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1. INSURANCE—BUILDING AND LOAN ASSOCIATION—PROVISION IN NOTE SECURED BY MORTGAGE ON REAL ESTATE FOR PAYMENT IN MONTHLY INSTALLMENTS AND THAT "IN THE EVENT ONE OF THE UNDERSIGNED DIES LEAVING A HUSBAND OR WIFE SURVIVING WHO IS ALSO ONE OF THE UNDERSIGNED" AND FOR FUL-

FILLMENT OF CERTAIN CONDITIONS THAT "THE INTEREST REMAINING UNPAID ON THIS OBLIGATION FOR SAID SIX MONTHS PERIOD WILL BE CANCELLED UPON PROMPT PAYMENT OF THE FIRST MONTHLY INSTALLMENT DUE THEREAFTER" IS A CONTRACT SUBSTANTIALLY AMOUNTING TO INSURANCE—BUILDING AND LOAN ASSOCIATION ENTERING INTO SUCH CONTRACTS IS ENGAGED IN TRANSACTION OF BUSINESS OF INSURANCE.

2. BUILDING AND LOAN ASSOCIATION MAY NOT LAWFULLY ENGAGE IN BUSINESS OF INSURANCE IN OHIO.

SYLLABUS:

1. Where a building and loan association provides in its note secured by a mortgage on real estate for the payment thereof in monthly installments and also provides that "in the event one of the undersigned dies leaving a husband or wife surviving who is also one of the undersigned" and for the fulfillment of certain other conditions that "the interest remaining unpaid on this obligation for said six months period will be cancelled upon prompt payment of the first monthly installment due thereafter", such note is a contract substantially amounting to insurance and the building and loan association in entering into such contracts is engaged in the transaction of the business of insurance.

2. A building and loan association may not lawfully engage in the business of insurance in the state of Ohio.

Columbus, Ohio, November 23, 1945

Hon. Walter Dressel, Superintendent of Insurance, State House Annex Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Home Building and Savings Company of Toledo, Ohio, is a building and loan association. It has been called to my attention that this company incorporates in its note and mortgage, the following paragraph:

'In the event one of the undersigned dies leaving a husband or wife surviving who is also one of the undersigned and is occupying as a home the premises described in the Mortgage securing this obligation, written notice thereof being given to the Company within thirty days after such death, and payments are

not made on this obligation as hereinbefore provided for six months from the date of said death, such lapse of payments shall not be treated as a default on this obligation provided prior thereto, the installments on this obligation have been paid when the same became due and there has been no default in the performance of any of the covenants or conditions contained in the Mortgage securing this obligation. The interest remaining unpaid on this obligation for said six months period will be cancelled upon prompt payment of the first monthly installment due thereafter.'

You will note, in this particular instance, that the provision is made for waiving six months interest upon written notice being given to the company within thirty days after the death of either the husband or wife, upon whose premises the mortgage was a lien.

You will note that the import of this paragraph is that it becomes effective only upon death of either of the parties. I desire your opinion and interpretation of this paragraph, as to the following particulars:

(a) Does the language contained in this paragraph of a note and mortgage substantially amount to insurance?

(b) Is it legal, in Ohio for a building and loan association to grant this particular benefit to its patrons?

For your convenience, I am attaching hereto, a loan contract and mortgage sent to me by the Home Building and Savings Company at Toledo, Ohio."

It is to be noted that the note set forth above provides that "in the event one of the undersigned dies leaving a husband or wife surviving who is also one of the undersigned" and the fulfillment of certain other conditions, that "the interest remaining unpaid on this obligation for said six months period will be cancelled upon prompt payment of the first monthly installment due thereafter."

The question to be considered is whether this note is a contract of insurance or one substantially amounting to insurance and whether the building and loan association may lawfully enter into such contracts.

There is no statutory definition of the term "insurance" in this state, however, our Supreme Court in the case of Keckley v. The Coshocton Glass Company, 86 O. S. 213, has defined a life insurance policy as follows:

"It is a contract to pay to the beneficiary a sum certain in the event of death."

Section 665, General Code, provides in part as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

The foregoing section was considered in an opinion of the Attorney General for 1928, found in Vol. I, page 424, No. 1722, in relation to a similar question and it was there held by the then Attorney General as follows:

"Where a furniture company in Ohio sells furniture on the installment plan and, at the time of the sale, makes an agreement with the purchaser that, in the event the purchaser dies before the furniture is completely paid for, the company will cancel the debt for such furniture and give the purchaser's estate a receipt in full for the balance of the account remaining unpaid, the transaction is a contract 'substantially amounting to insurance' within the meaning of Section 665, General Code."

Section 665, General Code, was again before the Attorney General, in regard to a similar question, in 1938 Opinions of the Attorney General No. 3104, where it was held by the then Attorney General as follows:

"Where a cemetery association sells lots for burial purposes upon the installment basis, the purchaser to pay a specific amount each week so long as he shall live, and in any event not more than twenty years, provided, however, if the purchaser should not survive the twenty-year period the association shall be required to execute a deed to his legal representative without further payment at the time of his death, the transaction is a contract substantially amounting to insurance within the meaning of Section 665, General Code."

The contract (note) under consideration does not provide for payment or forgiveness of the principal amount of the note in the event of death but does provide for the cancellation of six months interest on the note, which is a substantial benefit and the amount of which can be definitely ascertained. I fail to see where this difference makes this con-

tract any different in kind from those considered in the two previously quoted opinions of the Attorney General. The conclusions reached in the two above quoted opinions were based on the decision of Attorney General ex rel. Monk v. Osgood Co., 249 Mass. 473, which held as follows:

> "A Massachusetts corporation engaged in the business of selling household furniture on the installment plan, included in a contract of conditional sale called a 'lease' the following clause: 'In case of the death of the person signing this lease before the whole amount of the lease is paid, we will receipt the balance due us on this account in full, provided the person signing this agreement is the principal wage earner of the family, and provided all the payments have been made according to the terms agreed to in this contract; but it is distinctly understood that this agreement does not apply on any account of five hundred dollars or more.' In an information by the Attorney General at the relation of the insurance commissioner under St. 1922, c. 417, Section 1, to restrain the corporation from soliciting, making, or advertising relative to such contracts, it was held, that
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> (1) The consideration for the contract was single both for the personal property sold and the agreement as to cancellation of the debt in case of the customer's death;
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> (2) The quoted clause was part of the initial contract of the defendant with its customer, was supported by the consideration of that contract, and was binding upon the defendant;
>
> (3) The clause respecting cancellation of the balance of the debt necessarily implied transfer of title to the property by the defendant to the estate of its customer on the death of the latter;
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> (4) The contract constituted insurance within the meaning of the statutory definition;
>
> (5) Whether the quoted clause was ancillary to its chief business or was mainly for advertising ends, was not relevant in view of the absolute prohibition in G. L. c. 175, Section 3, against the making of contracts for insurance except by companies and in the manner authorized by law;
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> (6) The statute was violated and the defendant should be enjoined."

Other cases presenting similar fact patterns and to the same effect may be found in annotations in American Law Reports as follows: 35 A. L. R. 1040; 63 A. L. R. 726; 100 A. L. R. 1454; and 119 A. L. R. 1241.

In the case of State v. Beardsley, 88 Minn. 20, 92 N. W. 472, the contract under consideration provided in effect for a loan of $1,000 to build a house, and for monthly payments to be made by the borrower for the discharge of the debt, which was secured to the lender by the house. The following provisions were also made a part of the contract, the disability referred to being that of the borrower:

> "Should his disability be total, permanent, and determined by satisfactory evidence, the unpaid balance of $1,000 provided for in this contract shall be paid to clear the home of the party of the second part, and his indebtedness to the parties of the first part shall be discharged, and the title to the property, if held by the parties of the first part, shall be conveyed as he may direct. In the event of his death before all advance payments to him shall have been returned to the first parties, the parties of the first part shall pay the balance, if any, of the $1,000 contracted for, and shall cancel his indebtedness to the first parties, and, if the title to the property purchased is in the first parties, they shall convey the same to his wife, if any; if there shall be no wife, then to his heirs * * *. If the second party is over fifty years of age at the signing of this contract, the provisions to give his wife or heirs a clear title in case of his death, unless accidental, do not apply. In case of his death, unless accidental, his wife or heirs must continue the payments according to the obligations of the second party."

The court said:

> "This is a valuable promise made to the contract holder for a consideration; namely, his monthly payments. If he becomes disabled, the company promises to do an act of value to him. If he dies, the promise is to do an act of value to his widow or to his heirs; that is, an act equivalent to, and actually involving, the payment of money, conditioned upon the cessation of human life. The real character of this promise, or of the act to be performed, cannot be concealed or changed by the use or absence of words in the contract itself; and it is wholly immaterial that, on its face, this contract does not expressly purport to be one of insurance, and that this word nowhere appears in it. Its nature is to be determined by an examination of its contents, and not by the terms used. The performance of the contract may be enforced by the holder in case of disability, or by his widow or heirs in case of his decease. If it does not come within the definition of an insurance contract, as found in Sec. 3 (that is, if it is not an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the

> assured, upon the destruction or injury of something in which the other party has an interest), it involves the payment of money or something else of value to the family or representatives of the holder, conditioned upon the continuance or cessation of human life, and is covered by the definition found in Sec. 63. *It is an agreement involving and providing, in effect, for the indirect payment of money by the relinquishment of a debt; and there is no substantial distinction between such an agreement or obligation and the ordinary life insurance policy. The obligation in each case is conditioned upon the cessation of human life.*"
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> (Emphasis added.)

In the case of K. & T. Trust Co. v. Krumseig, 23 C. C. A. 1, 40 U. S. App. 620, 77 Fed. 32, a contract issued after the applicant had passed a medical examination, by which a loan was made to him, and he gave a number of promissory notes, payable in monthly installments, covering the sum loaned, interest, and costs, and secured by deed of trust or mortgage, and by which the lender undertook, in case of the applicant's death before all payments had been made, to release the unpaid portion of the debt, if previous installments had been promptly paid, was held by Caldwell, J., to be a combination of a mortgage loan and policy of life insurance, so that it was incumbent on the company issuing it to comply with the laws governing insurance companies.

It would seem that the contract note in question, in addition to providing for the payment of the note in monthly installments, also provides for the cancellation of six months interest by the building and loan association upon the death of one of the signers of the note. The cancellation of this interest would be equivalent to the payment of a sum which could be rendered certain by calculation and such note contains all the necessary elements of a life insurance policy.

Section 9643, General Code, defines a building and loan association as follows:

> "A corporation for the purpose of raising money to be loaned to its members, and others, shall be known in this chapter and in the laws relating to the department of building and loan associations, as a 'building and loan association' or as a 'savings association'."

Section 9647, General Code, provides as follows:

> "Such corporation shall have all the powers set forth in the following sections of this chapter."

An examination of the sections of the General Code, following the above quoted section and contained in that chapter fails to disclose a power in a building and loan association to engage in the insurance business.

I am therefore of the opinion that where a building and loan association provides in its note secured by a mortgage on real estate for the payment thereof in monthly installments, and also the following:

> "In the event one of the undersigned dies leaving a husband or wife surviving who is also one of the undersigned and is occupying as a home the premises described in the Mortgage securing this obligation, written notice thereof being given to the Company within thirty days after such death, and payments are not made on this obligation as hereinbefore provided for six months from the date of said death, such lapse of payments shall not be treated as a default on this obligation provided prior thereto, the installments on this obligation have been paid when the same became due and there has been no default in the performance of any of the covenants or conditions contained in the Mortgage securing this obligation. The interest remaining unpaid on this obligation for said six months period will be cancelled upon prompt payment of the first monthly installment due thereafter."

that such note is a contract substantially amounting to insurance and that the building and loan association is engaged in the transaction of the business of insurance.

I am also of the opinion that a building and loan association may not lawfully engage in the business of insurance in this state.

Respectfully,

HUGH S. JENKINS

Attorney General