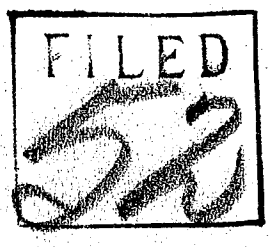
INSURANCE: Contract of Floral Hills Memorial Chapels, Inc., with Oliver F. Gregg, dated June 10, 1953, not an insurance contract. Persons negotiating such contracts not required to be licensed by superintendent of division of Insurance.



September 15, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

> "Over a period of some three or four years this Division has received complaints from various organizations and individuals concerning contracts issued by the captioned company, which provide certain funeral benefits in case of death of the party contracting with the company.
>
> "You will find attached hereto a photostatic copy of the contract which is currently being issued by the company and I respectfully ask an opinion from your office as to whether or not the said contract constitutes an insurance contract under the applicable laws of this State."

Your request calls upon this office to review the written provisions of a certain contract purportedly entered into between Floral Hills Memorial Chapels, Inc., of Kansas City, Missouri, as one contracting party, and Oliver F. Gregg, 4434 Park, Kansas City, Missouri, as the other contracting party, such contract bearing date of June 10, 1953. The purpose of this review is to determine if the contract is one which contains covenants and agreements which will cause the same to be denominated a "contract of insurance," the offering for sale of which would be in violation of Section 375.310, RSMo 1949, which statute provides, in part, as follows:

> "Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been

> suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * * ."

At the very outset it must be stated that Floral Hills Memorial Chapels, Inc., is not licensed by the Missouri Division of Insurance to conduct an insurance business in this State.

It will not be necessary to copy into this opinion the full text of the contract, heretofore referred to by date, but the prominent features of the contract will be reviewed by summarizing specific provisions which will cause the contract to give evidence on its face that it is or is not a "contract of insurance."

Summarized, the contract provides:

(1) Floral Hills Memorial Chapels, Inc., covenants and binds itself to furnish Oliver F. Gregg, or his assignee, specific merchandise and services which are to be useful only after the death of Oliver F. Gregg, or his assignee. Such merchandise and services meet the needs of one who desires a respectable burial.

(2) To cover the cost of merchandise and services to be supplied, Oliver F. Gregg agrees to pay Floral Hills Memorial Chapels, Inc., by depositing with Floral Hills Provisional Covenants Trust Association, as Trustee, the sum of $500.00, with an additional guarantee charge of $25.00, the entire amount payable in fixed monthly installments until the full $525.00 is paid. The final $300.00 paid of the entire amount of $525.00, is to be deposited with Floral Hills Provisional Covenants Trust Association, as Trustee, to be held until all obligations under the contract are performed.

(3) If Oliver F. Gregg defaults in any of his regular payments and such default continues for a period of more than thirty days, then Floral Hills Memorial Chapels, Inc., may declare all payments, theretofore made, forfeited as and for liquidated damages and terminate the contract.

(4) All of the benefits and provisions of the contract may inure to any member of the immediate family of Oliver F. Gregg should such contingency arise, upon payment of the unpaid installments due under the contract.

(5) It is recited in the contract that the purchase price set out in the contract is based upon standard published manufacturer's material and labor costs as of the date of the agreement. However, at the time of delivery of merchandise and the performance of the obligations, if such costs are lower than those at the date of the agreement, Floral Hills Memorial Chapels, Inc. will refund the difference in costs, provided, however, should the costs of said

merchandise and/or services be more at the date of delivery, Oliver F. Gregg agrees to pay, as part of the purchase price, an additional sum equaling the exact increase in costs to Floral Hills Memorial Chapels, Inc.

(6) When Oliver F. Gregg has paid ten per cent of the purchase price named in the contract he becomes one of a group of persons holding like contracts whose lives are insured under a group policy of life insurance issued by the American National Insurance Company of Galveston, Texas. Payment of this insurance is contingent on the death of the insured, with the face amount of the policy to be measured by the unpaid balance of indebtedness owed to Floral Hills Memorial Chapels, Inc. by Oliver F. Gregg at the time of his death and prior to his making full payments under his contract. If it should become necessary for the insurance company to pay under its group policy, due to the death of Oliver F. Gregg, the insurance company pays the amount due, to Floral Hills Memorial Chapels, Inc., as a creditor of Oliver F. Gregg, debtor.

As above summarized, the provisions of the contract entered into between Floral Hills Memorial Chapels, Inc., and Oliver F. Gregg, evidence a unique plan for attracting new business for Floral Hills Memorial Chapels, Inc. Having stated the prominent provisions of the contract, it now becomes necessary to rule them as being within, or outside of, the scope of a "contract of insurance."

Missouri statutes do not define a "contract of insurance." The essential elements of a contract of insurance are alluded to in the following language from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535:

> "The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l. c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

> "Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay him a sum of money, or otherwise indemnify him.'"

The insurance character of burial associations is evident from the following language found in Section 376.020 RSMo 1949, of Missouri's regular life insurance company law:

> "* * * provided, that any association consisting of not more than one thousand five hundred citizens, resident of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

In 44 C.J.S., Insurance, Sec. 48, p. 494, we find burial insurance referred to in the following language:

> "Burial insurance is a contract based on a legal consideration whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum."

The foregoing citation disclosing a definition of burial insurance bears remarkable likeness to the following definition found in 1 Joyce on Insurance (2 Ed), p. 87:

> "Burial insurance is a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance."

In 1 Couch on Insurance, Section 32, burial insurance is referred to in the following language:

> "Burial or funeral benefit insurance is valid, and being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance."

Citation of cases under the foregoing definitions are found conveniently grouped in the case of Peterson v. Smith, 196 So. 505, 188 Miss. 659, l.c. 664, decided by the Supreme Court of Mississippi in 1940. Before commenting on the cases cited in Peterson v. Smith, supra, it is well to disclose the type of burial contract being construed in such case, as evidenced from the following quotation from the opinion found at 188 Miss. 659, l.c. 663:

> "Appellants are, each and all, residents of Quitman County, and they conduct as partners at Marks, in that county, a business called Marks Burial Association. On June 15, 1938, the Association issued to V. T. Smith a funeral benefit contract by which, in consideration of a registration fee of $1 and a small monthly premium to be paid thereafter until death, the Association agreed 'to furnish a Complete Funeral, consisting of Casket, Robe and Hearse valued as follows:
>
> "'For members 1 week to 5 years inclusive $35.00
> 'For members 6 years to 15 years inclusive $75.00
> 'For members 16 years and above . . . . . $125.00'"

In holding that the above described contract was a contract of burial insurance the Supreme Court of Mississippi rested its decision on the definition of burial insurance as taken from 1 Joyce on Insurance (2Ed.), p. 87, quoted supra. Before passing from this case we desire to make special note of the type of consideration moving from the contract holder to Marks Burial Association--a registration fee of $1 and a small monthly premium to be paid thereafter until death. We will refer to this legal consideration after commenting on adjudicated cases in which the courts have held certain contracts to be burial insurance contracts. (Emphasis supplied)

In State v. Willett, 86 N.E. 68, 171 Ind. 296, it is disclosed that the plan for payment of funeral expenses involved the payment of an initiation fee plus assessments to be made against members to meet the cost of burial. In State v. Wichita Mutual Burial Association, 84 P. 757, 73 Kan. 179, the contract there held to be an insurance contract was one which provided for burial benefits in consideration of stipulated assessments to be paid by members of the association during their lives. (Emphasis supplied)

In Renschler v. State, 107 N.E. 758, 90 Ohio St. 363, the contract was termed a mutual note whereby the party of the first part promised to pay the undertaker during the life of first party the sum of fifteen cents (termed 'interest') on or before the 10th day of

each month in advance. The face value of the note varied from $50 to $100. The contract or note provided that if the said first party be not in default athe time of his or her death, the second party, undertaker, agreed to furnish funeral for said first party. (Emphasis supplied)

In Sisson v. Prata Undertaking Co., 49 R.I. 132, the contract which was held to be an insurance contract is best described by quoting from the case at 49 R.I. 132, l.c. 133, as follows:

> "By its contracts respondent agrees to perform specified services and provide some of the furnishings and materials necessary for the funeral and burial of the person named in the contract subject to certain conditions. The contracts are in two forms but all are subject to the condition that the contract holder shall pay a certain sum, monthly or annually, in order to become entitled to the benefits under the contract, and in case default is made in such payments the contract becomes void and the holder loses all rights and benefits thereunder. One form of contract provides that a casket is to be furnished with some other necessaries for a funeral at the expense of the respondent. The other form of contract does not include a casket but states that the services and materials to be furnished for the funeral by the respondent are of the value of $70. This form of contract requires the annual payment of $1.00 by the contract holder 50 years old and $2.00 by the contract holder 65 years old. The annual payments are to be made until the amount of $50 has been paid. Each contract provides that in the event of the death of the holder before the payment of said amount the holder shall be entitled to the funeral without further payment by his heirs." (Emphasis supplied)

A case bearing close analogy, insofar as contract provisions are concerned, to the facts disclosed in the contract of Floral Hills Memorial Chapels, Inc., is Harrison v. Tanner-Poindexter Company, 1 S.E. 2d 646, 187 Ga. 678. In this case the court was construing a contract providing for certain funeral benefits. The definition of life insurance before the court was as follows:

> "That a contract of life insurance is one whereby the insurer, for a consideration, assumes an obligation to be performed

> upon the death of the insured, or upon the death of another in the continuance of whose life the insured has an interest, whether such obligation be one to pay a sum of money, or to perform service, or to furnish goods, wares or merchandise or other thing of value, and whether the cost or value of the undertaking on the part of the insurer be more or less than the consideration flowing to him."

The contract being construed in Harrison v. Tanner-Poindexter Company, cited above, provided, in part, as follows:

> "It is mutually understood and agreed between the parties that the price to be paid for said articles above named is the sum of $250, to be paid in instalments as hereinafter provided; the sum of $4 having been paid on this date, and the sum of $.75 to be paid on each 2 months thereafter, on the first of each such month, until the purchase price is paid, with interest only after maturity, such payments to be applied on the articles so purchased. . . .In the event of failure to pay any instalment or any number of such, all said instalments provided for in this contract may be declared due and payable by said first party, unless waived in writing by first party, then the amount then existing under this contract shall become due and payable. It is further agreed by the parties that delivery of the articles of merchandise so purchased as aforesaid is hereby waived, the same to be delivered upon the payment of $100 of purchase-price. In the event of death of second party before full compliance with this contract, the liability for the remaining instalments shall be paid from the estate of the second party in amounts stated in this contract on the same instalment plan and in the amounts stated. * * *"

Tanner-Poindexter Company contended that the contract referred to above was not an insurance contract for the reason, among others, that there was no element of risk in so far as each contract of sale was concerned, since the terms of sale were definitely fixed and the amounts to be paid for the merchandise were definitely stated, and for the further reason that the death of the purchaser did not terminate the contract or the payments due thereunder. In holding the contract to be a life insurance contract within the definition of a "contract of life insurance" as defined by the statutes of Georgia,

the court spoke as follows at 189 Ga. 678, l. c. 685, 686:

> "Under the foregoing method the company, in the language of the act of 1937, supra, 'for a consideration, assumes an obligation to be performed upon the death of the' purchaser 'or upon the death of another in the continuance of whose life, . (he) has an interest,' namely to furnish the goods and render the stipulated funeral service. The result is that the business is to be characterized as a life-insurance business within the meaning of the act of 1937, and the company--whether it be an individual 'person, firm or corporation . . shall be deemed to be engaged in the business of life insurance,' within the meaning of section 1 of the act, and 'subject to all of the provisions of the laws of Georgia regulating life-insurance companies.' It is true the contract provides that the specified articles of merchandise may be delivered at any time upon the payment of $100. But burial of the dead is the main object of the purchase, and is essential to complete performance of the company's obligation. The goods are desired only in connection with the funeral service which in natural course of events must follow death, as no intent to bury the living could be attributed to the parties. In the circumstances the company was engaged in the life-insurance business as defined in the act of 1937, supra, and was subject to the regulatory provisions of the law relating to life insurance generally."

The Tanner-Poindexter Company case, cited supra, was decided on February 16, 1939, solely on the new Georgia statute defining a "contract of insurance," as passed and approved March 31, 1937. It is of interest to note that on October 16, 1936, the Suppeme Court of Georgia, in the case of South Georgia Funeral Home Incorporated et al. v. Harrison, 188 S.E. 529, 183 Ga. 379, held that the Georgia state court erred in adjudging defendants in contempt of court for alleged violation of an injunctive order which enjoined defendants from selling their so-called option contracts for funeral services and merchandise. It was as a result of this opinion that Georgia enacted its new statute in 1937 re-defining a "life insurance contract," with the ultimate result of the ruling in the Tanner-Poindexter Company case, cited supra. We consider the following language found in the decision of South Georgia Funeral Homes et al. v. Harrison, 183 Ga. 379, l.c. 382, to be of great weight in arriving at the final conclusion

to be stated in this opinion:

> "We think it can safely be said, however, that a contract of life insurance must contain an element of risk in so far as the particular individual contract is concerned. The contract now being sold by the defendants, and by reason of the sale of which this contempt proceeding arose, is one wherein the defendant corporation, for a fixed and definite sum in hand paid or payable in installments, agrees to render and perform or cause to be rendered and performed, for the purchaser or any one member of his family, certain funeral services, with the additional obligation to allow the purchaser to buy funeral merchandise in connection with the funeral, for a price definite and ascertainable. While the performance of the contract is contingent upon death, this in and of itself does not make it a contract of life insurance, nor does the fact that the fixed sum is payable in installments. There is nothing in the contract itself, nor is there any evidence, to show that the amount paid by the purchaser is less than the value of the funeral services contracted to be performed, or that there is any element of risk involved, either on the part of the purchaser or the defendant corporation. The contract on its face does not appear to be one of life insurance."

In Richards On Insurance (5th Ed.), Vol. 2, Sec. 206, we find the following discourse on "risk":

> "'Risk' in insurance law is an uncertainty surrounding the possible occurrence of the Insured Event. It is not 'chance of loss' in the sense that the frequency with which any given number of exposures are subjected to an unfavorable contingency will result in financial loss. 'Risk' should also be differentiated from 'hazard' which is but a situation or action which can cause loss; and from 'loss' which pertains to an unintentional parting with value. 'Risk' might best be defined as (1) fortuitous, i. e., the event or events described <u>may</u> happen but not <u>must</u> happen; wear and tear, inherent

> defect or vice, depreciation of property, etc. etc. are not appropriate subjects of ordinarily insurable risks, (2) extraneous, i. e., the event or events arise from external causes, not from internal causes such as decomposition or disintegration, (3) lawful, i.e., the event or events do not describe possession or ownership of illegal property like narcotics, lottery tickets, etc. etc. which are noninsurable risks, and (4) not contributed to by the insured's wilful or fraudulent act, i. e., the event or events are not precipitated or within the control of the parties so that in accord with public policy there is no profit in the given wrong."

To cite additional cases from other jurisdictions where contracts providing for the furnishing of merchandise or services at time of death have been held to be insurance contracts would not be of further help in ruling the contract under consideration. Stated simply, it is the opinion of this office that the contract being construed does not contain the essential elements necessary to attribute to it the character of an insurance contract as judicially defined by the appellate courts of Missouri; that for this office to adopt the statutory definition of an insurance contract as enacted by foreign states in order to rule the contract before us to be a contract of insurance would be usurping a legislative function; and that the contract in question is not so drawn as to embrace the element of "risk" so essential to all valid insurance contracts. If offering of this type of contract to the public discloses hazards which should be obviated, such matters should be addressed to the attention of the State legislature.

CONCLUSION

It is the opinion of this office that the contract purportedly entered into between Floral Hills Memorial Chapels, Inc., of Kansas City, Missouri, and Oliver F. Gregg, 4434 Park, Kansas City, Missouri, bearing date of June 10, 1953 is not a contract of insurance, within the meaning of language contained in Section 375.310 RSMo 1949, and persons negotiating such contracts are not required to be licensed by the superintendent of the division of insurance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

JLO'M/vtl:da

JOHN M. DALTON
Attorney General