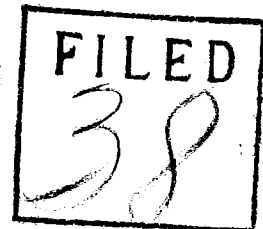


BURIAL ASSOCIATIONS: Agency contract entered into under authority of unconstitutional statute is void.

June 16, 1941

Mr. Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri



Dear Sir:

This will acknowledge receipt of your recent letters presenting for our opinion the following situation.

The Atlas Life Society of Springfield is a corporation existing under the provisions of Sections 5451 to 5456, inclusive, of R. S. Missouri, 1939, commonly known as a burial insurance association. Its method of operation in Southeast Missouri was by contracting with an undertaker, as follows:

"1. The Atlas Life Society hereby appoints _____ as its Exclusive general agent and branch manager, subject to the conditions of this contract and such instructions and regulations as may from time to time be executed by the Home Office, with the right and authority that said General Agent is to act as Branch Manager, with authority to accept applications for Burial Benefits on persons between the age of 3 months and age 65 at his or her nearest birthday, in any amounts at his discretion not to exceed \$300.00 on the life of any one person, such application to provide that the benefits be paid upon policy issued thereon, and shall be due and payable upon the death of the insured, in funeral service or merchandise, provided for, directed by the said General Agent, such applications to be taken only on forms furnished or approved by the Secretary Treasurer of the Atlas Life Society at its Home Office in Springfield, Missouri.

"2. Said General Agent shall have the right and authority to issue and countersign all policies providing for funeral benefits in his trade territory, on policy forms furnished only by the Home Office of the Atlas Life Society.

"3. The trade territory of the General Agent shall include the city of Caruthersville and a 50 mile radius, in the State of Missouri and the General Agent shall have the right to solicit applications on persons, or through any agent or agents he may appoint in the above designated territory.

"4. The General Agent shall issue policies only at such rates payable monthly, quarterly or annually at his discretion, such rates to be approved by the Home Office, but it is mutually agreed and understood that the matter of rates charged for funeral benefits shall be subject to the conditions extant in the General Agent's trade territory and conformed generally with the average death ratio in his trade territory, plus a reasonable charge for expense in producing and operating the Branch Office of the Atlas.

"5. The General Agent hereby agrees that he will keep an accurate record at the Branch Office of all policies issued and shall keep intact and in the office of the Branch Manager, all original applications, together with a carbon copy of the typewritten portion of all policies issued and that such record shall be open for inspection at any and all times to the proper officers of the Home Office of the Atlas.

"6. The General Agent further agrees that he will make a monthly report to the Home Office on or before the 15th., of each month, setting forth the business transacted by the Branch Office for the month previous, giving the following information.

- a. Total number of policies issued.
- b. Total amount of funeral benefits provided therein.
- c. Total premiums received during the previous month.
- d. No. of death claims paid.
- e. Total amount paid in death claims.
- f. Amount otherwise disbursed.
- g. Balance on hand.

"7. The General Agent shall deposit monies received or premiums (excepting the first quarterly premium) in some bank designated by the General Agent and subject to the approval of the Home Office, in the name of Atlas Life Society and subject

to the signature of Atlas Life Society, by _____
Branch Manager.

"8. The General Agent hereby agrees that he will remit with the above mentioned report, check in the sum equal to 10% of the gross premiums received by him during the month previous, said check for 10% to be made payable to Atlas Life Society and remitted direct to the Home Office, on or before the 15th., day of each and every month, covering the previous month's business.

"9. The General Agent hereby agrees that he will submit to the Home Office any special forms of literature or advertising matter which he may choose to distribute in his trade territory, to the Home Office for their approval before distributing same, unless said literature is practically the same as that already approved by the Home Office.

"10. Said General Agent hereby covenants and agrees that out of the 90% gross premiums received and retained by him that he will fulfill every policy contract issued by his Branch Office and furnish and pay for every funeral furnished by reason of the death of any policyholder under any and every policy contract issued by him and that he will not, at any time, call upon or cause the Home Office to be liable for the payment of any death claim under any policy issued by his Branch Office but shall pay the same through his funeral home in cash or in merchandise and service, as provided in the insurance contract and that should a deficit occur at any particular period of time, that the said General Agent shall absorb that deficit or lose himself and should any funds be created by reason of premiums received through his General Agency, over and above the amount necessary to pay all death claims, or expense of sending out notices and other incidental expense of his general agency, such amount shall be preserved by him and carried over as surplus until such time as it may be necessary for the payment of subsequent death claims.

"11. The General Agent hereby agrees that he will reimburse the Home Office of the Atlas for the printing of policies, circulars, literature, applications, stationery and any other forms of printing used by his Branch Office and authorized or ordered by him and that he will not incur any indebtedness in the name of the Atlas Life Society, other than that provided for in the policy of insurance issued through his Branch office.

Mr. Robert W. Hawkins

(4)

June 16, 1941

"12. (Omitted: Concerns furnishing grave markers and is not pertinent to our question.)

"13. The Atlas reserves the right to so inspect and audit the books of the Branch Manager at any time and to verify the statement and reports made by the General Agent, to the Home Office.

"14. This contract shall not be assigned by the General Agent to any person, firm or corporation, without first obtaining the consent of the Atlas and shall remain in continuous force so long as the arrangements and provisions herein are carried out to the mutual satisfaction to the parties to this contract.

"15. It is hereby agreed that the Branch Manager named herein will not be held liable for any legal litigation in connection with this contract or agreement, and in case that such legal litigation does arise in connection with the proper performance of the duty of said Branch Manager, the home office of the Atlas Life Society, hereby agrees to be solely liable and assume any and all obligations in connection therewith."

On December 11, 1940, the Supreme Court of Missouri handed down its decision in the case of State ex inf. v. Black, et al., 145 S. W. (2d) 406, in which it held void and unconstitutional Sections 5451 to 5456, supra. In view of this you ask:

Does said decision render void the contract above set forth?

Of prime importance in answering this question is the effect of the court's judgment holding these statutes unconstitutional.

In State ex rel. Miller v. O'Malley, 117 S. W. (2d) 319, (Mo. Sup.) at l. c. 324, the court said:

"An unconstitutional statute is no law and confers no right. 12 C.J. Sec. 168, p. 748; 6 R.C.L., Sec. 117, p. 117. This

is true from the date of its enactment and not merely from the date of the decision so branding it. * * *

In *Garden of Eden Drainage Dist. v. Bartlett Trust Co.*, 50 S. W. (2d) 627 (Mo. Sup.), the point involved was the right of a drainage district to enforce a tax claim in face of the challenge that the act under which it was organized was unconstitutional. The court said, l. c. 628-9:

"* * * * * as the plaintiff is a creature of the statutes in question and does not exist and cannot function except as such laws give it life, then, if such laws are void because violative of the paramount law of the land, plaintiff never had any life or legal existence, and cannot levy and collect taxes."

In *Lieber v. Hell*, 32 S. W. (2d) 792 (Mo. App.), the court, in speaking of a law held unconstitutional by the Supreme Court, said l. c. 793:

"* * * In other words, the statute is now to be regarded as void ab initio, and as though it had never been in existence; * * * * *"

In *Clark v. Grand Lodge, etc.*, 43 S. W. (2d) 404 (Mo. Sup.) at l. c. 406, it is held that an unconstitutional statute leaves the question that it intended to settle just as it would be had the statute not been enacted.

It is, therefore, to be seen that, so far as the law recognizes, there has never been any corporation in existence in this state that was authorized to write burial insurance such as that written by the Atlas Life Society. However, it may be contended that while there has been no de jure corporation yet, Atlas Life Society has been a de facto corporation.

In Garden of Eden Drainage Dist. v. Bartlett Trust Co., supra, it was further urged to sustain the tax collection that the corporation had a de facto existence, and thus could exercise the right of tax collection, but on this the court said, l. c. 629:

"* * * Plaintiff cannot act as a de facto corporation unless there is a foundation on which it could, if properly done, be erected. There must be a 'charter or general law under which such a corporation as it purports to be might lawfully be organized.' * * *
* * * And an unconstitutional law is no law and confers no rights. * * * *"

In Meramec Spring Park Co. v. Gibson, 268 Mo. 394, the court discusses the de facto existence of a corporation, saying l. c. 405-6:

"* * * a de facto corporation exists because (and only when) there is a law or statute permitting its incorporation for the purposes and with the powers assumed, but which law was not followed (though attempted so to be) in its organization. * * * * * 'the first requisite' says Constantineau in his excellent work on the De Facto Doctrine, 'to constitute a de facto corporation is the existence of a law authorizing the incorporation. When, therefore there is no law providing for the organization * * *, there cannot be any such corporation either de facto or de jure.' * * * *"

We are not aware of any existing laws that would have permitted a corporation to be organized "for the purposes and with the powers assumed" by Atlas Life Society, and

therefore it could have had no de facto existence. The insurance code does not contemplate any insurance where payment is made on policies in other than money. One of the "powers assumed" by Atlas Life Society was payment under its policies in material and service. Neither was there any attempt on the part of said corporation in its organization to follow any provision of the insurance code.

The contract above set forth was entered into by the Atlas Life Society in furtherance of and to carry on the business it was purportedly authorized to engage in under Sections 5451 to 5456, R. S. Missouri, 1939. In substance and effect it appoints a person as its agent for the purpose of writing policies, collecting premiums, payment of expenses in connection with these activities, and payment of liabilities incurred upon the contracts entered into. It is an agency contract which has for its foundation an unconstitutional statute.

Lieber v. Heil, supra, was an action to legitimize a child. Pending the final disposition of said cause by the St. Louis Court of Appeals, the Supreme Court of Missouri held unconstitutional the statute that authorized the mother of said child to maintain such a suit. The Appellate Court said, l. c. 793:

"* * * It follows, therefore, that with the statute declared unconstitutional and void ab initio, she does not have, and has never had, a cause of action thereunder; and, further, that the judgment of the court rendered in the course of proceeding brought under such unconstitutional and void statute is likewise void. 12 C.J. 801."

This rule applies not only to legal proceedings under a void statute, but also to all other acts. In 16 C. J. S. p. 290, Section 101 (c), it is stated:

"As a general rule, all acts done under an unconstitutional law are void and of no effect, but acts that are merely incidental to an unconstitutional legislative enactment, it seems, may be valid. * * * * *"

We need not pay heed to the exception above noted because the writing of policies and payment of claims arising thereunder certainly is not "merely incidental" to the purported authority granted in Sections 5451 to 5456, R. S. Missouri, 1939.

In *Klenk v. Metropolitan Life Ins. Co.*, 36 Pa. Dist. & Co., 266, 267, it is stated:

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute imposes no duties, confers no rights, creates no office, bestows no power, affords no protection, and justifies no acts performed under it."

Again, in *City of St. Louis v. Polar Wave Ice & Fuel Co.*, 296 S. W. 993 (Mo. Sup.), the court, quoting from *Cooley's Constitutional Limitations*, said l. c. 998:

"When a statute is adjudged unconstitutional, it is as if it had never been; rights cannot be built up under it; contracts which depend upon it for their consideration are void; * * * * *"

In *State ex inf. v. Black, et al.*, 145 S. W. (2d) 406, the Court, in speaking of the burial association involved, said l. c. 410:

"* * * this association is a business corporation, doing an insurance business and giving its members nothing for which they do not fully pay."

Following the above, it then appears that Sections 5451 to 5456, R. S. Missouri, 1939, settled nothing and did not authorize the Atlas Life Society to engage in the insurance business in which it is engaged. In this connection Section 6004, R. S. Missouri, 1939, provides:

"No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri, unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of insurance. * * * * *"

This section is contained in Chapter 37 of R. S. Missouri, 1939, relating to insurance companies and Section 6003 of said chapter provides:

"No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; * * * * *"

Of course, the Atlas Life Society has no such certificate and is thereby barred from engaging in the insurance business under Section 6004, supra, and has always been so barred. The contract above set forth is in furtherance of the very business in which no one can engage, absent the

Hon. Robert W. Hawkins

(10)

June 16, 1941

certificate of the Insurance Department. It is therefore to be seen that this contract is in the face of Sections 6003 and 6004, R. S. Missouri, 1939, and is therefore void.

From the foregoing we conclude that Sections 5451 to 5456 being unconstitutional, the Atlas Life Society has never, in law, had any existence either as a de facto or de jure corporation; it had no power to contract and the contract it entered into is void. Not only is said contract void on this ground, but also because it is for the purpose of carrying on a business that is illegal, absent the proper authority from the Insurance Superintendent, which authority Atlas Life Society does not have.

What we have said here is to be confined solely to this agency contract. We do not rule that the policies of insurance issued by Atlas Life Society are unenforceable, (Clark v. Grand Lodge, etc., 43 S. W. (2d) 404) or that the promoters of said company may retain the fruits of their illegal enterprise against one who has paid in, as premiums, his money. Johnson-Brinkman Co. v. Central Bank, 116 Mo. 558; Bisesi v. Farm & Home Saving & Loan Association, 78 S. W. (2d) 871.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv