Building and Loan Associations—Interest—Usury.

A building and loan association cannot under any pretext or guise exact from its members a premium which when taken with the rate of interest amounts to usury.

October 14, 1919.

Hon. H. S. Magraw,
State Examiner,
Helena, Montana.

Dear Sir:

I acknowledge receipt of your communication of recent date in which you request my opinion on the following proposition:

> "Herewith a certified copy of resolution of Western Loan and Building Co., Salt Lake City, by which they are taking advantage of our building and loan act re. premium, so as to raise the rate of interest to 12%, see copy of note herewith inclosed."
>
> Writer is of the opinion that premium should be set forth in their by-laws and should be universal, whereas this is just a resolution and applies only to Montana.
>
> In California and Oregon they are only allowed to charge 10% per annum interest.

The note which you attach to your letter is in words and figures as follows:

> $1000.00 Helena, Montana, September 19, 1919.
> For value received, we promise to pay to the order of the Western Loan and Building Company, a corporation, at its office in Salt Lake City, Utah, the sum of $1000.00 with interest at the rate of ten per cent, and a premium of two per cent per annum upon deferred payments, principal, interest and premium payable monthly, as follows: Twenty-two and 8-100 dollars on the 17th day of each and every month, commencing with the month of October, 1919, until 60 payments shall have been made, payments to be applied first upon interest and premium due, and balance upon principal. Default in the payment of any installment shall, at election of the holder thereof, without notice, mature the entire indebtedness, and if after default, this note is placed in the hands of an attorney for collection, we agree to pay the reasonable attorney's fee for such attorney.

The copy of the resolution adopted by the board of directors of said association, which you attach to your letter is in substance that a fixed rate of interest of 10 per cent per annum and an additional per cent "rate of premium" of 2 per cent per annum are to be charged borrowers in the State of Montana, on and after April 14th, 1919.

Building and loan associations so widely differ from other corporations in their purpose and nature that they are generally recognized as a proper subject of independent legislation. For example, it is generally conceded that such an association may be exempted from general statutes relating to usury, so long as such exemption is uniform as applied to all building and loan associations.

Though the said Western Loan and Building Association is a corporation organized under the laws of Utah, its relations to its members and their rights are to be determined by the provisions of the laws of Montana relating to building and loan associations; otherwise, it may be permitted to enjoy greater rights and privileges than are enjoyed by a corporation of the same or similar character created under the laws of Montana, and thus the constitutional prohibition on this subject would be infringed. (Const. Sec. 11, Art. 15.)

Our statute relating to building and loan associations prescribes (Sec-'ion 4193 as amended by Chapter 64, Laws of 1919) "such corporations shall have power to issue stock to members on such terms and conditions as the constitution and by-laws may provide. To assess and collect from members and depositors such dues, fines, interest, fees and premium on loans made, or other assessments as may be provided for in the constitution and by-laws. Such dues, fines, premiums, fees or other assessments shall not be deemed usuary although in excess of the legal rate of interest, etc."

Does this statute permit the taking of a rate of premium such as is stated in the obligation set out in the said note? Section 4193, amended as aforesaid, requires the by-laws to provide for the amount of the premium to be paid for, and the rate of interest on loans. This obviously treats the premium as something different in character from interest. The intendment of the legislature is not clear. It may be conceded that it would be legitimate for the association, through its by-laws or by resolution of its board of directors, to prescribe a minimum lump premium, or name a certain or definite amount per share to be paid as a premium, upon a loan or advancement to be made, but even this would not authorize the fixing of a premium by a rate per cent.

There is nothing in such a condition to distinguish it from interest, and the legislature surely did not intend to say that interest shall not be treated as interest, or that interest, to be collected by the designation of premium, shall not be treated as interest. So that, when the satute speaks of he rate of premium, it does not mean the same thing as the rate of interest. The more natural and consistent interpretation would be that, when the legislature speaks of a rate of premium it means a proportional or pro rata distribution of the payment of a premium, fixed by the by-laws or by resolution of the board of directors of the association.

If it does not have this meaning, it has no other that will distinguish it from interest, and the Act cannot be held to sanction the taking of any

premium at all under the appellation of "rate of premium." The idea of a rate of premium corresponding to rate of interest, is not within the spirit and intendment of the law of building associations, and, if that is what was attempted to be sanctioned by legislative edict, so as to relieve it from amendability to the laws relating to usury, it would be very questionable whether it could secure the warrant of the Constitution, which inhibits the adoption of any special or local law relating to interest on money.

Under this interpretation of the law, it is plain that the association is not warranted in exacting from the borrower the two per cent premium upon the amount of the loan, as, when added to the ten per cent interest, it exceeds the lawful rate which is permitted to be charged in this state as interest on money. The device to circumvent and avoid the law relating to usury. In the case of Meoney v. Atlanta Bldg. & Loan Assn., 21 S. E. 924 (N. C.), was a case where $3.25 per month, as interest and premium, was contracted to be paid upon a loan of $300.00, and it was held that the whole transaction could not be characterized otherwise than as a "lending of $300.00 to the plaintiff (the borrower) at 12 per cent per annum." It was said in Butler vs. Mut. and L. & Sav. Co., 20 S. E. 101 (Ga.):

> "It (the association) claims to loan money at 6 per cent per annum, payable and collectable monthly; but under the name of premium, which is but another name for usury, collects another 6 per cent monthly, by such device collecting really 12 per cent interest per annum, payable monthly, on loans; thus, under fancy names, carefully eschewing the name of interest, which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than that allowed by law."

Loans made to persons who are not members are subject to the general laws as to interest and usury.

9 C. J. 976, and cases cited.

When, in addition to legal interest, the lender exacts of the borrower, as a condition of the loan, or forbearance, an additional sum, the loan is tainted with usury, which cannot be cloaked by calling the illegal exaction "commission" or "bonus," or by any other enphemistic name.

39 Cyc. 971.

The same authority, in note 4, page 971, refers to cases in Connecticut, Georgia, Idaho, Illinois, Minnesota, Nebraska, North Carolina, Florida and North Dakota, supporting the above rule. The Supreme Court of North Carolina in Mills et ux vs. The Salisbury Bldg. and Loan Ass'n, 75 Hargrove (Conn.), at page 219, says:

> "We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest without incurring the penalties of our usury laws. Calling the borrower 'a partner' or substituting 'redeeming' for lending; or 'premium or bonus' for an amount which they profess to have advanced, and yet withhold, or 'dues' for interest, or any like subterfuges, will not avail. We look at the substance."

As a general rule any benefit or advantage exacted by the lender from the borrower, whatever be its name or form, which, added to the interest taken or reserved, would yield to the lender a greater profit upon his loan than is allowd by law is deemed usury.

39 Cyc. 971 and cases cited.

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9 C. J. 976 and cases cited.

Generally the basis and essential principle of a building and loan association is mutuality.

Wilson vs. Farrin, 119 Fed. 652;
Int. Imp. Co. vs. Wagener, 125 Pac. 597 (Colo.).
Rooney vs. Son. Bldg. Ass'n, 47 S. E. 345 (Ga.).
Winegarder vs. Eq. L. Co., 94 N. W. 1110 (Ia.).
Hannon vs. Cobb, 63 N. Y. S. 738 (N. Y.).
Clarke vs. Olson, 83 N. W. 519 (N. D.).

The Western Loan and Building Association is a building and loan association organized upon a purely mutual basis under the laws of Utah, and its members, as has been well said in many cases, are essentially partners in a common enterprise, in the burdens and benefits of which they must mutually share. If the association charges its members a lower rate of interest in Washington and California than in Montana, it is discriminating against its members residing in Montana, which is contrary to the above rule and should not be sanctioned.

It is, therefore, my opinion that building and loan associations cannot colect usury under any guise or name, or by any trick or artifice and that the contract in question is, under the existing statute, usurious and therefore illegal.

Respectfully,

S. C. FORD,

Attorney General.