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INSURABLE INTEREST IN LIFE.

I.

THE NATURE OF THE CONTRACT.

To understand properly the questions that will confront us, we must have a clear conception of the contract of Life Insurance and of its treatment at the Common Law. Was the contract one of indemnity and, if not, what was requisite to give it validity? What objections were made to a contract without interest and how, in a general way, are these objections regarded to-day? These matters will be examined briefly before entering upon the subject of an insurable interest.

The contract of life insurance is said by Mr. Biddle, the latest of the text writers on the subject, to be "substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money," and his definition of it is "An agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended:" *Biddle on Ins.*, § 2. Parke's definition is much to the same effect, but it emphasizes the element of the consideration: "It is a contract by which the underwriter, for a certain sum proportioned to the age, health, profession and other circumstances of the person whose life is the object of insurance, engages that the person shall not die within the time limited in the policy; or, if he do, that he will pay a sum of money

to him in whose favor the policy was granted:" *Park on Ins.*, ch. xxii. And Bunyon's definition is substantially the same: *Bunyon on Ins.*, 1.

Turning now to the cases, we find Parke, B., speaking of it as "a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable:" *Dalby v. I. & L. L. Ass. Co.*, 15 C. B. 365 (1854). This was quoted with approval in *Elliott's Appeal*: 50 Pa. 75 (1865).

Clearly, then, these contracts of life insurance should be classed as wagers, which are "promises to pay money or transfer property upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either a present payment or transfer by the other party or a promise to pay or transfer upon the event of determining in a particular way:" *Anson on Contracts*, 173. It is none the less a wager because sanctioned by law under proper conditions: *Ogilvie v. Knox L. I. Co.*, 22 How., at 388; yet we find the courts using the term "wagering policy" wholly in an invidious sense. Thus Bradley, J., speaks of "a mere wager policy" as one "in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction:" *Conn. M. L. I. Co. v. Schaeffer*, 94 U. S. 460 (1876). The same idea recurs constantly throughout the reports. Strictly then, this is an inaccurate use of the terms, yet it prevails so generally that it would but lead to confusion were we to attempt to do differently.

The contract, as defined above, is in its nature not one of indemnity. A different view was expressed by Lord Ellenborough, C. J., in the leading case of *Godsall v. Boldero*, 9 East 72 (1807). Certain creditors of Mr. Pitt's had insured his life, and their debt being paid *aliunde*, they brought suit against the company to recover the amount of their policy. Lord Ellenborough said: "This assurance, as every other to which the law gives effect, is in its nature a contract of

indemnity as distinguished from a contract by way of *gaming* or *wagering*." Judgment was, therefore, given against the plaintiff. The error here came from the failure to distinguish between the case of marine and fire insurance on the one hand, and life insurance on the other. The only authority relied on was the case of *Hamilton v. Mendes*, 2 Burr. 1198, (1761), and Lord Mansfield, C. J., was quoted as saying: "The plaintiff's demand is for an *indemnity*; his action then must be founded upon the nature of the *damnification*, as it really was at the time the action is brought. It is repugnant, upon a contract for indemnity to recover as for a total loss, when the event has decided that the damnification is in truth an average, or perhaps no loss at all." But here Lord Mansfield was discussing a question of marine insurance—an altogether different matter.

The error went uncorrected for many years, until *Godsall v. Boldero* was overruled in the Exchequer Chamber by *Dalby v. I. & L. L. A. Co.*, 15 C. B. 365 (1854). Parke, B., called attention to the fact that the premiums to be paid for a policy were computed solely on the chances of life, and that it was a matter of indifference to the insurer what was the nature of the interest the insurance was effected to protect; this being so, it was not open to the insurers to object that the debt had been satisfied and their liability released. They had received their *quid pro quo*, and provided only that the contract did not offend against the public policy or a statute, it must be fulfilled according to its terms.

Such being the nature of the contract, if one may, without restriction, insure the life of a perfect stranger, an excellent opportunity is afforded for gambling of the most pernicious kind.

Was, then, a wagering policy good at the common law? This is evidently a question of the first importance to us and yet one not easy to answer. Three views seem to have been met with favor in the minds of the courts:

(i). Originally an interest was requisite and subsequently, through a mistaken analogy to marine insurance, wagering policies were permitted. Then, and before the matter had

come before the courts, the Statute 14 G. III. c. 48 substantially re-enacted the old rule.

(ii). Wagering policies on lives were valid, as were all other wagers, save perhaps a few that tended to immorality or were clearly against public policy.

(iii). However may have been the law in England, all wagers, whether on lives or not, are opposed to the genius of our American institutions, and will therefore be declared void by the American Common Law, regardless of any statute.

The first view is plausible, yet it is hardly borne out by the facts and it is disapproved by the latest text-writers: *Biddle on Ins.*, § 184. The fullest discussion of it is to be found in *Ruse v. Mut. B. L. I. Co.*, 23 N. Y. 516 (1861). Under the circumstances of the case it became necessary for the court to investigate the Common Law of New Jersey, which apparently is assumed to be the same as that of England. Innocent wagers were pronounced valid, though wagering contracts of fire insurance were to be condemned as leading to gambling, and the decisions of Lords Chancellors King and Hardwicke were cited in regard to the latter: *Lynch v. Dalzell*, 4 Bro. P. C. 431 (1729); *Sadlers' Co. v. Badcock*, 2 Atk. 554 (1743). A different rule, however, obtained in regard to marine insurance, but Selden, J., speaking for the court, calls the distinction "a mere accident." "To me," he says, "it seems clear that the decision in *DePaba v. Ludlow*, 1 Comyns, 361 (1721), was made because the court failed to distinguish between a waiver of proof of interest at the trial, which the defendant was, of course, at liberty to make, and a waiver of proof in the policy itself, by which it was converted into a mere wager." The court, in that case, decided that the import of the words "interest or on interest" in the policy was that the plaintiff had no occasion to prove his interest. The Statute 19 Geo. II. c. 37 was passed in consequence of this and subsequent cases, and it contains in its recitals a statement of the dangers of these marine policies made "interest or no interest." Judge Selden continues: "In this indirect way, the doctrine in question, as to marine policies, first crept into the law. . . . It must have been, I think, in consequence of the doctrine initiated in that case that

it came to be understood in England that in insurance on life it was not necessary at the common law that there should be any interest in the life. There may not have been any direct decision to this effect, yet that such was the prevalent impression is to be inferred from the 14th of Geo. III., prohibiting insurance on life without an interest. . . . The probability is that as soon as such insurance became frequent, and before any decision, Parliament interposed to avoid the same evils, upon the assumption that the same rule applied to this as to ships. I cannot regard that act as affording any very strong evidence that at the Common Law wagering policies on lives were valid. . . . My conclusion, therefore, is that the Statute 14 Geo. III., avoiding wager policies on lives, was simply declaratory of the Common Law and that all such policies would have been void independently of that act."

It cannot well be objected that this a mere dictum, and Judge Selden was certainly a very learned judge. The decision, too, is cited with approval in *Whitmore v. Supr. L.*, 100 Mo. 36 (1889), and elsewhere, and Bradley, J., takes substantially the same position in the leading case of *Conn. M. L. I. Co. v. Schaeffer*, 94 U. S. 457 (1876). In the light of the other authorities, however, the second view appears the preferable one.

That wager policies were valid in England at the time of the Statute there can be no doubt, and it seems equally clear that they were so originally. Perhaps the earliest case is that of *Andrews v. Herne*, 1 Lev. 33, 1 Keb. 65 (1662), where a wager was made that Charles Stuart, then in exile, should be king of England within twelve months then next ensuing. Of course this might have been prevented by his death, yet no suggestion is made either of public policy, or of the interest one is given in the death of another. "The consideration was sufficient:" 1 Keb. 65, and the plaintiff recovered.

This position was subsequently completely abandoned, and early in the present century we find *Andrews v. Herne*, disapproved in the important case of *Gilbert v. Sykes*, 16 East 150 (1812). A., in consideration of £100, had agreed to

pay B. £1 per day so long as Napoleon should live. This, of course, was a wager on Napoleon's chances of assassination, concealed in the guise of an annuity.

It was admitted by the court, though not without doubt, that a wager may be sustained where the parties have no special interest in the subject-matter; there is the qualification, however, that it must not offend against public policy. "Wherever the tolerating of any species of contract has a *tendency* to produce a public mischief or inconvenience, such a contract has been held to be void:" *per* Lord Ellenborough, C. J. That this contract has an evil tendency is then argued at length, its general impolicy and immorality, the disaffection produced in the mind of an English subject by an opposing private and pecuniary interest, the possibility, though remote, of encouraging assassination and retaliation in kind by the enemy, and the disgust created abroad among foreign potentates by having such matters discussed in the courts of law, are all given as reasons why such a wager should be condemned. The suggestion is made, too, that the hearing of such idle wagers as this should be postponed until the courts have nothing better to do, that the time of worthy suitors need not thus be wasted.

This case has been dwelt upon at some length to illustrate what have been called the "ludicrous attempts" of the courts to discountenance such forms of gambling by relying solely on the principles of public policy involved in each particular case. An advance has been made and a distinct one since *Andrews v. Herne*—LeBlanc, J., has "no hesitation in saying that that bet would never have been sustained in these days"—yet the modern doctrine that no one may enter into a contract, involving the life of another, without an interest in that life, is still unrecognized. Mr. Justice Buller had suggested such a ruling in *Atherfold v. Beard*, 2 D. & E. 611 (1786); and again in *Good v. Elliott*, 3 D. & E. 695 (1788); and Lord Ellenborough seems inclined to agree with him, but evidently that was not then the law. *Gilbert v. Sykes*, therefore, occupies an intermediate position, and is of importance to us as illustrating the rule as then understood, with

its exceptions, and marking the transition from the law of *Andrews v. Herne*, to that of the present day.

Such we believe to have been the law in England at the time of the passage of the Statute, 14 Geo. III. c. 48: (See the Statute cited at length in 1 *Bid. on Ins.*, § 186) This view is sustained, too, by the recitals of the Statute: "Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming, for remedy whereof be it enacted, etc." Nothing could show more clearly the intention of Parliament to change an existing law and not simply to pass a declaratory statute.

That this is the proper interpretation to be put upon the Act appears from three important Irish cases. The Statute did not, in terms, extend to Ireland, and questions arising there came under the Common Law until the Act of 29 and 31 Vict. c. 42.

The first case, *Shannon v. Nugent*, 1 Hayes, 536 (1832), did not require a consideration of the matter by the court, but Joy, C. B., said: "Our *leaning* is that interest is not necessary to give validity to the contract"—*i. e.*, a wagering policy would be good at the Common Law.

The next case, *British Ins. Co. v. Magee*, 1 Cooke & Alcock, 182 (1834), presented the question squarely for decision. A policy was declared on without any allegation of interest, "No interest" was pleaded in bar and the record was opened by a demurrer. We quote from the opinion of Bushe, C. J.: "The argument that insurance without interest was illegal at the common law, independently of statute, and that the 14 Geo. III. was declaratory of the Common Law, has not been sustained. No authority has been cited to show that such an insurance has been held illegal, as being against policy or morals, in any case in England decided before the Statute; and it is only necessary to look into the Statute itself to be satisfied that it is not declaratory, for it does not recite any existing doubt or prevailing mistake as to the law, but recites that the making of such insurance without interest 'has been found by experience to have introduced a dangerous kind of

gambling,' and then enacts 'that from and after the passage of this Act' 'such insurance shall not be made,' thus recognizing the frequency of the practice and the necessity of preventing it in the future. The court is, therefore, unanimously of the opinion that the judgment of the Court of Exchequer must be affirmed."

This case was followed a few years later by *Scott v. Roose*, 3 Tr. Eq. R. 170 (1841), Brady, C. B., basing his decision wholly on the fact that there was no Statute in Ireland.

It is interesting to contrast these cases with *Ruse v. Mut. B. L. I. Co.*, 23 N. Y. 516 (1861), and see how widely the courts have differed in regard to what is really a matter of history. On the whole there appears to be no reason to doubt the decision of the Irish courts, sustained, as it is, by many other authorities.

We will examine now the subject of wagering policies as they have been treated in America. A more remarkable instance of judicial legislation it would be hard to imagine. Often we shall find the courts saying frankly that such contracts were valid by the Common Law of England, on which our Common Law is founded, yet because such a doctrine is to their minds inadvisable, these contracts will not be enforced. This is simply to do what Parliament did by 14 Geo. III. c. 48. That such a rule is universally considered a wise one may be conceded—gambling of any sort is held to be pernicious; as was said by Marshall: "There never can be a loss without an interest. A policy therefore made without interest is a wager and has nothing in common with insurance but name and form:" 1 *Marshall on Ins.* 97. All this may be true without effecting the question of the proper source of the change.

It is probable, however, that the change may be traced one step further back, to the declaration that *all* wagers, of which these are but species, are invalid by our American Common Law.

The development of this doctrine in Pennsylvania, the state perhaps where the common law is held in the highest esteem, is well worthy of notice. Its course is traced by Sergeant, J., in *Edgell v. M'Laughlin*, 6 Whar. 176 (1840).

The first case considered is *Pritchett v. Ins. Co. of N. A.*, 3 Y. 458 (1803), where Shippen, C. J., discussing a contract of marine insurance, had said of the Statute 19 Geo. II. c. 376: "Certainly it does not bind us *proprio vigore*; but the system of national policy which dictated the law has been adopted by our courts." (It will be remembered that *DePaba v. Ludlow* had sustained wagering policies made "interest or no interest.") This is really not an unreasonable position, in its result, for the court to take, as the contract of marine insurance is essentially a contract of indemnity. The language of Yeates, J., is broader: "Every species of gaming contract wherein the insured have no interest, under the cloak of insurance, is reprobated by our law and usage."

Following this case is *Phillips v. Ives*, 1 R. 36, (1828), which bears a certain analogy to *Andrews v. Herne* and *Gilbert v. Sykes*. A bet was made that Napoleon, then imprisoned in St. Helena, would escape or be removed thence, by death or otherwise, within two years. Huston, J., delivered the opinion of the majority of the court. He expressed himself as regretting that wagers ever had been recognized, but in this he "does not give the opinion of the court, who think the legislature only can prohibit a recovery in all cases of wagers." He is determined, however, that this bet shall not be sustained, and finally he "holds that no bet of any kind, about any human being, is recoverable in a court of justice."

Gibson, C. J., dissented vigorously from this decision and Smith, J., concurred in the dissent.

"It seems to me," says the Chief Justice, "that the policy of the law, as already settled, is not a subject for our consideration. Nothing like argument or reason has been adduced at the Bar to show that the adjudications of the English courts prior to the American Revolution, are not, as regards the point in controversy, binding authority and conclusive upon the judgment of this court. If they be disregarded in this instance, I see nothing to prevent us from uprooting the very foundations of the common law. It has not been pretended that this wager would be invalid on any principle of those decisions. . . . In the case at bar, the mischievous con-

sequences supposed to have been producible were, an enterprise against the Island of St. Helena; the rescue of Napoleon; the selection by him of the United States as a place of refuge; the demand of his person by the European powers; the refusal of the American Government; and, as a consequence of the whole—war. Surely we ought to look at these matters with a practical eye to their probable results, instead of encouraging a train of idle fancies by the aid of which there is no circumstances or contingency that may not be made pregnant with danger and unlawful as the subject of a wager. It is undoubtedly true that a wager which prejudices the interest or outrages the feelings of a third person is illegal; and were there color to suppose that the wager in the case at bar would have thus operated on the interest or feelings of Napoleon, I would agree that it ought not to be sustained. It seems to me this wager tended neither to indecent evidence, nor to disturb the peace of the public or of an individual; and that it was not, in its design or consequence, contrary to good manners or sound policy. I am, therefore, of opinion that the action be sustained.”

We will consider now the principal case: *Edgell v. M'Laughlin*, 6 Whar. 176 (1840), *supra*. A cheque was declared on, which appeared at the trial to have been given in payment of a wager that B. had not done a certain thing perfectly innocent in its nature and leading to no evil results.

Mr. Justice Sergeant speaks first of the continuous efforts made by the English courts to extend the exceptions to the general rule that wagers were valid, and he then turns to an examination of the Pennsylvania authorities cited above. Nowhere does he find it expressly decided by the Supreme Court that wagers are recoverable, and he is as strenuously opposed to them as was Huston, J., in *Phillips v. Ives*, *supra*.

“Mr. Justice Huston,” says he, “expressed his opinion very plainly that, though bets were recoverable by the Common Law of England, it was not a part of the Common Law introduced into Pennsylvania by William Penn or his successors, nor recognized in the Act of Assembly passed in 1777, which is our guide on that subject. And I fully concur with

him, that it is not. When I look back to the character and principles which actuated our founders and predecessors, I am satisfied they never countenanced such a principle, but left parties who chose to embark into contracts of this kind, to recover as they could, according to the code of honor under which they originated; and that it is derogatory to the character and injurious to the interests of the community, to sanction them, and to employ their legal tribunals in investigations, often indecent, often inflammatory, often impertinent and frivolous, and always useless, if not noxious in their effects on society:" (Cf. the language of Parker, C. J., in *Lord v. Dall*, 12 Mass. 115 (1815): " . . . a mere wager policy, which, we think, would be contrary to the policy of our laws, and, therefore, void.")

Contrast with this the descent of an intestate's land in Pennsylvania. It was felt by "our founders and predecessors" that the English system of primogeniture was ill-adapted to the conditions prevailing here, yet that system continued in force until changed by an Act of the Provincial Legislature: *Mitchell on Real Property*, p. 284. The cases are essentially similar in that each was believed to be repugnant to a true sense of public policy; what right then had the court, especially in the face of Chief Justice Gibson's most vigorous dissent, to declare that from their knowledge of the characters of the founders of this commonwealth, this integral part of the Common Law of England had been left there and had never formed a part of the Common Law of this country?

The rule that there must be an interest in the subject-matter of insurance has been recognized very generally both by the legislatures: (See Statutes cited in *1 Biddle on Ins*); and the courts, and it is believed that in the United States the contrary is true only in New Jersey and possibly Rhode Island. The leading case in New Jersey is *Trenton M. L. I. Co. v. Johnson*, 4 Zab. 576 (1854), decided in the same year as *Dalby v. I. & L. L. A. Co.*, 15 C. B. 365 (1854), *supra*, and before the latter was reported in this country. The opinion of Elmer, J., is so interesting and able that we quote from it at length:

"The case of *Godsall v. Boldero* is the leading case relied on to show that a contract of life insurance is simply a contract of indemnity, not only requiring an interest in the assured in order to give validity to it at its inception, but continuing good only so far as it is rendered so by the persistence of such interest. This case has been since adhered to and has often been considered as founded on the Common Law, an impression to which some countenance is given by some of the language used by Lord Ellenborough in giving the opinion of the court. It is evident, however, that the decision was not warranted by the Common Law, but by the Statute of 14 Geo. III., c. 48, which does not purport to be a declaratory act, but enacts in expression that no insurance shall be made on the life of any person, wherein the person for whose use the policy shall have been made shall have no interest, and that in all cases where the insured hath interest in the life, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life. This Statute not extending to Ireland, the courts in that country held, in several recent cases, that at Common Law policies of insurance are valid without any interest. No such statute exists in this state. Whether an action can be sustained on a policy without interest, which is, therefore, in some respects like a mere wager on the life of a third person, or on any other wager relating to a transaction in itself legal, does not appear to have been decided by our courts. . . . Wagers on indifferent questions are held good grounds of action in England, and it was there held that at Common Law wagering policies of insurance were valid: *Crawford v. Hunter*, 8 D. & E. 13 (1798). . . . The American text-writers strongly favor the doctrine that wager policies should, in all cases, be held bad, upon general principles of policy and morality. I confess, however, that whatever might be my opinion as to the expediency of a statute like that in England, before quoted, I must agree with the Irish courts in holding that such is not the law. Our act to prevent gaming: Rev. Stat. 572, does not in terms or by implication, prohibit all wagers, but only particular forms of gaming. Until the legislature shall think

proper to interfere, the courts can only adhere to the Common Law as they find it established. To do otherwise would be an act of legislation, and not of judicial construction. It was insisted by counsel, and with much apparent force, that wagers on the life of a third person are in their very nature dangerous, and contrary to the policy and to sound morality. But the danger, if any exists, would apply with great, although not with equal force, to policies where there is an interest as well as to those where there is none. . . .

Modern experience has proved the value of insurance upon the insured's life, or upon the life of another upon whom the insured may be dependent; or in whose life he has a real or supposed interest. And it is worthy of notice that even in England since that Statute, so great is considered the injustice of requiring the continued subsistence of an insurable interest, that in practice it is disregarded, and the offices find it to their interest, and are in the common practice of paying, without any inquiry as to the interest. . . . Upon a view of the whole matter, I think it admits of great doubt whether the English Statute, by throwing impediments in the way of life insurances, and by raising questions often of difficult solution as to the nature and amount of the required interest, can be regarded as wise and salutary; at all events, in the absence of any such legislation here, I see no solid ground upon which we can safely depart from the doctrine of the Common Law, and upon reason of doubtful expediency hold a policy of life insurance to be something different from what it purports to be, that is to say, a contract to indemnify against loss, and not a contract to pay a given sum upon the happening of a particular event."

The position of the Rhode Island courts is similar, Potter, J., referring with approval to this case and saying "The reasons generally given for requiring an interest as matter of public policy do not seem very forcible:" *Mowry v. Home I. Co.*, 9 R. I. 354 (1869).

The objections to policies without interest appear then to be that they give one a dangerous interest in the death of another, and that they are wagers. Both have their

source in considerations of public policy, and for this reason we may expect to see the courts scrutinize doubtful cases more and more closely. At times, of course, they question the necessity for such strict rules, but such instances are exceptional: (Cf. *Mowry v. Home I. Co.*, *supra*.) In this connection the remarks of Shaw, C. J., in *King v. State M. F. I. Co.*, 7 Cush. 10 (1851), will be found interesting: "We suppose a wager policy is not held void because it is without consideration or is unequal between the parties, but because it is contrary to public policy and prohibited by positive law. But, independently of considerations of public policy, if an insurance were made on a subject in which the assured has no pecuniary interest—although in another respect he may be deeply concerned in it, and on that ground be willing to pay a fair premium—made with a full knowledge of all the circumstances, by both parties, without coercion or fraud, we cannot perceive why it would not be valid, as between the parties. But upon the strong objections on grounds of public policy to all gaming contracts and especially to contracts which would create a temptation to destroy life or property, such contracts without interest are justly held to be void."

We should do well though, to bear in mind what Burroughs, J., said of public policy: *Richardson v. Mellish*, 2 Bing. 252 (1824). "Public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you far from the sound law."

It is hardly too much to say that sometimes this warning has been far from the minds of the courts.

From this examination into the nature of the contract of life insurance, it appears that an interest is required, not because the contract is one of indemnity but to prevent its use for gambling purposes. The question of the nature of an interest that the courts will regard as sufficient to sustain a policy will not be entered into any length until we take up the question of insurable interest in the life of another. We must defer until then, too, any attempt at definition. For the present, the ordinary conception of insurable interest will

suffice—that the continued existence of the subject-matter of insurance is a matter of concern to the person effecting the insurance, at the time the contract is entered into. Whether it must continue so to be, will appear later.

In concluding this brief preliminary view of the subject, it may tend to clearness if we bear in mind—a deduction from the definitions cited above—that while in fire and marine insurance it is the interest and not the thing that is insured, in life insurance it is the thing and not the interest.

II.

INSURANCE EFFECTED ON ONE'S OWN LIFE.

We have seen that an insurable interest is considered requisite to support a policy. Such an interest every one has in his own life: *Loomis v. Eagle L. & H. I. Co.*, 6 Gray, 396 (1856); *Campbell v. N. E. M. L. I. Co.*, 98 Mass. 381 (1867); *Ætna Co. v. France*, 94 U. S. 561 (1876); *Scott v. Dickson*, 108 Pa. 6 (1884); *Benefit Ass'n v. Blue*, 120 Ill. 121 (1887); *Lamont v. Gr. L. I'a L. of H.*, 31 Fed. R. 177 (1887), and in every part thereof; *Wainwright v. Bland*, 1 Moo. & Rob. 481 (1835), *per* Lord Abinger, C. B., and it is of a pecuniary nature, for it represents his earning power.

Whether the beneficiary also must have an interest is a question that has caused the courts much difficulty and their answers to it have depended upon their conceptions of public policy. Where one insures his life for his own benefit or for the benefit of his estate, it is clear that the question cannot arise—the same person is at once the insured and the assured, and he has an interest in either capacity. But where A. insures his life for the benefit of B. and pays the premiums himself, is the interest that supports the policy the interest of A. or that of B. or is it the combination of the two? The qualification that A. pay the premiums is important, else the policy will usually be assimilated to one taken out by B. on the life of A., and then undoubtedly A. must be interested.

That A.'s interest in his own life is the fundamental one is the prevailing opinion; this appears both from the direct

statements to this effect and from the treatment of a beneficiary without interest, in certain jurisdictions, as a trustee of the fund for the insured's estate. The second view—that the policy depends on B.'s interest in A.'s life—was advanced in the recent cases of *Ætna Bank v. U. S. L. I. Co.*, 24 Fed. R. 770 (1885), and *Washington v. Hume*, 128 U. S. 195 (1885), but it has been severely criticized: (See 25 Am. L. Rev. 195 (1891),) and on the whole appears unsound. This case of *Washington Bank v. Hume* will be considered at length in the discussion of policies for the benefit of married women. The third view will explain the position of many of the courts—A.'s interest may be the fundamental one, but to enable B. to derive any benefit from the policy, he must have a subsidiary interest, as well, in A.'s life.

Considering the matter from the point of view of strict public policy, it is difficult to see why one may not insure his own life, pay the premiums himself and designate whom he will as beneficiary to receive the fund at his death. There is no suggestion of gambling on the part of any one. In an average case, the sums laid out by the insured in premiums will by judicious investment equal, or rather exceed, the face of the policy. His right to make annual gifts equivalent to the premiums cannot be questioned when the rights of creditors have not intervened, not yet his right to invest such sums and by his will leave them with their accumulated interest to the one who might otherwise be made the beneficiary of a policy of insurance. There is no more "gambling on the chances of human life" in the one case than in the other—no more offence against public policy. In each case, the owner alone is dealing with his own property, and "it would seem, when the person whose life is insured is himself an actor in the matter, that the amount of temptation held out to others to take his life, may, as a general rule at least, be left to his discretion:" *Eq. L. A. Soc. v. Paterson*, 41 Ga. at 365 (1870). We will examine a few of the cases in which these views are expressed.

One of the first of these is: *Amer. L. & H. I. Co. v. Robertshaw*, 26 Pa. 189 (1856). There A. insured his life in

favor of B. a credit or for more than the amount of the debt, the surplus to go to the debtor's wife. The case is of value for the dictum of Sharswood, J., contained in his opinion on a motion for a new trial :

"For myself, I can see no good reason why a man having an insurable interest may not insure it and present the policy as a gift to a friend ; and if such an agreement to give be made at the very time of the contract, why may not the policy be made at once in the name of the donee, the whole transaction being *bona fide*—no fraud on the company intended?"

Another Pennsylvania case is *Scott v. Dickson*, 108 Pa. 6 (1885). The beneficiary here was in fact interested in the insured, yet the language of Paxson, J., would seem broad enough to cover all cases free from fraud : "Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own to say he could not in any form insure his life for the benefit of an indigent relation or a friend to whom he felt himself under obligations." It is noticeable, however, that the nature of the relationship or obligation is not defined, to make it clear that mere love or sentiment would suffice.

Turning now from these dicta, we find it held positively in Massachusetts, *Campbell v. N. E. M. L. I. Co.*, 98 Mass. 381 (1867), that the beneficiary need have no interest, for the insured's own interest supports the policy. The same conclusion was reached in the recent case of *Benefit Ass'n v. Blue*, 120 Ill. 12 (1887), after a careful review of the authorities : (Cf. *Conn. M. L. I. Co. v. Schaeffer*, 94 U. S. 457 (1876), and *Campbell v. N. E. L. I. Co.*, 98 Mass. 38 (1867) ; *Amick v. Butler*, 111 Ind. 578 (1885). "The better rule is," says CRAIG, J., "that where a person obtains a policy on his life of his own accord, and pays the premiums himself, he may, if he desires, make the policy payable to one who has no insurable interest in his life, and by so doing, no rule of law or principle of public policy will be violated.")

This is stated also in *Biddle on Insurance*, (*Benefit Ass'n v. Blue*, *supra*.) § 194, to be the general rule and it is certainly difficult to understand the objections to it.

Opposed to it is the broad rule laid down in Pennsylvania in *Gilbert v. Moose*, 104 Pa. 74 (1883); and approved in *U. B. M. Aid Soc. v. McDonald*, 122 Pa. 324 (1888), and elsewhere. It is true that most, if not all, of these cases involved wagering policies, but nothing could be more emphatic than the language of Mr. Justice Gordon: "As a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary; if we admit that one man may insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wagering policies goes by the board. The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured. But in the case supposed the presumption is inverted; the beneficiary is directly interested in the death of the assured. Moreover, if such a transaction were permitted, the wager could always be concealed under the mere form of the policy."

This, it will be seen, is broad enough to cover even the case under consideration, where the insured alone is an actor and the assured is a passive beneficiary. The rule was aimed chiefly at the so-called "grave-yard" insurance which prevailed at the time, and it proved itself effectual in ending a dangerous practice. The absence of interest raised a presumption of fraud in all cases and the beneficiary was not allowed to derive a benefit from the policy.

Gilbert v. Moose is constantly cited as the leading case, yet its effect may now be said to be restricted to wager policies. The dictum of Paxson, C. J., in *Scott v. Dickson*, has been quoted in several recent cases: *Hill v. United Life Ins. Ass'n.*, 154 Pa. 89 (1893); *Northwestern Masonic Aid Ass'n v. Jones*, 154 Id. 99 (1893); *Overbeck v. Id.*, 155 Id. 5 (1893); *Childester v. Yard*, 155 Id. 483 (1893); where the facts were such as to preclude any suspicion of fraud, and it seems clear that the rule is now relaxed as to policies carried by the insured. In some of these cases the point was not, perhaps, necessary to the decision of the court and what was said may

fairly be considered *obiter dictum*, yet it is said very positively. Thus, Thompson, J., in *Masonic Aid Ass'n v. Jones*, treats rights under certificates of beneficial associations as analogous to rights under contracts of insurance and speaks of the right so to insure for the benefit of a stranger as one that "cannot be questioned. . . These contracts [with the beneficial association] were made in good faith, without any misrepresentation and in the form prescribed by the laws of the state in which they were made, and they were not wagering contracts in any sense."

The subsequent cases of *Overbeck v. Id.* and *Chidester v. Yard* appear to raise the question directly and in each the recovery by the assured was sustained by the Supreme Court in a *per curiam* opinion.

That the beneficiary must in all cases have an interest is law in several other jurisdictions. Thus in *Watson v. Cent'l M. L. Ass'n*, 14 Ins. L. J. 73 (1884), Brewer, J., in the Circuit Court of Missouri, permitted a recovery on the express ground that such an interest existed: (Cf. *Gambis v. Cov. M. L. I. Co.*, 50 Mo. 44 (1872).) The same appears to be true in New York: *Baker v. Union M. L. I. Co.*, 43 N. Y. 283 (1871), but see *Olmsted v. Keyes*, 85 N. Y. 593 (1881), *contra*; and at one time in Massachusetts: *Lord v. Dall*, 12 Mass. 115 (1815); though in the latter state this is now changed: *Campbell v. N. E. M. L. I. Co.*, 98 Mass. 387 (1867), *supra*.

That the beneficiary should be permitted to maintain his action against the company is but reasonable. As was said in *Ins. Co. v. Baum*, 29 Ind. 240, (1867), "It is not for the insurance company, after executing such a contract and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be a controversy as to the distribution among the heirs of the deceased of the sum so contracted to be paid, it does not concern the insurers. The defendant company contracted with the insured to pay the money to the plaintiff (the beneficiary), and upon such payment being made it will be discharged from all responsibility. So far as the insurance company is interested,

the contract is effective as an appointment of the plaintiff to receive the sum insured." Stayton, C. J., quotes this passage in *Ins. Co. v. Williams*, 79 Tex. 633 (1891); and adds "The fact that (the beneficiary) may recover against the insurance company, and is entitled to do so, does not cut off an inquiry between (him) and the legal representatives or heirs of the insured as to whether (he, the beneficiary) had an insurable interest"—i. e., the beneficiary may be made a trustee of the fund: (Cf. *Gilbert v. Moose*, 104 Pa. 94 (1883); *Mcily v. Herschberger*, 16 W. N. C. 183 (1885).) The only other alternative is to allow the heirs or representatives of the insured to sue, on the ground that the policy is a valid contract, the consideration for which was paid by the insured. The appointment to the beneficiary, being unlawful and invalid if an interest is required, will be disregarded, and then the heirs or representatives, may sue in their own right. The contract is not with the beneficiary, so that not even in Michigan, it is submitted, could recovery from the company be impossible: *M. B. Ass'n v. Hoyt*, 46 Mich. 473 (1881).

When A. applies for a policy for the benefit of B., and by mutual agreement B. pays the premiums, the courts have held very generally that the transaction is equivalent to B.'s taking out the policy at once in his own name and an interest in B. is accordingly required. In the latter case, it must often happen that A. is obliged to submit to a medical examination, so that the policy is not issued without his knowledge and consent, yet the two cases differ widely in their nature. A. is the actor in the first instance—he lends to the policy the support of his interest in his own life—and, save in cases of fraud, no harm would seem to be done by permitting such insurance. The circumstances are exactly the same as when a policy, taken out for example to protect a debt, has survived the interest on which it was founded. No objection is then made on the score of public policy: *Dably v. I. & L. L. A. Co.*, 15 C. B. 365 (1854); *Conn. M. L. I. Co. v. Schaeffer*, 94 U. S. 457 (1876), *supra*; although the whole advantage of the assured comes equally from an early termination of the life. The difficulty would seem to be that an

opportunity is afforded sometimes for wagering on life, though, as said before, the party running the risk goes into the transaction with his eyes open. His care for his own safety will subserve the ends of public policy as well as could an interest in the ordinary case.

Numerous cases might be cited in regard to these policies, for they have been often before the courts, but we need examine only a few of them. The earliest of importance is: *Wainewright v. Bland*, 1 Moo. & Rob. 481 (1835), *supra*. The evidence showed the policy was taken out in the name of the insured but really for the benefit of the plaintiff and with the plaintiff's money. The plaintiff had no interest. Lord Abinger, C.B., charged the jury that should they find the policy had been fraudulently taken out at the instigation of the plaintiff, their verdict must be for the defendant. The fraud involved seems to have been the controlling feature of this case: See *per* Crompton, J., in *Hebden v. West*, 3 B. & S. 578, (1863) for the court treated the policy as made out directly to the plaintiff.

Even where an interest exists, the courts will sometimes refuse to permit a recovery, if they believe the parties have not acted in good faith. Thus, in *Shilling v. Accidental D. I. Co.*, 27 L. J. Exch. 16 (1857), a verdict was set aside on evidence showing that a policy taken out by an aged father in favor of his son had really been negotiated by the son without the father's knowledge. They went rowing together soon after the policy issued, and the father was drowned when the boat upset. A similar case is *N. Y. M. L. I. Co. v. Armstrong*, 117 U. S. 591 (1886), to be referred to again when we treat of assignments.

The rule in Pennsylvania is, of course, most stringent, and it is sufficient to refer to the language of Mr. Justice Gordon in *Gilbert v. Moose*, 104 Pa. 74 (1883). See, also, the very recent case of *Rincer v. Id.*, 166 Pa. 617 (1895). Other authorities often cited are *Guardian M. L. I. Co. v. Hogan*, 80 Ill. 32 (1875), and *Amick v. Butler*, 111 Ind. 578 (1887). "If the beneficiary is really the contracting party," says the court in the latter case, "and

has paid the premiums, then to avoid a wager he must have an insurable interest." In *Goldbaum v. Blum*, 79 Tex. 638 (1891), already referred to, we have an illustration of a procedure quite common in insurance by creditors—both parties, the creditor and his debtor, joined in the application for the policy. This, the court held, gave the debtor such an interest in it that his heirs and representatives were entitled to demand from the creditor the surplus over and above the debt and expenses, although the creditor had paid the premiums. The case, however, is partly to be explained by the fact that in Texas a creditor's policy is substantially a contract of indemnity.

The leading case in the Federal Courts is: *Ætna L. I. Co. v. France*, 94 U. S. 561 (1876). A. and B. joined in the application for a policy designating B. as beneficiary, and A. paid the premium. The court, per Bradley, J., held this constituted "a contract between the company and (A.) for an assurance of his life, with a stipulation and agreement that the money should be paid to (B.); and such a policy is sustainable at law on account of the nearness of the relationship of the parties"—*i. e.*, on account of the interest of B. "As held by us in the case of *Conn. M. L. I. Co. v. Schaeffer*, 94 U. S. 457 (1876), any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy . . . and the direction of payment in the policy itself is equivalent to such an assignment."

A further question was raised by the fact that some of the premiums had, in fact, been paid by B., but this was held immaterial. "Waiving the question, whether merely as sister of A., B. could have effected in her own name an insurance on his life, without its being obnoxious to the charge of a wager policy, the evidence was incompetent to prove the fact sought to be proved by it. The company, when taking the notes in question, acknowledged the premiums to have been received from A., and was estopped from going behind its own admission, under the circumstances of the case. The contract of insurance, as correctly construed

by the court, was made with A., and the relationship of the parties was such as to divest the assignment of the policy or the direction of its payment to his sister of all semblance of a wagering transaction. Under the circumstances, it matters not if the money or notes required for paying the premium did come from B.; at most, it was by way of advance on her brother's account, and on his contract. He had a right to take out a policy on his own life for his sister's benefit; and she had a right to advance him the necessary means to do so. As between strangers, or persons not thus nearly connected, such a transaction would be evidence to go to jury, from which, according to the circumstances of the case, they might or might not infer that it was mere gambling. But as between brother and sister, or other near relations, desirous of thus providing for each other . . . the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it. On this ground, we hold that where, as in this case a brother takes out a policy on his own life for the benefit of his sister, it is totally immaterial what arrangement they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals. And as the company gets a perfect *quid pro quo* in the stipulated premiums, it cannot justly refuse to pay the insurance when incurred by the terms of the contract."

SEC. 42. To sum up our results: The general rule, and the correct one, is that a person may insure his life for his own benefit or for that of another, if he pay the premiums himself; if such other, as designated beneficiary, pay the premiums, he must, in most jurisdictions, have an interest in the life, for he is then regarded, rightly or wrongly, as the real contracting party.

ERSKINE HAZARD DICKSON.