BURIAL ASSOCIATION: Mayes Burial Association Plan is a plan for insurance business and not a non-profit benevolent society.

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April 4, 1942 4-15

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

FILE 38

Dear Sir:

Sometime ago you wrote this office requesting an opinion as follows:

> "I have been informed that you have filed an information in the nature of quo warranto against a burial association in Barry County, which has been operating on an assessment plan and issuing policies. A ruling on this character of association would not clear up matters in my county as burial associations here have reorganized under a new plan, a printed copy of which I herewith enclose.
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> "As I understand the law, where a society is formed to furnish relief to its members out of mutual contributions without profit, it is not a business enterprise. I call your attention especially, to the following cases:
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> Barbaro v. Occidental Grove, 4 Mo. App. 429.
> Kuhl v. Meyer, 35 Mo. App. 206.
> Froelich v. Asson, 93 Mo. App. 383.
> Blanchard v. Hamblin, 162 Mo. App. 242.
> 5 C. J. Page 1335.

> "Kindly furnish me at the earliest date possible, your opinion as whether the enclosed plan conflicts with any statute in this state and oblige."

The reply to your request has been delayed because of the large amount of business in the office and the amount of study required to prepare a reply to your question. The plan was apparently evolved for the purpose of providing a substitute for the type of burial societies outlawed by the decision of the Supreme Court in the case of State ex inf. Williamson v. Black, 145 S. W. (2d) 406, and a great deal of thought has gone into it.

The insurance code of the State applies alike to all persons, corporations and associations doing an insurance business in the State.

Section 6003, Article 10, Chapter 37, R. S. Mo. 1939, 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; a copy of which certificate, certified by the superintendent, and issued only upon the request of the president or secretary, or other chief officer of the company, or of a general agent of the company for this state, notice of whose appointment has been filed in the department, shall be held by every agent or solicitor for such company doing business for such company within

> this state, and such copy shall, in some convenient and distinct manner, set forth the name of the person, agent or solicitor for whose use it is issued: Provided, however, that where two or more persons comprise a firm doing business at the same place it shall be sufficient if one copy of said certificate, certified by said superintendent, shall be issued in favor of said firm, and one license fee only collected therefor. Every such company shall be required to procure annually for the use of its agents and solicitors, copies of the renewed certificate of authority provided for by law. The superintendent of insurance for cause shall have the authority to refuse to issue a license to an agent or may suspend or after 15 days' notice of his intention to do so given in writing to the agent and the company represented by such agent revoke any such license after a hearing before the superintendent of insurance. If the ruling of the superintendent of insurance be adverse, then, within thirty days after receiving notice of the revocation, suspension, or refusal to license, the person aggrieved shall have the right to petition any court of record of the county wherein the applicant resides to require said superintendent of insurance to show cause why the license so revoked, suspended, or refused, should not be reinstated or issued."

This section, as you will observe, provides "no company shall,"etc. In the case of State v. Stone, 118 Mo. 388, the Supreme Court held Section 5710, R. S. Mo. 1889 to apply not only to corporations but to individuals and associations. From this case we quote at length, beginning at l. c. 397:

"The use of the word 'company' in section 5910, Revised Statutes, 1889, which provides that no company shall transact in this state any insurance business, unless it shall first procure from the superintendent of insurance department of this state a certificate stating that the requirements of the insurance laws of the state have been complied with, authorizing it to do business, we have no doubt was simply because the business of insurance in this state is almost all done by incorporated companies. It should be read in connection with the following section and as including both companies and association of individuals. The letter of the section must yield to the evident intent of the legislature as deduced from the whole act in regard to insurance taken together, giving due consideration to the object of the act, and the fact that it is intended to regulate the entire system of insurance within the state. Perry County v. Jefferson County, 94 Ill. 214; Railroad v. Trustees, 43 Ill. 303.

"Section 5793, Revised Statutes, 1889, provides that the insurance department shall be charged with the execution of all laws now in force, or which may be hereafter enacted, in relation to insurance and insurance companies doing business in this state. Section 5801 provides that it shall be the duty of the superintendent of the insurance department 'to file in his office and safely keep all books and papers required by law to be filed therein, to issue certificates of authority to transact business in this state to any companies who have fully com-

plied with the laws of this state in the organization of insurance companies, and the transaction of the business of insurance, etc. Section 5802, makes it his duty to furnish to every insurance company doing business in this state blanks on which to make its annual report; while section 5805 provides for an examination by the commissioner of any insurance company incorporated or doing business in this state, and section 5807 provides for the payment of certain fees to be paid by such insurance companies.

"The whole of article 2, Revised Statutes, 1889, in regard to life and accident insurance uses the words company or corporation, and in no place does it make use of the word individual, and if taken by itself, it must be conceded that the various provisions therein contained relate to incorporated companies doing an insurance business in this state, and not to individuals or an unincorporated association of individuals. The first section of article 5, of the same chapter, being section 5910 of the Revised Statutes of 1889, is an old section brought down from the Revised Statutes of 1879; and, standing alone, it also relates to, and contemplates, incorporated companies, and not individuals or an unincorporated association of individuals. But the next section, as amended and carried into the Revised Statutes of 1889, provides that '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 law of this state governing the law of insurance.'

"This section in express terms makes the provisions of article 2 applicable to an individual or an association of individuals doing an insurance business. The argument that section 5916, upon which this information is founded, should be disregarded, so far as it applies to a person or an unincorporated association of persons, because the law points out no method by which a person or such an association can procure a certificate to do business, is not well taken. The argument is based upon a false assumption; for, according to section 5911, an individual or such an association of individuals may, and indeed must, first comply with the laws governing the business of insurance, meaning, in case of life and accident insurance, the provisions of article 2. It is true that some of the provisions of that article can have no application to an individual doing insurance business, as, for instance, those relating to the organization of insurance corporations; and in other instances designated officers of the insurance corporation are required to do certain things. All these things can be done by the individual or the association of individuals proposing to do an insurance business. There is no difficulty whatever in this respect, and the indiviual or association proposing to do an insurance business can make the required deposits and do the other things necessary to procure a certificate to do such business.

"The evident intent of the legislature as shown by the sections of the statute quoted, was to regulate and systematize the business of insurance in this state, and that it was never its purpose to require strict observance of its statutory behests, by corpora-

> tions and companies, doing business in this state, and to require nothing whatever of individuals engaged in the same business. On the contrary, it is manifest that the intent was to require of them the same compliance with the law that is required of corporations and companies, and if we are correct in this position, while conceding that the offense with which the defendant is charged is penal in its nature, and that in such case a strict construction of the statute is required as is held in Com. v. Carroll, 8 Mass. 490; State v. Brady, 9 Humph. 74; Hamuel v. State, 5 Mo. 260, and Bishop on Statutory Crimes, sec. 220; yet it is not proper or reasonable to construe it strictly for the mere purpose of defeating it when the intent is plain as in this case."

Section 6003, supra, has the same language as Section 5910, R. S. Mo. 1889.

As the insurance code applies to individuals and associations as well as corporations, it is necessary to determine first whether or not the plan enclosed by you is a plan for doing an insurance business, and, second, if it is a plan for doing an insurance business, whether or not it comes under any of the exceptions to the insurance laws.

The cases you cite do not seem to shed any light upon your question. The case of Barbaro v. Occidental Grove, 4 Mo. App. 429, was a case in which enforcement of an agreement was sought, the court holding the paying of a death benefit to the family of a deceased member as one of the incidents of membership was not the doing of an insurance business, inasmuch as the defendant corporation provided in its by laws that 'aiding the families of deceased members' was one of the objects of the corporation. The defendant apparently was a benevolent and fraternal society similar to those authorized

by Article 13, Chapter 37, R. S. Mo. 1939. And all of the by laws of the organization are not included in the case. The sole purpose of the "Burial Association Plan" is to secure for its members, graves, burial supplies and funeral services as a non profit, non-commercial voluntary association.

The case of Kuhl v. Meyer, 35 Mo. App. 206, did not raise the question of the right of persons to voluntarily associate as an unincorporated voluntary benevolent association. While plaintiffs in the action alleged they were the trustees for said voluntary, unincorporated benevolent association, no question was before the court of the right of such individuals to so associate.

The case of Froelich v. Asson, 93 Mo. App. 383, involved an association of musicians, persons all engaged in the same profession. The "Burial Association Plan" submitted is not limited to any particular business, profession or trade, and the payment by the Musicians Association of a small sum towards the funeral expense of a deceased member was not the sole object of the association, it was merely incidental to membership, and was only payable if the deceased member had been in good standing for one year.

The case of Blanchard Co. v. Hamblin, 162 Mo. App. 242, was one involving reciprocal inter-insurance contracts between persons and firms in the same business. The Burial Association Plan is not limited to persons in the same business, further reciprocal insurance agreements are now governed by Article 1, Chapter 37, R. S. Mo. 1939.

Insurance is defined as follows in Vol. 32 of Corpus Juris, at page 975:

> "Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. * * * * *"

Also, attention is directed to the case of State ex rel. Beach v. Benefit Assn., 6 Mo. App. 163. Attention is directed to the following extract from this case, at l. c. 169:

> "The text-writers generally give similar definitions; and, in the definitions of the contract cited by them from the reports, the amount to be paid on the happening of the loss is commonly spoken of as a fixed sum, or a certain sum. In Paterson v. Powell, 9 Bing. 320 (cited in the text of Bliss on Ins. 4), insurance is defined to be 'a contract in which a sum is paid as a premium in consideration of the insurer's incurring the risk of paying a larger sum upon a given contingency.' 'Insurance,' says Marshall (vol. 1, p. 1), following the civilians, whom he cites in the note, 'is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event;' and 'the insurance of life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum, or an annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, within a certain period, if the insurance be for a limited time.' 2 Marsh. on Ins. 766. The law, however, is not fond of definitions, and these definitions are to be taken, perhaps, rather as state-

> ments by the learned men who make them, of the contract as they find it existing around them, than as strict definitions which contain every essential element without which the thing cannot exist, and which exclude everything not necessary to its being."

Attention is further directed to the Tennessee case of State ex rel. Reece, Commissioner of Insurance v. Stout, 65 S. W. (2d) 827, where the court held, at l. c. 829, as follows:

> "Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished by and through a designated undertaker, or official undertaker. 1 Couch's Cyc. of Insurance Law, 47, Sec. 32; State ex rel. Unity I. L. I. & S. Ben. Ass'n v. Michel, 121 La. 350, 46 So. 352; Flynn v. Prudential Ins. Co., 145 App. Div. 704, 130 N. Y. S. 546; State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197; State ex rel. Fishback v. Globe C. & Undertaking Co., 82 Wash.

124, 143 P. 878, L. R. A. 1915B, 976; State ex rel. Coleman v. Wichita M. Burial Ass'n, 73 Kan. 179, 84 P. 757; Fikes v. State, 87 Miss. 251, 39 So. 783; Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319."

The Burial Association Plan submitted provides for the payment of dues by members, the furnishing of funeral merchandise and funeral by a designated undertaker upon the death of a member, these to be paid for from the dues collected from members. There is the payment of the premium, dues, the payment of the funeral upon the happening of the contingency, the death of the member. The plan seems to be clearly a plan for doing an insurance business.

Now it is necessary to determine whether the plan comes within the exceptions to the insurance laws. Article 13, Chapter 37, R. S. Mo. 1939, provides for the organization and supervision of Fraternal Beneficiary Associations, as follows:

"Sec. 6105. Fraternal benefit societies defined. -- Any incorporated society, order, or supreme lodge, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries and not for profit, operating on a lodge system and having a representative form of government and which shall make provision for the payment of benefits in accordance with this article, is hereby declared to be a fraternal benefit society."

"Sec. 6106. Lodge system defined. Every such society having a supreme governing or legislative body and sub-

> ordinate lodges or branches, by whatever name known, into which members shall be elected, initiated, or admitted in accordance with its constitution, laws, rules, and regulations, which subordinate lodges or branches shall be required by the constitution or by-laws of such society to hold regular or stated meetings at least once in each month, and either to conduct prescribed ritualistic ceremonies or to carry on other altruistic, educational, fraternal, religious, patriotic, or recreational activities, shall be deemed to be operating on the lodge system."

The Burial Association Plan submitted is not a fraternal society within contemplation of this article as the plan has no lodge system.

In Section 6137 of this article and as amended Laws 1941 page 398, certain associations are exempted from the provisions of the article. This section is as follows:

> "Section 6137. Exemption of certain societies. -- Exemption of certain societies. --(1) Nothing contained in this article shall be so construed as to affect or apply to grand or subordinate lodges of societies, orders, or associations now doing business in this state which provide benefits exclusively through local or subordinate lodges, or to:
>
> (a) Orders, societies, or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business; and the

ladies societies or ladies auxiliaries to such orders, societies or associations.

(b) Domestic societies which limit their membership to employees of a particular city or town, designated firm, business house or corporation which provide for a death benefit of not more than five hundred ($500) dollars or disability benefits of not more than three hundred and fifty ($350) dollars to any person in any one year, or both;

(c) Domestic societies or associations of a purely religious, charitable and benevolent description, which provided for a death benefit of not more than five hundred ($500) dollars or for disability benefits of not more than three hundred and fifty ($350) dollars to any one person in any one year, or both.

"(2) Any such society or association described in clauses (b) or (c) of subsection (1) which provides for death or disability benefits for which certificates are issued and any such society or association included in subsection (c) which has more than two thousand members, shall not be exempted from the provisions of this article, but shall comply with all the requirements thereof.

"(3) No society which, by the provisions of this section, is exempt from the requirements of this article, except any society described in clause (a), supra, shall give or allow, or promise to give or allow to any person any compensation for procuring new members.

> "(4) Any society whose membership is confined to any religious denomination shall not be required to have ritualistic ceremonies.
>
> "(5) Every fraternal benefit society heretofore organized and incorporated and which provides exclusively for benefits in case of death or disability resulting solely from accident and which does not obligate itself to pay natural death or sick benefits may be relicensed under the provisions of this article, if heretofore authorized, and shall have all of the privileges and be subject to all the applicable provisions and regulations of this article except that the provisions thereof relating to medical examination, standard provisions, prohibited provisions, valuations of benefit certificates and the requirement that the certificate shall specify the amount of benefits, shall not apply to such society.
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> "(6) The superintendent may require from any society or association by examination or otherwise, such information as will enable him to determine whether such society or association is exempt from the provisions of this article."

An examination of the Burial Association Plan shows it does not come within these exceptions. It is not the scheme of operation of a grand or subordinate lodge existing at the time of the enactment of the statute; the membership is not limited to persons engaged in one or more hazardous occupations, or in the same business or similar lines of business; the membership is not limited to employees of any particular

city, town, business firm or corporation, nor is the membership limited to two thousand or less members.

As heretofore mentioned, this plan was evidently devised to take the place of the plan used by the ousted burial insurance associations. And a great deal of thought has apparently gone into the preparation of it. Whether or not the plan is one which is exempt from the operation of the insurance laws of the State, is a question that can only be definitely settled by the decision of a court of proper jurisdiction.

CONCLUSION

However, it is the conclusion of the writer, from the authorities cited herein and numerous others not cited, including the case of State ex inf. Williamson v. Black, 145 S. W. (2d) 406, that if the question were submitted to a court having jurisdiction of the matter the Burial Association Plan would be held to be a plan for doing an insurance business for the benefit of the undertaker designated and not a voluntary, non profit benevolent association.

Respectfully submitted,

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APPROVED:

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