OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

May 26, 1939

Hon. Walter C. Woodward
Life Insurance Commissioner
Board of Insurance Commissioners
Austin, Texas

Dear Sir:

Opinion No. O-171
Re: Whether death cancellation agreement issued by the American Industrial Investment Company, a contract of insurance.

We beg to advise that the request as contained in your letter of May 20th has received the attention of this department. You wish to be advised whether or not the death cancellation agreement accompanying your letter is an insurance contract and if the parties issuing same should be required to comply with the insurance laws of Texas as a condition precedent to the issuance of such agreement.

The material provisions of said agreement read as follows:

"In the event of the death of _____ (hereafter known as the borrower) within ten (10) months after date the American Industrial Investment Company agrees to cancel that certain promissory note executed by said borrower on _____ for $_____ and release all endorsers, individually and collectively unconditionally, from any further liability or obligation. And all of the provisions and agreements embodied in said note, and the 4 3/4% Investment Certificate issued in connection therewith, shall become null and void, and

of no further force or effect, notwithstanding anything to the contrary—

"(1) Provided said death did not result directly or indirectly from self-destruction, whether sane or insane, from committing an assault or felony, or from intoxication or any consequence thereof.

"(2) All monthly installment payments were paid within the month they became due and no monthly payment was delinquent over a period of fifteen days at the time of death."

Following the above provisions, a line is left for signature by the secretary-treasurer for the American Industrial Investment Company and provides for a seal of the company affixed thereto. A line is provided for the signature of the borrower following his acceptance of the terms of the agreement in words as follows:

"In consideration of the issuance of the above cancellation agreement I hereby agree to its terms and tenure, also the various provisions embodied therein and agree to pay the necessary charges in connection."

The endorsers of the note mentioned are also required to execute the agreement in the presence of the borrower, who sign for the purposes and considerations therein expressed, certifying that they endorsed the note described in the agreement.

It appears that the note itself and the 4 3/4% investment certificate constitute and form along with this agreement the contract between the borrower and the company. We are not furnished such instruments and upon the facts presented, would not like to be understood as passing on the lawfulness of the agreement in question or as to the legality of the operations of said company in the use or intended use of the agreement above described

We do not think, however, the fact that an investment certificate is issued whereby the borrower shares or participates in the earnings or dividends from the loans would in any wise affect the status of the agreement as to whether or not it constitutes a contract of insurance.

"Insurance" is a word of comprehensive and various meanings. In a general sense the term signifies an agreement, for a consideration, to pay a sum of money upon the happening of a particular event or contingency, or indemnity for loss in respect of a specified subject or a specified peril; in other words, an undertaking by one party, generally designated as the "insured" or the "assured", from loss arising from named risks, for the consideration and upon the terms and under the conditions recited....but the true character of an alleged contract of insurance cannot be concealed or changed by the use of absence of words, it being immaterial whether or not the contract on its fact purports to be one of insurance, since the courts will look behind the terminology to ascertain the intent of the parties. 24 Tex. Jur., Para. 2, p. 650.

An "insurance contract" has been defined as "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." Cooley's Briefs on Insurance (2nd Ed.) Vol. 1, p. 6; National Auto & Service Corp. vs. State, (Tex. Civ. App.) 55 SW 2nd 209; Barns vs. Clifford County Estates, 143 Misc. 813, 15, 258 N. Y. S. 671, 73; Attorney General vs. C. E. Osgood Co., 249 Mass. 473, 144 N. E. 371, 35 A. L. R. 1037; State vs. Berdsley, 88 Minn. 20, 92 N. W. 472; Ramos vs. Home Insurance Co., 94 U. S. 621, 29, 24 Lawyer's Ed. 298; Equity Service Corp. vs. Agull, 281 N. Y. S. 292.

The agreement in question provides against any loss incurred by the estate of the borrower, contingent upon his death within ten months after date of the loan and provided no monthly payment is delinquent over fifteen

days at the time of death or that death did not result directly or indirectly from self-destruction and other conditions not necessary to be re-stated. While the borrower does not receive, so far as the fact of the agreement discloses, any particular sum of money, the consideration for a loan manifestly appears to be one and the same for the contract or agreement and the investment certificate recited therein. Upon death happening within the terms of the agreement, the company is bound to cancel any balance of the loan remaining unpaid and such is an act of value to the borrower.

In the case of Equity Service Corporation vs. Agull, supra, there was involved a contract under which plaintiff loaned defendant two hundred ($200.00) dollars and was given a chattel mortgage on defendant's car. By the contract, defendant agreed to pay two hundred and sixty ($260.00) dollars unless the car was destroyed or lost, in which event the debt was to be cancelled. It was held that this constituted an insurance contract under the New York insurance laws for the issuance of which plaintiff had not been licensed.

It has been held that the cancellation of the debt is the equivalent of the payment of money to the estate of the customer. Attorney General vs. C. E. Osgood Co., Supra, 35 A. L. R. 1037 and annotations.

We are unable to distinguish the holding in the case last cited, which involves the transferring of title to property for which the notes were executed, upon death occurring within the terms of said contract, from the agreement in question. The statutory definition involved in that case was essentially the same as Cooley's, above quoted. As pointed out by the Massachusetts Supreme Court in this case:

> "The cancellation of the debt and the transfer of title to the personal property spring out of the agreement, and are in performance of its terms. The customer paying to the defendant the consideration for the doing of these things and the money handed

> to it as deposits and as the partial payments made from time to time. The cancellation of the debt and the transfer of the title to the peracnal property occur upon the death of the customer. That loss of his life is plainly something in which the customer has an interest. Every element of the statutory definition of insurance is present."

You are respectfully advised, therefore, that in the opinion of this department the death cancellation agreement submitted and herein described is a contract of insurance and the parties issuing same must comply with the insurance laws of Texas.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Wm. J. R. King
Wm. J. R. King
Assistant

WMK:AW

APPROVED:

APPROVED
OPINION
COMMITTEE
BY HBB
CHAIRMAN

Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

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