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EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, THE — LEGALITY OF ASSURED HOME OWNERSHIP PLAN.

SYLLABUS:

Legality of the Assured Home Ownership Plan of The Equitable Life Assurance Society of the United States discussed.

Columbus, Ohio, April 10, 1941.

Hon. John A. Lloyd, Superintendent of Insurance,
Columbus, Ohio.

Dear Sir:

Your recent request for my opinion reads as follows:

"I desire your opinion on the legality of the Assured Home Ownership Plan of The Equitable Life Assurance Society of the United States. The plan contemplates that at the time of making an application for a mortgage loan the borrower shall also apply to the insurance company for life insurance in the amount of the loan applied for, the policy to be assigned to the Society as collateral security for the loan. In order that you may be fully advised as to the operation of the plan, I enclose herewith the following documents and papers pertaining thereto:

1. Assured Home Ownership loan application.
2. Assignment of policy as collateral security.
3. Application for life insurance.
4. Certificate as to issuance of policy of life insurance.
5. Form of note.

6. Form of mortgage deed.

7. Preliminary inquiry blank.

8. Receipt for cost of appraisal and photograph.

9. Receipt for Assured Home Ownership Plan Loan deposit.

10. Preliminary inspection blank.

11. Owner's credit information.

12. Appraiser's report on residential property.

The plan is not being used in this state, and before permitting the company to undertake it, I desire your opinion as to whether such plan is violative of Sections 9403 and 9404 of the General Code of Ohio or any other provision of law."

I have carefully examined the documents used by The Equitable Life Assurance Society in its Assured Home Ownership Loan Plan, which documents you have submitted to me with your letter. Those which you have numbered 7, 8, 9, 10, 11 and 12, respectively, have to do with the value of the property on which the loan is to be made, the encumbrances against it, credit information with respect to the applicant and receipts for the cost of appraisal and photography, title examination and the like. The use of these documents could not conceivably violate any of the provisions of the insurance laws of this state and no further discussion in this opinion will be made with respect to them.

The document which you have numbered 1 and which is called "Assured Home Ownership Loan Application" is a blank whereby provision is made for application for a loan on premises occupied by the applicant as a home. Certain information which is not germane to your question is required and the applicant promises to apply for a life insurance policy on his life or such other person as may be satisfactory, in such form as may be required by The Equitable Life Assurance Society, for the full amount of the loan applied for, and that a deposit will be made for the amount of the first premium. Paragraph 3 of such application reads as follows:

> "If this application and the application for life insurance are not approved or if the application for life insurance is not approved both deposits subject to the provision in the last sentence of this paragraph will be returned on demand on surrender of receipts given therefor. If the application for life insurance has been approved and the policy has been in force the premium will not be refunded although subject to the following sentence the loan deposit will be refunded if the loan is not approved. The cost of appraisal and photo will not be returned except when the loan applied for is recommended by the local appraiser but not approved by the Equitable."

The document which you have numbered 2 is an assignment of the policy as collateral security for the loan which is granted pursuant to the application and which is also secured by a mortgage on the premises occupied by the applicant as a home. The instrument assigns to the Society "all dividends, options, benefits or advantages derived" from the policy "including the right to exercise any and all options and privileges therein given," but the Society agrees in the event the policy shall lapse after default in the payment of any premium thereof, if said policy shall have a cash value, to exercise only the option to continue the insurance as non-participating paid up extended term insurance. The assignment takes away from the insured the option to have dividends applied toward the payment of premiums so long as the assignment is in force.

The document numbered 3 is an application for life insurance, together with a receipt for the first premium. In the main, it is in the ordinary form, its only unusual provision being that "any policy issued hereon shall not take effect until the first day of the calendar month next succeeding the expiration of ten days after the date of the Society's approval of the insurance risk."

Number 4 is a certificate by The Equitable Life Assurance Society that it has issued a policy of life insurance with blanks for the date, number and name of the beneficiary and a statement that the policy has been duly assigned to and is held by the Society as collateral security for the payment of the loan upon the premises described in the certificate. It also requires no further discussion.

Document numbered 5 is a real estate mortgage note by which the maker promises to pay to the order of The Equitable Life Assurance Society the principal sum loaned in successive equal monthly installments, which such installments shall include (a) a payment on account of the

principal of said loan, (b) interest on the monthly decreasing principal balance, and (c) the monthly premium on the life insurance policy issued by the corporation and assigned to it as collateral security. The note also contains a promise on the part of the borrower to pay the monthly premiums on the policy of life insurance until said regular monthly mortgage installments commence to be payable.

Document numbered 6 is a mortgage deed of a real estate in ordinary form except as hereinafter noted. The defeasance clause contains a provision to the effect that the mortgagor "will keep in full force and effect that certain policy of life insurance bearing register date _____, numbered _____, issued by the Grantee on the life of _____ and assigned to the Grantee as collateral security for the payment of the indebtedness secured hereby."

The second paragraph of Section 9404, General Code, provides:

> "No life insurance company doing business in this state, or any officer, agent, employee, or representative thereof, nor any other person, shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, nor shall any person, co-partnership or corporation knowingly receive as such inducement to insurance any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon, or any special advantage in the date of a policy or date of the issue thereof; or any valuable consideration or inducement whatsoever; or give or receive, sell or purchase, or offer to give or receive, sell or purchase, as inducements to insurance or in connection therewith, any stocks, bonds or other obligations or securities of any insurance company or other corporation, association, partnership or individual, or any dividends or profits to accrue thereon, or any paid employment or contract for services of any kind, or anything of value; nor shall any company do business in this state, nor any employee, agent, officer, or representative thereof, *give or offer to give, or enter into any separate agreement, promising to secure, as an inducement or consideration for insurance, the loan of any money,* either directly or indirectly, or any contract for services." Emphasis mine.)

The quoted portion of Section 9404, General Code, prohibits an insurance company from giving or offering to give, or entering into any separate agreement, promising to secure, as an inducement to insurance, anything of value, including the loan of any money. Similar provisions are found in Sections 12956 and 13137, General Code, but the language of these

two sections is more general and does not specifically include the loan of money. Both Sections 12956 and 13137, General Code, as well as Section 9404, General Code, provide penalties for violation of their terms, and it is well settled in Ohio that a strict construction is to be accorded such statutes and that they should be interpreted strictly against the state and liberally in favor of the accused. See 37 O. Jur., 744, Section 420.

Undoubtedly, the documents you have submitted contemplate that a policy of life insurance may be issued to an applicant for a loan under the Assured Home Ownership Loan Plan even if the loan itself may be refused. The applications for the loan and for the insurance are separate, and paragraph 3 of the application for the loan expressly provides that if the life insurance policy has been issued the premium will not be refunded even if the application for a loan is denied. At no time does it appear from the papers which you have submitted to me that the insurance company gives or offers to give, or enters into any separate agreement promising to secure the loan of any money as an inducement or consideration for insurance. It would therefore seem that the loan, if made, is not an inducement to insurance but rather that the insurance is an inducement to the loan.

I realize, of course, that the plan makes it possible for an agent to offer to secure a loan as an inducement to a prospective purchaser of insurance to apply for such insurance. This, however, is not contemplated by the documents which you have submitted to me and the mere possibility of such misconduct on the part of an agent does not suffice to make the plan illegal. In such event, the statute gives to you ample authority to punish such an agent. In view of the rules of construction applicable to the statutes in question and since the documents which you have submitted to me do not contain any promise on the part of the insurance company to make a loan of money to the applicant, I conclude that the plan as evidenced by these documents does not constitute an inducement to insure within the meaning of the sections above referred to.

However, your attention is also invited to the provisions of Section 9403, General Code, and to the first paragraph of Section 9404, General Code, which respectively provide as follows:

Section 9403.

"No life insurance company doing business in this state

shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life in the amount of payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract, *other than is plainly expressed in the policy issued thereon.*" (Emphasis mine.)

Section 9404.

"No life insurance company, doing business in this state, whether on the group insurance plan or any other plan, shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor, except as otherwise expressly provided by law, shall any such company, or any agent thereof, make any contract of insurance or agreement *as to such contract, other than as plainly expressed in the policy issued thereon.*" (Emphasis mine.)

It is clear that the above quoted provisions prohibit a life insurance company from making any contract of insurance, or agreement as to such contract, other than is plainly expressed in the policy, prior to or contemporaneous with the issuance of the policy. As to whether these prohibitions apply to contracts made subsequently to the issuance of the policy, the authorities are not in accord. There do not appear to be any Ohio cases bearing on the question. In 32 C.J., 1118, Section 216, it is said:

"Some statutes provide that an insurance policy shall contain the entire agreement, or that no insurance company, nor any agent thereof, shall make any contract of insurance other than is plainly expressed in the policy issued thereon. Such a statute is binding alike on insured and the company. However, such statutes are given a limited application; they are held not to apply to agreements between the company and insured made subsequently to the issuance of the policy, such as notes subsequently given by insured to the company, * * * "

While there is respectable authority supporting this statement, I also find the following in 1 Couch on Insurance, at page 285:

"Some dispute arises as to whether statutes apply only as of the time when the contract of insurance is made, or whether

they also apply to subsequent agreements which affect the contract, one line of cases supporting the rule that subsequent agreements are invalid if not attached to the policy or made a part thereof, as required by statute, and the others, which have passed upon the point, supporting the rule that the statute does not apply to contracts entered into subsequent to the issuance of the policy."

I have examined all the cases cited in Corpus Juris in support of the text and those cited by Mr. Couch and several others in addition thereto. In each of these cases, it appears that the policy was about to lapse for non-payment of a premium and that the insured gave his note therefor. These notes contain provisions to the effect that if they were not paid when due, the policy should lapse. Typical of the cases upholding the validity of a provision in such a note to the effect that a policy should lapse upon failure to pay the note when due is French v. Columbia Life Insurance and Trust Company, 80 Ore., 412, 156 Pac., 1042, Ann. Cas. 1918D, 484, from which I quote as follows (p. 420 of 80 Ore.):

"It is conceded that both policies would have lapsed if the insured had not executed the two notes in 1913; and therefore if the plaintiff can recover at all, that right exists only because the notes were executed. Elizabeth French must stand upon the notes or fall with them. One note stipulates that the March policy shall 'lapse and become of no further force or effect' on July 15, 1913, if James M. French fails to pay, on or before that date, the full amount of the note; and the other note provides for the termination of the May policy if the insured fails to pay the full amount of such note on July 24, 1913. If the stipulations for the termination of the policies appearing in the notes violate Section 4632, L.O.L., then the instruments are invalidated in their entirety, especially when it appears on the face of the writings that those stipulations are of the very essence of the instruments. If the statute bans the stipulation for the lapsing of the policy because the stipulation is not attached to and made a part of the policy itself, then the whole note becomes lifeless, and the plaintiff cannot recover. Although a situation might arise where the court would enforce a contract made in violation of a statute, as was done in Rideout v. Mars, 99 Miss. 199 (54 South. 801, Ann. Cas. 1913D, 770, 35 L.R.A. (N.S.) 485), still, under the circumstances presented here, there is no force in the argument that the court should cleanse the note by removing the impurities with the judicial knife, and then vouch for the success of the operation by declaring that life remains in the mutilated remnant. If the words, 'nor shall any such company or any representative thereof make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy issued thereon,' found in the statute, apply to one of the principal provisions of the notes, then it must follow that the notes in controversy are wholly vitiated."

Other cases reaching the same conclusion are Keller v. North American Life Insurance Company, 301 Ill., 198, 133 N.E., 727; Sethman Elec. Co. v. Mountain States Life Insurance Company, 93 Colo., 64, 23 Pac. (2d), 952; Diehl v. American Life Insurance Company, 204 Iowa, 706, 213 N.W., 753, 53 A.L.R., 1528; Toole v. National Life Insurance Company, 169 Wash., 627, 14 Pac.(2d), 468; Watson v. Lincoln National Life Insurance Company (C.C.A.8), 12 Fed.(2d), 422; Fidelity Mutual Life Insurance Company v. Price, 117 Ky., 25, 77 S.W., 384; State Mutual Life Insurance Company v. Rosenberry (Tex.), 213 S.W., 242; Southland Life Insurance Company v. Hopkins (Tex.), 244 S.W., 289. It may well be that the principle announced in these cases should be limited in its application to premium notes and that the same courts would reach different conclusions if the validity of some instrument other than a premium note modifying the terms of the policy were in question.

Some courts have even refused to sustain such a provision in a premium note. See Reliance Life Insurance Company v. Lowry, 229 Ala., 258, 156 So., 570; Coughlin v. Reliance Life Insurance Company, 161 Minn., 446, 201 N.W., 920; and Ritter v. American Life Insurance Company, 48 S.Dak., 231, 203 N.W., 503. The Ritter case, however, was overruled in Kenefick v. Mutual Trust Life Insurance Company, 64 S.Dak., 325, 266 N.W., 675.

In any event, I note from an examination of the assignment of the policy that it provides that it is to be attached to and retained with the policy. This assignment contains several agreements modifying the terms of the policy itself. I have noted these heretofore in this oipinion and it is unnecessary to repeat them now. However, according to the rule as stated in 1 Couch on Insurance, supra, the attachment to the policy of an agreement modifying the terms of a life insurance contract is a sufficient compliance with a statute of the type in question. This appears to me to be a reasonable construction of such a statute and I accept this view without further discussion. Since the assignment of the policy as collateral security is attached to the policy, the terms of such assignment do not violate the provisions of Sections 9403 and 9404, General Code, in the respects under discussion.

In the mortgage note, the borrower promises to pay the premiums on the life insurance policy and the mortgage provides that it shall become

absolute if the life insurance policy is not kept in full force and effect. These promises are not made by the insurance company but by the borrower. The statutes prohibit an insurance company from making any agreement as to a contract of insurance other than is plainly expressed in the policy. No agreement is made by the insurance company and the provisions of these statutes therefore do not apply to the note and mortgage. Moreover, they do not affect or modify the terms of the life insurance policy at all.

For these reasons, I am of the opinion that the proposed plan known as the Assured Home Ownership Loan Plan of the Equitable Life Insurance Society does not violate Sections 9403 and 9404 of the General Code or any other provision of the law.

Respectfully,

THOMAS J. HERBERT,

Attorney General.