THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by DANIEL S. DORBY, at 115 South Sixth Street, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF: all business communications to the TREASURER.

INSURABLE INTEREST IN LIFE; CREDITOR'S POLICY; VALIDITY. The Supreme Court of Georgia has delivered an exhaustive opinion in the case of *Exchange Bank of Macon* v. *Loh*, 31 S. E. 459 (1898), discussing the nature of a creditor's policy of life insurance and the *quantum* of the insurable interest. The facts were briefly these: Hudgins gave the bank certain mortgages on his property as security for his indebtedness. He assigned likewise two policies on his life and continued to pay the premiums himself. Subsequently he applied for another policy for his own purposes, but the company sent two, both payable to his estate; as he declined to accept the additional one on account of the expense involved in carrying it, the bank assumed it, whereupon Hudgins accepted it and executed the necessary assignment in due form. It was distinctly understood by all parties that the bank took the policy solely for its own protection as a creditor and that Hudgins was in nowise liable for any premiums upon it. The bank paid all the premiums accordingly. Hudgins died insolvent, and his administrator filed a bill praying that the assets of the estate be marshaled. A net balance was due the bank, after deducting the proceeds of the policies first mentioned and the proceeds of the mortgages; the bank proposed, therefore, to pay this out of the net proceeds of the last mentioned policy and then to retain the balance of the fund as its own. The court, however, ordered the net proceeds of all the policies to be applied first to the indebtedness and to the cost of the policies, and the proceeds of the mortgages to be applied to pay the small remaining balance. The effect of such a marshalling was to leave a fund for the general creditors. From this decree the bank appealed.

Had the funds been applied as proposed by the bank, the indebtedness, after the proceeds of the first policies and of the mortgages had been exhausted, would have been a little over $600; the last policy raised a fund of nearly $5000. The court felt itself obliged, therefore, to pass upon the nature of the bank's insurable interest and to decide whether or not, under the circumstances, this was a wagering policy.

The nature of a creditor's policy of insurance is first examined; the opinion of the court opens with the preliminary remark that much of the confusion which surrounds this complicated question of a creditor's insurable interest is to be attributed to two erroneous views entertained by quite a number of the most respectable courts and judges in this country—that the contract is not one of indemnity, and that the insurable interest is not confined strictly to the amount of the indebtedness to be secured. There is also the preliminary remark that the form of the transaction is utterly immaterial; the policy may be issued to the insured and by him assigned to his creditor, or it may be payable directly to the creditor as nominated beneficiary. The proposition that life insurance cannot be valid for any purpose but indemnity is asserted most positively. *Godsall* v. *Boldero*, 9 East. 72 (1807), is cited and approved. In this case, it may be remembered, Lord Ellenborough followed Lord Mansfield's ruling in a question of marine insurance and held it was the indenmity involved which distinguished life insurance from gaming or wagering. The court refers to the fact that *Godsall* v. *Boldero* was overruled, yet adheres to the rule enunciated in that case. Reference is likewise made to *Bank* v. *Hume*, 128 U. S. 195 (1888), where a distinction appears to be recognized in the aspects of the question as regards the relations of the assured to the company and to the insured's estate. The court, however, does not suggest the other alternative, *i. e.*, a creditor's policy may be one of indemnity in its inception but afterwards, like any other policy of insurance, it is to be performed regardless of the continuance of the interest.

Having determined the policy to be strictly one of indemnity, the court comes readily to the conclusion that the insurable interest cannot exceed the indebtedness to be secured. The court "wishes to be understood as employing the word 'indebtedness' in a liberal sense and, accordingly, as holding that it may embrace not only a debt or debts actually existing when the insurance is taken out by the debtor or is thereafter assigned to the creditor, but also additional indebtedness to arise upon the making of further loans or advances by the creditor to the debtor; such, for instance, as cash for premiums to be paid in obtaining the policy or in keeping it alive." But the further distinction is made that premiums voluntarily paid by the creditor, without liability on the part of the debtor, cannot be charged against the policy. The decisions upon this much litigated subject are then examined in some detail and shown to be thoroughly conflicting. Those holding the amount of the debt is the limit of insurance are approved. The court next considers the important cases of *Ritter* v. *Smith*, 70 Md. 261, and *Ulrich* v. *Reinoehl*, 143 Pa. 238 (1891), which decide that the insurance may exceed this limit, provided there be not a "gross disproportion" between the two. In *Ulrich* v. *Reinoehl*, Chief Justice Paxson considered the *quantum* of the interest at very great length, as a result of which he elaborated this rule:

"A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount sufficient to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the debtor's expectancy of life according to the Carlisle Tables; but, if such amount be exceeded, the policy may be a wagering transaction."

This opinion is criticised by Lumpkin, P. J., much as it was in this magazine (35 AM. LAW REG. & REV., 179–181). "It is radically erroneous," he declares, "to say that one average man has a greater or less chance to live out his expectancy than another." The same conclusion is reached also, as in the article cited, that under the doctrine announced in Pennsylvania there can be no such thing as a wagering policy. *Amick* v. *Butler*, 111 Ind. 578 (1887), a case very much in point, is then examined, and the award of the fund to the creditor disapproved. The opinion then suggests that many of the policies thus litigated should have been treated as nullities and the courts should not have lent their assistance either in compelling the insurance companies to pay or in determining the title to proceeds paid voluntarily by the insurers.

The principles governing the decision being thus ascertained, it is held the contract was a wager if the bank took the policy solely on its own responsibility, at its own expense and for its own benefit; if, on the other hand, Hudgins assigned the policy as a collateral security for his indebtedness, present or prospective, the transaction was lawful and proper. If the policy were solely for the bank's benefit, the insured's administrator had no status because (a) there was no privity of contract between him and the insurer, and (b) the courts would not intervene to enforce a wager. An examination of the facts satisfied the court that the purpose of the parties was indemnity and the decree of the court below was confirmed.

Little, J., concurred specially. Life insurance is not, he considers, a contract of indemnity, for "a life is not and cannot of itself be a subject of valuation." At the most, it would seem, the policy is "in the nature of indemnity." As to the *quantum* of the interest, the rule adopted by the majority of the court is pronounced impracticable because of the impossibility of ascertaining the cost of the insurance, to include it in the "indebtedness." The Pennsylvania rule is substantially approved instead. Judge Little insists, likewise, on a distinction between policies assigned to the creditor and those issued directly to him. In the one case he has no rights save under the assignment and that is only to secure the payment of his debt; if the debt be paid prior to the debtor's decease, the assignment has no further validity, the original contract is enforced and the beneficiary will receive the fund. On the other hand, where the contract is with the creditor, the debtor and his representative had no interest in it under any circumstances and cannot assert a claim to the proceeds.

The questions involved in this case have been discussed at such length in this magazine by the present writer, ("*Insurable Interest in Life*," Vol. 35, pages 65 to 87 and 161 to 183), that it is not now proposed to examine them very fully. The court, we may add, cites this article among its authorities.

Lumpkin, P. J., does not recognize the distinctions generally drawn between policies on one's own life and on the life of another than the assured. Certainly, in an ordinary case, it will make no difference to a creditor whether he himself takes out the policy or receives an assignment of one then taken out by the insured; yet, as Little, J., points out, the two are not identical because of the difference in the parties to the original contract. A further distinction between them is that one is issued on the interest of the assured, the other on the insured's interest in his own life. Such an interest in his own life is necessarily present and we may well conceive of its *quantum* being limited as is the *quantum* of one's interest in the life of another. The writer, however, is not aware of any case involving such a limitation. Once a policy has been issued, the further continuance of the underlying interest is generally thought unimportant. After its inception, therefore, the contract ought not to be held one of indemnity. Whether an assignee of a policy issued originally upon a sufficient interest must likewise have an interest, is a question in a measure analogous in treatment to the question whether the beneficiary must originally have an interest. Of course, in some jurisdictions, wagers are unlawful either by the Common Law or by statute. Originally, as has been shown (35 AM. LAW REG. & REV., 67–78, *supra*), contracts of life insurance made without interest were valid at Common Law and were afterwards prohibited only because of the questions of public policy involved. In the present case the insured was an actor in effecting the insurance. His own prudence should have prevented his incurring any serious risk of murder and his interest alone would have been sufficient in most jurisdictions to sustain the policy.

If the policy was valid, the further question arises as to the ownership of the surplus. Since the assignment was for collateral security and was not absolute, the court's decision is probably in accord with most of the authorities, but this only goes to show how precarious was the bank's position. Its security diminished year by year and at last might well prove an actual source of loss, yet not even the early death of the insured could yield the bank an advantage to compensate it for the risk it had run. Those wishing to pursue the subject further should examine *Bruce* v. *Garden*, L. R. 5 Ch. App. 32 (1869), and *Crotty* v. *Union M. Ins. Co.*, 144 U. S. 621 (1891), both interesting and well-considered cases.

Strictly speaking, the two rules formulated in the case to govern the *quantum* of the interest apply only to policies taken out by the creditor or assigned to him absolutely. They appear equally impracticable in operation. The one Judge Little advocates is substantially the Pennsylvania rule criticised by Judge Lumpkin. As the latter very truly says, under it there can never be a gambling contract. In fact it is easy to demonstrate by mathematics that the limit can never be reached, even when the premiums alone are considered and the debt is disregarded. Judge Lumpkin's rule, similarly, is shown by Judge Little to be unsatisfactory. If the insured dies before his expectancy, the creditor may save a part of his security, but even at best only a part. If the payment of premiums continues for three-fourths or seven-eighths of the expectancy, the security must in most cases be wholly lost. Of course, not even the intermediate rule of allowing insurance to an amount exceeding the debt, and then awarding the insured's estate the surplus after repaying the debt and costs, fully meets the case. The truth of the matter, as has been shown, is that insurance to protect a debt is essentially fallacious and the only endeavor must be to find some working rule. Neither of those suggested by the Georgia court is satisfactory; one, because it is wholly inadequate, the other, because of its vagueness. Probably some restraint upon life insurance is needful in addition to those ordinarily imposed by our modern civilization to prevent murder, yet it would seem the law might well be satisfied with any interest, even though small, which would lead a man in good faith to insure another's life.

Erskine Hazard Dickson.

TRIAL BY JURY; COMMUNICATIONS TO JURORS. *State* v. *McCormick* (Supreme Court of Washington, Oct. 19, 1898), 54 Pac. Rep. 764. The importance of preserving the purity of the trial by jury has led to the establishment of the well-recognized rule that communications between jurors and other persons, bearing upon the cause and working prejudice to one of the parties, invalidate the verdict. That this rule be enforced with strictness would seem essential to the administration of justice and to the retention of the confidence of the community in this mode of trial. The courts agree upon this point in all jurisdictions. But where such a communication is not positively shown to have related to the cause and to have worked prejudice, though it is probable or possible that such was the case, the courts have rendered conflicting decisions as to the validity of the verdict. In civil suits the general rule seems to be that a verdict which twelve men have rendered under the solemnity of their oaths is entitled to such consideration that something more than mere suspicion of improper influence is required to set it aside. Prejudice to the unsuccessful party must affirmatively appear: *Hamilton* v. *Pease*, 54 Ill. 225 (1870); *Armleder* v. *Lieberman*, 33 Ohio, 77 (1877); *Barbour* v. *Archer*, 3 Bibb (Ky.), 8 (1813),; *Blain* v. *Chambers*, 1 S. & R. 169 (1814); *Jackson* v. *Jackson*, 32 Ga. 325 (1861). Some cases have gone very far in this direction. In *Baker* v. *Simmons*, 29 Barb. 198 (1859), there was a direct interference with the jury on the part of the constable having them in charge to induce them to agree upon a verdict in favor of the successful party, and it was held that the verdict should not be set aside on this ground. This case was cited and followed in *Hager* v. *Hager*, 38 Barb. 92 (1863). In the same state, however, *Nesmith* v. *Ins. Co.*, 8 Abb. Pr. 141 (1859), a verdict was set aside because a juror listened to statements made by a third party attacking the credibility of defendant's witnesses.

Communications are more closely scrutinized in criminal cases *Morrow* v. *Commissioners*, 21 Kan. 484 (1879), and while a verdict will never be disturbed where it affirmatively appears that a communication was innocent (*McKenzie* v. *State*, 26 Ark. 334, 343 (1870), there are cases which rule that a communication, without more, creates such an unfavorable presumption that unless it is positively shown to be innocent, the verdict will be set aside: *State* v. *Hascall*, 6 N. H. 352 (1835); *Nelms* v. *State*, 21 Miss. 500 (1850). A much larger number of decisions hold that the mere fact of such communication will not invalidate a verdict, unless it be made to appear probable that prejudice resulted therefrom: *Martin* v. *People*, 54 Ill. 225 (1870); *Brake* v. *State*, 4 Baxt. (Tenn.) 361 (1874); *People* v. *Kelly*, 94 N. Y. 526 (1884); *Flanegan* v. *State*, 64 Ga. 52 (1879); *Barlow* v. *State*, 2 Blackf. 114 (1829); *State* v. *Cucuel*, 31 N. J. L. 249, 262; *MacKenzie* v. *State*, 26 Ark. 234, 343 (1870). In the last cited case, which was a trial for a capital offence, a bystander handed a juror a slip of paper with writing on it. The Supreme Court on reviewing the case, recognized that the communication was highly improper, but held that as the record showed a want of proof that an improper influence was had on the juror, the verdict should not be set aside. In *Epps* v. *State*, 19 Ga. 102 (1855), a remark was made to a juror by a person standing near. The court held that in order to set the verdict aside the defendant must show that the remark was made about the case, and unfavorable to him, at least.

In the principal case, which was a trial for assault with intent to kill, the presiding judge allowed two letters to be delivered to a juror during the trial. The judge, without opening the letters, saw that they were from a considerable distance from the county and had been in transit several days. This was specified as error before the Supreme Court of the state, and on that ground the decision was reversed and the case remanded. Chief Justice Scott, in rendering the opinion of the court, said "It is the intention of the law that jurors in all actions shall be most carefully guarded from outside influences, and while it is probably true in this case that the documents sent in did not influence them in arriving at their verdict, it is possible that they did so. It is certainly conceivable that the envelopes containing the letters might have been opened, and communications to the jury inserted therein, and the envelopes again sealed in such a manner as to escape detection . . . It is not necessary to establish that the letters did contain anything damaging to the defendant. The opportunity was given, and the fact that they might have contained something of the kind is sufficient."

It is believed that the rule laid down in this case is stricter than that of any prior American decision. In *State* v. *Hascall, supra,* and similar cases which hold that a communication, without more, creates an unfavorable presumption which must be rebutted, it positively appeared that there was such unexplained communication. In the case under discussion it is apparent that, if the letters handed to the juror had not been tampered with (and there was no evidence that they had been), nothing was present to raise a suspicion of prejudice to the defendant. So far as any communication was shown to have been made, it was explained. In order, therefore, to raise the unfavorable presumption, the court must depend upon a double possibility—first, the possibility that there was a communication; and second, if in fact there was a communication, the possibility that it was prejudicial to the defendant. In view of the fact that the communication was made with the consent of the presiding judge, whose discretion in cases of this kind is certainly entitled to some confidence, and in view of the state of the authorities on this point, it is believed that the rule laid down in the Washington court will not be followed in its strictness in other jurisdictions.