitutes a separate and distinct charge.

THE AMENDED BY-LAW.

The second clause of the notice sent by the Auditor to the officers of defendant Association, on October 24th, 1895, is as follows:

"2. That it attempts, under cover of an amendment to its charter, to change its existing contracts with shareholders in such manner as to deprive such shareholders of large amounts due them, by the terms of the contract so attempted to be changed, without the assent and against the protest of such shareholders, thereby injuring the reputation of said association for fair dealing, and constituting an unsafe and illegal manner of doing business."

This clause of the notice deals with and refers to an amendment made by the Association, or, rather by a majority of its shareholders, to a by-law which contained and set forth the conditions upon which members might withdraw from it, and which by-law, prior to said amendment was, and had been in

force from the time the Association was incorporated and commenced doing business. The original by-law, as it existed prior to the 15th day of January, 1895, was as follows:

"Section 21. Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving the secretary 30 days' notice of such desire. The board of directors shall refund to such withdrawing members all that they have paid into the Association, except membership fees and fines: *Provided,* that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of withdrawing shareholders without the consent of the board of directors. Such withdrawing members shall be entitled to receive interest on the installments of stock paid in by them as follows:

On stock 1 to 2 years old, 6 per cent. per annum.

On stock 2 to 3 years old, 7 per cent. per annum.

On stock 3 years old or over, 8 per cent. per annum.

Interest to be computed for the average time the money has been in use by the Association, but no interest will be paid on installments paid on stock after application is made to withdraw."

On the 15th day of January, 1895, a majority of the shareholders of the Association amended said by-law.

As amended it reads as follows:

"Section 21. Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving 30 days' notice of such desire. The board of directors shall refund to such withdrawing members all that they have paid in to the Association, except membership fees and fines and their proportionate share of expenses, to be determined by reference

to the Association's books at the closing of the same last preceding the date of the receipt of the application to withdraw, and such fees, fines and expenses are hereby declared to be charges and liens upon the members' stock: *Provided*, that at no time shall more than one-half of the funds of the treasury or the corporation be applicable to the demands of withdrawing shareholders without the consent of the board of directors. Such withdrawing members shall be entitled to receive interest on the installments of stock paid in by them as follows:

On stock 1 to 2 years old, 6 per cent. per annum.

On stock 2 to 3 years old, 7 per cent. per annum.

On stock 3 years old or over, 8 per cent. per annum.

Interest to be computed for the average time the money has been in use by the Association, but no interest will be paid on installments paid on stock after application is made to withdraw."

The question is suggested upon this original by-law and its amendment whether shareholders who did not vote for the amendment and who have not consented thereto, and whether withdrawing shareholders whose withdrawal applications had been on file with the secretary of said Association for many months prior to the amendment and had not been paid, are affected by the provisions of said amendment.

For a proper determination of this question it is material to enquire what is the status of a member of an association of this kind. What rights and interests has he in the association, and when is it he may be bound by a by-law materially changing a former one? An association of this kind is denominated a corporation for pecuniary profit; it is what is called a private corporation, but one which, I think, is quasi public in its

character. As I have said, it is one organized for pecuniary profit; it loans money to its members, and when they desire a loan, and when it does so, exorbitant interest is paid by them for the forbearance of the money so borrowed. When a person becomes a member of such an association he enters into a contract with it. The rights which that contract gives him are vested ones, and cannot be divested without his consent.

The law provides that these corporations may enact by-laws and amend the same, but such by-laws or amendments thereto cannot change or impair a vested right already existing in a shareholder. What then were the rights of a member who desired to withdraw from this association prior to the 15th of January, 1895? The law gave him the right to withdraw at any time; that was as much a part of his contract as the right to become a member. In other words; he had a right to withdraw princisely as he had a right to become a member of the association. I repeat then, what was a withdrawing member's rights prior to the 15th of January, 1895? The association had contracted with him that when withdrawing his shares of stock the board of directors should pay to him all he had paid into the association, together with six per cent. interest thereon on stock from one to two years old, seven per cent. interest on stock from two to three years old, and eight per cent. interest on stock from three to eight years old or over, always excepting membership fees and fines.

The status of such a member on and after the 15th of January was materially changed, and to the detriment of such member.

The amended by-law provided that he would receive from the association only the principal and interest, as above designated, less fees, fines and expenses, and those were declared by such amendment to be charges and liens upon such withdrawing member's stock.

When the contract was entered into prior to the amendment above referred to the query arises, was it valid in its entirety, and one which the association could enter into with such member? I apprehend that the most casual reading of the statute creating associations of this kind will convince any person that the contract was one which the association had lawful authority to enter into with a person desiring to become a member of it. There is nothing in the law to prohibit it, and when the association entered into it, I apprehend its officers and directors knew what they were doing, and assured the risks attendant upon it. They evidently believed that the periodical installments, membership fees, fines and other moneys that might come to it from the member would be sufficient at any period of time that the member saw fit to withdraw to pay him the amount of the principal, together with the interest above referred to, less fines and membership fees, and that the earnings of the moneys so paid to it would leave a balance, after the payment of such moneys to the withdrawing member, to defray his pro rata share of the expenses of the association. They certainly must have contemplated a condition of affairs like unto this. The association, through its officers and directors, voluntarily entered into it, and can they now be heard to disavow it, and say, that in addition thereto the pro rata share of the expenses of the association must also be deducted therefrom? Suppose that the

money already paid in by a withdrawing member has earned enough, and brought into its treasury, an amount equal to the principal sum and interest above referred to, and also an amount to pay his pro rata share of the expenses of this association, or even more than that, is he now to be again charged with a like amount for his pro rata expense, as may be determined upon by this association? If so, a second and additional amount is being exacted without authority of law. If, on the other hand, the amount paid by the member has only earned sufficient to pay the principal and the interest under this contract, then the amount of the expenses is simply lost to the association, but that was a part of its contract, and it, like other persons, must be bound by contracts. Suppose that the moneys paid in by this member have not earned enough to pay back the principal sum paid in by him, will it be said that this association, pretending to be solvent and capable of discharging its honest obligations, can violate this contract, and say: "I will only pay you on withdrawal one-half of the money, or any other aliquot part thereof, which you have paid in." I think not.

If the Association is insolvent, and its assets are about to be distributed between withdrawing and non-withdrawing members an entirely different question may arise; in the latter case I have no doubt but there would be no preference between a withdrawing and a non-withdrawing member.

I think that when this Association engaged with a person to become a member thereof, and entered into a contract with him, receiving his money and issuing stock to him, and the law being that he had a right te withdraw therefrom at any time he saw fit after giving thirty days' notice, that he has from the

very moment of the entering into that contract such a vested interest in it that one party to it could not violate or impair it in any respect.

The amendment to this by-law was submitted to me, as Attorney General, under the provisions of the law, which requires such Associations to submit for the approval of the Attorney General all the by-laws which they may adopt. The by-law was approved, but no question arose as to its application to shareholders who had filed their withdrawal applications prior to its adoption, or to shareholders who refused to assent thereto; and I am of the opinion that the amended by-law, while it may be valid and binding as to future members, cannot be construed to be applicable to or a lien upon the stock of withdrawing members who have not assented thereto, and who had subsisting vested rights in said Association prior to the 15th day of January, 1895. I believe that such shareholders have a right to demand the full performance of their respective contracts; that is, to receive in withdrawals the principal sum paid in, together with the interest as provided in the by-laws, less fines and membership fees.

In the argument of this question the attorneys for the Association applied to the adoption of this amended by-law, the law as applicable to similar actions taken by the ordinary business corporation. They cited many authorities, including Morawetz on Private Corporations, Angell & Ames on Corporations and Cook on Stockholders, to the effect that where an act is to be performed by the stockholders of a corporation a majority of those who appear may act. This is undoubtedly true of the ordinary business corporation, and may be true of these Asso-

ciations in so far as the action does not violate a vested right, or the terms of an executed contract; and in this case in so far as the action taken by a majority of shareholders does not violate a vested right, or the terms of an executed or subsisting contract, such action may be valid.

It was contended by counsel for defendant Association that in the determination of this question much depended upon the position which a withdrawing shareholder occupies with reference to his association, upon the expiration of the thirty days' notice required by the law to be filed by all withdrawing shareholders. I presume that they will urge the same theory here. It was insisted that such withdrawing shareholders are not creditors of the association in the true sense of the word, and that therefore my position was not tenable. From this I infer that it is admitted that if such withdrawing shareholders are in the true sense of the term creditors of such an association upon the expiration of the thirty days' withdrawal notice, my contention would be proper and the amended by-law would not control the amount which defendant association should pay upon such withdrawals. In my judgment this view raises a distinction without a difference. Much authority was cited, and probably will be cited here, to the effect that such withdrawing shareholders cannot maintain an action against such an association, upon the expiration of the period of notice. These authorities were from courts of other States, and the opinions based upon laws which were, in many respects, unlike our own. So far as I am advised the question has not been decided by our own Court.

Let us examine the statute which provides for the withdrawal of shareholders. The law relating to withdrawals is found in section 6 of the Act, wherein it is provided that "any stockholder wishing to withdraw from the said corporation shall have power to do so by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such interest thereon, or such proportion of the profits thereon, as the by-laws may determine, less all fines and other charges: *provided*, that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of withdrawing stockholders, without the consent of the board of directors, and that no stockholder shall be entitled to withdrawal whose stock is held in pledge for security."

The power to withdraw is vested in the shareholder and the law designates what he shall do. If he desires to withdraw and files the notice required by this section of the statute the law provides that upon the expiration of the thirty days he shall be entitled to receive the amount paid in by him or her, less fines and other charges. No action is required to be taken by the association in order that a shareholder may be permitted to withdraw. His right to withdraw is entirely within his own breast and is a personal privilege assured to him by the law which the association, as such, has no power to stay. When he files his withdrawal application he has exercised a privilege assured to him by the statute; and if he does not withdraw his withdrawal application, but permits it to remain of file for thirty days after filing it, he is no longer a member of the association. By his own action, and by operation of law,

he has passed out of the association; and by operation of law he is entitled to receive the money which he has paid into the association, less fines and other charges. The fact that a proviso in the statute declares that at no time shall more than one-half of the funds of the treasury of the association be applicable to the demands of withdrawing stockholders without the consent of the board of directors, does not change the position of the withdrawing shareholders. It certainly is not the law that in such cases an association can by a majority of its shareholders change vested rights and vary the terms of subsisting contracts, to the injury of the person who has performed the contract upon his part, and has exercised his privilege of withdrawing and put himself in a position, in the language of the statute, "to receive from the association the amount paid in by him or her." The statute does not say he may receive, but that he shall receive. The language is emphatic, is expressive, and is not ambiguous.

I therefore insist that in the determination of this demurrer this by-law cannot be so extended as to take from withdrawing shareholders money to which by their contracts and by their acts of withdrawal, they are entitled to receive. The fact that it is so earnestly insisted by defendant association that the by-law, as amended, is operative not only as against the shares of stock of shareholders who participated in its enactment, but equally against the shares of stock of constant shareholders who protested against its adoption and the shareholders who have withdrawn therefrom, is suggestive that its financial condition is not such as to enable it to pay back to its shareholders the money which they respectively paid in, less fines and other

charges; this is clearly required of all such associations by Section 6 of the act and less will not satisfy the law. It is difficult to understand how a majority, or all, of the shareholders of an association can vary this positive provision of law. In my judgment they cannot do so, and an association that cannot return to its shareholders the amount that the statute says such associations must return, viz: the amount which its shareholders have paid in, less fines and other charges, cannot be heard to say that its financial condition is such as to justify a further continuance of business by it.

In this connection the attention of the Court is directed to the fact that the report of the supplemental examination of the Association shows that it refused to comply with the requirement of the Auditor that it settled with withdrawing shareholders under the provisions of the by-laws relating to withdrawals as they stood prior to the 15th day of January, 1895, but continued to enforce the amended by-laws against withdrawing shareholders and against their earnest protestations. If my position as to the law be correct, this action upon the part of this Association is without warrant or authority and requires a forfeiture of its charter.

THE FINANCIAL CONDITION OF THE ASSOCIATION.

The information charges that on the morning of April 6, 1895, the association held mortgages upon real estate, securing eight hundred and ninety-four loans made by it, representing to said Association $598,547.69; that of these loans thirty-three, amounting to $32,775.00, were paid in advance; that two hundred and forty-one of these loans, amounting to $166,480.81, were paid to

date; and that six hundred and twenty of them, amounting to $409,291.88, were delinquent; that the delinquency upon said loans represented the interest and charges due thereon to the Association for periods of time running from one to twenty-seven months; that a very large proportion of the delinquent loans were made upon security entirely inadequate, and that upon a foreclosure of the mortgages given to secure said loans the Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

That on the morning of the said day the Association was the owner of ninety-one pieces of real estate, nearly if not all of which it had been forced to accept in satisfaction of unproductive loans, and said real estate has remained an unproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are diminished in value; that these ninety-one pieces of real estate were given as security to the Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive on the part of the borrowers to pay the interest and other charges accruing to the Association by reason of said loans, and that said loans represent to the Association at the present time the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by the Association, in satisfaction of said debts, the Association is deriving an income from only thirty-seven thereof, and that the remaining pieces of said real estate are entirely unproductive; and that the in-

come which the association realizes from said thirty-seven pieces of real estate amounts only to the sum of $273.72 per month.

That by reason of the unsafe methods in the investment of the funds of the Association it has been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other states, and that the Association will ultimately be compelled to accept said properties in discharge of the debt to the Association, which said pieces of property were, respectively, mortgaged to secure; that at the time said foreclosure proceedings were respectively brought, there was due said Association, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional charges against said real estate; that the foreclosure of said mortgages will entail a large expense to the Association in attorney's fees, costs of proceedings in court, and the necessary expense incident thereof, which costs, added to the principal, interest and premiums due the Association by reason of said loans, will exceed the aggregate of the amounts loaned by the Association by the sum of many thousands of dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association are diminished, and the value of the shares of stock issued by said Association are correspondingly diminished.

That the Association is insolvent, and that its assets are not sufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it

has sustained, by reason of losses upon loans, a loss of $121,-895.71; and that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14; and that its total liabilities amount to the sum of $1,332,603.70; and that its total liabilities exceed its total assets by the sum of $65,635.13. That the condition of said Association requires its dissolution and a forfeiture of its corporate right to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

The demurrer admits these facts to be true. Upon these facts, therefore, the question arises, are the assets of defendant Association sufficient to justify a continuance of business by it. It is provided by the Act relating to Building, Loan and Homestead Associations, that a member may withdraw from such Association by filing a withdrawal notice, and that upon the expiration of thirty days from the date of such notice, he shall be entitled to receive the amount paid in by him, together with interest thereon, or such proportion of the profits, as the by-laws may determine, less all fines and other charges. It was held by Judge Grosscup in the case of Towle v. American Building Loan & Investment Society, 61 Fed. Rep., 446, that an Association is not in such a financial condition as to justify a continuance of business by it when it cannot pay back to its shareholders, dollar for dollar, less fines and proper charges, the amount of money paid into the Association by them. This, then, fairly interprets the meaning of the statute providing that if the financial condition of an Association is not such as to justify a continuance of business by it, the Auditor shall give notice to that effect, and upon a failure of the Association

to make its assets sufficient, within a period of sixty days, he shall report it to the Attorney General, whose duty it shall be to proceed against it in chancery for its dissolution, and the distribution of its assets. The fact that defendant Association seeks to avoid the re-payment to its shareholders of the amounts which they have respectively paid to it through the provisions of the amended by-law is a confession that it is unable to comply with this positive provision of the statute. In view of the history of this Association, and the foregoing facts concerning its financial condition admitted by the demurrer, it is undoubtedly true that the adoption of said by-law was intended to enable it to settle with withdrawing stockholders for less amounts than they respectively paid to said Association, in direct violation of the law. When an Association thus seeks to escape its legal liability to its withdrawing shareholders, it thereby confesses the weakness of its financial condition, and admits that it has arrived at a period in its history when it can no longer conform to and comply with the requirements of the law.

It is charged in the information, as stated hereinbefore, that the total liabilities of defendant Association are $65,635.13 greater than its total assets. This fact is admitted by the demurrer. It is also apparent from a consideration of the foregoing facts relating to its financial condition, which facts are admitted to be true, that a very large proportion of the assets of said Association are unproductive; that it has been compelled to foreclose many mortgages and to protect itself has purchased the property mortgaged to it as security for loans; that a large proportion of said property is unproductive and idle in its hands; that

it has paid out large sums of money as costs and attorneys' fees in connection with the foreclosure of such mortgages; that the total amount of moneys so paid out stands charged to its real estate account and increases by that amount the cost of said real estate to said Association; and that a very large proportion of all its outstanding loans are in arrears for interest and dues for periods of time running from one to twenty-seven months. In addition to this condition it must be remembered that the information charges, and the demurrer admits its truth, that a very large proportion of its shareholders have filed withdrawal notices and that it is in arrears in settling with such withdrawing shareholders for a period of six months. It is alleged that its shareholders have lost confidence in its ability to maintain itself and on that account its shareholders were continuing to file withdrawal applications at the time the supplemental examination was being conducted.

Upon a consideration of this condition it requires no argument to establish the fact that the assets of this Association are not such as to justify a continuance of business by it.

The foregoing facts justify this proceeding. The charges contained in the information are explicit and properly stated. We respectfully submit, therefore, that the court erred in sustaining the demurrer to the information and dismissing the same.

M. T. MOLONEY,
Attorney General.

T. J. SCOFIELD AND
M. L. NEWELL,
Of Counsel.

IN THE

SUPREME COURT

CENTRAL GRAND DIVISION.

STATE OF ILLINOIS.

JUNE TERM, 1896.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL., DAVID GORE, *Auditor, etc.*

vs.

THE NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

BRIEF AND ARGUMENT.

M. T. MOLONEY, *Attorney General.*

T. J. SCOFIELD AND
M. L. NEWELL, *Of Counsel.*

SPRINGFIELD, ILL.,
ED. F. HARTMAN, STATE PRINTER.
1896.

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THE NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appeal from the Circuit Court of McLean County.

BRIEF AND ARGUMENT.

May it Please the Court:

The National Home Building and Loan Association, of Bloomington, Illinois, was organized under the laws of the State of Illinois, and was authorized to do business on the 11th day of January, A. D. 1890. By virtue of its authority it commenced business as a building and loan association, and in accordance with the requirements of its charter, maintained its principal office at the city of Bloomington, in McLean county.

Pursuant to the law which requires the Auditor of Public Accounts to examine into the affairs and financial condition of building and loan associations organized under the laws of Illinois, the Auditor conducted an examination of said National Home Building and Loan Association. Upon the examination it was found that said Association had been guilty of illegal practices, the result of which had so far reduced the value of its assets and securities that its financial condition was such as to no longer justify a continuance of business by it. Upon the completion of said examination, and in accordance with the requirements of the law in such cases, the Auditor, on the 24th day of October, 1895, mailed a notice to the president and secretary of said association, setting forth its condition and the causes which gave rise thereto, which said notice was in the words and figures following, to-wit:

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
BUILDING AND LOAN ASSOCIATION DEPARTMENT,
October 24, 1895.

"*To F. J. Fitzwilliam, President, and W. R. Fitzwilliam, Secretary of the National Home Building and Loan Association, of Bloomington, Illinois:*

"WHEREAS, It appears from an examination of the affairs of the National Home Building and Loan Association, of Bloomington, Illinois, that the said Association is conducting its business in an unsafe manner, and contrary to law, as follows, to-wit:

1. "That it attempts, under cover of amendment to its charter, to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due

them by the terms of the contract, so attempted to be changed, without the assent, and against the protest of such shareholders, thereby injuring the reputation of said Association for fair dealing, and constituting an unsafe and illegal manner of doing business.

2. "In that its secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

3. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the Association, to the great loss of its shareholders, and against the provisions of the law.

5. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made application to withdraw therefrom, and continue to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

6. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

7. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

8. "In that its loans have been selected with so little care that only a small per cent. of the charges thereon are regularly or promptly paid.

9. "In that compensation is paid to its president, contrary to the provisions of the statute.

10. "In that its assets are insufficient to justify a continuance of business by it.

11. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate as proper, and largely in excess of what such Association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now, therefore, I, David Gore, Auditor of Public Accounts, do hereby notify you, the said F. J. Fitzwilliam, president, and W. R. Fitzwilliam, secretary, of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty days from the date hereof, I shall report the said National Home Building and Loan Association to the Attorney General, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

[SEAL] "DAVID GORE,

"Auditor of Public Accounts."

That thereafter, and on the 28th day of December, A. D. 1895, the Auditor of Public Accounts, for the purpose of ascertaining whether the Association had ceased its illegal practices, and placed its finances in a condition to justify a continuance of business by it, conducted a supplemental examination thereof. As a result of such examination he ascertained that the condition of said Association continued to be practically the same as on the 24th of October, 1895, and that its financial condition had not been improved in any respect, and was not such as to justify a continuance of business by it. It was further found that the amendment to the by-laws of the Association, referred to in the notice of October 24, 1895, and hereinafter referred to at length, still existed, and that the officers of the Association continued to insist upon its legality, and continued to settle with withdrawing shareholders in accordance with its provisions. It was further found, that although the officers of the Association agreed to discontinue many illegal practices, of which it had been guilty, such discontinuance could not affect its financial condition, and the Auditor therefore transmitted the examinations, and his conclusions thereon, to me, with a request that an information be filed against said Association, for the purpose of dissolving its charter, appointing a receiver to take charge of its assets, to collect moneys due it and distribute the same in accordance with the order of the Court. Accordingly on the 18th day of January, 1896, I filed an information in chancery against said Association, for the purpose of dissolving its charter, and distributing its assets. On the same day I took leave to amend the bill. The amended bill was filed on the 21st day of January, 1896. It appears in the ab-

stract of the record from pages 28 to 52 inclusive. To the amended bill the Association filed a demurrer, both general and special, and also a special plea to a part thereof. The demurrer to the information was heard and sustained by the Court. The People refused to amend the information, but abided by the same, and the Court thereupon entered a decree dismissing the information. From this decree an appeal was taken to this Court. The special plea filed related to its financial condition. The sufficiency of the information was disposed of upon the argument of the demurrer. The Court in sus'aining the demurrer, filed a written opinion. The following quotation from the opinion shows that the contentions of the respective parties were disposed of on the demurrer:

"To this bill the defendant has interposed a demurrer which challenges, either directly or indirectty, every allegation of the bill.

"The defendant also filed a plea which technically may waive one or two of the grounds of demurrer; but the Attorney-General does not insist upon this waiver, and asks that the sufficiency of the bill be determined on the demurrer, and in this opinion I shall not discuss or pass upon any of the questions involved in the plea, but shall confine myself solely to the sufficinncy of the bill."

THE INFORMATION.

The amended information sets forth the facts relating to the organization and examination of the condition of said Association, and recites the filing of the report of such examination in the office of the Auditor of Public Accounts. The informa-

tion contains a summary of the contents of said report, and the conclusions which the Auditor drew therefrom, and upon which he based the notice of October 24th, 1895, which notice is set forth in said information in *hec verba.* The information also alleges that a supplemental examination was conducted upon the expiration of the sixty days allowed by law to such associations to correct their impaired financial condition and to cease their illegal practices. It is alleged that the financial condition of said Association had not been materially changed during said sixty days.

Thereafter it is directly charged in said information as causes which led to its unsatisfactory financial condition that said Association has paid to its officers, agents and other individuals, salaries and for expenses alleged to have been incurred sums of money which greatly exceeded the value of the services rendered, and which were largely in excess of the amount which its earning capacity justified it in so expending, and that the extravagant expenditure of the money belonging to its stockholders had decreased the value of the shares of stock held by them. That the secretary of said Association, commencing with October 15th, 1894, received a salary of $7,000.00 per year, that said sum was in excess of the value of his services and that said Association paid a salary to its president which was not authorized or warranted by law. That said Association had loaned large sums of money upon security wholly inadequate, and had loaned money upon real estate already encumbered by prior liens not held by said Association, in direct violation of law. That the security given to said Association for many loans made by it was so inadequate that the borrower preferred to

part with his property rather than to pay his interest and dues, and that such loans were unproductive. That the investment of the moneys of said Association had been so carelessly managed and the security taken by it so wholly inadequate that only a small per cent. of the charges accruing upon its loans, from month to month, were regularly and promptly paid, and that such charges upon a very large per cent of its loans had not been collected by said Association, and had been permitted to accumulate until the unpaid aggregate was a very large sum of money.

That on the morning of April 6, 1895, said Association held mortgages upon real estate, securing eight hundred and nine-four loans made by it, representing to said Association $598,-547.69; that of these loans, thirty-three, amounting to $32,775.00 were paid in advance; that two hundred and forty-one of these loans amounting to $166,480.81 were paid to date, and six hundred and twenty of these loans, amounting to $409,291.88 were delinquent; that the delinquency upon said loans represented the interest and charges due thereon to said Association for periods of time running from one to twenty-seven months; that a very large proportion of said loans, so delinquent were made upon security entirely inadequate, and that upon a foreclosure of the mortgages given to secure said loans that said Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

That on the morning of the said 6th of April, 1895, said Association was the owner of ninety-one pieces of real estate, nearly if not all of which it had been forced to accept in satisfaction of unproductive loans, and said real estate has remained an unproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are diminished in value; that these ninety-one pieces of real estate were given as security to said Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive upon the part of the borrowers to pay the interest and other charges accruing to said Association by reason of said loans, and that said loans represent to said Association at the present time, the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by said Association, in satisfaction of said debts, the said Association is deriving an income from only thirty-seven thereof, and that the remaning pieces of said real estate are entirely unproductive; and that the income which said Association realized from said thirty-seven pieces of real estate amounted only to the sum of $273.72 per month.

That by reason of said unsafe methods in the investment of the funds of said Association it had been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other States, and that said Association will ultimately be compelled to accept said properties in discharge of the debt to said Association, which said pieces of property were, respectively, mortgaged to secure; that at the time said foreclosure proceedings were respectively brought, there was due said As-

sociation, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional charges against said real estate; that the foreclosure of said mortgages will, respectively, entail a large expense to said Association in attorney's fees, costs of proceedings in court and the necessary expense incidental thereto which said costs added to the principal, interest and premiums due said Association by reason of said loans will exceed the aggregate of the amounts loaned by said Association by the sum of many thousands of dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association have been diminished, and the value of the shares of stock issued by said Association have been correspondingly diminished.

That by reason of the fact that the Association had accepted second liens upon property, with first liens not held by the Association, it became necessary for it to buy said first liens, and that it did so, and was compelled in a number of instances to accept said property to its great financial loss and detriment. That it loaned large sums of money paid in by its stockholders to stockholders who did not intend to use the same, for the purpose of procuring or improving homesteads and that such moneys were not used by the borrowers for the purpose of buying and improving homesteads but were used for other purposes.

That it did business in nearly all the States of the Union, that its loans were scattered throughout said States and that

in doing business outside of the State of Illinois, and the reasonable territory around its principal place of business, it violated the spirit of the law of its creation

That prior to the 15th day of January, 1895, the by-laws of said Association concerning the withdrawal by its shareholders of the withdrawal value of shares of stock held by them, respectively, provided, among other things, that members whose shares of stock were not pledged to said Association might withdraw all or any part of their shares by giving the secretary thirty days' notice of their desire to do so, and that the board of directors should refund to such withdrawing members all that they had paid into such Association, excepting their membership fees and fines. That said by-laws further provided that withdrawing shareholders should be entitled to receive interest on installments of stock paid in by them as follows: On stock from one to two years old, six per cent. per annum; on stock two to three years old, seven per cent. per annum, and on stock three years old or over, eight per cent. per annum; that on or about the 15th day of January, A. D 1895, at a meeting of the shareholders of said Association, a majority of its share holders amended said by-law relating to the withdrawal value of its shares of stock, and in and by said amendment provided that the board of directors of said Association should refund to its withdrawing members all that they had respectively paid into said Association, except membership fees, fines and their respective proportionate shares of expenses, to be determined by reference to the Association's books at the closing of the same last preceding the date of the receipt of the withdrawal application, and said by-law declared such fees, fines and ex-

penses to be a lien upon the stock of each member. That it was further provided by said amendment that withdrawing members should be entitled to receive interest on the installments of stock paid in by them in accordance with the provisions of said amendment, which provisions were identical with the provisions of the old by-law relating to interest. That a large number of the shareholders of said Association protested against the adoption of said amendment on the ground that they had not consented to said amendment, and the enforcement of the same against them would be to violate the conditions of the contract entered into between them and said Association at the time they became members of said Association and purchased shares therein. That notwithstanding the fact that said Association cannot violate the rights of its shareholders so as to reduce the amount of money which they would be respectively entitled to receive under the provisions of the law, as they existed at the time the shares of stock were respectively issued without the consent of such members, nevertheless said Association has insisted, and still insists, upon forcing its withdrawing shareholders to accept the amounts of money which they are respectively entitled to, less their proportion of the expenses of said Association, in accordance with the provisions of said amended by-law. That said Association has refused to settle with withdrawing shareholders upon any other basis than that provided by said amended by-law, and has forced its withdrawing shareholders to accept the amount provided under and by virtue of said amended by-law, in full and complete satisfaction of all their claims against said Association; and that by reason

of the premises withdrawing shareholders have been made to suffer large financial loss, and that said Association in so forcing the effect of said by-law upon members who did not consent thereto, but who were opposed to the adoption of said amendment, violated its duty to such members, and withhheld from them amounts of money which said Association was not entitled to retain.

That the law requires such Associations to pay withdrawing stockholders the amounts due them within a period of thirty days after the filing of withdrawal notices. That large numbers of the shareholders of said Association filed applications of withdrawal, and that six months had elapsed from the expiration of said thirty days, and said shareholders still remained unpaid. That the Association in a number of instances discounted the claim of such withdrawing shareholders, and that its Secretary had such discounted shares assigned to himself or to a person or persons designated by him. That such conduct had shaken the confidence of its shareholders in the integrity of the Association and its ability to maintain itself by reason of the premises had been practically destroyed. That by reason of such loss of confidence its shareholders had filed and were at the date of said supplemental examination continuing to file large numbers of withdrawing applications and its further transaction of business was thereby rendered unprofitable to its shareholders. That the Secretary of said Association withdrew large amounts of money from the funds thereof, and appropriated the same to his own personal use, to an unnecessary and unjustifiable extent; that during the first three years of the history of said Association its Secretary withdrew from the

moneys paid into said Association by its shareholders, over $119,000.00. This amount was withdrawn under and by virtue of a by-law which permitted him to use five cents per share per month of fifty-five cent stock, and ten cents per share per month of one dollar and ten cent stock, for the purpose of an expense fund; that the Secretary assumed that amount to be intended for his personal use, and out of which to defray the expenses of the office at Bloomington, Illinois; out of this amount during said period he paid the rent, light, heat, expense of clerks and incidentals, and the books of said Association show that during the first three years of the history of said Association that the said $119,000.00 netted the said Secretary the sum of over $50,000.00; that during the first year it netted the said Secretary the sum of $11,622.56; the second year the sum of $18,439.07; and the third year the sum of $21,536.96. That this fund was not applied to the payment of expenses which accrued from time to time in the transaction of business by said Association in different parts of the State of Illinois and in the different states in which it transacted business; that upon the foreclosure of mortgages the attorneys' fees and costs were paid by said Association out of other funds than said expense fund, and was carried into the real estate account of said Association.

That said Association is insolvent and its assets are insufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained, by reason of losses upon loans, a loss of $121,895.71; that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14;

that its total liabilities amount to the sum of $1,332,603.70; that its total liabilities exceed its total assets by the sum of $65,635.13; and that the condition of said Association requires its dissolution and a forfeiture of its corporate right to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

The prayer of the information is in the usual form, and asks that the Association be enjoined from doing any business; that it be dissolved, its assets converted into cash, its debts paid, and the remainder thereof be distributed among its shareholders in accordance with law.

DEMURRER.

That on the 25th day of January said Association filed a demurrer to the information in words and figures following:

"This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, except that part charging insolvency any insufficiency of assets, generally and specially, and for causes of demurrer, shows to the court the following matters:

"1st. Because of all of the allegations in the bill beginning with the second paragraph on page 2 and including page 5 are repeated in substance on page 10, and the pages following; and some of said allegations are repeated three different times in the bill.

"2nd. That the allegations on page 3 and on page 11 of the bill, 'that said association has made loans of money illegally

in excess of the real estate mortgaged to secure the same, etc.,' is not included in the notice given by the Auditor to the officers of said association.

"3rd. That the allegations on page 4, 'that said association has issued shares of stock to persons residing at different places in the State of Illinois, and in different states in the United States of America, etc.,' is not included in the notice given by the Auditor to the officers of said association; and the doing of the same is not contrary to law.

"4th. That the allegations in the paragraph beginning on page 16 is not included in the notice given by the Auditor to said association.

"5th. That the notice given by a Auditor was wholly insufficient to apprise defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business.

"6th. That the only possible way of complying with many of the requirements of said notice was by making good any deficiency of assets that might exist, and the notice given did not state what amount, if any, was required to make the assets sufficient to justify a continuance of business.

"7th. The paragraph on page 10 does not show that any sums were unlawfully expended except that a salary was paid to the president, and the amended bill shows this requirement was complied with by the said association, nor is it alleged that said salary was paid to the president for services as president.

"8th. That the allegation on pages 11 and 14, that 'said association has made loans on previously incumbered real estate,' is wholly insufficient, in that it does not allege that such loans were so made knowingly, and that said allegation is set forth

three different times in the bill, nor is it alleged that it was a practice of said association to loan on encumbered real estate.

"9th. That the allegation on page 15, that 'said association has loaned money on real estate other than homesteads,' etc., does not show a violation of any law.

"10th. That the allegations in the paragraph beginning on page 17 show that the by-law complained of was legally passed, and is binding on all shareholders, and its constitution affects only those who are shareholders, and is a matter in which the State has no interest.

"11th. That by the amended bill it is admitted that all the requirements of the Auditor's notice were complied with in so far as it was possible for the association to comply with the same, except the requirement that the assets should be made sufficient to justify the continuance of business. It shows compliance with all matters except those affecting the rights of shareholders already in, and are matters in which the State has no interest.

"12th. That the allegation on page 20, that 'said association has not paid to its withdrawing shareholders the amount due them upon the expiration of a period of thirty days after notice was given,' is not a violation of any law.

"13th. That the further allegation on the same page 'that the secretary did discount the claims of some withdrawing shareholders, etc.,' is shown by the amendment to the bill to have been corrected within the sixty days, and it is not alleged that the said acts were done with the knowledge and consent of the said Association.

"14th. That the allegations contained in the paragraph beginning on page 21, do not charge any unlawful disbursements of the funds of said Association.

"15th. That the charging of the interest as a liability is unwarranted by law.

"16th. That part of the statute under which the Auditor's examination was made, and this proceeding is had, is unconstitutional.

"17th. That all of the complaints in the Auditor's notice, except those charging insolvency and a want of insufficient assets to justify a continuance of business, are not of such a character as to rightly concern the Auditor or the State.

"Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, as to so much thereof as before is set forth, this defendant demurs, and prays the judgment of this honorable Court whether it shall be compelled to make any further answer to such parts of the said bill so demurred to as aforesaid."

ALLEGED REPETITIONS.

The first special cause of demurrer is that the charges and complaints made against the defendant association are repeated in the bill. This objection is not well taken. The information contains no repetition of charges or grounds of complaint. It first sets out the allegations contained in the report of the examiners to the Auditor of Public Accounts. It is alleged that upon this report the Auditor gave the Association the notice set out in the information. And then the charges and complaints

found in the report are made against the Association by direct, positive and formal averments in the information, and it is in this connection that they are again found in the bill.

CONSTITUTIONALITY OF THE ACT.

The 16th special cause of demurrer is as follows: "That part of the statute, under which the Auditor's examination was made, and this proceeding had, is unconstitutional."

From an examination of the Acts relating to building, loan and homestead associations I am unable to discover anything which would suggest their unconstitutionality. The special cause, however, does not seem to relate to the Acts as a whole, but to only certain parts thereof. Having heard the arguments of counsel below, and similar arguments in other cases, I take it that it will be said that sections 16 and 17 are unconstitutianal. It is urged that section 16 confers power upon the Auditor of Public Accounts to make an examination of the books and papers of a corporation organized under this law, and that under the laws of Illinois the same power is not conferred upon the Auditor with relation to any other class of corporations, and therefore the Act is repugnant to the constitution as special legislation. This position is not tenable. Building and loan associations organized under the laws of Illinois are the objects of a special solicitude on the part of the State. The act was created in the interest of the poor to the end that they might become owners of homesteads. To prevent a diversion of their funds from the purpose which they are intended to subserve the power of visitation and examination was conferred upon the Auditor. This power is the power so aptly approved and commended by Judge

Grosscup in the opinion in Towle v. American Building, Loan & Investment Society referred to and quoted from at length hereafter.

It is unnecessary, however, to discuss at length the question of the right of the state to confer the power of visitation and examination upon the Auditor, as is done by this Act, for the question has been settled by the Supreme Court of this State, in upholding and affirming to be constitutional the laws of Illinois relating to mutual benefit societies, which contain provisions very similar to sections 16 and 17 of this Act. These insurance laws provide for a visitation by the Auditor and an examination of the condition of such societies and a report to the Attorney General based thereon, and for action by the Attorney General; in chancery, in certain contingencies, and the Supreme Court of Illinois has said that said Act is constitutional.

Ward v. Farwell et al., 97 Ill., 594;
Hunt v. Chicago Mutual Life Indemnity Ass.: 127 Ill., 257;
Chicago Life Ins. Co. v. Auditor, 101 Ill., 86.

The Supreme Court has also held that where the power conferred upon questions of practice is applicable to all in a particular class, the act conferring such power is not special legislation, and is not unconstitutional on that account.

Chicago Life Ins. Co. v. Auditor, 101 Ill., 87;
People v. Harper, et al., 91 Ill., 369.

If it be said that section 16 of the act is a violation of article 2, section 6 of the constitution, which provides that, "the right of the people to be secure in their persons, houses, papers

and effects against unreasonable searches shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized," it must be remembered that this section of the constitution has application to proceedings for the suppression of crime, or the detection and punishment of criminals. Only such searches as are instituted and pursued upon the complaint of or suggestion of a party to a litigation into the house or possessions of another, in order to secure a personal advantage, and not with a design to afford aid in the administration of justice, are held to be unreasonable. So far as our own courts have discussed this section of the constitution, it has been in relation to violations and enforcements of penal laws.

Meyers v. The People, 67 Ill., 303;
Housh v. The People, 75 Ill., 487;
Hawthorne v. The People, 109 Ill., 307.

The declaration of rights of the State of Massachusetts, Article XIV, is very similar to this section of our Constitution, and assures to all citizens of that State immunity from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. In discussing the provisions of this article, and the searches which may be reasonable under its provisions, the Supreme Court of Massachusetts, in the case of Robertson and another v. Richardson, 13 Gray 456, use the following language:

"Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere

private right; but their use was confined to cases of public prosecution instituted and pursued for the suppression of crime, or the detection and punishment of criminals. Even in those cases, if we may rely upon the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because, without them, felons and other malfactors would escape detection. Entick v. Carrington, 19 Howells' State Trials, 1067; 1st Chitty Criminal Law, 64. The principles upon which the legality of such warrants could be defended, and the use and purpose to which, by the common law, they were restricted, were well known to the framers of our Constitution. Commonwealth v. Dana, 2 Met. 336. Having this knowledge, it cannot be doubted that by the adoption of the fourteenth article of the declaration of rights, it was tended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants of that character to the general class of cases in and to the furtherance of the objects of which they had been recognized and allowed as justifiable and lawful processes, and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used, or to make them legal and available in the course or for the maintenance of civil proceedings. All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice, in reference to acts or

offenses in violation of penal laws, must be held to be unreasonable, and consequently, under our Constitution, unwarrantable, illegal and void."

The language here used is applicable to the State of Illinois. The provisions of the respective constitutions of the two States are practically the same. It cannot be said that the object of the examination of the condition of building and loan associations by the Auditor of Public Accounts is intended to gain or secure for the State any advantage for any purpose; but it is rather to see to the proper application and investment of moneys contributed by shareholders of such associations under the provisions of their respective by-laws and the laws of the State. Therefore, the examination provided for by said Section 16 is not in conflict with this provision of our Constitution. It may be added that the class of searches to which this section of the Constitution is applicable is such as may be made by the authority of warrants issued upon affidavits filed showing probable cause, and particularly describing the place to be searched, and the person or things to be seized. It may also with propriety be suggested that the examination which is conducted by the Auditor under the provisions of Section 16 is not in any sense of the word a seizure reasonable or unreasonable. The laws of this State relating to such associations and under which they are incorporated provide for the accumulation of funds to be invested for certain purposes, in certain ways, and upon certain securities. If the law is not conformed to in all these particulars the result may be disastrous to the financial interests of shareholders; and such examination as said section provides for is in the interest of the shareholders in order that they may

be advised of its exact condition. The right of the Auditor to make such examination under a proper law is well established in this State; and the legality of the laws which provide for such examinations has been uniformly upheld. The statutes relating to insurance companies and State banks organized under the laws of Illinois, contain similar provisions, and these laws have been uniformly upheld and declared to be constitutional. If it be said that insurance companies and State banks fall within the class of corporations sometimes denominated *quasi* public corporations and for that reason the State has a power of examination and visitation which it cannot extend to private corporations, it must be remembered that our own court and the courts of the United States have said, that banks, insurance companies and railroad companies are not *quasi* public corporations, and that while they owe duties to the public, and in the exercise of the powers conferred upon them by their respective charters must discharge those duties, they are nevertheless strictly private corporations.

Directors, etc. v. Houston, 71 Ill., 319;
Chicago Dock Co. v. Gar., 115 Ill., 166;
Dartmouth College v. Woodward, 4 Wheat., 668;
Osborne v. United States Bank, 9 Wheat., 738.

If it be said that by section 16 the Auditor of Public Accounts is allowed a compensation, in addition to and beyond his salary, to be paid by building and loan associations for such examinations, and that therefore said section is in conflict with article V, paragraph 3 of the constitution which prohibits the Auditor from receiving on his own account, or to his own use, any fees, costs, perquisites of office, or other compensation,

it must be remembered that in practice the Auditor of Public Accounts only receives for such examinations the actual expenses which he incurs in conducting the same. This is undoubtedly in accordance with the spirit and intention of this section of the law. Any attempt upon the part of the Auditor to collect compensation over and above the expenses necessarily incurred in said examinations would be a violation of the constitution and could not be tolerated; nor would such course upon his part find any justification in said section. It would seem to be the duty of an Association in settling with the Auditor for such an examination to pay to the Auditor his reasonable expenses and no more. If the Auditor, in his examination of defendant Association, charged for his services in connection with such examination an amount in excess of his actual expenses, the Association was under no legal obligation to pay the same. If, however, the Court should feel upon a consideration of this subject, that this portion of section 16 is unconstitutional, it must be remembered that it is the law of this State recognized in a long list of opinions, that where parts of a law conflict with the constitution, the entire act is not necessarily unconstitutional; but that if the unconstitutional portion is so disconnected from the remainder of the act that the constitutional portion may stand, without materially affecting the purpose of the entire act, the unconstitutional portion may be declared inoperative, and the remainder of the act stand; and this is true, although the constitutional and unconstitutional provisions may be contained in the same section.

Cooley's Const. Lim., 178;

Reid, et al v. Morton, 119 Ill., 118.

Republic Life Ins. Co. v. Swigert, 135 Ill., 160.

Wheeler v. P. I. Steel Co., 143 Ill., 197.

Where the power so conferred upan chancery is applicable to all in a particular class, it is not special legislation, and is therefore constitutional.

Chicago Life Ins. Co. v. Auditor, 101 Ill. 87.

This disposes of the constitutional question, in my judgment, so far as section 17 of the Act is concerned.

These two sections invest the auditor with power to examine building and Loan Associations in Illinois, for the purpose of ascertaining whether or not the assets of such associations are insufficient to justify their continuance of business, or whether they are conducting their business in whole or in part contrary to law, or in an unsafe manner. If, upon such examination, he believes that their assets are insufficient, or that they are conducting their business, in whole or in part, contrary to law or in an unsafe manner, by notice he suggests these facts to the association, and if upon the expiration of sixty days they have not conformed to his views, he reports the fact to the Attorney General, whose duty it is to proceed in chancery for the purpose of obtaining a judicial determination of the questions involved. Upon the presentation of the facts involved in each case, the Court then determines the question between the People and the association, and if upon this determination the Court is of the opinion that the interest of the shareholders and the laws of the State require a dissolution of its charter, a decree is entered accordingly, and the affairs of the association closed, and its assets distributed according to law.

Upon a consideration of these two sections they seem to be reasonable, just and eminently proper. They are in my judgment constitutional, and as Judge Grosscup has said, are in the interests of the shareholders of such associations, and they should be enforced and no obstructions thrown in the way of their execution under the directions of the public officers of the State.

Can an association do a national business or lend money for other than homestead purposes?

The information states that upon the supplemental examination the officers of said Association expressed a willingness to comply with the requirements of the Auditor, so far as the same related to illegal practices upon its part, but the 17th special ground of demurrer charges, that all of the complaints in the Auditor's notice, except those charging insolvency and a want of insufficient assets to justify a continuance of business are not of such a character as to rightly concern the Auditor or the State. The just inference from this special cause of demurrer is, that the State in the opinion of the Association has no right to insist that the Association cease the practices designated as illegal in the notice sent to it by the Auditor. Nearly all of the charges set forth in the notice mailed to said Association by the Auditor and declared by him to be illegal practices upon the part of the Association, by reason of the fact that they had respectively been practiced by the Association during its entire life, were directly responsible for its financial condition at the time the Auditor made the original and supplemental examination. It therefore follows that if the

financial condition of the Association is such as not to justify a continuance of business by it, although the Association should comply with the request of the Auditor that it cease said illegal practices, its financial condition would not be thereby improved; and it would nevertheless be the duty of the Court to decree its dissolution, and a distribution of its assets. Very many of the charges made by the Auditor are so apparently illegal that it will not be necessary to consider them with particularity. Others are of such a nature, when considered in connection with the history of building and loan associations of this State and in their consequences are so important to the stockholders of similar institutions, that a decision of this Court upon their legality is necessary and important in order that, if illegal, associations may have the benefit of the knowledge of the fact.

The information challenges the right of a building and loan association to extend its business to the different States of the Union, and engage in the building and loan association business, denominated "National." As a matter of history it is important to notice that the calamities which have befallen building and loan associations organized under the laws of this State have been largely confined to such associations. Among others it may not be improper to cite the American, the National, the Continental, the Inter-Ocean, and the Illinois, of Bloomington. These associations operated in many different States, and by reason of the fact that the lending of money was necessarily entrusted to agents in the locality in which the loan was made, there was a lack of that careful examination of securities which is so essential in lending the money paid by

shareholders for investment under the law. In each of these cases it was found that the securities accepted by the Association for loans made in different States was entirely inadequate and in foreclosing mortgages given to said associations, respectively, an average loss of fifty per cent. of the loans so made by said associations was sustained. The information in this case sets up a condition which, if true, shows that the history of such loans in the associations above referred to has been repeated in the National Home.

I am not aware of any decision of our Court passing upon the right of building and loan associations to thus extend their business beyond the immediate locality in which their principal offices are respectively located, but I earnestly insist that there is no warrant or authority of law which justifies associations organized under the laws of the State of Illinois in so extending their business. In this connection I may be permitted to quote from an opinion filed by the Honorable John Gibbons, in the case of The People v. Continental Building and Loan Association. Upon this subject the quotation is explicit, apt and pertinent, and, in my judgment, expresses a legal restriction which controls homestead and loan associations in selecting the locality in which they may do business:

"It is universally conceded, because attested by the experience of ages, that the stability and durability of government and the happiness and well-being of society are best secured when the bulk of the property is in the hands of the many, owned and controlled by the subordinate holders of power. Home-owners are the strength and bulwark of the commonwealth, and as homestead associations are doing more than all

other factors to make men frugal, industrious and saving, and as a consequent building up a stable and loyal citizenship, they ought to be regarded by those who make and enforce the laws as peculiarly under the fostering care and paternal solicitude of the State.

These associations were local in their origin, their membership being confined to a particular societyor guild, and their aims and ultimate ends the procurement of homes for their members. It never was their aim or purpose to branch out beyond the confines of the town or hamlet in which the members resided, or to embark in speculations of a pecuniary character endangering the safety of the investment of these members."

This undoubtedly expresses the origin and the purpose of building and loan associations, and the laws in force in the State of Illinois relating to and governing such associations contain nothing which would justify an inference that such an association has a right to extend its business to other localities than the locality of its creation. It is important that the Court give expression to its opinion upon this question in order that if the contention of The People in this case be the law, the great misfortunes which have befallan similar associations by reason of extending their business beyond the locality to which they are by operation of law confined may be avoided in the future.

It is insisted by the information that building and loan associations are not authorized to lend money excepting for the purpose of improving and procuring homesteads. This is the object and purpose of the law. It was not intended to give

capital an opportunity to invest surplus money, and the purpose of the law cannot be extended to accommodate and subserve the purpose of the wealthy. While there is no restriction upon the right of any individual to become a member of such associations, yet it is undoubtedly true that the spirit and the purpose of the law confines associations in lending money to making loans to individuals who are desirous of procuring for themselves homesteads or for the purpose of improving the same. It is denied that an association has authority under the law to lend money for any other purpose.

The information charges that this Association loaned money to different shareholders for other purposes, and that the money so borrowed was invested in the erection of business blocks and for speculative purposes, and it is insisted by the State that much of the misfortune which has befallen this Association is directly traceable to such unauthorized loans. It was insisted by the Association, on the argument of the demurrer, that it had a right to lend its money to any stockholder who might apply for the same and comply with the requirements of the Association regulating loans. It was said that the law does not require an association to inquire of a borrower as to how he proposed to invest the money.

In support of its contention that it had a right to lend money for other than the purpose of building and improving homesteads, it cited the case of Kadish et al. v. G. C. E. L. & B. Assn. et al., 151 Ill., 531, as holding that there is no express prohibition in the statute against corporations becoming members of homestead and loan associations, or against such associations loaning money for other than building purposes. This

case does not establish or announce such a doctrine as between The People and the corporation. It goes no further than to assert that where a homestead and loan association had made a loan to two of its members for the use of a brewing company, which gave its deed of trust to the association to secure the loan, there being no fraud in the loan and nothing to mislead the parties in whose names the loan was made, that as the brewing company could not avoid its deed of trust under the plea of *ultra vires*, such parties were also estopped from availing of the defense and that the deed of trust might be foreclosed as against them and other creditors of the brewing company having notice of the rights of the loan association. Throughout the opinion in this case the Court confines itself in every statement and in every citation to the facts upon which the case was submitted, and carefully avoids giving any expression to the right of such an association to make such loans where its right to do so is called in question by The People. This is manifest from the closing paragraph of the opinion, commencing on page 539, which is as follows:

"The question as to whether, under a proper construction of our statute, corporations for manufacturing purposes should be allowed to become members of homestead loan associations and whether such association should be allowed to loan money for general business purposes are very important ones, but the decision of them not being necessary to the determination of this case, we have purposely avoided deciding them."

It is thus apparent that the question has not been decided by the Supreme Court of this State, and that the authority cited by defendant upon the argument of this demurrer does not es-

tablish the right of an Association to lend money for general business purposes, but only that where an Association has made such a loan the individual cannot, when the Association seeks to enforce its contract by foreclosure or otherwiss, set up the doctrine of *ultra vires*. It does not, however, hold that the people may not insist that it has no right to engage in such business; and the language just quoted from said opinion is significant of the duty of the People where associations assume to make such loans, in this that the Court raises a question as to whether such Associations should be allowed to make such loans. Allowed by whom? By the authority which conferred its powers upon it, recognizing the right of some power to control its action in this regard. This power is the State. The doctrine of *ultra vires* has two phases. These two phases are explicitely set forth in the case Higgins v. Lansingh, 154 Ill., page 301. In the opinion, on page 392, Judge Carter said in referring to the opinion in Kent v. Quick-Silver Mining Co., 78 N. Y., 159: "That the application of the doctrine of *ultra vires* has two phases: one in which the public is concerned and the other which concerns the company and its stockholders only; that as to the first the assent of the stockholders to the unauthorized act is of no avail, but that when it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholders may in many cases be denied on the ground of his express assent or his intelligent, though tacit, consent to the corporate action."

Here the distinction between the two phases of acts which are *ultra vires* is distinctly drawn, and in this case the first phase is important because it is the creator which seeks to restrain

such associations in the transaction of business and the lending of money to the powers which they may rightfully enjoy under the law.

The only other case cited by defendant in support of its contention that it had a right to make loans for ordinary business purposes to its members was the case of Junita Building & Loan Association v. Mixell, 84 Pa., 315. This case, like the case of Kadish, et al., v. G. C. E. L. & B. Assn., et al., supra, was decided under what Judge Carter termed the second phase of *ultra vires* acts, and is therefore no authority in support of defendant's contention.

When we consider the scope of the organization of such associations, we cannot but reach a conclusion that the purpose and object of this law does not extend beyond the procurement of homesteads, and that in lending money paid into it by shareholders, it becomes the duty of the Association to inquire into the purpose for which a loan is sought.

It is provided by section 1 of the Act relating to building, loan and homestead associations "that whenever any number of persons not less than five may desire to become incorporated as a mutual building, loan and homestead association for the purpose of building and improving homesteads and loaning money to the members thereof only" they shall make a certain statement and do certain things required by the residue of said section and other sections of the Act. The sole and only purpose expressed in the Act as a reason for the creation of such corporations is the building and improving of homesteads. The lending of money to the members thereof is but a means to the end; in other words, it is by lending money collected from

month to month to its shareholders that they may be enabled to build and improve homesteads. This idea cannot be more plainly and forcibly conveyed than by the following illustration: Two members of a building and loan association are desirous of procuring a loan of $1,000 each. One desires to build or improve a homestead, and the other to erect a store room. The association has in its treasury only $1,000 for the purpose of being loaned. It is apparent, from a consideration of the scope and the purpose of the organization of such associations, that there would be absolutely no power to lend the money to the member who desires to build a store-room. The association would have no election in the matter. It would be its plain duty to lend the money to the member who desired it for the purpose of building or improving a homestead. If this conclusion be correct it follows that the object of lending money by such associations is to build and improve homesteads, and for no other purpose. Members who desire to borrow money for the purpose of speculation are not entitled to loans for such purpose, but the association must lend it to its members who desire to use the same for the purpose expressed in the statute, and in harmony with the spirit of the law.

It is therefore insisted by the People that the lending of money for speculative purposes, and business investments, by Loan Associations, is an *ultra vires* act upon their part, and that the State has a right to insist that Associations organized under its laws shall not violate the law in this particular. And it is further insisted by the People that the defendant is in error when it insists that this is a matter in which the People

of the State of Illinois have no right to interfere. It is the duty of the People of this State to protect those whom this law was intended to benefit, and by its supervision to confine such Associations to its spirit and plain provisions.

The duty of the State to see to it that such Associations are carefully supervised and inspected and confined to the legitimate purpose of their creation, is so aptly stated in an opinion by Judge Grosscup in Towle v. American Building Loan & Investment Society, 60 Fed. Rep., page 131, that I cannot refrain from quoting the same here, from page 136 of the opinion:

"The Building Associations of Illinois have become institutions of great magnitude and consequence. They are practically savings institutions, and invite the deposit of large numbers of people whose frugality enables and whose forethought impels them to lay by a store for the future. These are at once among the most deserving of our citizens and the least skilled in ascertaining a safe depository for their savings. Seventy million dollars have thus already been gathered into the hands of these socities. I know of no institutions, except perhaps savings banks, that have a greater title to be regarded as quasi public institutions. I know of no institutions that ought to be regulated and inspected with greater care and subjected to more rigid scruntity than these treasuries of the poor. The officers of these institutions carry a great trust, and ought when derelict, especially when intentionally derelict, to be subjected to instant and severe punishment. The State ought to watch them with a vigilant eye to see that cupidity or treachery do not succeed, or if they do succeed, are speedily corrected. I regard the recent legislation of this State as a beneficent step in that

direction. The Auditor of Public Accounts and the Attorney General are thereby created public agents to see that no harm or wrong creeps into these institutions of the People, and to seize and close them up the moment any malfeasance appears. It would be intolerable to throw any obstacle in the way of these officers of the public or to deprive them of a potent voice in the selection of the agents intended to carry out these purposes. There is not one but many of these societies whose affairs have become honeycombed with maladministration."

When we realize the fact that the history of such Associations confirms the assertion that the great misfortunes which have befallen them is largely confined to National Associations lending money in almost all the States of the Union for any and all purposes, speculation, business and procuring homesteads as well, and that their misfortunes are directly tracable to improper and careless loans, the State insists that it would be a great misfortune for the Court to hold in the absence of an express power conferred by the statute upon such Associations, that they may either do business outside of the reasonable locality in which they are respectively created, or lend money for other purposes than the purposes of procuring and building homesteads. Where a doubt exists as to the power of a corporation to do a certain act in a proceeding between the corporation and the State, calling that power in question, it is fundamental that the right to exercise such power is resolved in favor of the public and against the corporation. It was said by the Court in an able opinion in Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. st., 339, that there never was a doubtful charter; that to be in doubt is to be resolved; that if a

corporation claims a power it must be able to show that power in its charter or in the laws of its creation, and that nothing but plain English will answer the purpose.

If the contention of the People be correct regarding the propositions that building, loan and homestead associations must confine their operations to the reasonable locality in which they are respectively organized, and that in lending money they have no power to do so for any other purposes than that of building and improving homesteads, it follows that any association engaging in one or both of these illegal practices, and insisting upon a right to continue therein, and refusing to comply with the law in this particular, is liable to a forfeiture of its charter, regardless of any other consideration. If the contention of the People in this regard be the law, the information upon these two charges is sufficient, without considering anything else, and will warrant and justify a forfeiture of the defendant's charter.

It was said by the defendant in argument below, and doubtless will be repeated here, that the right of such an association to do a notional business was not assigned as one of the llegal practices in which the defendant had engaged in the notice sent to it by the Auditor of Public Accounts, and that the People cannot, therefore, be heard to insist upon the charge of the information based thereon.

The law confers upon equity jurisdiction to forfeit the charter of snch associations in proper cases, at the suit of the Attorney General. When this jurisdiction is invoked by the Attorney General he has the right to insist upon the conditions of each case as they actually exist, and where such asso-

ciations are guilty of *ultra vires* acts the Attorney General would be derelict in his duty if he failed to direct the attention of the Court to such *ultra vires* acts, and to invoke the assistance of the Court in suppressing them. The power of the Attorney General to proceed against such associations in chancery, jurisdiction having been conferred upon chancery by law, is not confined to the simple statutory proceedings designated in the act relating to building, loan and homestead associations.

In Chicago Mutual Life Indemnity Ass. et al. v. Hunt, 127 Ill., page 257, a case heard and decided upon a statute very similar to this, but relating to the business of life insurance, the Court used the following language:

"We are of the opinion that the power of the Attorney General to file the information in no way depended upon the communication made to him by the Auditor, but came within the purview of those powers which are inherent in his office. See Hunt v. Chicago Horse and Dummy Railway Co., 20 Ill. App., 282; same case, 121 Ill., 638. The section of the statute under consideration conferred no new powers upon him, but vested the Auditor with the supervision of associations organized under the statute, and made it the duty of the Attorney General to take proper legal proceedings whenever the Auditor should communicate to him the fact that an association or its officers had so conducted as to give occasion for the removal of the officers from their offices, or the closing of the business of the association."

It is, therefore, undoubtedly the law that in a case like the one at bar, where an information is filed in chancery, under a notice given by the Auditor of Public Accounts to the association, that acts which are plainly *ultra vires* upon the part of the association, as between the association and the People, may be included within the information with perfect propriety, and without injustice to the association itself.

I therefore insist that if my view of the law upon this subject is correct, said association should be ousted of its franchise by reason of these violations, without regard to its financial condition, which constitutes a separate and distinct charge.

THE AMENDED BY-LAW.

The second clause of the notice sent by the Auditor to the officers of defendant Association, on October 24th, 1895, is as follows:

"2. That it attempts, under cover of an amendment to its charter, to change its existing contracts with shareholders in such manner as to deprive such shareholders of large amounts due them, by the terms of the contract so attempted to be changed, without the assent and against the protest of such shareholders, thereby injuring the reputation of said association for fair dealing, and constituting an unsafe and illegal manner of doing business."

This clause of the notice deals with and refers to an amendment made by the Association, or, rather by a majority of its shareholders, to a by-law which contained and set forth the conditions upon which members might withdraw from it, and which by-law, prior to said amendment was, and had been in

force from the time the Association was incorporated and commenced doing business. The original by-law, as it existed prior to the 15th day of January, 1895, was as follows:

"Section 21. Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving the secretary 30 days' notice of such desire. The board of directors shall refund to such withdrawing members all that they have paid into the Association, except membership fees and fines: *Provided,* that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of withdrawing shareholders without the consent of the board of directors. Such withdrawing members shall be entitled to receive interest on the installments of stock paid in by them as follows:

On stock 1 to 2 years old, 6 per cent. per annum.

On stock 2 to 3 years old, 7 per cent. per annum.

On stock 3 years old or over, 8 per cent. per annum.

Interest to be computed for the average time the money has been in use by the Association, but no interest will be paid on installments paid on stock after application is made to withdraw."

On the 15th day of January, 1895, a majority of the shareholders of the Association amended said by-law.

As amended it reads as follows:

"Section 21. Members whose shares are not pledged to the Association may withdraw all or a part of their shares by giving 30 days' notice of such desire. The board of directors shall refund to such withdrawing members all that they have paid in to the Association, except membership fees and fines and their proportionate share of expenses, to be determined by reference

to the Association's books at the closing of the same last preceding the date of the receipt of the application to withdraw, and such fees, fines and expenses are hereby declared to be charges and liens upon the members' stock: *Provided*, that at no time shall more than one-half of the funds of the treasury or the corporation be applicable to the demands of withdrawing shareholders without the consent of the board of directors. Such withdrawing members shall be entitled to receive interest on the installments of stock paid in by them as follows:

On stock 1 to 2 years old, 6 per cent. per annum.

On stock 2 to 3 years old, 7 per cent. per annum.

On stock 3 years old or over, 8 per cent. per annum.

Interest to be computed for the average time the money has been in use by the Association, but no interest will be paid on installments paid on stock after application is made to withdraw."

The question is suggested upon this original by-law and its amendment whether shareholders who did not vote for the amendment and who have not consented thereto, and whether withdrawing shareholders whose withdrawal applications had been on file with the secretary of said Association for many months prior to the amendment and had not been paid, are affected by the provisions of said amendment.

For a proper determination of this question it is material to enquire what is the status of a member of an association of this kind. What rights and interests has he in the association, and when is it he may be bound by a by-law materially changing a former one? An association of this kind is denominated a corporation for pecuniary profit; it is what is called a private corporation, but one which, I think, is quasi public in its

character. As I have said, it is one organized for pecuniary profit; it loans money to its members, and when they desire a loan, and when it does so, exorbitant interest is paid by them for the forbearance of the money so borrowed. When a person becomes a member of such an association he enters into a contract with it. The rights which that contract gives him are vested ones, and cannot be divested without his consent.

The law provides that these corporations may enact by-laws and amend the same, but such by-laws or amendments thereto cannot change or impair a vested right already existing in a shareholder. What then were the rights of a member who desired to withdraw from this association prior to the 15th of January, 1895? The law gave him the right to withdraw at any time; that was as much a part of his contract as the right to become a member. In other words; he had a right to withdraw princisely as he had a right to become a member of the association. I repeat then, what was a withdrawing member's rights prior to the 15th of January, 1895? The association had contracted with him that when withdrawing his shares of stock the board of directors should pay to him all he had paid into the association, together with six per cent. interest thereon on stock from one to two years old, seven per cent. interest on stock from two to three years old, and eight per cent. interest on stock from three to eight years old or over, always excepting membership fees and fines.

The status of such a member on and after the 15th of January was materially changed, and to the detriment of such member.

The amended by-law provided that he would receive from the association only the principal and interest, as above designated, less fees, fines and expenses, and those were declared by such amendment to be charges and liens upon such withdrawing member's stock.

When the contract was entered into prior to the amendment above referred to the query arises, was it valid in its entirety, and one which the association could enter into with such member? I apprehend that the most casual reading of the statute creating associations of this kind will convince any person that the contract was one which the association had lawful authority to enter into with a person desiring to become a member of it. There is nothing in the law to prohibit it, and when the association entered into it, I apprehend its officers and directors knew what they were doing, and assured the risks attendant upon it. They evidently believed that the periodical installments, membership fees, fines and other moneys that might come to it from the member would be sufficient at any period of time that the member saw fit to withdraw to pay him the amount of the principal, together with the interest above referred to, less fines and membership fees, and that the earnings of the moneys so paid to it would leave a balance, after the payment of such moneys to the withdrawing member, to defray his pro rata share of the expenses of the association. They certainly must have contemplated a condition of affairs like unto this. The association, through its officers and directors, voluntarily entered into it, and can they now be heard to disavow it, and say, that in addition thereto the pro rata share of the expenses of the association must also be deducted therefrom? Suppose that the

money already paid in by a withdrawing member has earned enough, and brought into its treasury, an amount equal to the principal sum and interest above referred to, and also an amount to pay his pro rata share of the expenses of this association, or even more than that, is he now to be again charged with a like amount for his pro rata expense, as may be determined upon by this association? If so, a second and additional amount is being exacted without authority of law. If, on the other hand, the amount paid by the member has only earned sufficient to pay the principal and the interest under this contract, then the amount of the expenses is simply lost to the association, but that was a part of its contract, and it, like other persons, must be bound by contracts. Suppose that the moneys paid in by this member have not earned enough to pay back the principal sum paid in by him, will it be said that this association, pretending to be solvent and capable of discharging its honest obligations, can violate this contract, and say: "I will only pay you on withdrawal one-half of the money, or any other aliquot part thereof, which you have paid in." I think not.

If the Association is insolvent, and its assets are about to be distributed between withdrawing and non-withdrawing members an entirely different question may arise; in the latter case I have no doubt but there would be no preference between a withdrawing and a non-withdrawing member.

I think that when this Association engaged with a person to become a member thereof, and entered into a contract with him, receiving his money and issuing stock to him, and the law being that he had a right te withdraw therefrom at any time he saw fit after giving thirty days' notice, that he has from the

very moment of the entering into that contract such a vested interest in it that one party to it could not violate or impair it in any respect.

The amendment to this by-law was submitted to me, as Attorney General, under the provisions of the law, which requires such Associations to submit for the approval of the Attorney General all the by-laws which they may adopt. The by-law was approved, but no question arose as to its application to shareholders who had filed their withdrawal applications prior to its adoption, or to shareholders who refused to assent thereto; and I am of the opinion that the amended by-law, while it may be valid and binding as to future members, cannot be construed to be applicable to or a lien upon the stock of withdrawing members who have not assented thereto, and who had subsisting vested rights in said Association prior to the 15th day of January, 1895. I believe that such shareholders have a right to demand the full performance of their respective contracts; that is, to receive in withdrawals the principal sum paid in, together with the interest as provided in the by-laws, less fines and membership fees.

In the argument of this question the attorneys for the Association applied to the adoption of this amended by-law, the law as applicable to similar actions taken by the ordinary business corporation. They cited many authorities, including Morawetz on Private Corporations, Angell & Ames on Corporations and Cook on Stockholders, to the effect that where an act is to be performed by the stockholders of a corporation a majority of those who appear may act. This is undoubtedly true of the ordinary business corporation, and may be true of these Asso-

ciations in so far as the action does not violate a vested right, or the terms of an executed contract; and in this case in so far as the action taken by a majority of shareholders does not violate a vested right, or the terms of an executed or subsisting contract, such action may be valid.

It was contended by counsel for defendant Association that in the determination of this question much depended upon the position which a withdrawing shareholder occupies with reference to his association, upon the expiration of the thirty days' notice required by the law to be filed by all withdrawing shareholders. I presume that they will urge the same theory here. It was insisted that such withdrawing shareholders are not creditors of the association in the true sense of the word, and that therefore my position was not tenable. From this I infer that it is admitted that if such withdrawing shareholders are in the true sense of the term creditors of such an association upon the expiration of the thirty days' withdrawal notice, my contention would be proper and the amended by-law would not control the amount which defendant association should pay upon such withdrawals. In my judgment this view raises a distinction without a difference. Much authority was cited, and probably will be cited here, to the effect that such witdrawing shareholders cannot maintain an action against such an association, upon the expiration of the period of notice. These authorities were from courts of other States, and the opinions based upon laws which were, in many respects, unlike our own. So far as I am advised the question has not been decided by our own Court.

Let us examine the statute which provides for the withdrawal of shareholders. The law relating to withdrawals is found in section 6 of the Act, wherein it is provided that "any stockholder wishing to withdraw from the said corporation shall have power to do so by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such interest thereon, or such proportion of the profits thereon, as the by-laws may determine, less all fines and other charges: *provided*, that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of withdrawing stockholders, without the consent of the board of directors, and that no stockholder shall be entitled to withdrawal whose stock is held in pledge for security."

The power to withdraw is vested in the shareholder and the law designates what he shall do. If he desires to withdraw and files the notice required by this section of the statute the law provides that upon the expiration of the thirty days he shall be entitled to receive the amount paid in by him or her, less fines and other charges. No action is required to be taken by the association in order that a shareholder may be permitted to withdraw. His right to withdraw is entirely within his own breast and is a personal privilege assured to him by the law which the association, as such, has no power to stay. When he files his withdrawal application he has exercised a privilege assured to him by the statute; and if he does not withdraw his withdrawal application, but permits it to remain of file for thirty days after filing it, he is no longer a member of the association. By his own action, and by operation of law,

he has passed out of the association; and by operation of law he is entitled to receive the money which he has paid into the association, less fines and other charges. The fact that a proviso in the statute declares that at no time shall more than one-half of the funds of the treasury of the association be applicable to the demands of withdrawing stockholders without the consent of the board of directors, does not change the position of the withdrawing shareholders. It certainly is not the law that in such cases an association can by a majority of its shareholders change vested rights and vary the terms of subsisting contracts, to the injury of the person who has performed the contract upon his part, and has exercised his privilege of withdrawing and put himself in a position, in the language of the statute, "to receive from the association the amount paid in by him or her." The statute does not say he may receive, but that he shall receive. The language is emphatic, is expressive, and is not ambiguous.

I therefore insist that in the determination of this demurrer this by-law cannot be so extended as to take from withdrawing shareholders money to which by their contracts and by their acts of withdrawal, they are entitled to receive. The fact that it is so earnestly insisted by defendant association that the by-law, as amended, is operative not only as against the shares of stock of shareholders who participated in its enactment, but equally against the shares of stock of constant shareholders who protested against its adoption and the shareholders who have withdrawn therefrom, is suggestive that its financial condition is not such as to enable it to pay back to its shareholders the money which they respectively paid in, less fines and other

charges; this is clearly required of all such associations by Section 6 of the act and less will not satisfy the law. It is difficult to understand how a majority, or all, of the shareholders of an association can vary this positive provision of law. In my judgment they cannot do so, and an association that cannot return to its shareholders the amount that the statute says such associations must return, viz: the amount which its shareholders have paid in, less fines and other charges, cannot be heard to say that its financial condition is such as to justify a further continuance of business by it.

In this connection the attention of the Court is directed to the fact that the report of the supplemental examination of the Association shows that it refused to comply with the requirement of the Auditor that it settled with withdrawing shareholders under the provisions of the by-laws relating to withdrawals as they stood prior to the 15th day of January, 1895, but continued to enforce the amended by-laws against withdrawing shareholders and against their earnest protestations. If my position as to the law be correct, this action upon the part of this Association is without warrant or authority and requires a forfeiture of its charter.

THE FINANCIAL CONDITION OF THE ASSOCIATION.

The information charges that on the morning of April 6, 1895, the association held mortgages upon real estate, securing eight hundred and ninety-four loans made by it, representing to said Association $598,547.69; that of these loans thirty-three, amounting to $32,775.00, were paid in advance; that two hundred and forty-one of these loans, amounting to $166,480.81, were paid to

date; and that six hundred and twenty of them, amounting to $409,291.88, were delinquent; that the delinquency upon said loans represented the interest and charges due thereon to the Association for periods of time running from one to twenty-seven months; that a very large proportion of the delinquent loans were made upon security entirely inadequate, and that upon a foreclosure of the mortgages given to secure said loans the Association would not be able to realize therefrom the respective amounts of money due thereon, and would be forced to accept said real estate in satisfaction of said loans, to the great financial detriment and loss of said Association and its shareholders.

That on the morning of the said day the Association was the owner of ninety-one pieces of real estate, nearly if not all of which it had been forced to accept in satisfaction of unproductive loans, and said real estate has remained an unproductive asset, and to the extent that said pieces of real estate are unproductive, the shares of stock issued by said Association are diminished in value; that these ninety-one pieces of real estate were given as security to the Association for the sum of $89,729.04; that the inadequacy of the security was so great that there was no incentive on the part of the borrowers to pay the interest and other charges accruing to the Association by reason of said loans, and that said loans represent to the Association at the present time the sum of $106,946.01; that of these ninety-one pieces of real estate, so acquired by the Association, in satisfaction of said debts, the Association is deriving an income from only thirty-seven thereof, and that the remaining pieces of said real estate are entirely unproductive; and that the in-

come which the association realizes from said thirty-seven pieces of real estate amounts only to the sum of $273.72 per month.

That by reason of the unsafe methods in the investment of the funds of the Association it has been forced to commence foreclosure proceedings in two hundred and twelve cases, and that said proceedings are pending in different courts in this and other states, and that the Association will ultimately be compelled to accept said properties in discharge of the debt to the Association, which said pieces of property were, respectively, mortgaged to secure; that at the time said foreclosure proceedings were respectively brought, there was due said Association, by reason of said respective loans, large sums of money, being interest and premiums which had remained unpaid for months, and had been permitted to accumulate as additional charges against said real estate; that the foreclosure of said mortgages will entail a large expense to the Association in attorney's fees, costs of proceedings in court, and the necessary expense incident thereof, which costs, added to the principal, interest and premiums due the Association by reason of said loans, will exceed the aggregate of the amounts loaned by the Association by the sum of many thousands of dollars, and to the extent that said Association has sustained a financial loss by reason of the premises, the assets of said Association are diminished, and the value of the shares of stock issued by said Association are correspondingly diminished.

That the Association is insolvent, and that its assets are not sufficient to justify a continuance of business by it; that the gross assets of said Association are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it

has sustained, by reason of losses upon loans, a loss of $121,-895.71; and that under and by virtue of its by-laws it is liable for interest upon withdrawal of its shares of stock for the sum of $103,471.14; and that its total liabilities amount to the sum of $1,332,603.70; and that its total liabilities exceed its total assets by the sum of $65,635.13. That the condition of said Association requires its dissolution and a forfeiture of its corporate right to the State, and the collection of its assets and the distribution thereof among those legally entitled to the same.

The demurrer admits these facts to be true. Upon these facts, therefore, the question arises, are the assets of defendant Association sufficient to justify a continuance of business by it. It is provided by the Act relating to Building, Loan and Homestead Associations, that a member may withdraw from such Association by filing a withdrawal notice, and that upon the expiration of thirty days from the date of such notice, he shall be entitled to receive the amount paid in by him, together with interest thereon, or such proportion of the profits, as the by-laws may determine, less all fines and other charges. It was held by Judge Grosscup in the case of Towle v. American Building Loan & Investment Society, 61 Fed. Rep., 446, that an Association is not in such a financial condition as to justify a continuance of business by it when it cannot pay back to its shareholders, dollar for dollar, less fines and proper charges, the amount of money paid into the Association by them. This, then, fairly interprets the meaning of the statute providing that if the financial condition of an Association is not such as to justify a continuance of business by it, the Auditor shall give notice to that effect, and upon a failure of the Association

to make its assets sufficient, within a period of sixty days, he shall report it to the Attorney General, whose duty it shall be to proceed against it in chancery for its dissolution, and the distribution of its assets. The fact that defendant Association seeks to avoid the re-payment to its shareholders of the amounts which they have respectively paid to it through the provisions of the amended by-law is a confession that it is unable to comply with this positive provision of the statute. In view of the history of this Association, and the foregoing facts concerning its financial condition admitted by the demurrer, it is undoubtedly true that the adoption of said by-law was intended to enable it to settle with withdrawing stockholders for less amounts than they respectively paid to said Association, in direct violation of the law. When an Association thus seeks to escape its legal liability to its withdrawing shareholders, it thereby confesses the weakness of its financial condition, and admits that it has arrived at a period in its history when it can no longer conform to and comply with the requirements of the law.

It is charged in the information, as stated hereinbefore, that the total liabilities of defendant Association are $65,635.13 greater than its total assets. This fact is admitted by the demurrer. It is also apparent from a consideration of the foregoing facts relating to its financial condition, which facts are admitted to be true, that a very large proportion of the assets of said Association are unproductive; that it has been compelled to foreclose many mortgages and to protect itself has purchased the property mortgaged to it as security for loans; that a large proportion of said property is unproductive and idle in its hands; that

it has paid out large sums of money as costs and attorneys' fees in connection with the foreclosure of such mortgages; that the total amount of moneys so paid out stands charged to its real estate account and increases by that amount the cost of said real estate to said Association; and that a very large proportion of all its outstanding loans are in arrears for interest and dues for periods of time running from one to twenty-seven months. In addition to this condition it must be remembered that the information charges, and the demurrer admits its truth, that a very large proportion of its shareholders have filed withdrawal notices and that it is in arrears in settling with such withdrawing shareholders for a period of six months. It is alleged that its shareholders have lost confidence in its ability to maintain itself and on that account its shareholders were continuing to file withdrawal applications at the time the supplemental examination was being conducted.

Upon a consideration of this condition it requires no argument to establish the fact that the assets of this Association are not such as to justify a continuance of business by it.

The foregoing facts justify this proceeding. The charges contained in the information are explicit and properly stated. We respectfully submit, therefore, that the court erred in sustaining the demurrer to the information and dismissing the same.

M. T. MOLONEY,
Attorney General.

T. J. SCOFIELD AND
M. L. NEWELL,
Of Counsel.

STATE OF ILLINOIS.

SUPREME COURT

CENTRAL GRAND DIVISION.

JUNE TERM, A. D. 1896.

PEOPLE EX REL, ETC.

Appellant.

—VS—

NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

JESSE R. LONG,
FIFER & BARRY,
Solicitors for Appellees.

PANTAGRAPH P. & E. CO., BLOOMINGTON, ILL.

STATE OF ILLINOIS.

Supreme Court---Central Grand Division.

JUNE TERM, A. D., 1896.

PEOPLE EX REL, ETC.,

Appellant.

—VS—

NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT.

This is a bill filed in the name of the People of the state of Illinois, on the relation of David Gore, auditor of public accounts, against the National Home Building and Loan Association, of Bloomington, Ill., a corporation under the Loan and Homestead Act, for the dissolution of the corporation, the forfeiture of its franchise, and the appointment of a receiver. The suit was brought under section 17 of the Loan and Homestead Act of July 1, 1893, and is based on an examination by said auditor under section 16 of said act, and a notice given by him to the president and secretary of the corporation on the 24th day of October, 1895. Appellant filed his bill, and before any action was taken on the same he obtained leave of court, and filed an amended bill. Appellee filed a general and special demurrer to all of the amended bill, except that charging insolvency and

insufficiency of assets, and filed a plea as to that part. The plea was not replied to. As there are many points raised by the demurrer, we will necessarily mention them under another head, and think it not advisable to put them in this statement. The demurrer was sustained, and appellant standing by his bill and declining to amend the same, the bill was dismissed.

THE ISSUES.

Owing to the fact that our demurrer refers to paragraphs and allegations on certain pages of the amended bill, and the abstract and record were gotten up without regard to any references in the demurrer, it would be a laborious task for the Court to pick out the different paragraphs and allegations demurred to without a restatement of the grounds of our demurrer, and giving the Court references to the pages of the abstract where they will be found. For this reason we restate the grounds of demurrer, with appropriate references, as follows:

1. Because all of the allegations in the bill, beginning with the second paragraph on page 2, and including page 5, are repeated in substance on page 10 and the pages following, and some of said allegations are repeated three different times in the bill. (Allegations referred to will be found on pages 30, 31, 32, 37 and 38 of abstract.)

2. That the allegations on pages 3 and 11 of the bill, "that said association has made loans of money illegally in excess of the real estate mortgaged to secure the same, etc.," is not included in the notice given by the auditor to the officers of said association. (Allegations referred to will be found beginning at the bottom of page 30, and again near the middle of page 38 of abstract.)

3. That the allegations on page 4, "that said association had issued shares of stock to persons residing at different places in the state of Illinois, and in different states in the United States of America, etc.," are not included in the notice given by the auditor to the officers of said association, and the doing of the same is not contrary to law. (Allegations referred to will be found near the bottom of page 31.)

4. That the allegations in the paragraph beginning on page 16 are not included in the notice given by the auditor to said association. (Allegations referred to begin about the middle of page 43 of abstract.)

5. That the notice given by the auditor was wholly insufficient to apprise defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business. (Notice will be found on page 33 of abstract.)

6. That the only possible way of complying with many of the requirements of said notice was by making good any deficiency of the assets that might exist, and the notice given did not state what amount, if any, was required to make the assets sufficient to justify a continuance of business. (Notice is on page 33 of abstract.)

7. The paragraph on page 10 of bill does not show that any sums were unlawfully expended, except that a salary was paid to the president, and the amended bill shows this requirement was complied with by the said Association, nor is it alleged that said salary was paid to the president for services as president. (Allegations referred to will be found on pages 36 and 37 of abstract.)

8. That the allegations on pages 11 and 14, "That said Association has made loans on previously incumbered real estate," are wholly insufficient in that they do not allege that such loans were so made knowingly, and that said allegation is set forth three different times in the bill, nor is it alleged that it was a practice of said Association to loan on incumbered real estate. (Allegations referred to will be found on pages 38 and 41 of abstract.)

9. That the allegation on page 15, "That said Association has loaned money on real estate other than homesteads," etc., does not show a violation of any law. (Allegations will be found on page 42 of abstract.)

10. That the allegations in the paragraph beginning on page 17, show that the by-law complained of, was legally passed, and is binding on all shareholders, and its construction affects only those who are shareholders, and is a matter in which the state has no interest. (Allegations will be found on page 44 of abstract.)

11. That by the amended bill it is admitted that all the requirements of the Auditor's notice were complied with in so far as it was possible for the Association to comply with the same, except the requirement that the assets should be made sufficient to justify the continuance of business. It shows compliance with all matters except those affecting the rights of shareholders already in, and are matters in which the state has no interest. (Amendment referred to is on page 36 of abstract.)

12. That the allegation on page 20, "that said Association has not paid to its withdrawing shareholders the amount due them upon the expiration of a period of thirty days after notice was given," is not a violation of any law. (Allegations will be found on page 46 of the abstract.)

13. That the further allegation on the same page, "that the secretary did discount the claims of some withdrawing shareholders, etc." is shown by the amendment to the bill (Abst. 36) to have been corrected within the sixty days, and it is not alleged that said acts were done with the knowledge and consent of the said association. (Allegation will be found on page 47 of abstract.)

14. That the allegations contained in paragraph beginning on page 21 did not charge any unlawful disbursements of the funds of said association. (Allegations will be found on pages 47 and 48 of abstract.)

15. That the charging of interest as a liability is unwarranted by law. (This charge will be found on page 50 of abstract.)

16. That part of the statute under which the auditor's examination was made, and this proceeding is had, is unconstitutional.

17. That all of the complaints in the auditor's notice, except those charging insolvency, and a want of sufficient assets to justify a continuance of business, are not of such a character as to rightfully concern the auditor or the state.

The notice given by the auditor is the basis of this suit, and nothing can be complained of in the bill that is not covered by the notice. The notice is as follows:

1. "Whereas, it appears from an examination of the affairs of the National Home Building and Loan Association of Bloomington, Ill., that the said association is conducting its business in an unsafe manner, and contrary to law as follows, to-wit:

2. "That it attempts, under cover of an amendment to its charter to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due them by the terms of the contract, so attempted to be changed, without the assent, and against the protest of such shareholders, thereby injuring the reputation of said association for fair dealing, and constituting an unsafe and illegal manner of doing business.

3. "In that its secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

5. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the association, to the great loss of its shareholders, and against the provisions of the law.

6. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made application to withdraw therefrom, and continued to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

7. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

8. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

9. "In that its loans have been selected with so little care that only a small per cent of the charges thereon are regularly or promptly paid.

10. "In that compensation is paid to its president, contrary to the provisions of the statute.

11. "In that its assets are insufficient to justify a continuance of business by it.

12. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate as proper, and largely in excess of what such association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now therefore, I, David Gore, auditor of public accounts, do hereby notify you, the said F. J. Fitzwilliam, president, and W. R. Fitzwilliam, secretary, of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty (60) days from the date hereof, I shall report the said National Home Building and Loan Association to the attorney-general, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

"DAVID GORE,

[SEAL] "Auditor of Public Accounts."

The causes of demurrer, numbered five to seventeen, both inclusive, except twelve and fifteen, relate to matters included in the auditor's notice.

The second, third, fourth, twelfth, and fifteenth points relate to matters not included in the auditor's notice to the association.

The plea goes to the sufficiency of appellee's assets.

Aside from the constitutionality of the act under which the bill was filed, the questions raised by the *demurrer* relate to the legality of appellee's practices; those raised by the *plea* relate to the sufficiency of its assets to justify a continuance of business.

Our second, third, fourth, twelfth, and fifteenth special causes for demurrer are well assigned, because the matters referred to are not included in the notice given by the auditor.

If this was a bill filed on the relation of the attorney general as at common law, no doubt it would be proper for him to complain, if he saw fit, of such matters as are referred to in said special causes of demurrer, and have same submitted to the court for determination, but the court will remember that this is a proceeding on the relation of the auditor under the statute, and not on the relation of the attorney general at common law.

It is substantially admitted in the amended bill, as shown at page 36 of abstract, that all the requirements of the auditor's notice were complied with in so far as it was possible for the association to comply with same, except that requiring that the assets should be made sufficient to justify the continuance of business. It will be noticed that by our fifth and sixth special causes of demurrer, we question the sufficiency of the notice given by the auditor, because it does not apprise the defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business. Many other of the allegations of the bill are questioned by our demurrer, any one of which, if well taken, is sufficient to sustain the decision of the trial court. This we understand to be the settled law.

The notice failed to show what amount, if any, was necessary to make good the deficiency. If our point on this question is well taken, it goes to the merits and disposes of the whole case, and under the state of the pleadings, we understand that if any point in our demurrer is well taken, in as much as appellant refused to amend his bill, the decision of the lower court is right, and the decree must be affirmed.

In the bill, beginning at the bottom of page 49 of abstract, is an allegation that the Association is insolvent; that its gross assets are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained losses upon loans to the sum of $121,895.71; that under and by virtue of its by-laws it is liable for interest upon its shares of stock, for the sum of $103,471.14, and that its total liabilities amount to the sum of $1,332,603.70, and that its total liabilities exceed its total assets by the sum of $65,635.13. This charge in the bill being broader than the complaint in the auditor's notice, and charging actual insolvency, and it not appearing from the face of the bill what items went to make up the general liabilities, appellee could not demur to this allegation, and therefore filed its special plea to this part of the bill, which is found on page 57 of abstract, and the same not being replied to, the truth of it is admitted, and the only question for the court to determine is, whether the facts set up constitute a bar to that part of the bill.

We also raise the point that all of the complaints in the Auditor's notice, except those charging an insufficiency of assets to justify a continuance of business, do not rightfully concern the auditor of the state.

BRIEF.

Auditor's Notice.

Under this head we will refer to the complaints in the auditor's notice.

As to Amended By-Law.

(Tenth special cause of demurrer.)

The second and principal complaint in the notice, which is set out at length in the bill at pages 44 and 45 of abstract, charges that on January 15, 1895, at a meeting of the shareholders of the association, a majority of its shareholders amended its by-law relating to the withdrawal of its shares of stock, so as to give to the withdrawing member all that he has paid into the association except membership fees, fines and their respective proportionate share of expenses; that a large number of the shareholders protested against the adoption of the amendment on the ground that

they had not consented to the same, and the enforcement of it against them would be in violation of the conditions of the contract entered into between them and the association at the time they became members. All members of the association are required to make monthly contributions to it. A part of each monthly contribution, under the charter and by-laws of the association, was used for expenses; the other, and major part, was used in making loans and for corporate purposes other than expenses. Under the by-law as to withdrawals, prior to the amendment, each withdrawing member was entitled to receive all he had paid into the association—that part he contributed for expenses as well as that contributed to what may be called the "loan fund," together with a stipulated rate of interest, according to the age of the stock, less membership fees and fines.

Under the by-law, as amended, the withdrawing member is not entitled to receive from the association the amount he had contributed as expenses and which had been used for that purpose. In other words, he is required to bear his proportionate part of the expenses during the time he was a member of the society. He is not longer permitted to unload his part of the expenses upon the other and persistent members. The association has ceased paying a premium to those members who would retire from the society. By the amended by-law *all* members, whether they withdraw or remain as a part of the society, bear their respective proportionate part of the expenses. This is right on principle. Any other rule would be to sow the seeds of disintegration into the society and to discriminate among the members who are bound together by the strongest ties of mutuality.

Endlich, in his work on Building and Loan Associations, affirms the rule, as follows:

"The most satisfactory expedient is that of allowing him (the withdrawing member) to take out what he has paid in, less fines and other charges still owing from him, and a *proportionate share of the expenses of the business to date*, and add to it such sum, as his share of the profits, as may be deemed proper by the society."

—Sec. 102 Endlich on Bldg. Assns., 2nd Edition.

The majority of the shareholders under the law are presumed to know the needs of the corporation better than the minority. They legislate for the common good and common interests of all. It is alleged in the bill that the association could not lawfully amend the by-law as aforesaid so as to be binding on those who did not consent, but that it is nevertheless requiring withdrawing members who did not consent to the amendment to settle according to the amended by-law, and by reason thereof has violated its duty to such members, and has thereby withheld from them amounts of money which the Association was not entitled to retain.

The Court will notice that it is not alleged, and no complaint is made, that any of the requirements necessary to amend the by-law were not complied with. The amendment was adopted by the shareholders, filed with the Secretary of State, and by him submitted to the Attorney General, *and duly approved by that officer*, and afterwards filed in the Recorder's office of McLean county, Illinois—all strictly in conformity with the statute. As we understand it, counsel admit that the by-law as amended is binding on all persons who voted for it, and on all persons who have since consented to it, or have in any way ratified it, and that it is binding on all those who become members after its adoption.

On the question of the principle of acquiescence, ratification or estoppel, see

—Sec. 80, vol. 1, Thomp. Corp.

We also understand that the only point insisted upon by counsel is that the by-law is not binding on the shareholders who did not vote for it and did not expressly consent to it, or have not in any way ratified it since its adoption.

We think the amendment is binding on all or none. We also think that there can be no question but that it is binding on all. It is admitted that the amendment was made by a majority vote of the shares represented at the meeting, which was a majority of the shares in force. It will be seen from our plea that a by-law was in force allowing amendments to be made by a majority vote of the shares represented.

The right to amend by-laws is inherent in the association, and it is also expressly authorized by the statute.

Sec. 3 as amended by act of July 1, 1893.

—Englehardt vs. Assn, 148 N. Y., 281. (42 N. E. Rep., p. 710.)

There is a distinction taken between a corporate act to be done by a select and definite body as by a board of directors, and one to be performed by the constituent members or stockholders. In the latter case a majority of those who appear may act, but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule, but the by-laws may provide that a less number than a majority shall constitute a quorum.

—Dennis vs. Maynard, 15 Ill., 477.

—2 Kent's Com., 293.

—Morawetz on Private Corporations, Sec 531.

—Angel and Ames Corporation, Sec. 459.

—Cook on Stock. etc., 713 (a).

The law is clear that those stockholders who attend a duly called stockholders' meeting, may transact the business of that meeting, although a majority in interest or in number of the stockholders are not present. Of those who attend the meeting, a majority rule. Their acts are as valid as though they constituted a majority of all the stockholders, or constituted a majority at a meeting in which a majority of the stockholders were present.

—Cook on Stock. etc., Sec. 607.

—Morawetz on Corp. Sec. 476.

—Cooley's Blackstone, 1st book, page 478 (note).

One or more attending such a meeting has been said to be sufficient.

—Morrell vs. Little Falls Mfg. Co., 5 N. W. Rep. 547, (Minn).

The better rule is that at least two members are necessary to constitute a corporate meeting.

—Cook. Sec. 607, (note).

In a recent case in the Illinois Supreme Court growing out of changes in the constitution and by-laws of the United Brethren church, it was held that although less than one-fourth of the full membership was present at the meeting that changed the by-laws, yet the whole membership was bound by the action of that meeting.

—Kuhns vs. Robertson, 154 Ill., 411.

There are two exceptions to the rule above stated: First, when an effort is made to carry out *ultra vires* acts; second, amendments which materially change the scope and purpose of the enterprise.

—Cook on Stockholders, etc. Sec. 607.

The amendment in question cannot be claimed to be *ultra vires*, because counsel admit that it is valid and binding on all members who voted for it, and on all who have since consented to it, or who ratified it in any way; and that it is binding on all persons who became members after its adoption. When a by-law is regularly amended according to the by-laws of the association, and is submitted to the attorney-general of the state for his approval, as this by-law was, and the same is approved by him, we do not think it will be contended by him that it is *ultra vires*.

It is contemplated by the statute that all members shall pay their proportion of the expenses of the association. By-laws fixing the terms upon which members may withdraw, are expressly authorized by statute, and upon giving the requisite notice, "he or she shall be entitled to receive the amount paid in by him, or her, and such interest or proportion of the profits thereon as the by-laws may determine, less all fines and *other charges.*"

—Starr & Curtis, Revised Statutes, vol. 1, p. 630, sec. 6.

The principle that the whole is bound by the acts of the majority, when those acts are lawful, is universally applicable to all corporations, *building societies not excepted.*

—Sec. 157, 2d edition, Endlich on Building Associations.

—Englehart vs. Loan Assn., vol. 42, N. E. Rep., 710.

—Chas. Sprague vs. Ill. River R. R. Co., 19 Ill., 174.

—Mercantile Statement Co. vs. Kneal, 53 N.W. Rep., 632.

—Angell & Ames Corp., sec. 499.

—Hagerman vs. Ohio Bldg. & Savings Assn., 25 O. St.,186.

—Sec. 17, 2d edition, Niblack Benefit Societies.

—Sec. 72, Waterman on Corporations.

—Sec. 76, Grant on Corporations.

The case of *Englehart vs. Association, supra*, was decided in January, 1896, by the New York Court of Appeals, and is in point. We quote therefrom:

The power to make reasonable by-laws consistent with its charter inheres in every corporation. * * * The member of an association accepts membership with notice of the powers thus conferred. He is subject not only to regulations existing when he becomes a member, but to such as may be enacted from time to time by the association within the scope of the power given by the statute. It may be admitted that the association could not, under this power, destroy the contract between it and the member; *but the contract was in law, subject to the power of the association to enact at any time reasonable by-laws.* * * * The association, by enacting the rule complained of, did not deny the plaintiff's right to be paid out of collections, but for convenience enacted a rule that those who first applied should be first paid; and this we think it was competent for the association to do, and *that when enacted the rule was binding upon all members alike.*"

We take it the Attorney General will not seriously contend that this amended by-law is not operative upon all the members, unless the change affects the *fundamental character* of the association, or a *vested right* of the member.

We will treat these two propositions briefly.

Thompson, in his new work, in discussing the view that the majority binds the minority unless there is a total deviation from the original object, says there is one view, "that a change in the charter, procured and accepted by a majority of the shareholders, will bind the minority unless the change is so radical as to have the effect to wrench the enterprise, so to speak, entirely from its original purpose—as to change a canal company into a railroad company, an insurance company into a banking company, or the like, * * * In the view of these courts the will of the majority should govern unless there is a fraud or an entire change in the original purpose."

—Sec. 73, vol. 1. Thomp. Corp.

And this is the view adopted by the Illinois Supreme Court.

—Barret vs. Alton & Sangamon R. R. Co., 10 Ill., 504.

—Sprague vs. Illinois, etc., R. R. Co. 19 Ill., 174.

—Illinois, etc., R. R. Co. vs. Zimmer, 20 Ill., 654.

—Ross vs. Chicago etc. R. R. Co., 77 Ill., 127.

—Fulton County vs. March, 10 Wall (U. S.), 677.

—Mercantile Statement Co. vs. Knead, 53 N. W. Rep., p. 632.

The law of this state is so clearly laid down in 19 Ill. *supra*, that we quote therefrom:

"The presumption, then, is that each one, when he enters into the association, agrees to do, and consents to have done, whatever may be the supposed will and is intended to make the undertaking a success, and the investment a profitable one. In the commencement of an undertaking like that of a railroad, no human sagacity can foresee every contingency which may present itself, in its prosecution, and all must know and anticipate that these contingencies or obstacles may make it necessary, for the common good, to make many and even important changes in the original plan, and each one is presumed to anticipate that such changes may become necessary, and to consent to them, when the majority of those entrusted with the management of

the common interest, shall deem it best (for the common good). *It will not do to say that the subscriber is only presumed to consent to such changes or acts as are expressly authorized by the charter as it exists when he subscribes, and that he always considered as protesting to any change of that charter or enlargement of the powers of the corporation, no matter how manifestly it may promote the common good of all. Such a rule would, in all cases, preclude the possibility of ever altering the charter of any corporation, without the express consent of all the shareholders.* Then might one stupid or obstinate holder of one share tie up the hands of all the rest, to their utter ruin. Such a proposition needs no refutation. The history of private corporations, and the legislation of all countries in reference to them, show that no sane man ever became a corporator with such an understanding or intention. There must be a palpable abuse of power by the majority, or governing authority, to the prejudice of the minority, or dissenting portion, before the courts would be authorized to declare its exercise illegal. If the act is performed in good faith and with the real intent to promote the best interest of the concern, even though it might turn out disastrously, the act would be none the less legal." * * * *

"The history of our own legislature is full of similar laws, either authorizing consolidations or amending charters, and limiting and extending their powers and operations, *and no instance can be found where the unanimous consent of all the shareholders of the corporation is made necessary to an acceptance of such amendment*, or to affect a proposed consolidation, and the same may be said of the most of our sister states * * * Such a long continued and uniform acquiescence in the exercise of this power, by those interested in the stocks of these corporations, and by the profession, shows the undoubted understanding of all, that this is a necessary and rightful exercise of power, and he is a bold man indeed, who, supposing he has been favored with some glimmer of constitutional right which has never been vouchsafed to any other, shall hold that this has all been but a usurpation of power, and a ruthless trampling upon individual rights * * * No rational man, upon becoming a member of a corporation, can suppose that for him the course of legislation is to be changed, and the mode of managing corporate concerns

is to be subverted. He must expect that his interest will be managed in the same way that all others, under like circumstances, have always been managed; and to this he must be presumed to consent and agree at the time. He must be held to consent that the charter of the corporation may be amended," etc.

The other Illinois cases are in the same line. The line of authority is unbroken.

The building and loan law of this state provides for amendment to the charter and by-laws, and stipulates how such amendments shall be made and approved, etc.

—Hurd's Statute, (1893) p. 378, Sec. 80.

The by-laws of the association also provide for changes therein, as hereinbefore stated, and the amendment under consideration was in accordance therewith.

In sec. 90, vol. 1, Thomp. Corp., after stating the doctrine in Illinois as to amendments, is this language:

"A necessary result of this doctrine is that the legislature may authorize any change in the organization, purposes, or powers which the majority may desire, contrary to the will of the minority," citing from Illinois:

Banet vs. Alton etc. R. R. Co, 13 Ill., 504.

Sprague vs. R. R. Co., 19 Ill., 74.

And numerous other authorities.

In the work of Mr. Kyd this proposition has been judicially approved:

"It seems to be the first suggestion of reason that an act, done by a simple majority of a collective body of men, which concerns the common interests, should be binding on the whole, and that is the principle of the rule adopted by the common law of England with respect to aggregate corporations."

—Sec. 99, vol. 1. Thomp. Corp.

—1 Kyd Corp., 422.

—Martin vs. Pensacola etc. R. R. Co., 8 Fla., 370. (73 Am. Dec. 718.)

" How would it ever be possible to obtain the express consent of each corporator? In many cases their particular localities would be unknown, and if originally known may have been changed from place to place. If this were not so, then in every case of the decease of a stockholder the corporation could accept no alteration of its charter, however much such alteration might promote its interest and the consequent interest of each individual corporator." etc.

" The individual subscribes to the contract with the distinct knowledge and understanding that its terms may be varied at any time by a concurrence between a majority of his associates and the legislature, and that, too, without his assent, and in defiance of his assent."

—Vol. 1, Thomp. Corp., sec. 99.

This change is not in violation of the contract of membership, but in accordance with it.

"The fundamental principle of every association for the purpose of self-government is that no one shall be bound except with his own consent, expressed by himself or his representative, but actual assent is immaterial, *the assent of the majority being the assent of all;* and this is not only constructively but actually true: for that the will of the majority shall in all cases be taken for the whole is an implied but essential stipulation in every compact of the sort; so *that the individual who becomes a member assents beforehand to all measures that shall be sanctioned by a majority of the voices.*"

—Sec. 499 Angell & Ames. Corp.

It cannot be said that the amendment materially changes the scope and purpose of the enterprise, nor does it affect any vested right.

There is at the basis of the contract relations of the shareholders between each other the stipulation that the contract may be changed whenever the majority of the members conclude the

common interests of all demand or justify such change. If the member had any vested rights at all they were subject to be divested.

Perhaps the latest decision on this subject is that of *Pepe vs. City and Suburban Building Society*, decided March 10, 1893, in 2 Chy. Division (Law Reports) 311, in which it is held, as follows:

"By one of the rules of the society a member, on giving thirty days notice in writing, might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. Plaintiff gave notice of withdrawal, but after such notice, and before he was paid, the rule was altered by giving the directors power to pay off in priority members holding less than fifty pounds in the society, and it was held that * * * he (the plaintiff), being still a member of the society, was liable to have his right divested by a subsequent alteration of the rule, and that he was therefore bound by the altered rule."

The following extract is from the opinion of the Court in that case:

"It has been settled by a series of authorities that a person in such a position is still a member of the society, and it follows that, under his contract with a society which has power to alter its rules, he remains subject to the rules when duly altered. * * * Mr. Daniel says that this case (referring to a case cited) only establishes that altered rules are binding when the alteration is of a comparatively slight nature, such as was the rule in that case regarding arbitration; *but I find no such proposition in the judgment, nor can I see how, on principle, I can make the distinction contended for. The Court would have in each case to examine the subject to which the alteration applied, and to say whether it was material or trifling, and so binding, or not binding. That would be to embark on a difficult course, and where would the Court draw the line?* Mr. Daniels suggests that it should at least be drawn at *vested rights;* but, as I have already said, the vested rights are subject to the still existing powers of altering the rule. In the cases relating to the mortgages, the alteration in the rules was substantial, and, so to speak, of a constitutional character; yet the Court held the new rules binding on the mortgagor although detrimental to him.

"I hold, therefore, that the plaintiff is bound by this altered rule, and I accordingly refuse the motion, but without costs."

Mr. Niblack says, "An incorporated society possesses inherent power to alter, amend or suspend its by-laws, provided that in doing so it does not interfere with vested rights;" and then cites some instances where there are no vested rights, saying, "A member of a society does not stand in the relation of a creditor to the society, and he can only claim such benefits as are prescribed by the by-laws existing at the time he applies for, and is entitled to relief."

The constitution and by-laws of the Odd Fellows' Lodge, provide that during the sickness of a member qualified to receive sick benefits, he should receive, if a scarlet degree member, $4.50 per week, after the first two weeks. The constitution also provided that the lodge might make, alter, or amend its by-laws, and the manner of so doing was pointed out therein. On July 9, 1878, the by-laws were regularly amended, so as to reduce the benefits of a brother who had been sick for twelve months, to one dollar per week. The plaintiff was taken sick October 5, 1875, and continued so until the commencement of this action. He was a scarlet degree member, and entitled to benefits. He was paid four dollars per week, to July 8, 1879, and after that date, one dollar a week. In an action by him to recover an additional three dollars per week, it was held that the lodge had the right to alter the by-law, fixing the amount to be paid to sick members after the plaintiff was taken sick, and that he could not recover the amount prescribed by the former one.

—Poultney vs. Bochman, 31 Hun. (N. Y.) 49.

—Fugure vs. Mutual Society, St. Jos. 46 Vt., 362.

A member of an incorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief.

—St. Pat. M. B. Society vs. McVey, 92 Pa. St., 510.

—Austin vs. Searing, 69 Am. Decisions 674, (note).

—Supreme Commandery vs. Ainsworth, 71 Ala., 436.

—Niblack Benefit Society, 19.

In another case the member claimed that the by-laws giving him a right to benefits constituted a contract which could not be changed during his illness so as to affect him. The court referred to the power given to the society by the laws of the state to change its contract, and said: "In view of this power to alter the contract, it can not be said that the defendant could not alter its by-laws in any respect. The respondent argues, however, that it had no power to alter them so as to impair a vested right. This must be conceded, but we do not think that the new by-law purported to impair a vested right. The term 'vested right' is often loosely used. In one sense every right is vested. If a man has a right at all it must be vested in him; otherwise how could it be a right? The moment a contract is made a right is vested in each party to have it remain unaltered, and to have it performed. The term, however is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent. Now, a right, whether it be of a fixed character or not, must be a right to do something; and when a man talks vaguely of a vested right, it conduces to clearness to ask: 'A vested right to what? In the present case the plaintiff can have *no* right to have a contract remain unchanged, because, as we have seen, *the contract itself provides that it may be changed.* Nor has he a right to remain unaffected by any change that may be made; for if such right be common to all the members, *it is merely another way of saying that no change can be made;* and if the right be not common to the other members, it would be to assert a privilege of superiority over them, of which there is no pretense."

—2d edition of Niblack, sec. 24.

—Stohr vs. Society, 82 Cal., 557.

—22 Pac. Rep., 1125.

Again, in vol. 1, Bacon on Benefit Societies, sec. 92, is a treatise of the by-laws relating to sick benefits.

In *St. Patrick, etc., Society vs. McVey*, 92 Pa., 510, *supra*, the Supreme Court held that a member of a beneficiary society does not stand in the relation of a creditor to, and can only claim

such benefits as are prescribed by the by-laws in force at the time a benefit is due to him; that it is wrong to treat a by-law in existence when the plaintiff became a member as a part of a contract unalterable except with his consent. "It is manifest," said the Court, "that the plaintiff ought not to be allowed to recover under a by-law which had been repealed before he fell sick."

As to State's Interest.

(Eleventh and seventeenth special causes of demurrer.)

What interest has the auditor, or the state, in the construction or application of the by-law, when it is admitted that it is a valid and binding law on all who voted for it, or assented to it, or have in any way ratified it, and is binding upon those who became members after its adoption? It seems to us that the only question then left is one of individual rights, to be settled between the association and the shareholders in an appropriate proceeding.

It will be observed by reference to the auditor's notice that each complaint is on the theory that he represents the shareholders, and not the public. He assumes to file complaints against the stockholders—the association—in behalf of stockholders. The stockholders are the association.

The state cannot interfere to redress private wrongs. It is not sufficient for the state to show that a wrong has been done some one. The wrong must appear to have been done to the People in order to support an action by the People for its redress. The state represents the public interests and not merely individuals and private rights. There are certain acts which the members of a corporation can complain of, and certain others which the state can complain of. Illegal acts, which would be fatal to the life of a corporation in a suit in behalf of the state, would not be a good defense of an individual defending against a claim of the association. Such individual could not put the association upon trial for its life, assuming to set off as it were, against the breach of his obligation to the society, the violation of the latter's duty to the state. There is manifestly a difference between the relations of the association to its members, and the relation of the association to the auditor of

public accounts, or to the state. The state can interfere only when it has been injured or imposed upon by the wrong doings of the corporation—when the corporation rebels against the sovereign authority, betrays its confidence, violates the contract of recognition and protection subsisting between the state and the association--the creator and the creature.

On the point that the state cannot interfere to redress private wrongs, see:

—Sec. 507, 2d Edition Endlich on Bldg. Assns.

—People vs. Low, 117 N. Y., 175 (22 N. E. Rep., 1016).

—Attorney-General vs. Ins. Co., 2 Johns Ch., 371.

—People vs. Ingersoll, 58 N. Y., 1.

—People vs. Wildcat Drainage Comrs., 31 Ill. App., 219-223.

High on Ex. Rem., sec 620.

The writ will be refused where the franchise assumed is of a merely private nature.

—Sec. 828, Spelling on Ex. Relief.

—People vs. Ridgley, 21 Ill., 65.

—Hildreth vs. Sands, 2 Johns Ch. (N. Y.), 37.

—Rex vs. Ogden, 10 B. & C., 230.

The court will refuse a forfeiture, though the corporation is guilty of a misuser, where it appears no injury has resulted to the public.

—Sec. 1829 & 1830, Spelling on Ex. Rel.

—State vs. Essex Bank, 8 Vt., 489.

—Ramsey vs. Carhart, 27 Ark, 12.

—High on Ex. Rem., 620.

—State vs. Turnpike Co., 38 Ind., 71.

—Dey vs. Durham, 2 Johns Ch., 190.

—Harris vs. R. R. Co., 41 Miss., 602.

—People vs. Imp. Co., 103 Ill., 491.

—People vs. R. R. Co. (N. Y.) 26 N. E. Rep., 622.

—State vs. Mfg. Co., 40 Minn., 213.

—Sec. 969 Spelling on Private Corp.

The appropriation of lands by a corporation without compensation to the owner does not show interest in the public or authorize the action, even though the act directed the payment of compensation to owners.

—People vs. Grand River Bridge Co., 11 Colo., 11, (21 Pac. Rep., 898.)

—See also State vs. Shields, 56 Ind., 521.

—Sec. 1830, Spelling on Ex. Rel.

—People vs. Hilsdale, etc., 2 Johns, 190.

—See also 142 Mass., 417 (8 N. E., 138.)

—State vs. Killbrick Tp. Co., 38 Ind., 71–72.

In the 117 N. Y. case, p. 175, *supra*, the Court, in concluding its discussion of the question, says: "It could never have been intended that the Attorney General, in his absolute discretion, by a suit in the name of the People, and at their expense and risk, intrude into a mere private quarrel, and carry on a litigation for purely private ends, in which the People in no proper sense have a shadow of right or interest. * * * The private parties who feel aggrieved in such cases have ample remedies to redress their wrongs by proceedings in their own names; and why should not the complaining members of this corporation redress them in that way, at their own expense and risk? It may be that these defendants would have some defense as to them which in this action by the people they cannot interpose. They might be able to show that by participation or acquiescence in or assent to the acts complained of, those members, or some of them, are estopped from assailing such acts.

On the point that the People must show interest in the subject matter, see also:

—People vs. Booth, 32 N. Y., 392.

—People vs. R. R. Co., 39 N. Y., 75.

—People vs. Low, 117 N. Y., 175.

—People vs. Ry., 89 N. Y., 75.

—People vs. R. R., 57 N. Y., 161.

—People vs. Booth, 32 N. Y., 397.

—People vs. Drainage Dist., 31 Ill. App., 219-223.

This Ill. App. Ct. case is exactly in point.

There must be something more than a mistake in the mode of exercising an acknowledged power before the state can interfere.

—Sec. 505, 507, and 539, Endlich on Bldg. Assns.

—Angell & Ames Corp., 776.

In 80 Illinois, page 134, the Court held that courts never interfere to control the enforcement of the by-laws of merely voluntary associations, created for the advancement of religious, moral, or social principles, or merely for amusement; that such organizations must be left to enforce their rules and regulations by such means as they have adopted for their government. This was in the case of the *People v. The Board of Trade* of Chicago.

In notes to 8 Am. St. Rep. page 182, is this language:

"Furthermore, only such acts or omissions are a cause of forfeiture as concerns matters which are of the essence of the contract between the state and the corporation, or in other words, in which the public have an interest."

—Commercial Bank of Natchez vs. State, 6 Smedes & M., 599, 617.

—Attorney General vs. Petersburg etc. R. R., 6 Tred., 456, 469.

—Harris vs. Mississippi Valley etc. R. R. Co., 51 Miss., 602, 605.

—State vs. Council Bluffs etc. Ferry Co., 11 Neb., 354, 356.

—Thompson vs. People, 23 Wend., 538, 581.

—State vs. Real Estate Bank, 5 Ark., 599, 601; 41 Am. Dec., 109, 114.

—State vs. Minnesota Ry., 36 Minn., 246, 258.

—State vs Minnesota Thrasher Mfg. Co., Minn. Sup. Ct., March 7, 1889, 40 Minn., 213.

Nor can a forfeiture be decreed for the violation by a corporation of a mere legal duty, which may be redressed by ordinary process of law:

—State vs. Real Estate Bank, 5 Ark., 595; 41 Am. Dec., 109, 118.

—Commonwealth vs. Allegheny Bridge Co., 20 Pa. St., 185.

In 31 Illinois App. Rep., on page 223, the Court says: "It may well be doubted whether in the present case any public interest appears. While in form the proceeding is in behalf of the People, to test the right to exercise a corporate franchise, yet in fact, the interests involved are mainly private, if not wholly so. The Court may decline to proceed with the inquiry, when such an aspect is disclosed."

In the case at bar a non-assenting member to the changed by-law, who gives notice of his intention to withdraw and thinks he does not receive the sum due him by the amount of his *pro rata* share of expenses, has a right to sue the association and have the courts pass upon the question as to whether or not such changed by-law is binding upon him.

As to Loans on Property Other than Homesteads.

(Ninth special cause of demurrer.)

The fourth complaint in the notice is, that the association has loaned large sums of money on real estate not used nor intended to be used as homesteads. Admitting this to be true it it is no violation of the law.

There is nothing in the letter or the spirit of the act that makes it the duty of these associations to inquire for what purpose loans are being obtained by members, or to require any stip-

ulation from the borrower as to the use he shall make of the money, or in any manner supervise or control its disbursement.

—The Juniata B. & L. Assn. vs. Mixell, 84 Pa. St., 313.

The statute under which the defendant is incorporated, authorizes the incorporation of such associations, "for the purpose of building and improving of homesteads and loaning money to the members thereof only."

—Sec. 1 of the Homestead & Loan Association Act.

There is no prohibition against loaning on property other than homesteads.

—Kakish vs. Garden City E. L. & B. Assn., 47 App., 608.

—Same Case, 151 Ill., 531.

As to Loans on Encumbered Real Estate.

(Eighth special cause of demurrer.)

The fifth complaint in the notice does not charge that the association *knowingly* loaned money on real estate already encumbered, or that it was their practice to do so. If, by reason of the negligence or fraud of an abstracter, or other person not connected with the association, a loan was made on previously encumbered real estate, we do not think the court should, for that reason dissolve the corporation. We think that the statute means that loans shall not be *knowingly* made on such security. Nor is there any charge that it was the practice of the association to make such loans.

As to Compensation of President.

(Seventh special cause of demurrer.)

The tenth complaint in the notice is, that compensation is paid to the president of the association. It is not alleged that the president was paid for his services *as president*, nor is it alleged that the president did not perform services *other* than those pertaining to his office.

As to Failure of Notice to Show Amount of Insolvency.

(Fifth and sixth special causes of demurrer.)

The eleventh complaint in the notice is, that its assets are insufficient to justify a continuance of business. This was wholly

Sec 8 2 B + L Act of 1893

PEOPLE VS NATIONAL HOME BUILDING & LOAN ASS'N.

Where charges of gross mismanagement and fraudulent practices were made, and it was shown to the Court that a meeting of the stockholders had been held, and a committee was appointed to investigate the charges, examine the books etc., and the committee reported that the corporation was all right, and expressed confidence in the management, and directors of the company, the trial Court appointed a receiver, but on appeal to the Appellate Court the case was reversed.

Vienna Bakery Co. vs Heissler 50 App. 400.

Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions and well-founded apprehensions as to the future. A receiver will not be appointed because of things done or attempted at a past time, when the present situation, and the prospects for the future are not such as to warrant taking the control of the property out of the hands of its owners.

Vienna Bakery Co. vs Heissler 50 App. 412.
Craver & Steel Mfg. Co. vs Whitman App. C't Ist Dist.
Legal News Feb'y 22, 1896 P. 214.

Courts are much more readily moved by proper orders to restrain the doing of improper acts, and compel the recognition of undoubted rights. Vienna Bakery Co. vs Heissler 50 App. 412.

insufficient to apprise appellee of what sum, if any, was necessary to make its assets sufficient. The purpose of the notice was to give the association an opportunity to make its assets sufficient. It had a right to scale its assets, or in some other way to make them satisfactory.

—Broadwell vs. Inter Ocean Homestead & Loan Association, Supreme Court of Ill., May 12, 1896.

Notice should contain the information necessary for intelligent action by the association, without having to resort to extrinsic evidence, as it is in the nature of an indictment, and must be the basis of any action taken on the relation of the auditor. It is nowhere alleged in the bill that the auditor ever gave the association notice of what amount, if any, was necessary to make its assets sufficient, and as a matter of fact, as we understand it, no such notice was ever given.

As to the Expense Fund.

(Fourteenth special cause of demurrer.)

The twelfth complaint in the notice does not charge that any money was unlawfully expended.

The third, sixth, seventh, eighth, and ninth complaints in the notice are matters which could not be corrected in any way, except, if true, to make good any deficiency in the assets occasioned thereby, the amount of which, if any, is not stated.

As to Secretary Discounting Stock.

(Thirteenth special cause of demurrer.)

There is no charge in the bill that the association had any knowledge of the alleged traffic in stock of appellee by its secretary. Should it ever become necessary, the falsity of the charge that the secretary dealt in or discounted stock of appellee can be established.

As to the Constitutionality of the Statute.

(Sixteenth special cause of demurrer.)

Appellee contends that sections 16 and 17 of the Homestead Loan Association Act of 1893, are unconstitutional and void.

This class of legislation would seem, as a matter of first impression, to be violative of constitutional provisions, and if it were not for the line of decisions in insurance cases, commencing with *Ward vs. Farwell*, 97 Ill., 593, and followed up by *Chicago Life Insurance Company vs. Auditor*, 101 Ill., Page 82, and *Chicago Mutual Life Insurance Company vs. Hunt*, 127 Ill., 257, it would seem to us, no argument to establish the invalidity of the act in question would be necessary.

These cases we concede would establish the validity of the act if the legislation upon which they were based is not distinguishable from that upon which the action in this case is founded.

The great distinguishing feature is that insurance companies deal principally with the public; they ask the public to trust them for large amounts, and their ability to take care of their obligations necessarily become a matter of public concern. On the other hand, a building association deals with nobody but its stockholders; as between the stockholders and the corporation, the stockholder is not one of the general public, but becomes an integral part of the company itself. The building association asks no credit, solicits no trade, incurs no obligation; in fact, deals with nobody but its stockholders. Unless, therefore, the legislature has the power to constitute the Auditor of Public Accounts the guardian of every stockholder of every building association, and of every person who contemplates becoming a stockholder, it is clear that it has gone beyond its functions in the present instance.

Matters Not Included in Auditor's Notice.

We contend that all points sought to be made in the bill, and which were not included in the auditor's notice, are demurrable.

The bill was not filed on the relation of the Attorney General, as at common law. A petition on his relation to file the same was not presented to the Court; leave was not obtained to the filing of the bill, as required at common law. It was purely a statutory proceeding, and matters not found by the auditor in his examination of appellee, or asked to be corrected in his

official notice to the association, cannot be complained of in this suit. The statute contemplates that these associations shall have opportunity to make their assets sufficient to justify a continuance of business, and to correct their illegal practices, if any, after receiving a sixty days' notice from the auditor, and it was never contemplated that a bill might be filed on relation of the auditor on grounds not complained of by him to the association, and which the association had no opportunity to correct. This view was maintained by this Court in the case of

Lucien Broadwell vs. Inter Ocean Homestead & Loan Association, the opinion being filed on the 12th of May, 1896.

The auditor is vested with no power, independent of the statute, to file a bill of this kind.

But as counsel insisted upon these points in the trial court, we will notice them here briefly.

As to the Right of a Withdrawing Member to Demand and Receive His Money at the Expiration of Thirty Days' Notice.

(Twelfth special cause of demurrer.)

We insist that even if the point could be made in this case it shows no violation of law not to pay withdrawals at the end of thirty days' notice to withdraw. In the bill it is alleged that the appellee is guilty of an illegal practice in not paying withdrawals at the expiration of thirty days, but there is no allegation in the bill that there was a fund in the treasury of the appellee legally applicable to the payment of those withdrawals that were not paid at the expiration of thirty days, or that appellee wrongfully refused to pay the withdrawals. No reference is made to this matter in the auditor's notice to the association.

The right of a member of a building and loan association to cease paying on his stock and retire from it is created alone by statute. At common law no such right exists, and no such privilege is given to shareholders of any other Illinois corporation. The statute, therefore, should be strictly construed and the interests of the persistent shareholder protected and subserved as well as the interests of the withdrawing shareholder.

For a member to withdraw is to compel the remaining members to buy his stock at a fixed price instead of the member disposing of same in the open market, and if one member has the right *all* have it.

These associations deal only with their members.

—Sec. 1, B. & L. Statute, (p. 378, Hurd's 1893 Statute.)

—Sec. 8, B. & L. Statute, (p. 380, Hurd's 1893 Statute.)

These associations can keep no large sums of money on hand, but must make loans monthly if they have one hundred dollars or more on hand.

—Sec. 8, B. & L. Statute, (p. 379, Hurd's 1893 Statutes.)

These associations are corporate co-partnerships. Mutuality is their essential principle. They have no debtors or creditors except the stockholders. None of the maxims which apply to contracts between strangers are applicable to transactions between the members and the association.

—Towle et. al. vs. American Building, Loan & Inv. Co., 61 Fed. Rep., p. 447.

—Eversman vs. Schmitt, (41 N. E. Rep., 139–141).

—Rayburn et. al. vs. Granite State Provident Ass'n, (New Hampshire Supreme Court, Hillsborough, yet unreported).

—Silver vs. Barnes, 6 Bing., N. C., 180.

On account of the co-partner relationship between the members loans from these associations to the members are not usurious.

—Sec. 78, p. 632, Vol. 1, Starr & Curtis Statute.

—Holmes vs. Smythe, 100 Ill., 413.

—Freeman vs. Association, 114 Ill., 182.

—Burbidge vs. Cotton, 8 Eng. Law & Equity Reports, 57.

—Tilley vs. American B. & L. Ass'n, 52 Fed. Rep., 618.

—Silver vs. Barnes, E. C. L., 571.

—Shannon vs. Dunn, 43 N. H., 194.

—Delano vs. Wilde, 88 Mass., 1.

—Clarksville B. & L. Ass'n vs. Stephens, 26 N. J. Eq., 351.

—Patterson vs. Workingmen's B. & L. Ass'n, 14 Lea, (Tenn.) 677.

A withdrawing member is not entitled to sue and recover judgment against the association for the amount due him on withdrawal, unless there is a fund in the treasury of the association legally applicable to the payment of his claim, and there is no liability on the part of the association to make such payment until there is such a treasury fund. A member who has given notice to withdraw is not a creditor of the association. The agreement between the withdrawing member and the association is that he is to withdraw, upon notice, and is entitled to his money only when there is a treasury fund legally applicable to the payment of his claim. and until this condition exists, membership continues. There is even a limitation upon amount of treasury funds that are applicable to the demands of withdrawing members.

—Sec. 6 B. & L. Statute (Hurd of 1893), p. 379.

—Sec. 21, Appellee's Charter, set out in the Pleadings.

—Heinbokel vs. Nat'l Sav., Loan & Bldg. Ass'n, (Supreme Court of Minn., July 23, 1894), 59 N. W. Rep., 1050.

—Texas Homestead B. & L. Ass'n vs. Kerr (Supreme Court of Texas, May 2, 1890), 13 S. W. Rep., 1020.

—Englehardt vs. Fifth Ward Per. Dime Sav. & Loan Ass'n (Court of Appeals of N. Y., Jan. 28, 1896), Vol. 42, N. E. Rep., 710.

—Maloney vs. Real Estate B. & L. Ass'n, 57 Mo. App., 384.

—Pepe vs. City Sub. Per. Bldg. Soc., Law Rep. 2 Ch., 1893, p. 311.

—Bret vs. The Monarch Inv. Bldg. Soc., 1 Q. B., 1894, p. 367.

—Barnard vs. Thomson, 1894, Law Rep. 1 Ch., p. 374.

—Nat'l B. & L. Herald, March 15, 1896, p. 112.

In re Pepe vs. Society, supra, it is said, "It has been held by a series of authorities that a person in such a position (one who was given notice to withdraw), is still a member of the society."

The giving of thirty days notice to the association to withdraw, is merely the expression of an intention to withdraw, on the part of the member, and to take his money when the same becomes payable under the proviso and condition of the statute, and membership does not thereby cease.

—Decatur Bldg. & Inv. Co. vs. Neal, 12 Son. Rep., 781.

As to Association's Liability to Its Members for Interest.

(Fourth and fifth special causes of demurrer.)

Mutuality being the basis of the plan of appellee, there is no liability on its part for interest to members on their stock independent of profits. It is a co-partnership, with corporate rights, and to say there is a liability for interest is to say that some of the members owe other members interest on their stock payments, regardless of whether the association or copartnership has made earnings equal to the interest or not. There can be no liability for interest, unless the profits or earnings equal or exceed the stipulated interest, and then *only on the stock that has been filed for withdrawal.* Even on withdrawal, interest is taken from the net earning or profits, leaving the balance of profits for the remaining or persistent members. Interest on all the stock payments is not a liability.

"Mutuality being the basis of the scheme, it follows that no association can pay to a member more than the book value of his shares on withdrawal, whatever may be the terms of the contract or certificate itself. No association can legally promise to pay more than the book value under its rules and regulations."

—Hall on Banks, 132.

In *O'Malley vs. People's Bldg. Assn.* (36 N. Y. Sup., 1016, New York Supreme Court, General Term, Dec., 1895), it appeared that the defendant issued to plaintiff a membership certificate containing the following withdrawal provision:

The association "agrees to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares at the end of five years from the date thereof."

Plaintiff had a certificate for five shares. He complied with his contract, and at the end of five years demanded the five hundred dollars apparently due him, according to the terms of his certificate. Defendant replied that only three hundred and seventy-one dollars was due on the certificate. The plaintiff refused to accept this sum and brought this action to recover the $500.00.

The defendant based its refusal to pay more than $371.00 upon the ground that no more than that amount had been earned. On appeal to the General Term of the New York Supreme Court, the judgment of the trial court was reversed and the recovery was reduced to the sum of $371.00, the sum offered by the defendant, the Court saying:

"The principal question presented is, whether the plaintiff is entitled to recover the par value of the shares, or whether his recovery shall be limited to the sum of $371.00, that being the amount as claimed by the defendant which the shares had earned at the time this action was commenced. * * * The trial court construed the certificate to be an absolute, unconditional promise to pay the $500.00 upon the expiration of five years from its date, and directed judgment accordingly.

"The main question presented by the appeal, as stated, is whether the plaintiff is entitled to recover the face value of the certificate, or shall his recovery be limited to the amount the shares have earned?

"If the language of the certificate alone is to be considered, there can be but little doubt that the decision of the trial court was right.

"In constructing this contract, the defendant's articles of association and by-laws must be considered as part of the considered as part of the contract, and given their proper effect. (*Gibbs vs. Bank*, 83 Hun., 92, 31 N. Y. Supp., 406. *In re Commissioners of Washington Park*, 52 N. Y., 131.) It is rea-

sonably certain that if the construction contended for is to prevail it will thwart the scheme and purpose of the Association and probably bankrupt it.

"The plan of the organization contemplates that the holders of the certificates shall be entitled to share equally in its earnings. It is a mutual association.

"It can not with any propriety be claimed that under the defendant's articles of association and by-laws it has contemplated that there should be any distinction in the time of maturity of the shares of stock.

"The plaintiff was presumably aware of the general plan of the association, for it was stated in his certificate that the articles of the association and the by-laws were to form a part of the contract, and, as stated, the general plan of the association contemplated that all the shareholders should be entitled to a *pro rata* share of its earnings. He must have been aware that it was not at all probable that the earnings of the association would be sufficient to pay the rate of interest which his construction of the contract calls for. It was not possible to know at the time the certificate was issued to defendant, when it would mature by the accumulation of dividends, for that necessarily depended upon the earnings of the association, and that could not be determined in advance. * * *

"We are of the opinion that the defendant did not possess the power or the authority to issue a certificate containing a fixed maturity period, and that the clause in the certificate in question should be construed as an estimated period of maturity. The amount actually earned by this certificate at the time it was presented by the plaintiff was only $371.

"The judgment should be reversed and a new trial granted, * * * unless the plaintiff * * * stipulates to reduce the recovery of damages to $371, and interest thereon from December 21, 1894."

In *Knoblanck vs. Robert Blum Ass'n* (8 Pittsb. Leg. J., 39) in the Court of Common Pleas, Allegheny County, Pa., in 1877,

the question turned on the obligation of the withdrawing member to bear his proportionate share of the losses.

The question was whether the association had a right to retain out of the sum otherwise due Knoblanck on withdrawal of his proportionate share of such loss.

The court held that the association had such right, and said: "Has a building and loan association the right to retain or hold back from a retiring member a reasonable amount to meet his share of the probable losses that may arise from loans made while he was a member? * * *

"Under the act of Assembly and the by-laws of this association, a member has a right to withdraw, * * * and is entitled to receive back the money paid in, with a share of the profits during the time he was a member. But suppose the association made no profits and met with severe losses; shall the withdrawing members get back all they paid and cast the whole burden of losses upon those who remain, or who may not know of the losses and not be so quick in giving notice of withdrawal? Certainly not. That would be unjust and inequitable.

"During the time the plaintiff was a member the association made a loan to one Grassel on mortgage, which was unpaid, the mortgage foreclosed, the property sold at sheriff's sale, and bought in by the association. They have not yet been able to sell it, and the probable loss on that loan will be five dollars per share on the stock. About a week before the sheriff's sale plaintiff gave notice of withdrawal, and claims all he paid in, without any abatement for the loss on that loan. To allow a member under such circumstances, to retire and demand all that he had paid in, without contributing anything to losses which are manifest, and impending, would be unjust towards his fellow members, and it would be bad faith in him. He had a right to share in the profits while he was a member, and he must also bear his proportion of the losses."

In *McGrath vs. Hamilton Savings and Loan Association*, (44 Pa., 383) in 1863, the question was whether the borrowing member was liable to a charge for his proportionate share of the

expenses of conducting the association's business. The by-laws of the association provided as follows:

"Sec. 3. Stockholders wishing to withdraw from this corporation shall be entitled to receive the amount actually paid in by each stockholder, less 5 per cent., and his or their proportion of the losses and expenses. * * *"

McGrath paid off part of his mortgage. On foreclosure to recover the balance, the association claimed that McGrath should be charged with his proportionate share of the expenses, on paying off his loan and withdrawing.

The court held that the member was properly charged with his proportionate part of the expenses, and said (p. 385):

"While the plaintiff in error remained a member of the association, he was under obligation to contribute his share of its expenses. What he had invested in its funds was chargeable with its proportion of the necessary expenditure. In a limited sense he was a partner with the other stockholders. * * * The association had a right to treat his payments while his membership continued, as his contribution, so far as they were needed, to the discharge of the expenses incurred in the management of the enterprise, in which he had a joint interest with the others. * * *"

As to Loans Made "Illegally in Excess of the Real Estate Mortgaged."

(Second special cause of demurrer.)

There is not a syllable in the bill showing any illegality on the part of the association in loaning its money, and no such charge is made in the auditor's notice.

The charge of actual insolvency in the bill, which begins at the bottom of page forty-nine of abstract is much broader than the complaint in the notice. This part of the bill is answered by our special plea. In the bill the liabilities of appellee are stated in gross. The plea shows that in that sum the auditor charges the association with one hundred thousand dollars as a liability on the theory that the amendment to the by-law is in-

valid ; that he charges the association with the sum of one hundred and three thousand dollars as interest on all stock in force whether the same has been presented for withdrawal or not by reason of a by-law authorizing the payment of interest to *withdrawing* members; and he further charges the association with $122,000 as a loss on loans on real estate, and arrives at this conclusion from appraisements made by inspectors sent out by him, and individuals selected by him to inspect the property, and the plea avers that such examination and appraisement of property is not authorized by law, and that appellee should not be charged with any loss on loans by reason thereof. There is no replication to this plea.

When a plea in chancery is not replied to, the truth of the facts therein alleged are admitted, and the only question for the Court to determine is, whether the facts set up constitute a bar.

—Knowlton vs. Hanbury, 117 Ill., 475.

—Farley vs. Kittson, 120 U. S., 314.

As to Appellee Pursuing Its Business Outside of McLean County, Illinois.

(Third special cause of demurrer.)

It is alleged in the bill that the association was not authorized by the law of its creation to do business outside of the immediate locality in which it was created; and that in violation of such law it did business in several states of the United States. Upon an examination of the statute under which appellee is incorporated, it will be found that there is no prohibition or limitation in this regard, and appellee was free to go into any state which did not prohibit it from doing so. It is not claimed that it did business in any state contrary to the laws of that state.

Matters Arising on Appellee's Plea.

All points arising on the plea, go to the sufficiency of appellee's assets to justify the continuance of business.

The first one is whether or not the expenses of the association, under the by-law hereinbefore discussed, are a liability. If the by-law is binding upon all the members, as we insist it is,

then there is no liability on the part of the association to its members for the amount of such expenses. If the member withdraws, the expenses are deducted from what he has paid in to the association. If he remains to the maturity of the stock, then he bears his proportionate part of the expenses, for it is only *net* earnings that mature stock. This one item reduces the liabilities of appellee, one hundred thousand dollars.

The second point is as to whether interest on all stock in force is a liability. We contend it is not. This point was also raised by the demurrer, inasmuch as this item of interest was separated from the general liabilities of appellee, and could be reached by the demurrer, while the item of expenses was concealed in what the Auditor called its general liabilities. What we said as to interest arising on demurrer, is applicable here. If we are right as to this, and we think we are, then appellee's liabilities on this account are $103,000 less than charged by the Auditor.

The third point raised by the plea is as to the authority of the Auditor to send men over the country and appraise its real estate properties, ignoring the value of its notes and bonds, and estimate the values of such real estate, and the loss of appellee. We contend he has no authority to make such appraisements and charge such estimated losses as a liability. If he has not such authority, then the liabilities of appellee are reduced another $122,000. This point we will discuss in the argument.

The auditor has erroneously charged as a liability items aggregating $325,000.

ARGUMENT.

If the matter stated in our plea shows a good defense to that part of the bill which it purports to answer, as we think it does, then by reason of the state of the pleadings, it is necessarily admitted of record by counsel for appellant, that appellee is not insolvent. The Auditor charges appellee with $100,000 as a liability under the old by-law, wholly ignoring the amendment, and treating it as absolutely void, as to all members, notwithstanding the fact that it is admitted to be valid and binding on all

who voted for it, or who consented to it, or have since ratified it in any way. The right of a corporation to amend its by-laws is an inherent right, but the right to amend is reserved to the association, as will be seen by the by-law set out in our plea. In addition to this, Sec. 3, of the Loan and Homestead act as amended July 1, 1893, expressly authorizes the amendment of by-laws, and provides the manner in which they shall become operative. It is in these words:

"And any subsequent amendment or alteration of said by-laws shall be submitted to the Secretary of State, and be approved by the Attorney General, and be recorded in like manner as the original by-laws before the same shall become operative, and only such by-laws as shall have been submitted, approved, and recorded as herein provided, shall be deemed operative."

After the examination of the association by the Auditor in the year 1894, appellee received from him a sixty days notice, one of the charges of illegal practices in the same being as follows:

"In that it, the association, has paid to its withdrawing members the full amount of installments paid by them, together with a certain amount of interest thereon, without regard to the fact that a certain part of such installments had been deducted and disbursed in the payment of expenses, such practice resulting in serious loss to its remaining and persistent stockholders, contrary to safe business methods," and in said notice appellee was given to understand that if a change was not made in this regard, the auditor would place the matter in the hands of the attorney general, and the association would be proceeded against according to law. The association, in compliance with the notice, and believing it for the best interests of the stockholders, at its regular annual meeting held January 15, 1895, amended the by-law and required withdrawing stockholders to pay their proportionate share of the expenses of the association. This is clearly authorized by the law, and was done with the intention of complying with the auditor's notice of 1894. After the adoption of the amendment as aforesaid, it was then filed with the secretary of state, and by him submitted to the attorney general, who approved it, and it was then filed in the recorder's office of McLean county, Illinois, in strict conformity with all the requirements of the law.

Now, after notifying appellee that unless a change was made in the regards aforesaid, the auditor would proceed against it, appellee in the best of faith, proceeded to comply with his notice, and adopted such an amendment as it thought would meet his ideas, but after amending the by-law in compliance with his demands, after his examination in 1895, he then complains of the amendment, and claims that it is not valid and binding on those who did not vote for it or ratify it. The legal officer of the state, in the performance of a duty imposed by law, approved of this amendment, and no intimation or suggestion was then made by him that such a by-law would not be binding upon all members of the association. As we understand his contention now, he would leave it to each stockholder of the association to fix the terms upon which his stock may be withdrawn, or that in sub stance. He would have a different rule for each member who did not see fit to vote for an amendment to the by-laws.

The auditor also charges appellee with $103,000 as a liabil ity under a by-law authorizing the payment of interest to *with drawing* members, and in order to charge it with this amount, he computes interest on all stock in force, whether notice of withdrawal had been given or not, whereas, as a matter of fact, the interest on all stock filed for withdrawal would not exceed $20,000, and that amount would only be a liability in the event the association was solvent, and had net earnings, or a surplus equal to or in excess of this interest, and this is in conflict with the theory of his bill. Under all of the authorities, a building and loan association is a corporate copartnership. It has rules which allow its co-partners to withdraw at any time upon giving certain notice. These rules fix the amount which a withdrawing member is entitled to receive. In lieu of profits on stock, owing to the time it has been in force, he is paid interest. This interest is not due to any member of the association until he files his notice of withdrawal, and then only if it has been earned. As long as the association is a going concern, the withdrawing member gets his interest in lieu of profits. All members who stay in until their stock matures, share in the profits earned, and are paid accordingly, instead of being paid interest. The interest feature is simply a convenient method of letting members retire when they see fit to do so, giving them what is intended as

an equitable compensation for the use of their money while it has been in the association. It may be that three-fourths of all the stock in force at the time this suit was commenced, will remain in force, and will not be withdrawn until the stock matures. In such case the settlement is not made on the basis of the by law authorizing the payment of interest, but is on the basis that the profits have accumulated sufficiently to mature the stock. This is the first time, so far as we are able to learn from the official reports of the auditor, that he has charged any association with interest as a liability.

The auditor also charges appellee with about $122,000 as a liability for losses on loans by depreciation in value of the real estate. He arrives at this conclusion from the appraisements made by inspectors appointed by him, who went around to see the property upon which appellee had loaned money. These inspectors made a guess on the values, and guessed that the association would lose this amount of money. This guess was made during the recent panic. We think it is not contemplated by the statute which authorizes an examination by the auditor that he will make appraisements of the property loaned upon. We do not think the statute gives him authority to do so. The authority given by the section under which he proceeds, being section 16 of the act of July 1, 1893, is in the same words as the authority given him by the bank act. It is safe to say, we think, that no one ever heard of the auditor going around over the country to examine the property owned by persons who have money borrowed from the banks, and putting appraisements upon such property, and deciding in this way that the banks will lose so much money from losses on loans. The notes and bonds are not to be ignored. The statute authorizes a full and complete examination of the books, securities, and other papers of the association, and authorizes an examination of all of the officers of the association under oath. The course pursued by the auditor in examining building and loan associations has been to send inspectors to see every piece of property upon which a loan was made, and making the association pay for such services at the rate of ten dollars per day for each inspector, besides his expenses. With an association like the appellee, which has a large number of loans, the cost of such an inspection is from $1,500 to $2,000 each year, the principal portion of which is caused by this inspection of property.

The court can readily see that if the amended by-law is valid and binding on all members, as we claim, then on that point appellee's liabilities are reduced $100,000; that if appellee is not chargeable with interest as a liability on stock, which has not been filed for withdrawal, then its liabilities are reduced by the sum of $83,000, or if there is no liability for interest on any stock the amount would be reduced by $103,000; that if there is no authority at law for making the appraisement of property as aforesaid, then its liabilities are reduced in the further sum of about $122,000. If all three of these items are improperly charged against appellee, as we contend, then, instead of being insolvent, to the extent of $65,635.13, it would have a surplus of about $260,000. If the amendment is binding on all, and appellee is not chargeable with interest on its stock, and the auditor's appraisement is authorized by law, then instead of being insolvent, it would have a surplus of about $138,000, or if there is a liability for interest on the stock filed for withdrawal its surplus, on this basis, would be $118,000. If appellee is not chargeable with any one of the three items charged against it, it is solvent, and has a big net surplus. These figures are as of date when the suit was brought. Since then its surplus has largely increased. Of course, if the court holds that any point of our demurrer is well taken, the decision of the trial court must be affirmed. It seems to us that it needs no argument to show that the matters set up in the bill which are not included in the notice have no place in this case, and the demurrer to those matters is certainly well taken. If this were a case in the name of the People on relation of the attorney general as at common law, these matters could be properly considered, but in the case at bar, we think they cannot. The auditor's notice should be so certain and specific that from its face, one can see what sum, if any, is required to make the association's assets sufficient to justify a continuance of business, otherwise, what is the purpose of giving a notice at all?

The statute contemplates that the association shall be notified of those matters which do not meet with the approval of the Auditor, and the association is given sixty days within which to correct them. Now, if a notice is to be held sufficient, which does not give the necessary information to show what is wanted

by the Auditor, we think it would keep an association guessing to know what is wanted. We have an example of this in the case at bar in regard to the by-law, the complaint of the Auditor in 1894, and his complaint after the amendment of the by-law. The demurrer on this point, we think it clearly well taken.

The demurer to that part of the bill which charges that the association has, in violation of the law, loaned its money on property other than homesteads, is shown by the authorities to be well taken. The charge in the bill that loans were made on previously incumbered real estate, is defective in that it is not charged that such loans were *knowingly* made, or that it was appellee's practice to make such loans. These, we think, are fatal defects to the allegation. The fact is, that only two or three loans were made on incumbered property, and in those cases, it was because of the fraud or negligence of abstracters, and the demurrer was, on this point, properly sustained.

The charge in the bill that the association did not pay withdrawing members promptly on the expiration of thirty days notice, does not show a violation of any law, for the reason that it is not charged that the association had funds with which to pay such members, and neglected, or refused to do so. It is not contemplated by the law that associations shall keep money on hand with which to pay withdrawing members promptly. Under the statute, only one half of the funds of the treasury shall be applicable to the demands of withdrawing members, without the consent of the board of directors.

We insist that every point of our demurrer is well taken.

It is admitted in the bill (Abst. 36) that all of the matters complained of by the Auditor had been complied with, in so far as it was possible to do so, except that the assets had not been made sufficient. It will be remembered also, that nearly all of the complaints in the Auditor's notice are of such a character that they could not be complied with, except by making good any deficiency in the assets. Our plea shows the manner in which the Auditor arrives at the conclusion that there is a deficiency of assets, and that there is in fact no deficiency.

The Court will observe the pleadings show property to the amount of about one million of dollars to be involved in this case, and can imagine this suit affects the interests and involves the homes of many hundreds of deserving, industrious citizens. These members have skimped their small wages to pay their dues in the hope of acquiring their own homes, and of getting good returns on their small investments in appellee's stock. They have committed no fraud, nor connived at any. They have not sought to wreck this corporation or to stuff their pockets with ill-gotten gains. The appointment of a receiver as prayed for by the state, would result in the punishment of these poor, hard working people, for an alleged wrong which they never committed or participated in. The appellee has done no wrong that would authorize or justify this Court in sustaining the bill.

We insist that the demurrer was properly sustained, and appellant refusing to amend his bill, the facts stated in the plea not being controverted, the Court could do nothing but dismiss the bill, as was done. The decision of the Court should be affirmed.

Respectfully submitted,

JESSE R. LONG,
FIFER & BARRY,
Solicitors for Appellee.

STATE OF ILLINOIS.

SUPREME COURT

CENTRAL GRAND DIVISION.

JUNE TERM, A. D. 1896.

PEOPLE EX REL, ETC.

Appellant,

—VS—

NATIONAL HOME BUILDING AND LOAN ASSOCIATION.

Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

JESSE R. LONG,
FIFER & BARRY,
Solicitors for Appellees.

PANTAGRAPH P. & B. CO., BLOOMINGTON, ILL.

STATE OF ILLINOIS.

Supreme Court---Central Grand Division.

JUNE TERM, A. D., 1896.

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Appellant,

—VS—

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Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT.

This is a bill filed in the name of the People of the state of Illinois, on the relation of David Gore, auditor of public accounts, against the National Home Building and Loan Association, of Bloomington, Ill., a corporation under the Loan and Homestead Act, for the dissolution of the corporation, the forfeiture of its franchise, and the appointment of a receiver. The suit was brought under section 17 of the Loan and Homestead Act of July 1, 1893, and is based on an examination by said auditor under section 16 of said act, and a notice given by him to the president and secretary of the corporation on the 24th day of October, 1895. Appellant filed his bill, and before any action was taken on the same he obtained leave of court, and filed an amended bill. Appellee filed a general and special demurrer to all of the amended bill, except that charging insolvency and

insufficiency of assets, and filed a plea as to that part. The plea was not replied to. As there are many points raised by the demurrer, we will necessarily mention them under another head, and think it not advisable to put them in this statement. The demurrer was sustained, and appellant standing by his bill and declining to amend the same, the bill was dismissed.

THE ISSUES.

Owing to the fact that our demurrer refers to paragraphs and allegations on certain pages of the amended bill, and the abstract and record were gotten up without regard to any references in the demurrer, it would be a laborious task for the Court to pick out the different paragraphs and allegations demurred to without a restatement of the grounds of our demurrer, and giving the Court references to the pages of the abstract where they will be found. For this reason we restate the grounds of demurrer, with appropriate references, as follows:

1. Because all of the allegations in the bill, beginning with the second paragraph on page 2, and including page 5, are repeated in substance on page 10 and the pages following, and some of said allegations are repeated three different times in the bill. (Allegations referred to will be found on pages 30, 31, 32, 37 and 38 of abstract.)

2. That the allegations on pages 3 and 11 of the bill, "that said association has made loans of money illegally in excess of the real estate mortgaged to secure the same, etc.," is not included in the notice given by the auditor to the officers of said association. (Allegations referred to will be found beginning at the bottom of page 30, and again near the middle of page 38 of abstract.)

3. That the allegations on page 4, "that said association had issued shares of stock to persons residing at different places in the state of Illinois, and in different states in the United States of America, etc.," are not included in the notice given by the auditor to the officers of said association, and the doing of the same is not contrary to law. (Allegations referred to will be found near the bottom of page 31.)

4. That the allegations in the paragraph beginning on page 16 are not included in the notice given by the auditor to said association. (Allegations referred to begin about the middle of page 43 of abstract.)

5. That the notice given by the auditor was wholly insufficient to apprise defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business. (Notice will be found on page 33 of abstract.)

6. That the only possible way of complying with many of the requirements of said notice was by making good any deficiency of the assets that might exist, and the notice given did not state what amount, if any, was required to make the assets sufficient to justify a continuance of business. (Notice is on page 33 of abstract.)

7. The paragraph on page 10 of bill does not show that any sums were unlawfully expended, except that a salary was paid to the president, and the amended bill shows this requirement was complied with by the said Association, nor is it alleged that said salary was paid to the president for services as president. (Allegations referred to will be found on pages 36 and 37 of abstract.)

8. That the allegations on pages 11 and 14, "That said Association has made loans on previously incumbered real estate," are wholly insufficient in that they do not allege that such loans were so made knowingly, and that said allegation is set forth three different times in the bill, nor is it alleged that it was a practice of said Association to loan on incumbered real estate. (Allegations referred to will be found on pages 38 and 41 of abstract.)

9. That the allegation on page 15, "That said Association has loaned money on real estate other than homesteads," etc., does not show a violation of any law. (Allegations will be found on page 42 of abstract.)

10. That the allegations in the paragraph beginning on page 17, show that the by-law complained of, was legally passed, and is binding on all shareholders, and its construction affects only those who are shareholders, and is a matter in which the state has no interest. (Allegations will be found on page 44 of abstract.)

11. That by the amended bill it is admitted that all the requirements of the Auditor's notice were complied with in so far as it was possible for the Association to comply with the same, except the requirement that the assets should be made sufficient to justify the continuance of business. It shows compliance with all matters except those affecting the rights of shareholders already in, and are matters in which the state has no interest. (Amendment referred to is on page 36 of abstract.)

12. That the allegation on page 20, "that said Association has not paid to its withdrawing shareholders the amount due them upon the expiration of a period of thirty days after notice was given," is not a violation of any law. (Allegations will be found on page 46 of the abstract.)

13. That the further allegation on the same page, "that the secretary did discount the claims of some withdrawing shareholders, etc." is shown by the amendment to the bill (Abst. 36) to have been corrected within the sixty days, and it is not alleged that said acts were done with the knowledge and consent of the said association. (Allegation will be found on page 47 of abstract.)

14. That the allegations contained in paragraph beginning on page 21 did not charge any unlawful disbursements of the funds of said association. (Allegations will be found on pages 47 and 48 of abstract.)

15. That the charging of interest as a liability is unwarranted by law. (This charge will be found on page 50 of abstract.)

16. That part of the statute under which the auditor's examination was made, and this proceeding is had, is unconstitutional.

17. That all of the complaints in the auditor's notice, except those charging insolvency, and a want of sufficient assets to justify a continuance of business, are not of such a character as to rightfully concern the auditor or the state.

The notice given by the auditor is the basis of this suit, and nothing can be complained of in the bill that is not covered by the notice. The notice is as follows:

1. "Whereas, it appears from an examination of the affairs of the National Home Building and Loan Association of Bloomington, Ill., that the said association is conducting its business in an unsafe manner, and contrary to law as follows, to-wit:

2. "That it attempts, under cover of an amendment to its charter to change its existing contracts with shareholders, in such manner as to deprive such shareholders of large amounts due them by the terms of the contract, so attempted to be changed, without the assent, and against the protest of such shareholders, thereby injuring the reputation of said association for fair dealing, and constituting an unsafe and illegal manner of doing business.

3. "In that its secretary has, by offering to discount the claims of shareholders upon withdrawal of their stock, encouraged the opinion that its stock should be sold at a discount, and thus injured it in its reputation to a large extent, and rendered its further success questionable.

4. "In that it has on sundry and divers occasions loaned large sums of money on real estate not used nor intended to be used as homesteads, such practice not being warranted by law.

5. "In that it has on sundry and divers occasions loaned large sums of money on real estate already encumbered by prior liens to parties other than the association, to the great loss of its shareholders, and against the provisions of the law.

6. "In that its affairs have been so managed that large numbers of shareholders have lost confidence therein, and have made application to withdraw therefrom, and continued to do so, thereby rendering the further transaction of business by it difficult and unsatisfactory.

7. "In that it has loaned large sums of money upon security wholly inadequate, to the great loss and detriment of its shareholders.

8. "In that a large part of its entire assets are unproductive of any profit, and are a constant source of loss.

9. "In that its loans have been selected with so little care that only a small per cent of the charges thereon are regularly or promptly paid.

10. "In that compensation is paid to its president, contrary to the provisions of the statute.

11. "In that its assets are insufficient to justify a continuance of business by it.

12. "In that its expenses have largely exceeded in amount the sum which ordinary business prudence would dictate as proper, and largely in excess of what such association could afford, its actual earning capacity being considered, contrary to safe business methods.

"Now therefore, I, David Gore, auditor of public accounts, do hereby notify you, the said F. J. Fitzwilliam, president, and W. R. Fitzwilliam, secretary, of the said National Home Building and Loan Association, that unless such conduct of business in an unsafe manner, and contrary to law, be corrected, and such assets be made sufficient to justify a continuance of business within sixty (60) days from the date hereof, I shall report the said National Home Building and Loan Association to the attorney-general, to be by him proceeded against, according to the form of the statute in such case made and provided.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and year first above written.

"DAVID GORE,

[SEAL] "Auditor of Public Accounts."

The causes of demurrer, numbered five to seventeen, both inclusive, except twelve and fifteen, relate to matters included in the auditor's notice.

The second, third, fourth, twelfth, and fifteenth points relate to matters not included in the auditor's notice to the association.

The plea goes to the sufficiency of appellee's assets.

Aside from the constitutionality of the act under which the bill was filed, the questions raised by the *demurrer* relate to the legality of appellee's practices; those raised by the *plea* relate to the sufficiency of its assets to justify a continuance of business.

Our second, third, fourth, twelfth, and fifteenth special causes for demurrer are well assigned, because the matters referred to are not included in the notice given by the auditor.

If this was a bill filed on the relation of the attorney general as at common law, no doubt it would be proper for him to complain, if he saw fit, of such matters as are referred to in said special causes of demurrer, and have same submitted to the court for determination, but the court will remember that this is a proceeding on the relation of the auditor under the statute, and not on the relation of the attorney general at common law.

It is substantially admitted in the amended bill, as shown at page 36 of abstract, that all the requirements of the auditor's notice were complied with in so far as it was possible for the association to comply with same, except that requiring that the assets should be made sufficient to justify the continuance of business. It will be noticed that by our fifth and sixth special causes of demurrer, we question the sufficiency of the notice given by the auditor, because it does not apprise the defendant of what sum, if any, was required to make its assets sufficient to justify a continuance of business. Many other of the allegations of the bill are questioned by our demurrer, any one of which, if well taken, is sufficient to sustain the decision of the trial court. This we understand to be the settled law.

The notice failed to show what amount, if any, was necessary to make good the deficiency. If our point on this question is well taken, it goes to the merits and disposes of the whole case, and under the state of the pleadings, we understand that if any point in our demurrer is well taken, in as much as appellant refused to amend his bill, the decision of the lower court is right, and the decree must be affirmed.

In the bill, beginning at the bottom of page 49 of abstract, is an allegation that the Association is insolvent; that its gross assets are $1,266,968.57; that its general liabilities amount to the sum of $1,107,236.85; that it has sustained losses upon loans to the sum of $121,895.71; that under and by virtue of its by-laws it is liable for interest upon its shares of stock, for the sum of $103,471.14, and that its total liabilities amount to the sum of $1,332,603.70, and that its total liabilities exceed its total assets by the sum of $65,635.13. This charge in the bill being broader than the complaint in the auditor's notice, and charging actual insolvency, and it not appearing from the face of the bill what items went to make up the general liabilities, appellee could not demur to this allegation, and therefore filed its special plea to this part of the bill, which is found on page 57 of abstract, and the same not being replied to, the truth of it is admitted, and the only question for the court to determine is, whether the facts set up constitute a bar to that part of the bill.

We also raise the point that all of the complaints in the Auditor's notice, except those charging an insufficiency of assets to justify a continuance of business, do not rightfully concern the auditor of the state.

BRIEF.

Auditor's Notice.

Under this head we will refer to the complaints in the auditor's notice.

As to Amended By-Law.

(Tenth special cause of demurrer.)

The second and principal complaint in the notice, which is set out at length in the bill at pages 44 and 45 of abstract, charges that on January 15, 1895, at a meeting of the shareholders of the association, a majority of its shareholders amended its by-law relating to the withdrawal of its shares of stock, so as to give to the withdrawing member all that he has paid into the association except membership fees, fines and their respective proportionate share of expenses; that a large number of the shareholders protested against the adoption of the amendment on the ground that

they had not consented to the same, and the enforcement of it against them would be in violation of the conditions of the contract entered into between them and the association at the time they became members. All members of the association are required to make monthly contributions to it. A part of each monthly contribution, under the charter and by-laws of the association, was used for expenses; the other, and major part, was used in making loans and for corporate purposes other than expenses. Under the by-law as to withdrawals, prior to the amendment, each withdrawing member was entitled to receive all he had paid into the association—that part he contributed for expenses as well as that contributed to what may be called the "loan fund," together with a stipulated rate of interest, according to the age of the stock, less membership fees and fines.

Under the by-law, as amended, the withdrawing member is not entitled to receive from the association the amount he had contributed as expenses and which had been used for that purpose. In other words, he is required to bear his proportionate part of the expenses during the time he was a member of the society. He is not longer permitted to unload his part of the expenses upon the other and persistent members. The association has ceased paying a premium to those members who would retire from the society. By the amended by-law *all* members, whether they withdraw or remain as a part of the society, bear their respective proportionate part of the expenses. This is right on principle. Any other rule would be to sow the seeds of disintegration into the society and to discriminate among the members who are bound together by the strongest ties of mutuality.

Endlich, in his work on Building and Loan Associations, affirms the rule, as follows:

"The most satisfactory expedient is that of allowing him (the withdrawing member) to take out what he has paid in, less fines and other charges still owing from him, and a *proportionate share of the expenses of the business to date*, and add to it such sum, as his share of the profits, as may be deemed proper by the society."

—Sec. 102 Endlich on Bldg. Assns., 2nd Edition.

The majority of the shareholders under the law are presumed to know the needs of the corporation better than the minority. They legislate for the common good and common interests of all. It is alleged in the bill that the association could not lawfully amend the by-law as aforesaid so as to be binding on those who did not consent, but that it is nevertheless requiring withdrawing members who did not consent to the amendment to settle according to the amended by-law, and by reason thereof has violated its duty to such members, and has thereby withheld from them amounts of money which the Association was not entitled to retain.

The Court will notice that it is not alleged, and no complaint is made, that any of the requirements necessary to amend the by-law were not complied with. The amendment was adopted by the shareholders, filed with the Secretary of State, and by him submitted to the Attorney General, *and duly approved by that officer*, and afterwards filed in the Recorder's office of McLean county, Illinois—all strictly in conformity with the statute. As we understand it, counsel admit that the by-law as amended is binding on all persons who voted for it, and on all persons who have since consented to it, or have in any way ratified it, and that it is binding on all those who become members after its adoption.

On the question of the principle of acquiescence, ratification or estoppel, see

—Sec. 80, vol. 1, Thomp. Corp.

We also understand that the only point insisted upon by counsel is that the by-law is not binding on the shareholders who did not vote for it and did not expressly consent to it, or have not in any way ratified it since its adoption.

We think the amendment is binding on all or none. We also think that there can be no question but that it is binding on all. It is admitted that the amendment was made by a majority vote of the shares represented at the meeting, which was a majority of the shares in force. It will be seen from our plea that a by-law was in force allowing amendments to be made by a majority vote of the shares represented.

The right to amend by-laws is inherent in the association, and it is also expressly authorized by the statute.

Sec. 3 as amended by act of July 1, 1893.

—Englehardt vs. Assn, 148 N. Y., 281. (42 N. E. Rep., p. 710.)

There is a distinction taken between a corporate act to be done by a select and definite body as by a board of directors, and one to be performed by the constituent members or stockholders. In the latter case a majority of those who appear may act, but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule, but the by-laws may provide that a less number than a majority shall constitute a quorum.

—Dennis vs. Maynard, 15 Ill., 477.

—2 Kent's Com., 293.

—Morawetz on Private Corporations, Sec 531.

—Angel and Ames Corporation, Sec. 459.

—Cook on Stock. etc., 713 (a).

The law is clear that those stockholders who attend a duly called stockholders' meeting, may transact the business of that meeting, although a majority in interest or in number of the stockholders are not present. Of those who attend the meeting, a majority rule. Their acts are as valid as though they constituted a majority of all the stockholders, or constituted a majority at a meeting in which a majority of the stockholders were present.

—Cook on Stock. etc., Sec. 607.

—Morawetz on Corp. Sec. 476.

—Cooley's Blackstone, 1st book, page 478 (note).

One or more attending such a meeting has been said to be sufficient.

—Morrell vs. Little Falls Mfg. Co., 5 N. W. Rep. 547, (Minn).

The better rule is that at least two members are necessary to constitute a corporate meeting.

—Cook. Sec. 607, (note).

In a recent case in the Illinois Supreme Court growing out of changes in the constitution and by-laws of the United Brethren church, it was held that although less than one-fourth of the full membership was present at the meeting that changed the by-laws, yet the whole membership was bound by the action of that meeting.

—Kuhns vs. Robertson, 154 Ill., 411.

There are two exceptions to the rule above stated: First, when an effort is made to carry out *ultra vires* acts; second, amendments which materially change the scope and purpose of the enterprise.

—Cook on Stockholders, etc. Sec. 607.

The amendment in question cannot be claimed to be *ultra vires*, because counsel admit that it is valid and binding on all members who voted for it, and on all who have since consented to it, or who ratified it in any way; and that it is binding on all persons who became members after its adoption. When a by-law is regularly amended according to the by-laws of the association, and is submitted to the attorney-general of the state for his approval, as this by-law was, and the same is approved by him, we do not think it will be contended by him that it is *ultra vires*.

It is contemplated by the statute that all members shall pay their proportion of the expenses of the association. By-laws fixing the terms upon which members may withdraw, are expressly authorized by statute, and upon giving the requisite notice, "he or she shall be entitled to receive the amount paid in by him, or her, and such interest or proportion of the profits thereon as the by-laws may determine, less all fines and *other charges.*"

—Starr & Curtis, Revised Statutes, vol. 1, p. 630, sec. 6.

The principle that the whole is bound by the acts of the majority, when those acts are lawful, is universally applicable to all corporations, *building societies not excepted.*

—Sec. 157, 2d edition, Endlich on Building Associations.

—Englehart vs. Loan Assn., vol. 42, N. E. Rep., 710.

—Chas. Sprague vs. Ill. River R. R. Co., 19 Ill., 174.

—Mercantile Statement Co. vs. Kneal, 53 N.W. Rep., 632.

—Angell & Ames Corp., sec. 499.

—Hagerman vs. Ohio Bldg. & Savings Assn., 25 O. St.,186.

—Sec. 17, 2d edition, Niblack Benefit Societies.

—Sec. 72, Waterman on Corporations.

—Sec. 76, Grant on Corporations.

The case of *Englehart vs. Association*, *supra*, was decided in January, 1896, by the New York Court of Appeals, and is in point. We quote therefrom:

The power to make reasonable by-laws consistent with its charter inheres in every corporation. * * * The member of an association accepts membership with notice of the powers thus conferred. He is subject not only to regulations existing when he becomes a member, but to such as may be enacted from time to time by the association within the scope of the power given by the statute. It may be admitted that the association could not, under this power, destroy the contract between it and the member; *but the contract was in law, subject to the power of the association to enact at any time reasonable by-laws.* * * * The association, by enacting the rule complained of, did not deny the plaintiff's right to be paid out of collections, but for convenience enacted a rule that those who first applied should be first paid; and this we think it was competent for the association to do, and *that when enacted the rule was binding upon all members alike.*"

We take it the Attorney General will not seriously contend that this amended by-law is not operative upon all the members, unless the change affects the *fundamental character* of the association, or a *vested right* of the member.

We will treat these two propositions briefly.

Thompson, in his new work, in discussing the view that the majority binds the minority unless there is a total deviation from the original object, says there is one view, "that a change in the charter, procured and accepted by a majority of the shareholders, will bind the minority unless the change is so radical as to have the effect to wrench the enterprise, so to speak, entirely from its original purpose—as to change a canal company into a railroad company, an insurance company into a banking company, or the like, * * * In the view of these courts the will of the majority should govern unless there is a fraud or an entire change in the original purpose."

—Sec. 73, vol. 1. Thomp. Corp.

And this is the view adopted by the Illinois Supreme Court.

—Barret vs. Alton & Sangamon R. R. Co., 10 Ill., 504.

—Sprague vs. Illinois, etc., R. R. Co. 19 Ill., 174.

—Illinois, etc., R. R. Co. vs. Zimmer, 20 Ill., 654.

—Ross vs. Chicago etc. R. R. Co., 77 Ill., 127.

—Fulton County vs. March, 10 Wall (U. S.), 677.

—Mercantile Statement Co. vs. Knead, 53 N. W. Rep., p. 632.

The law of this state is so clearly laid down in 19 Ill. *supra*, that we quote therefrom:

"The presumption, then, is that each one, when he enters into the association, agrees to do, and consents to have done, whatever may be the supposed will and is intended to make the undertaking a success, and the investment a profitable one. In the commencement of an undertaking like that of a railroad, no human sagacity can foresee every contingency which may present itself, in its prosecution, and all must know and anticipate that these contingencies or obstacles may make it necessary, for the common good, to make many and even important changes in the original plan, and each one is presumed to anticipate that such changes may become necessary, and to consent to them, when the majority of those entrusted with the management of

the common interest, shall deem it best (for the common good). *It will not do to say that the subscriber is only presumed to consent to such changes or acts as are expressly authorized by the charter as it exists when he subscribes, and that he always considered as protesting to any change of that charter or enlargement of the powers of the corporation, no matter how manifestly it may promote the common good of all. Such a rule would, in all cases, preclude the possibility of ever altering the charter of any corporation, without the express consent of all the shareholders.* Then might one stupid or obstinate holder of one share tie up the hands of all the rest, to their utter ruin. Such a proposition needs no refutation. The history of private corporations, and the legislation of all countries in reference to them, show that no sane man ever became a corporator with such an understanding or intention. There must be a palpable abuse of power by the majority, or governing authority, to the prejudice of the minority, or dissenting portion, before the courts would be authorized to declare its exercise illegal. If the act is performed in good faith and with the real intent to promote the best interest of the concern, even though it might turn out disastrously, the act would be none the less legal." * * * *

"The history of our own legislature is full of similar laws, either authorizing consolidations or amending charters, and limiting and extending their powers and operations, *and no instance can be found where the unanimous consent of all the shareholders of the corporation is made necessary to an acceptance of such amendment*, or to affect a proposed consolidation, and the same may be said of the most of our sister states * * * Such a long continued and uniform acquiescence in the exercise of this power, by those interested in the stocks of these corporations, and by the profession, shows the undoubted understanding of all, that this is a necessary and rightful exercise of power, and he is a bold man indeed, who, supposing he has been favored with some glimmer of constitutional right which has never been vouchsafed to any other, shall hold that this has all been but a usurpation of power, and a ruthless trampling upon individual rights * * * No rational man, upon becoming a member of a corporation, can suppose that for him the course of legislation is to be changed, and the mode of managing corporate concerns

is to be subverted. He must expect that his interest will be managed in the same way that all others, under like circumstances, have always been managed; and to this he must be presumed to consent and agree at the time. He must be held to consent that the charter of the corporation may be amended," etc.

The other Illinois cases are in the same line. The line of authority is unbroken.

The building and loan law of this state provides for amendment to the charter and by-laws, and stipulates how such amendments shall be made and approved, etc.

—Hurd's Statute, (1893) p. 378, Sec. 80.

The by-laws of the association also provide for changes therein, as hereinbefore stated, and the amendment under consideration was in accordance therewith.

In sec. 90, vol. 1, Thomp. Corp., after stating the doctrine in Illinois as to amendments, is this language:

"A necessary result of this doctrine is that the legislature may authorize any change in the organization, purposes, or powers which the majority may desire, contrary to the will of the minority," citing from Illinois:

Banet vs. Alton etc. R. R. Co, 13 Ill., 504.

Sprague vs. R. R. Co., 19 Ill., 74.

And numerous other authorities.

In the work of Mr. Kyd this proposition has been judicially approved:

"It seems to be the first suggestion of reason that an act, done by a simple majority of a collective body of men, which concerns the common interests, should be binding on the whole, and that is the principle of the rule adopted by the common law of England with respect to aggregate corporations."

—Sec. 99, vol. 1. Thomp. Corp.

—1 Kyd Corp., 422.

—Martin vs. Pensacola etc. R. R. Co., 8 Fla., 370. (73 Am. Dec. 718.)

"How would it ever be possible to obtain the express consent of each corporator? In many cases their particular localities would be unknown, and if originally known may have been changed from place to place. If this were not so, then in every case of the decease of a stockholder the corporation could accept no alteration of its charter, however much such alteration might promote its interest and the consequent interest of each individual corporator." etc.

"The individual subscribes to the contract with the distinct knowledge and understanding that its terms may be varied at any time by a concurrence between a majority of his associates and the legislature, and that, too, without his assent, and in defiance of his assent."

—Vol. 1, Thomp. Corp., sec. 99.

This change is not in violation of the contract of membership, but in accordance with it.

"The fundamental principle of every association for the purpose of self-government is that no one shall be bound except with his own consent, expressed by himself or his representative, but actual assent is immaterial, *the assent of the majority being the assent of all;* and this is not only constructively but actually true: for that the will of the majority shall in all cases be taken for the whole is an implied but essential stipulation in every compact of the sort; so *that the individual who becomes a member assents beforehand to all measures that shall be sanctioned by a majority of the voices.*"

—Sec. 499 Angell & Ames. Corp.

It cannot be said that the amendment materially changes the scope and purpose of the enterprise, nor does it affect any vested right.

There is at the basis of the contract relations of the shareholders between each other the stipulation that the contract may be changed whenever the majority of the members conclude the

common interests of all demand or justify such change. If the member had any vested rights at all they were subject to be divested.

Perhaps the latest decision on this subject is that of *Pepe vs. City and Suburban Building Society*, decided March 10, 1893, in 2 Chy. Division (Law Reports) 311, in which it is held, as follows:

"By one of the rules of the society a member, on giving thirty days notice in writing, might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. Plaintiff gave notice of withdrawal, but after such notice, and before he was paid, the rule was altered by giving the directors power to pay off in priority members holding less than fifty pounds in the society, aud it was held that * * * he (the plaintiff), being still a member of the society, was liable to have his right divested by a subsequent alteration of the rule, and that he was therefore bound by the altered rule."

The following extract is from the opinion of the Court in that case:

"It has been settled by a series of authorities that a person in such a position is still a member of the society, and it follows that, under his contract with a society which has power to alter its rules, he remains subject to the rules when duly altered. * * * Mr. Daniel says that this case (referring to a case cited) only establishes that altered rules are binding when the alteration is of a comparatively slight nature, such as was the rule in that case regarding arbitration; *but I find no such proposition in the judgment, nor can I see how, on principle, I can make the distinction contended for. The Court would have in each case to examine the subject to which the alteration applied, and to say whether it was material or trifling, and so binding, or not binding. That would be to embark on a difficult course, and where would the Court draw the line?* Mr. Daniels suggests that it should at least be drawn at *vested rights;* but, as I have already said, the vested rights are subject to the still existing powers of altering the rule. In the cases relating to the mortgages, the alteration in the rules was substantial, and, so to speak, of a constitutional character; yet the Court held the new rules binding on the mortgagor although detrimental to him.

"I hold, therefore, that the plaintiff is bound by this altered rule, and I accordingly refuse the motion, but without costs."

Mr. Niblack says, "An incorporated society possesses inherent power to alter, amend or suspend its by-laws, provided that in doing so it does not interfere with vested rights;" and then cites some instances where there are no vested rights, saying, "A member of a society does not stand in the relation of a creditor to the society, and he can only claim such benefits as are prescribed by the by-laws existing at the time he applies for, and is entitled to relief."

The constitution and by-laws of the Odd Fellows' Lodge, provide that during the sickness of a member qualified to receive sick benefits, he should receive, if a scarlet degree member, $4.50 per week, after the first two weeks. The constitution also provided that the lodge might make, alter, or amend its by-laws, and the manner of so doing was pointed out therein. On July 9, 1878, the by-laws were regularly amended, so as to reduce the benefits of a brother who had been sick for twelve months, to one dollar per week. The plaintiff was taken sick October 5, 1875, and continued so until the commencement of this action. He was a scarlet degree member, and entitled to benefits. He was paid four dollars per week, to July 8, 1879, and after that date, one dollar a week. In an action by him to recover an additional three dollars per week, it was held that the lodge had the right to alter the by-law, fixing the amount to be paid to sick members after the plaintiff was taken sick, and that he could not recover the amount prescribed by the former one.

—Poultney vs. Bochman, 31 Hun. (N. Y.) 49.

—Fugure vs. Mutual Society, St. Jos. 46 Vt., 362.

A member of an incorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief.

—St. Pat. M. B. Society vs. McVey, 92 Pa. St., 510.

—Austin vs. Searing, 69 Am. Decisions 674, (note).

—Supreme Commandery vs. Ainsworth, 71 Ala., 436.

—Niblack Benefit Society, 19.

In another case the member claimed that the by-laws giving him a right to benefits constituted a contract which could not be changed during his illness so as to affect him. The court referred to the power given to the society by the laws of the state to change its contract, and said: "In view of this power to alter the contract, it can not be said that the defendant could not alter its by-laws in any respect. The respondent argues, however, that it had no power to alter them so as to impair a vested right. This must be conceded, but we do not think that the new by-law purported to impair a vested right. The term 'vested right' is often loosely used. In one sense every right is vested. If a man has a right at all it must be vested in him; otherwise how could it be a right? The moment a contract is made a right is vested in each party to have it remain unaltered, and to have it performed. The term, however is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent. Now, a right, whether it be of a fixed character or not, must be a right to do something; and when a man talks vaguely of a vested right, it conduces to clearness to ask: 'A vested right to what? In the present case the plaintiff can have *no* right to have a contract remain unchanged, because, as we have seen, *the contract itself provides that it may be changed.* Nor has he a right to remain unaffected by any change that may be made; for if such right be common to all the members, *it is merely another way of saying that no change can be made;* and if the right be not common to the other members, it would be to assert a privilege of superiority over them, of which there is no pretense."

—2d edition of Niblack, sec. 24.

—Stohr vs. Society, 82 Cal., 557.

—22 Pac. Rep., 1125.

Again, in vol. 1, Bacon on Benefit Societies, sec. 92, is a treatise of the by-laws relating to sick benefits.

In *St. Patrick, etc., Society vs. McVey*, 92 Pa., 510, *supra*, the Supreme Court held that a member of a beneficiary society does not stand in the relation of a creditor to, and can only claim

such benefits as are prescribed by the by-laws in force at the time a benefit is due to him; that it is wrong to treat a by-law in existence when the plaintiff became a member as a part of a contract unalterable except with his consent. "It is manifest," said the Court, "that the plaintiff ought not to be allowed to recover under a by-law which had been repealed before he fell sick."

As to State's Interest.

(Eleventh and seventeenth special causes of demurrer.)

What interest has the auditor, or the state, in the construction or application of the by-law, when it is admitted that it is a valid and binding law on all who voted for it, or assented to it, or have in any way ratified it, and is binding upon those who became members after its adoption? It seems to us that the only question then left is one of individual rights, to be settled between the association and the shareholders in an appropriate proceeding.

It will be observed by reference to the auditor's notice that each complaint is on the theory that he represents the shareholders, and not the public. He assumes to file complaints against the stockholders—the association—in behalf of stockholders. The stockholders are the association.

The state cannot interfere to redress private wrongs. It is not sufficient for the state to show that a wrong has been done some one. The wrong must appear to have been done to the People in order to support an action by the People for its redress. The state represents the public interests and not merely individuals and private rights. There are certain acts which the members of a corporation can complain of, and certain others which the state can complain of. Illegal acts, which would be fatal to the life of a corporation in a suit in behalf of the state, would not be a good defense of an individual defending against a claim of the association. Such individual could not put the association upon trial for its life, assuming to set off as it were, against the breach of his obligation to the society, the violation of the latter's duty to the state. There is manifestly a difference between the relations of the association to its members, and the relation of the association to the auditor of

public accounts, or to the state. The state can interfere only when it has been injured or imposed upon by the wrong doings of the corporation—when the corporation rebels against the sovereign authority, betrays its confidence, violates the contract of recognition and protection subsisting between the state and the association--the creator and the creature.

On the point that the state cannot interfere to redress private wrongs, see:

—Sec. 507, 2d Edition Endlich on Bldg. Assns.

—People vs. Low, 117 N. Y., 175 (22 N. E. Rep., 1016).

—Attorney-General vs. Ins. Co., 2 Johns Ch., 371.

—People vs. Ingersoll, 58 N. Y., 1.

—People vs. Wildcat Drainage Comrs., 31 Ill. App., 219-223.

High on Ex. Rem., sec 620.

The writ will be refused where the franchise assumed is of a merely private nature.

—Sec. 828, Spelling on Ex. Relief.

—People vs. Ridgley, 21 Ill., 65.

—Hildreth vs. Sands, 2 Johns Ch. (N. Y.), 37.

—Rex vs. Ogden, 10 B. & C., 230.

The court will refuse a forfeiture, though the corporation is guilty of a misuser, where it appears no injury has resulted to the public.

—Sec. 1829 & 1830, Spelling on Ex. Rel.

—State vs. Essex Bank, 8 Vt., 489.

—Ramsey vs. Carhart, 27 Ark, 12.

—High on Ex. Rem., 620.

—State vs. Turnpike Co., 38 Ind., 71.

—Dey vs. Durham, 2 Johns Ch., 190.

—Harris vs. R. R. Co., 51 Miss., 602.

—People vs. Imp. Co., 103 Ill., 491.

—People vs. R. R. Co. (N. Y.) 26 N. E. Rep., 622.

—State vs. Mfg. Co., 40 Minn., 213.

—Sec. 969 Spelling on Private Corp.

The appropriation of lands by a corporation without compensation to the owner does not show interest in the public or authorize the action, even though the act directed the payment of compensation to owners.

—People vs. Grand River Bridge Co., 11 Colo., 11, (21 Pac. Rep., 898.)

—See also State vs. Shields, 56 Ind., 521.

—Sec. 1830, Spelling on Ex. Rel.

—People vs. Hilsdale, etc., 2 Johns, 190.

—See also 142 Mass., 417 (8 N. E., 138.)

—State vs. Killbrick Tp. Co., 38 Ind., 71–72.

In the 117 N. Y. case, p. 175, *supra*, the Court, in concluding its discussion of the question, says: "It could never have been intended that the Attorney General, in his absolute discretion, by a suit in the name of the People, and at their expense and risk, intrude into a mere private quarrel, and carry on a litigation for purely private ends, in which the People in no proper sense have a shadow of right or interest. * * * The private parties who feel aggrieved in such cases have ample remedies to redress their wrongs by proceedings in their own names; and why should not the complaining members of this corporation redress them in that way, at their own expense and risk? It may be that these defendants would have some defense as to them which in this action by the people they cannot interpose. They might be able to show that by participation or acquiescence in or assent to the acts complained of, those members, or some of them, are estopped from assailing such acts.

On the point that the People must show interest in the subject matter, see also:

—People vs. Booth, 32 N. Y., 392.

—People vs. R. R. Co., 39 N. Y., 75.

—People vs. Low, 117 N. Y., 175.

—People vs. Ry., 89 N. Y., 75.

—People vs. R. R., 57 N. Y., 161.

—People vs. Booth, 32 N. Y., 397.

—People vs. Drainage Dist., 31 Ill. App., 219-223.

This Ill. App. Ct. case is exactly in point.

There must be something more than a mistake in the mode of exercising an acknowledged power before the state can interfere.

—Sec. 505, 507, and 539, Endlich on Bldg. Assns.

—Angell & Ames Corp., 776.

In 80 Illinois, page 134, the Court held that courts never interfere to control the enforcement of the by-laws of merely voluntary associations, created for the advancement of religious, moral, or social principles, or merely for amusement; that such organizations must be left to enforce their rules and regulations by such means as they have adopted for their government. This was in the case of the *People v. The Board of Trade* of Chicago.

In notes to 8 Am. St. Rep. page 182, is this language:

"Furthermore, only such acts or omissions are a cause of forfeiture as concerns matters which are of the essence of the contract between the state and the corporation, or in other words, in which the public have an interest."

—Commercial Bank of Natchez vs. State, 6 Smedes & M., 599, 617.

—Attorney General vs. Petersburg etc. R. R., 6 Tred., 456, 469.

—Harris vs. Mississippi Valley etc. R. R. Co., 51 Miss., 602, 605.

—State vs. Council Bluffs etc. Ferry Co., 11 Neb., 354, 356.

—Thompson vs. People, 23 Wend., 538, 581.

—State vs. Real Estate Bank, 5 Ark., 599, 601; 41 Am. Dec., 109, 114.

—State vs. Minnesota Ry., 36 Minn., 246, 258.

—State vs Minnesota Thrasher Mfg. Co., Minn. Sup. Ct., March 7, 1889, 40 Minn., 213.

Nor can a forfeiture be decreed for the violation by a corporation of a mere legal duty, which may be redressed by ordinary process of law:

—State vs. Real Estate Bank, 5 Ark., 595; 41 Am. Dec., 109, 118.

—Commonwealth vs. Allegheny Bridge Co., 20 Pa. St., 185.

In 31 Illinois App. Rep., on page 223, the Court says: "It may well be doubted whether in the present case any public interest appears. While in form the proceeding is in behalf of the People, to test the right to exercise a corporate franchise, yet in fact, the interests involved are mainly private, if not wholly so. The Court may decline to proceed with the inquiry, when such an aspect is disclosed."

In the case at bar a non-assenting member to the changed by-law, who gives notice of his intention to withdraw and thinks he does not receive the sum due him by the amount of his *pro rata* share of expenses, has a right to sue the association and have the courts pass upon the question as to whether or not such changed by-law is binding upon him.

As to Loans on Property Other than Homesteads.

(Ninth special cause of demurrer.)

The fourth complaint in the notice is, that the association has loaned large sums of money on real estate not used nor intended to be used as homesteads. Admitting this to be true it it is no violation of the law.

There is nothing in the letter or the spirit of the act that makes it the duty of these associations to inquire for what purpose loans are being obtained by members, or to require any stip-

ulation from the borrower as to the use he shall make of the money, or in any manner supervise or control its disbursement.

—The Juniata B. & L. Assn. vs. Mixell, 84 Pa. St., 313.

The statute under which the defendant is incorporated, authorizes the incorporation of such associations, "for the purpose of building and improving of homesteads and loaning money to the members thereof only."

—Sec. 1 of the Homestead & Loan Association Act.

There is no prohibition against loaning on property other than homesteads.

—Kakish vs. Garden City E. L. & B. Assn., 47 App., 608.

—Same Case, 151 Ill., 531.

As to Loans on Encumbered Real Estate.

(Eighth special cause of demurrer.)

The fifth complaint in the notice does not charge that the association *knowingly* loaned money on real estate already encumbered, or that it was their practice to do so. If, by reason of the negligence or fraud of an abstracter, or other person not connected with the association, a loan was made on previously encumbered real estate, we do not think the court should, for that reason dissolve the corporation. We think that the statute means that loans shall not be *knowingly* made on such security. Nor is there any charge that it was the practice of the association to make such loans.

As to Compensation of President.

(Seventh special cause of demurrer.)

The tenth complaint in the notice is, that compensation is paid to the president of the association. It is not alleged that the president was paid for his services *as president*, nor is it alleged that the president did not perform services *other* than those pertaining to his office.

As to Failure of Notice to Show Amount of Insolvency.

(Fifth and sixth special causes of demurrer.)

The eleventh complaint in the notice is, that its assets are insufficient to justify a continuance of business. This was wholly

Sec 8 of B & L Act of 1893

PEOPLE VS NATIONAL HOME BUILDING & LOAN ASS'N.

Where charges of gross mismanagement and fraudulent practices were made, and it was shown to the Court that a meeting of the stockholders had been held, and a committee was appointed to investigate the charges, examine the books etc., and the committee reported that the corporation was all right, and expressed confidence in the management and directors of the company, the trial Court appointed a receiver, but on appeal to the Appellate Court the case was reversed.

Vienna Bakery Co. vs Heissler 50 App. 406

Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions and well-founded apprehensions as to the future. A receiver will not be appointed because of things done or attempted at a past time, when the present situation and the prospects for the future are not such as to warrant taking the control of the property out of the hands of its owners.

Vienna Bakery Co. vs Heissler 50 App. 412.
Craver & Steel Mfg. Co. vs Whitman App. C't Ist Dist.
Legal News Feb'y 22, 1896 P. 214.

Courts are much more readily moved by proper orders to restrain the doing of improper acts, and compel the recognition of undoubted rights. Vienna Bakery Co. vs Heissler 50 App. 413.

insufficient to apprise appellee of what sum, if any, was necessary to make its assets sufficient. The purpose of the notice was to give the association an opportunity to make its assets sufficient. It had a right to scale its assets, or in some other way to make them satisfactory.

—Broadwell vs. Inter Ocean Homestead & Loan Association, Supreme Court of Ill., May 12, 1896.

Notice should contain the information necessary for intelligent action by the association, without having to resort to extrinsic evidence, as it is in the nature of an indictment, and must be the basis of any action taken on the relation of the auditor. It is nowhere alleged in the bill that the auditor ever gave the association notice of what amount, if any, was necessary to make its assets sufficient, and as a matter of fact, as we understand it, no such notice was ever given.

As to the Expense Fund.

(Fourteenth special cause of demurrer.)

The twelfth complaint in the notice does not charge that any money was unlawfully expended.

The third, sixth, seventh, eighth, and ninth complaints in the notice are matters which could not be corrected in any way, except, if true, to make good any deficiency in the assets occasioned thereby, the amount of which, if any, is not stated.

As to Secretary Discounting Stock.

(Thirteenth special cause of demurrer.)

There is no charge in the bill that the association had any knowledge of the alleged traffic in stock of appellee by its secretary. Should it ever become necessary, the falsity of the charge that the secretary dealt in or discounted stock of appellee can be established.

As to the Constitutionality of the Statute.

(Sixteenth special cause of demurrer.)

Appellee contends that sections 16 and 17 of the Homestead Loan Association Act of 1893, are unconstitutional and void.

This class of legislation would seem, as a matter of first impression, to be violative of constitutional provisions, and if it were not for the line of decisions in insurance cases, commencing with *Ward vs. Farwell*, 97 Ill., 593, and followed up by *Chicago Life Insurance Company vs. Auditor*, 101 Ill., Page 82, and *Chicago Mutual Life Insurance Company vs. Hunt*, 127 Ill., 257, it would seem to us, no argument to establish the invalidity of the act in question would be necessary.

These cases we concede would establish the validity of the act if the legislation upon which they were based is not distinguishable from that upon which the action in this case is founded.

The great distinguishing feature is that insurance companies deal principally with the public; they ask the public to trust them for large amounts, and their ability to take care of their obligations necessarily become a matter of public concern. On the other hand, a building association deals with nobody but its stockholders; as between the stockholders and the corporation, the stockholder is not one of the general public, but becomes an integral part of the company itself. The building association asks no credit, solicits no trade, incurs no obligation; in fact, deals with nobody but its stockholders. Unless, therefore, the legislature has the power to constitute the Auditor of Public Accounts the guardian of every stockholder of every building association, and of every person who contemplates becoming a stockholder, it is clear that it has gone beyond its functions in the present instance.

Matters Not Included in Auditor's Notice.

We contend that all points sought to be made in the bill, and which were not included in the auditor's notice, are demurrable.

The bill was not filed on the relation of the Attorney General, as at common law. A petition on his relation to file the same was not presented to the Court; leave was not obtained to the filing of the bill, as required at common law. It was purely a statutory proceeding, and matters not found by the auditor in his examination of appellee, or asked to be corrected in his

official notice to the association, cannot be complained of in this suit. The statute contemplates that these associations shall have opportunity to make their assets sufficient to justify a continuance of business, and to correct their illegal practices, if any, after receiving a sixty days' notice from the auditor, and it was never contemplated that a bill might be filed on relation of the auditor on grounds not complained of by him to the association, and which the association had no opportunity to correct. This view was maintained by this Court in the case of

Lucien Broadwell vs. Inter Ocean Homestead & Loan Association, the opinion being filed on the 12th of May, 1896.

The auditor is vested with no power, independent of the statute, to file a bill of this kind.

But as counsel insisted upon these points in the trial court, we will notice them here briefly.

As to the Right of a Withdrawing Member to Demand and Receive His Money at the Expiration of Thirty Days' Notice.

(Twelfth special cause of demurrer.)

We insist that even if the point could be made in this case it shows no violation of law not to pay withdrawals at the end of thirty days' notice to withdraw. In the bill it is alleged that the appellee is guilty of an illegal practice in not paying withdrawals at the expiration of thirty days, but there is no allegation in the bill that there was a fund in the treasury of the appellee legally applicable to the payment of those withdrawals that were not paid at the expiration of thirty days, or that appellee wrongfully refused to pay the withdrawals. No reference is made to this matter in the auditor's notice to the association.

The right of a member of a building and loan association to cease paying on his stock and retire from it is created alone by statute. At common law no such right exists, and no such privilege is given to shareholders of any other Illinois corporation. The statute, therefore, should be strictly construed and the interests of the persistent shareholder protected and subserved as well as the interests of the withdrawing shareholder.

For a member to withdraw is to compel the remaining members to buy his stock at a fixed price instead of the member disposing of same in the open market, and if one member has the right *all* have it.

These associations deal only with their members.

—Sec. 1, B. & L. Statute, (p. 378, Hurd's 1893 Statute.)

—Sec. 8, B. & L. Statute, (p. 380, Hurd's 1893 Statute.)

These associations can keep no large sums of money on hand, but must make loans monthly if they have one hundred dollars or more on hand.

—Sec. 8, B. & L. Statute, (p. 379, Hurd's 1893 Statutes.)

These associations are corporate co-partnerships. Mutuality is their essential principle. They have no debtors or creditors except the stockholders. None of the maxims which apply to contracts between strangers are applicable to transactions between the members and the association.

—Towle et. al. vs. American Building, Loan & Inv. Co., 61 Fed. Rep., p. 447.

—Eversman vs. Schmitt, (41 N. E. Rep., 139–141).

—Rayburn et. al. vs. Granite State Provident Ass'n, (New Hampshire Supreme Court, Hillsborough, yet unreported).

—Silver vs. Barnes, 6 Bing., N. C., 180.

On account of the co-partner relationship between the members loans from these associations to the members are not usurious.

—Sec. 78, p. 632, Vol. 1, Starr & Curtis Statute.

—Holmes vs. Smythe, 100 Ill., 413.

—Freeman vs. Association, 114 Ill., 182.

—Burbidge vs. Cotton, 8 Eng. Law & Equity Reports, 57.

—Tilley vs. American B. & L. Ass'n, 52 Fed. Rep., 618.

—Silver vs. Barnes, E. C. L., 571.

—Shannon vs. Dunn, 43 N. H., 194.

—Delano vs. Wilde, 88 Mass., 1.

—Clarksville B. & L. Ass'n vs. Stephens, 26 N. J. Eq., 351.

—Patterson vs. Workingmen's B. & L. Ass'n, 14 Lea, (Tenn.) 677.

A withdrawing member is not entitled to sue and recover judgment against the association for the amount due him on withdrawal, unless there is a fund in the treasury of the association legally applicable to the payment of his claim, and there is no liability on the part of the association to make such payment until there is such a treasury fund. A member who has given notice to withdraw is not a creditor of the association. The agreement between the withdrawing member and the association is that he is to withdraw, upon notice, and is entitled to his money only when there is a treasury fund legally applicable to the payment of his claim. and until this condition exists, membership continues. There is even a limitation upon amount of treasury funds that are applicable to the demands of withdrawing members.

—Sec. 6 B. & L. Statute (Hurd of 1893), p. 379.

—Sec. 21, Appellee's Charter, set out in the Pleadings.

—Heinbokel vs. Nat'l Sav., Loan & Bldg. Ass'n, (Supreme Court of Minn., July 23, 1894), 59 N. W. Rep., 1050.

—Texas Homestead B. & L. Ass'n vs. Kerr (Supreme Court of Texas, May 2, 1890), 13 S. W. Rep., 1020.

—Englehardt vs. Fifth Ward Per. Dime Sav. & Loan Ass'n (Court of Appeals of N. Y., Jan. 28, 1896), Vol. 42, N. E. Rep., 710.

—Maloney vs. Real Estate B. & L. Ass'n, 57 Mo. App., 384.

—Pepe vs. City Sub. Per. Bldg. Soc., Law Rep. 2 Ch., 1893, p. 311.

—Bret vs. The Monarch Inv. Bldg. Soc., 1 Q. B., 1894, p. 367.

—Barnard vs. Thomson, 1894, Law Rep. 1 Ch., p. 374.

—Nat'l B. & L. Herald, March 15, 1896, p. 112.

In re Pepe vs. Society, supra, it is said, "It has been held by a series of authorities that a person in such a position (one who was given notice to withdraw), is still a member of the society."

The giving of thirty days notice to the association to withdraw, is merely the expression of an intention to withdraw, on the part of the member, and to take his money when the same becomes payable under the proviso and condition of the statute, and membership does not thereby cease.

—Decatur Bldg. & Inv. Co. vs. Neal, 12 Sou. Rep., 781.

As to Association's Liability to Its Members for Interest.

(Fourth and fifth special causes of demurrer.)

Mutuality being the basis of the plan of appellee, there is no liability on its part for interest to members on their stock independent of profits. It is a co-partnership, with corporate rights, and to say there is a liability for interest is to say that some of the members owe other members interest on their stock payments, regardless of whether the association or copartnership has made earnings equal to the interest or not. There can be no liability for interest, unless the profits or earnings equal or exceed the stipulated interest, and then *only on the stock that has been filed for withdrawal.* Even on withdrawal, interest is taken from the net earning or profits, leaving the balance of profits for the remaining or persistent members. Interest on all the stock payments is not a liability.

"Mutuality being the basis of the scheme, it follows that no association can pay to a member more than the book value of his shares on withdrawal, whatever may be the terms of the contract or certificate itself. No association can legally promise to pay more than the book value under its rules and regulations."

—Hall on Banks, 132.

In *O'Malley vs. People's Bldg. Assn.* (36 N. Y. Sup., 1016, New York Supreme Court, General Term, Dec., 1895), it appeared that the defendant issued to plaintiff a membership certificate containing the following withdrawal provision:

The association "agrees to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares at the end of five years from the date thereof."

Plaintiff had a certificate for five shares. He complied with his contract, and at the end of five years demanded the five hundred dollars apparently due him, according to the terms of his certificate. Defendant replied that only three hundred and seventy-one dollars was due on the certificate. The plaintiff refused to accept this sum and brought this action to recover the $500.00.

The defendant based its refusal to pay more than $371.00 upon the ground that no more than that amount had been earned. On appeal to the General Term of the New York Supreme Court, the judgment of the trial court was reversed and the recovery was reduced to the sum of $371.00, the sum offered by the defendant, the Court saying:

"The principal question presented is, whether the plaintiff is entitled to recover the par value of the shares, or whether his recovery shall be limited to the sum of $371.00, that being the amount as claimed by the defendant which the shares had earned at the time this action was commenced. * * * The trial court construed the certificate to be an absolute, unconditional promise to pay the $500.00 upon the expiration of five years from its date, and directed judgment accordingly.

"The main question presented by the appeal, as stated, is whether the plaintiff is entitled to recover the face value of the certificate, or shall his recovery be limited to the amount the shares have earned?

"If the language of the certificate alone is to be considered, there can be but little doubt that the decision of the trial court was right.

"In constructing this contract, the defendant's articles of association and by-laws must be considered as part of the considered as part of the contract, and given their proper effect. (*Gibbs vs. Bank*, 83 Hun., 92, 31 N. Y. Supp., 406. *In re Commissioners of Washington Park*, 52 N. Y., 131.) It is rea-

sonably certain that if the construction contended for is to prevail it will thwart the scheme and purpose of the Association and probably bankrupt it.

"The plan of the organization contemplates that the holders of the certificates shall be entitled to share equally in its earnings. It is a mutual association.

"It can not with any propriety be claimed that under the defendant's articles of association and by-laws it has contemplated that there should be any distinction in the time of maturity of the shares of stock.

"The plaintiff was presumably aware of the general plan of the association, for it was stated in his certificate that the articles of the association and the by-laws were to form a part of the contract, and, as stated, the general plan of the association contemplated that all the shareholders should be entitled to a *pro rata* share of its earnings. He must have been aware that it was not at all probable that the earnings of the association would be sufficient to pay the rate of interest which his construction of the contract calls for. It was not possible to know at the time the certificate was issued to defendant, when it would mature by the accumulation of dividends, for that necessarily depended upon the earnings of the association, and that could not be determined in advance. * * *

"We are of the opinion that the defendant did not possess the power or the authority to issue a certificate containing a fixed maturity period, and that the clause in the certificate in question should be construed as an estimated period of maturity. The amount actually earned by this certificate at the time it was presented by the plaintiff was only $371.

"The judgment should be reversed and a new trial granted, * * * unless the plaintiff * * * stipulates to reduce the recovery of damages to $371, and interest thereon from December 21, 1894."

In *Knoblanck vs. Robert Blum Ass'n* (8 Pittsb. Leg. J., 39) in the Court of Common Pleas, Allegheny County, Pa., in 1877,

the question turned on the obligation of the withdrawing member to bear his proportionate share of the losses.

The question was whether the association had a right to retain out of the sum otherwise due Knoblanck on withdrawal of his proportionate share of such loss.

The court held that the association had such right, and said: "Has a building and loan association the right to retain or hold back from a retiring member a reasonable amount to meet his share of the probable losses that may arise from loans made while he was a member? * * *

"Under the act of Assembly and the by-laws of this association, a member has a right to withdraw, * * * and is entitled to receive back the money paid in, with a share of the profits during the time he was a member. But suppose the association made no profits and met with severe losses; shall the withdrawing members get back all they paid and cast the whole burden of losses upon those who remain, or who may not know of the losses and not be so quick in giving notice of withdrawal? Certainly not. That would be unjust and inequitable.

"During the time the plaintiff was a member the association made a loan to one Grassel on mortgage, which was unpaid, the mortgage foreclosed, the property sold at sheriff's sale, and bought in by the association. They have not yet been able to sell it, and the probable loss on that loan will be five dollars per share on the stock. About a week before the sheriff's sale plaintiff gave notice of withdrawal, and claims all he paid in, without any abatement for the loss on that loan. To allow a member under such circumstances, to retire and demand all that he had paid in, without contributing anything to losses which are manifest, and impending, would be unjust towards his fellow members, and it would be bad faith in him. He had a right to share in the profits while he was a member, and he must also bear his proportion of the losses."

In *McGrath vs. Hamilton Savings and Loan Association*, (44 Pa., 383) in 1863, the question was whether the borrowing member was liable to a charge for his proportionate share of the

expenses of conducting the association's business. The by-laws of the association provided as follows:

"Sec. 3. Stockholders wishing to withdraw from this corporation shall be entitled to receive the amount actually paid in by each stockholder, less 5 per cent., and his or their proportion of the losses and expenses. * * *"

McGrath paid off part of his mortgage. On foreclosure to recover the balance, the association claimed that McGrath should be charged with his proportionate share of the expenses, on paying off his loan and withdrawing.

The court held that the member was properly charged with his proportionate part of the expenses, and said (p. 385):

"While the plaintiff in error remained a member of the association, he was under obligation to contribute his share of its expenses. What he had invested in its funds was chargeable with its proportion of the necessary expenditure. In a limited sense he was a partner with the other stockholders. * * * The association had a right to treat his payments while his membership continued, as his contribution, so far as they were needed, to the discharge of the expenses incurred in the management of the enterprise, in which he had a joint interest with the others. * * *"

As to Loans Made "Illegally in Excess of the Real Estate Mortgaged."

(Second special cause of demurrer.)

There is not a syllable in the bill showing any illegality on the part of the association in loaning its money, and no such charge is made in the auditor's notice.

The charge of actual insolvency in the bill, which begins at the bottom of page forty-nine of abstract is much broader than the complaint in the notice. This part of the bill is answered by our special plea. In the bill the liabilities of appellee are stated in gross. The plea shows that in that sum the auditor charges the association with one hundred thousand dollars as a liability on the theory that the amendment to the by-law is in-

valid ; that he charges the association with the sum of one hundred and three thousand dollars as interest on all stock in force whether the same has been presented for withdrawal or not by reason of a by-law authorizing the payment of interest to *withdrawing* members; and he further charges the association with $122,000 as a loss on loans on real estate, and arrives at this conclusion from appraisements made by inspectors sent out by him, and individuals selected by him to inspect the property, and the plea avers that such examination and appraisement of property is not authorized by law, and that appellee should not be charged with any loss on loans by reason thereof. There is no replication to this plea.

When a plea in chancery is not replied to, the truth of the facts therein alleged are admitted, and the only question for the Court to determine is, whether the facts set up constitute a bar.

—Knowlton vs. Hanbury, 117 Ill., 475.

—Farley vs. Kittson, 120 U. S., 314.

As to Appellee Pursuing Its Business Outside of McLean County, Illinois.

(Third special cause of demurrer.)

It is alleged in the bill that the association was not authorized by the law of its creation to do business outside of the immediate locality in which it was created; and that in violation of such law it did business in several states of the United States. Upon an examination of the statute under which appellee is incorporated, it will be found that there is no prohibition or limitation in this regard, and appellee was free to go into any state which did not prohibit it from doing so. It is not claimed that it did business in any state contrary to the laws of that state.

Matters Arising on Appellee's Plea.

All points arising on the plea, go to the sufficiency of appellee's assets to justify the continuance of business.

The first one is whether or not the expenses of the association, under the by-law hereinbefore discussed, are a liability. If the by-law is binding upon all the members, as we insist it is,

then there is no liability on the part of the association to its members for the amount of such expenses. If the member withdraws, the expenses are deducted from what he has paid in to the association. If he remains to the maturity of the stock, then he bears his proportionate part of the expenses, for it is only *net* earnings that mature stock. This one item reduces the liabilities of appellee, one hundred thousand dollars.

The second point is as to whether interest on all stock in force is a liability. We contend it is not. This point was also raised by the demurrer, inasmuch as this item of interest was separated from the general liabilities of appellee, and could be reached by the demurrer, while the item of expenses was concealed in what the Auditor called its general liabilities. What we said as to interest arising on demurrer, is applicable here. If we are right as to this, and we think we are, then appellee's liabilities on this account are $103,000 less than charged by the Auditor.

The third point raised by the plea is as to the authority of the Auditor to send men over the country and appraise its real estate properties, ignoring the value of its notes and bonds, and estimate the values of such real estate, and the loss of appellee. We contend he has no authority to make such appraisements and charge such estimated losses as a liability. If he has not such authority, then the liabilities of appellee are reduced another $122,000. This point we will discuss in the argument.

The auditor has erroneously charged as a liability items aggregating $325,000.

ARGUMENT.

If the matter stated in our plea shows a good defense to that part of the bill which it purports to answer, as we think it does, then by reason of the state of the pleadings, it is necessarily admitted of record by counsel for appellant, that appellee is not insolvent. The Auditor charges appellee with $100,000 as a liability under the old by-law, wholly ignoring the amendment, and treating it as absolutely void, as to all members, notwithstanding the fact that it is admitted to be valid and binding on all

who voted for it, or who consented to it, or have since ratified it in any way. The right of a corporation to amend its by-laws is an inherent right, but the right to amend is reserved to the association, as will be seen by the by-law set out in our plea. In addition to this, Sec. 3, of the Loan and Homestead act as amended July 1, 1893, expressly authorizes the amendment of by-laws, and provides the manner in which they shall become operative. It is in these words:

"And any subsequent amendment or alteration of said by-laws shall be submitted to the Secretary of State, and be approved by the Attorney General, and be recorded in like manner as the original by-laws before the same shall become operative, and only such by-laws as shall have been submitted, approved, and recorded as herein provided, shall be deemed operative."

After the examination of the association by the Auditor in the year 1894, appellee received from him a sixty days notice, one of the charges of illegal practices in the same being as follows:

"In that it, the association, has paid to its withdrawing members the full amount of installments paid by them, together with a certain amount of interest thereon, without regard to the fact that a certain part of such installments had been deducted and disbursed in the payment of expenses, such practice resulting in serious loss to its remaining and persistent stockholders, contrary to safe business methods," and in said notice appellee was given to understand that if a change was not made in this regard, the auditor would place the matter in the hands of the attorney general, and the association would be proceeded against according to law. The association, in compliance with the notice, and believing it for the best interests of the stockholders, at its regular annual meeting held January 15, 1895, amended the by-law and required withdrawing stockholders to pay their proportionate share of the expenses of the association. This is clearly authorized by the law, and was done with the intention of complying with the auditor's notice of 1894. After the adoption of the amendment as aforesaid, it was then filed with the secretary of state, and by him submitted to the attorney general, who approved it, and it was then filed in the recorder's office of McLean county, Illinois, in strict conformity with all the requirements of the law.

Now, after notifying appellee that unless a change was made in the regards aforesaid, the auditor would proceed against it, appellee in the best of faith, proceeded to comply with his notice, and adopted such an amendment as it thought would meet his ideas, but after amending the by-law in compliance with his demands, after his examination in 1895, he then complains of the amendment, and claims that it is not valid and binding on those who did not vote for it or ratify it. The legal officer of the state, in the performance of a duty imposed by law, approved of this amendment, and no intimation or suggestion was then made by him that such a by-law would not be binding upon all members of the association. As we understand his contention now, he would leave it to each stockholder of the association to fix the terms upon which his stock may be withdrawn, or that in sub stance. He would have a different rule for each member who did not see fit to vote for an amendment to the by-laws.

The auditor also charges appellee with $103,000 as a liabil ity under a by-law authorizing the payment of interest to *with drawing* members, and in order to charge it with this amount, he computes interest on all stock in force, whether notice of withdrawal had been given or not, whereas, as a matter of fact, the interest on all stock filed for withdrawal would not exceed $20,000, and that amount would only be a liability in the event the association was solvent, and had net earnings, or a surplus equal to or in excess of this interest, and this is in conflict with the theory of his bill. Under all of the authorities, a building and loan association is a corporate copartnership. It has rules which allow its co-partners to withdraw at any time upon giving certain notice. These rules fix the amount which a withdrawing member is entitled to receive. In lieu of profits on stock, owing to the time it has been in force, he is paid interest. This interest is not due to any member of the association until he files his notice of withdrawal, and then only if it has been earned. As long as the association is a going concern, the withdrawing member gets his interest in lieu of profits. All members who stay in until their stock matures, share in the profits earned, and are paid accordingly, instead of being paid interest. The interest feature is simply a convenient method of letting members retire when they see fit to do so, giving them what is intended as

an equitable compensation for the use of their money while it has been in the association. It may be that three-fourths of all the stock in force at the time this suit was commenced, will remain in force, and will not be withdrawn until the stock matures. In such case the settlement is not made on the basis of the by law authorizing the payment of interest, but is on the basis that the profits have accumulated sufficiently to mature the stock. This is the first time, so far as we are able to learn from the official reports of the auditor, that he has charged any association with interest as a liability.

The auditor also charges appellee with about $122,000 as a liability for losses on loans by depreciation in value of the real estate. He arrives at this conclusion from the appraisements made by inspectors appointed by him, who went around to see the property upon which appellee had loaned money. These inspectors made a guess on the values, and guessed that the association would lose this amount of money. This guess was made during the recent panic. We think it is not contemplated by the statute which authorizes an examination by the auditor that he will make appraisements of the property loaned upon. We do not think the statute gives him authority to do so. The authority given by the section under which he proceeds, being section 16 of the act of July 1, 1893, is in the same words as the authority given him by the bank act. It is safe to say, we think, that no one ever heard of the auditor going around over the country to examine the property owned by persons who have money borrowed from the banks, and putting appraisements upon such property, and deciding in this way that the banks will lose so much money from losses on loans. The notes and bonds are not to be ignored. The statute authorizes a full and complete examination of the books, securities, and other papers of the association, and authorizes an examination of all of the officers of the association under oath. The course pursued by the auditor in examining building and loan associations has been to send inspectors to see every piece of property upon which a loan was made, and making the association pay for such services at the rate of ten dollars per day for each inspector, besides his expenses. With an association like the appellee, which has a large number of loans, the cost of such an inspection is from $1,500 to $2,000 each year, the principal portion of which is caused by this inspection of property.

The court can readily see that if the amended by-law is valid and binding on all members, as we claim, then on that point appellee's liabilities are reduced $100,000; that if appellee is not chargeable with interest as a liability on stock, which has not been filed for withdrawal, then its liabilities are reduced by the sum of $83,000, or if there is no liability for interest on any stock the amount would be reduced by $103,000; that if there is no authority at law for making the appraisement of property as aforesaid, then its liabilities are reduced in the further sum of about $122,000. If all three of these items are improperly charged against appellee, as we contend, then, instead of being insolvent, to the extent of $65,635.13, it would have a surplus of about $260,000. If the amendment is binding on all, and appellee is not chargeable with interest on its stock, and the auditor's appraisement is authorized by law, then instead of being insolvent, it would have a surplus of about $138,000, or if there is a liability for interest on the stock filed for withdrawal its surplus, on this basis, would be $118,000. If appellee is not chargeable with any one of the three items charged against it, it is solvent, and has a big net surplus. These figures are as of date when the suit was brought. Since then its surplus has largely increased. Of course, if the court holds that any point of our demurrer is well taken, the decision of the trial court must be affirmed. It seems to us that it needs no argument to show that the matters set up in the bill which are not included in the notice have no place in this case, and the demurrer to those matters is certainly well taken. If this were a case in the name of the People on relation of the attorney general as at common law, these matters could be properly considered, but in the case at bar, we think they cannot. The auditor's notice should be so certain and specific that from its face, one can see what sum, if any, is required to make the association's assets sufficient to justify a continuance of business, otherwise, what is the purpose of giving a notice at all?

The statute contemplates that the association shall be notified of those matters which do not meet with the approval of the Auditor, and the association is given sixty days within which to correct them. Now, if a notice is to be held sufficient, which does not give the necessary information to show what is wanted

by the Auditor, we think it would keep an association guessing to know what is wanted. We have an example of this in the case at bar in regard to the by-law, the complaint of the Auditor in 1894, and his complaint after the amendment of the by-law. The demurrer on this point, we think it clearly well taken.

The demurer to that part of the bill which charges that the association has, in violation of the law, loaned its money on property other than homesteads, is shown by the authorities to be well taken. The charge in the bill that loans were made on previously incumbered real estate, is defective in that it is not charged that such loans were *knowingly* made, or that it was appellee's practice to make such loans. These, we think, are fatal defects to the allegation. The fact is, that only two or three loans were made on incumbered property, and in those cases, it was because of the fraud or negligence of abstracters, and the demurrer was, on this point, properly sustained.

The charge in the bill that the association did not pay withdrawing members promptly on the expiration of thirty days notice, does not show a violation of any law, for the reason that it is not charged that the association had funds with which to pay such members, and neglected, or refused to do so. It is not contemplated by the law that associations shall keep money on hand with which to pay withdrawing members promptly. Under the statute, only one half of the funds of the treasury shall be applicable to the demands of withdrawing members, without the consent of the board of directors.

We insist that every point of our demurrer is well taken.

It is admitted in the bill (Abst. 36) that all of the matters complained of by the Auditor had been complied with, in so far as it was possible to do so, except that the assets had not been made sufficient. It will be remembered also, that nearly all of the complaints in the Auditor's notice are of such a character that they could not be complied with, except by making good any deficiency in the assets. Our plea shows the manner in which the Auditor arrives at the conclusion that there is a deficiency of assets, and that there is in fact no deficiency.

The Court will observe the pleadings show property to the amount of about one million of dollars to be involved in this case, and can imagine this suit affects the interests and involves the homes of many hundreds of deserving, industrious citizens. These members have skimped their small wages to pay their dues in the hope of acquiring their own homes, and of getting good returns on their small investments in appellee's stock. They have committed no fraud, nor connived at any. They have not sought to wreck this corporation or to stuff their pockets with ill-gotten gains. The appointment of a receiver as prayed for by the state, would result in the punishment of these poor, hard working people, for an alleged wrong which they never committed or participated in. The appellee has done no wrong that would authorize or justify this Court in sustaining the bill.

We insist that the demurrer was properly sustained, and appellant refusing to amend his bill, the facts stated in the plea not being controverted, the Court could do nothing but dismiss the bill, as was done. The decision of the Court should be affirmed.

Respectfully submitted,

JESSE R. LONG,
FIFER & BARRY,
Solicitors for Appellee.