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THE LAW OF INSURABLE INTEREST IN NORTH CAROLINA

HERMAN LEROY TAYLOR*

I. INTRODUCTORY

One who has no insurable interest in the subject matter of a contract of insurance may not recover on such contract. This rule is all but universally recognized.¹ Although the rule is apparently simple on its face, its application to a given set of facts has involved considerable difficulty, because of the varying contractual and other legal relationships in which the question of insurable interest arises. A consideration of the cases in which the problem has been treated will impress one with the fact that the resulting difficulty stems chiefly from disagreement among the courts on two issues which are fundamental in the theory of insurable interest: (1) the rationale behind the requirement of insurable interest and (2) what constitutes an insurable interest.

Although there is some evidence to the contrary,^{1a} the majority of the American courts adopted the view that the doctrine of insurable interest, as it finally evolved in English law, was directed primarily against the use of contracts of insurance for purely gaming or wagering purposes,² and it was this rationale which most of them adopted.³

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¹ *Crotty v. Union Mutual L. Ins. Co.*, 144 U. S. 621, 36 L. ed. 566 (1891); *Trinity College v. Travelers Ins. Co.*, 113 N. C. 244, 18 S. E. 175 (1893); *VANCE, INSURANCE* (2d ed. 1930) 119.

^{1a} While it appears that the prohibition against insurance on lives without interest was directed against wagering [see preamble to Statute 14 Geo. III, C. 48 (1774): "Whereas it hath been found by experience, that the making insurance on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming . . ."], the preamble to Statute 19 Geo. III, C. 37 (1746), which prohibits insurance on property without interest, clearly indicates that aside from the element of wagering, other evils or "pernicious practices" (e.g., fraudulent destruction of ships and cargoes, unfair trade practices, etc.) were aimed at by the statute.

² A controversy early developed among the American courts as to the status of contracts of insurance not founded upon insurable interest at English common law. The controversy was the result of a further controversial matter, viz., the status of wager contracts at common law. Historically, it appears that under the common law theory of "freedom of contract," wager contracts were held enforceable. Subsequently, however, the courts without the aid of statutes, began to restrict actions to wagers which were innocently made and not injurious in their consequences to the public. [See *March v. Pigot*, 5 Bur. 2802, 98 Eng. Rep. 471 (1771); *Shepherd v. Sawyer*, 6 N. C. 26 (1811)]. As to insurance contracts, it appears that at an early period, except for "interest or no interest" marine policies [see *Dean v. Dicker*, 2 Strange 1250, 93 Eng. Rep. 1162 (1746)] an interest in

Others of the American courts, notably those of Texas,⁴ probably being impelled by local considerations,⁵ adopted the view that the policy behind the requirement of insurable interest was that of reducing the incentive on the part of the assured to bring to pass the event insured against.⁶ It may be apparent from close consideration that if these two theories be kept separate and distinct, the application of one or the other to a given factual situation would correspondingly vary the result reached by the court. For example, A and B are man and wife. B takes out a policy of insurance on the life of A. Subsequently A and B are divorced, and subsequent to that A dies. B sues to collect on the insurance policy as the beneficiary thereunder. Now, if the suit is brought in a jurisdiction which recognizes as the purpose of insurable interest the desire to discourage or prevent wagering, the contract being valid in its inception, that is, the relationship between A and B at the time the policy was taken out being such as to negative any possible imputation of wagering, B will be allowed to recover. On the other hand, if the suit is brought in a jurisdiction which has adopted the other rationale, viz., the desire to reduce the incentive to destroy the subject

the subject of the insurance was essential. [Le Cras v. Hughes, 3 Doug. 81, 99 Eng. Rep. 549 (1782). On this point compare the view of Ruse v. Mut., etc., Ins. Co., 23 N. Y. 516 (1861) (insurable interest required at common law) with that of Trenton Mutual, etc., Ins. Co. v. Johnson, 24 N. J. L. 576 (1854) (insurable interest not required at common law)]; however, the subsequent recognition of innocent wager contracts also penetrated the field of insurance, so that contracts of insurance involving innocent wagers were sustained, despite the absence of insurable interest. [Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251 (1876); Riggs v. Commercial Mut. L. Ins. Co., 125 N. Y. 7, 25 N. E. 1058 (1890)]. Although the courts later began to temper this view [see Cousins v. Naptes, 3 Taunt. 513, 128 Eng. Rep. 203 (1811) (intent to wager must be indicated on face of policy)], it was only by the intervention of Parliament that insurable interest was finally required to validate all contracts of insurance—Statute 19 Geo. II, c. 37, secs. 1, 2 (1746), covering property insurance, and Statute 14 Geo. III, c. 48 (1774), covering life insurance.

² See the statement of the U. S. Supreme Court in Grigsby v. Russell, 222 U. S. 149, 156, 56 L. ed. 133 (1911): "... the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming."

⁴ "It is against the public policy of this state to allow any who has no insurable interest to be the owner of a policy of insurance upon the life of a human being. . . . In some states it is held that an element of wagering likewise enters into such contracts, which has led, as we believe, to inconsistencies in the decisions in some of the courts. Our court has placed the inhibition against such contracts upon the higher and sounder ground that the public, independent of the consent or concurrence of the parties, has an interest that no inducement shall be offered to one man to take the life of another." Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 275 (1894).

⁵ It has been suggested that the "western" atmosphere prevailing in Texas, where guns were considered a normal part of daily attire and where life was to the one "who drew the quickest and aimed the straightest," was probably the motivating spirit behind the adoption of this rule.

⁶ For a critical evaluation of the Texas rule, see Hallen, *The Texas Rule of Insurable Interest*, (1931) 9 TEX. L. REV. 333.

matter of the insurance as a means of hastening the time of recovery, B would be denied recovery, as, being no longer the wife of A, she would likely have a greater interest in his death than in his continued existence and thereby be tempted to bring the former to pass. It is generally held that in such instances the existence of insurable interest at the inception of the policy makes no difference. In many of the cases the courts employed these two concepts concurrently and indiscriminately, treating them as two parts of one whole.⁷

On the part of what constitutes an insurable interest, no definition can be constructed which would have universal application. In general, one is deemed to have an insurable interest in the subject matter insured if he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination or injury by the happening of the contingency insured against.⁸ Present in this generally accepted criterion of insurable interest, however, are other ambiguities. For example, not every "possibility of pecuniary loss to the insured" gives rise to insurable interest, as "mere expectancies," though having the status of property for some purposes,⁹ are generally conceded as unfit subjects for insurance, the rule being that the right giving rise to insurable interest must have some foundation in law, i.e., must be capable of legal recognition.¹⁰

The situation has been further confused by the tendency among the courts to apply the same criteria to determine what is an insurable interest for purposes of life insurance as are applied in connection with property insurance, failing to recognize that a fundamental difference between the two types of insurance contracts requires a difference in treatment of the question of insurability of the interests involved. Insurance on property is primarily, if not wholly, for the purpose of indemnity, that is, to recoup to the owner of the property loss resulting from its destruction, by shifting the burden from him to others who agreed to accept it for a price commensurate with the risk involved. Life insurance, on the contrary, excepting perhaps the situation where insurance is procured by a creditor on the life of a debtor as security against the death of the latter before the repayment of the debt,¹¹ is

⁷ Cf. *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. ed. 924 (1882); *Burbage v. Windley*, 108 N. C. 357, 361, 12 S. E. 839 (1891).

⁸ *Lucena v. Crauford*, 2 B. & P. N. R. 269, 127 Eng. Rep. 630 (1805); *VANCE, INSURANCE* (2d ed. 1930) 124.

⁹ In New York expectant estates are descendible, devisable and alienable. *New York Real Prop. Law*, §59.

¹⁰ "It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest." *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 1059 (1890). See *Lucena v. Crauford*, 2 B. & P. N. R. 269, 324, 127 Eng. Rep. 630 (1805).

¹¹ To the effect that creditor insurance is "indemnity," see *Wash. Central Bank v. Hume*, 128 U. S. 195, 205 (1888); *Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459 (1898).

generally recognized as a contract of investment, and not one of indemnity,¹² for the reason generally assigned that no definite value can be placed upon human life. Thus, while, in the case of property insurance, the presence or absence of insurable interest can be determined rather simply by whether or not the immediate or direct result of the happening of the contingency insured against is a pecuniary loss to the insured, which is deducible from comparatively readily ascertainable facts, no such determination can normally be made in life insurance because of the presence there of abstract and subjective factors which will not yield readily, if at all, to the affixation of the dollar sign.¹³ It is obvious, therefore, that the application of the "indemnity" concept of property insurance to life insurance would rule out recovery by the insured in many instances where application of the investment theory would permit recovery.

Despite the fact that the courts may have pursued separate paths in quest of the determinant of insurable interest, they have been more or less uniform on the point of the quantum of interest necessary to give rise to an insurable interest, holding with general liberality, that any interest cognizable either in law or in equity is an insurable interest.¹⁴

Irrespective of what may be considered to be the proper rationale behind the doctrine of insurable interest and despite the differences in opinion as to what constitutes an insurable interest, there is general recognition among the courts of factors extrinsic to contracts of insurance which warrant abridging "freedom of contract" in the interest of a greater "public policy" which can be effectuated only by the supervising hand of "the law."¹⁵

II. INSURABLE INTEREST IN PROPERTY

The first reported case in North Carolina involving the problem of insurable interest was *Shepherd v. Sawyer*.¹⁶ It may be noted that as the contract involved was insurance on the life of a slave, and as slaves

¹² VANCE, INSURANCE (2d. ed. 1939) 80. *But cf.* Howell v. American National Ins. Co. 189 N. C. 212, 214, 126 S. E. 603 (1925) (a contract of life insurance is primarily a contract for indemnity). The ordinary contract of life insurance may, however, partake of the nature of indemnity. If, for example, a person's life is insured for an amount equal to his expected earnings, computed by multiplying his life expectancy by his expected annual earnings, and taking the present value thereof, such insurance, since it is intended to recoup to the beneficiary or beneficiaries this loss of earnings, is to that extent designed for indemnification.

¹³ See Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251, 253 (1877), where the court said: "In marine and fire insurance the difficulty is not so great because there the insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values."

¹⁴ Grabbs v. Farmers' Mut. L. Ins. Assoc. of N. C., 125 N. C. 389, 394, 34 S. E. 503 (1899).

¹⁵ On this point, see the discussion in Patterson, *Insurable Interest in Life*, (1918) 18 Col. L. Rev. 381, 383-385.

¹⁶ 6 N. C. 26 (1811).

were generally considered property,¹⁷ the case might have been considered from the aspect of either property or life insurance. The theory of the case appeared to be that of insurance on property. On the other hand, it is significant to note that a later case, *Burbage v. Windley*,¹⁸ involving the question of insurable interest in life, is reported to have overruled the *Sawyer* case.

The decision in the *Sawyer* case was apparently the result of the early attitude in the state courts on the question of the validity of wagering contracts and of the effect of the presence of the wager element in contracts of insurance. Although the plaintiff in the *Sawyer* case appeared to have had no property rights in the slave and, therefore, had no insurable interest in his life, the court held that inasmuch as the plaintiff's wager was an innocent one and inasmuch as such wagers were enforceable at common law, the plaintiff could recover on the undertaking. This doctrine endured in the state, however, no longer than the very next case involving the question of insurable interest to be considered by the state Supreme Court. This statement contradicts the report that the *Sawyer* case was overruled by the *Winley* case; it is believed, however, that foundation for this view rests in a consideration of the case of *Lockhart v. Cooper*,¹⁹ in which the court repudiated the theory expounded in the *Sawyer* case, although it made no specific reference to the latter case. The *Lockhart* case was decided nine years before the *Winley* case, yet no reference is made in the latter to the former. The court held in the *Lockhart* case that insurance against loss by fire, effected by one without insurable interest in the property, was a wagering contract not sanctioned by common law and was therefore void. The presence or absence of innocence in effecting the insurance was given no consideration at all by the court.

Whether the theory adopted by the court in the *Sawyer* case was repudiated by the *Winley* case or the *Lockhart* case, it may be observed that the courts of the state, after apparently having got off to a bad start, early adopted the theory that insurable interest was necessary to support a contract of insurance. The rationale behind this requirement, as conceived by the courts, is clearly stated in the *Winley* case:

"As the assured had no insurable interest in the life of the *cestui que vie* the contract was simply a wager; it was a mere gambling speculation. The assured was not to be indemnified against loss, injury or disadvantage in any respect growing out of the life he insured; the insurance was not intended to serve any legitimate business purpose or end—it was purely a matter of speculation founded upon nothing but

¹⁷ *Stevens v. Ely*, 16 N. C. 493 (1830).

¹⁸ 108 N. C. 357, 12 S. E. 839 (1891).

¹⁹ 87 N. C. 149, 42 Am. Rep. 514 (1882).

hazard. Such contracts and speculations are wholly unnecessary; they cannot serve or promote any useful and wholesome purpose of individuals, society, or government. They do not stimulate, promote or encourage industry, enterprise, legitimate business, sound morality, or increase the wealth of the people or the strength and power of the State. On the contrary, their nature and uniform experience go to show that they represent nothing substantial or valuable, or of practical advantage to persons or communities. They strongly tend to demoralize society and embarrass industries and general business. In their very nature they stimulate, afford incentives to, and encourage those who become parties to them to resort to sinister, oftentimes criminal, means to turn or end the hazard in their favor, and thus gain unjust and dishonest advantage. They encourage men to engage in the business of speculation in hazard not necessary or useful in the general purposes and business of life, but which is positively and seriously injurious to them. Such contracts and speculations contravene the justice and policy of the law—they are *contra bonos mores*, and are therefore void.”²⁰

On the further point of what constitutes an insurable interest in property, it was stated in *Bank v. Assurance Co.*²¹ that “any interest is insurable if the peril against which insurance is made would bring upon the insured by its immediate and direct effect, a pecuniary loss.” The view of the courts on the point of what constitutes an insurable interest can be demonstrated best by considering the various interests which have been held sufficient to support a contract of insurance.

Generally speaking, the courts of the state have held that any interest, legal or equitable, is an insurable interest.²² More specifically, it has been held that both a mortgagor and a mortgagee have an insurable interest in the property which is the subject of the mortgage;²³ a vendee of property with a bond for title has an insurable interest in the property;²⁴ so has a tenant for life by curtesy;²⁵ so has one owning property subject to an equitable charge;²⁶ so have lienors in the subject matter of the lien;²⁷ trustees or bailees for hire;²⁸ members

²⁰ *Burbage v. Windley*, *supra* note 18, at 361-362.

²¹ 188 N. C. 747, 125 S. E. 631 (1924).

²² *Grabbs v. Farmers' Mut. L. Ins. Assoc. of N. C.*, 125 N. C. 389, 34 S. E. 503 (1899).

²³ *Bryan v. Old Colony Ins. Co.*, 213 N. C. 391, 196 S. E. 345 (1938); *Jeffrey v. Boston Ins. Co.*, 202 N. C. 368, 162 S. E. 761 (1932); *Wayne Nat'l Bank v. Nat'l Bank of LaGrange*, 197 N. C. 68, 147 S. E. 691 (1929); *Federal Land Bank v. Atlas Assurance Co.*, 188 N. C. 747, 125 S. E. 631 (1924); *Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779 (1916); *Lockhart v. Cooper*, 87 N. C. 149, 42 Am. Rep. 514 (1882).

²⁴ *Clapp v. Farmers' Mut. Fire Ins. Assoc. of N. C.*, 126 N. C. 388, 35 S. E. 617 (1900).

²⁵ *In re Wilson*, 224 N. C. 505, 31 S. E. (2d) 543 (1944); *Stockton v. Maney*, 212 N. C. 231, 193 S. E. 137 (1937).

²⁶ *Bryan v. Old Colony Ins. Co.*, 213 N. C. 391, 196 S. E. 345 (1938).

²⁷ *Byrd v. Pilot Fire Ins. Co.*, 201 N. C. 407, 160 S. E. 458 (1931); *Batts v. Sullivan*, 182 N. C. 129, 108 S. E. 511 (1921).

²⁸ *Lockhart v. Cooper*, 87 N. C. 149, 42 Am. Rep. 514 (1882).

of partnerships in partnership property;²⁹ tenants in common of an estate for life;³⁰ so has a tenant at will in crops sown, though title to same, as security for payment of rent, by statute, rests in the landlord.³¹

The foregoing cases appear to be all of the law on the subject of insurable interest in property in the state as revealed by the reported cases. By and large, they cover the areas in which the problem most frequently arises. Some of the situations which are apparently *res integra* in the state, however, are: insurability of the interest of contractors and builders in buildings in the course of construction; of vendors of property where title to property is retained as security; of lessors and lessees in the subject matter of the lease; of trustees and *cestui que trust* in trust property; of stockholders in corporate property; husband or wife in property, title to which rests only in the other. Although consideration of these relationships as a basis of insurable interest has not been specifically undertaken, in view of the liberality of the courts of the state in the matter of what constitutes an insurable interest, and the further fact that in other jurisdictions such relationships are generally deemed to give rise to insurable interest,³² one would be warranted in concluding that they would be so regarded by the courts of this state.

One further point is worthy of mention before concluding the discussion of insurable interest in property, namely, the requirement as to the duration of insurable interest, or, stated differently, at what time or times must the interest in the subject matter of the insurance exist? Only one case was found among the reported cases touching on this point, viz., the early case of *Lockhart v. Cooper*,³³ in which the court adopted, by way of dictum, the rule generally applied, namely, the interest insured must exist both at the time the contract is entered into and at the time the loss occurs. The modern trend, born out of the

²⁹ *Grabbs v. Farmers' Mut. Fire Ins. Co.*, 125 N. C. 389, 34 S. E. 503 (1899).

³⁰ *Houck v. Amer. Eagle Fire Ins. Co.*, 198 N. C. 303, 151 S. E. 628 (1930).

³¹ *Batts v. Sullivan*, 182 N. C. 129, 108 S. E. 511 (1921).

³² *Amer. Equitable Assur. Co. v. Lumber Co.*, 225 Ala. 208, 142 So. 37 (1932) (contractors and builders); *Mahan v. Home Ins. Co.*, 204 Mo. App. 592, 226 S. W. 593 (1920) (vendor retaining property as security); *Hale v. Simmons*, 200 Ark. 556, 139 S. W. (2d) 696 (1940) (lessor); *Smith v. Royal Ins. Co.*, 111 F (2d) 667 (1940) (lessee); *Haywood v. Fidelity-Phoenix Fire Ins. Co.*, 285 S. W. 144 (Mo. App. 1926) (trustee); *Cummings v. Dirigo Mut. Fire Ins. Co.*, 112 Me. 379, 92 A. 298 (1914) (*cestui que trust*); *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058 (1880) (stockholders in corporate property). The cases are not uniform on the question of whether a husband or wife has an insurable interest in the separate property of each other based solely upon their marital relation; the present rule, which is a product of statutes emancipating married women, appears to be that, in the absence of statute giving one interest in the property other than the common law interests, they have no insurable interest in such property. *Ohio Valley F. & M. Ins. Co. v. Skaggs*, 216 Ky. 535, 287 S. W. 969, 971 (1926).

³³ 87 N. C. 149, 42 Am. Rep. 514 (1882).

necessities of business, has, however, been away from this rule.³⁴ The practice existing in business of taking out policies of insurance on property presently owned and to cover property to be acquired subsequently, e.g., in the case of constantly changing merchandise inventories, has required an abrogation of the requirement that an interest exist at the time the policy is taken out. This view, although not uniformly followed at the present,³⁵ is a common sense attitude toward the problem; even if the "wager prevention" theory of the requirement of insurable interest be invoked, the presence of an interest at the time of the loss is sufficient to negative any intimation of wagering. This view may be further substantiated by the fact that assignments with the permission of the insurance company permit the assignees to recover although they had no insurable interest at the time the policy was effected, assuming, however, that the consent of the insurance company is not deemed a "novation."

III. INSURABLE INTEREST IN LIVES

The matter of insurable interest in lives generally raises more problems than are encountered in connection with insurable interest in property. This stems chiefly from the fact that insurance on life involves problems peculiar only to this type of insurance contract and, in addition, involves those which are also characteristic of other types of insurance contracts. In the main, as was stated previously, insurance on life is not secured for purposes of indemnity, but as an investment. At times, however, as when insurance is taken out on the life of a debtor by a creditor, or a corporation on the life of a valued employee, the contract partakes of one of indemnity, and, thus, in this connection rules applicable to insurable interest in property might properly be invoked. A consideration of the cases will show that much of the confusion that developed in connection with the determination of what constitutes an insurable interest in life was the result of this duality of purpose of life insurance. The courts have frequently failed to keep properly distinguished the use of life insurance for purpose of indemnity from its use as an investment and, as a result, have frequently been inconsistent as well as illogical in their conclusion. For example, as to the duration of insurable interest, the rule as to property is that such interest must exist at the time of the loss; in life insurance, the rule is the reverse, i.e., insurable interest need exist only at the inception of the contract;

³⁴ See California Insurance Code (Dearing 1944) §286: "An interest insured must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime"; *Sun Ins. Co. of London v. Merz*, 64 N. J. L. 301, 45 A. 785 (1900); *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503 (1875); VANCE, *INSURANCE* (2d ed. 1930) 143.

³⁵ See *Lockhart v. Cooper*, 87 N. C. 149, 151, 42 Am. Rep. 514 (1882); 1 COOLEY'S BRIEFS ON INSURANCE (1905) 137.

what happens thereafter is immaterial.³⁶ Now, if the purpose of the life insurance contract be that of investment, the rule applicable to life insurance is quite appropriate; on the other hand, if the purpose of the contract is indemnification, then the invocation of the rule validating the insurance if interest existed only at the inception of the contract, i.e., the life insurance rule rather than the property insurance rule, has the illogical result, for example, of permitting recovery by a creditor at the death of the *cestui que vie* although the latter had repaid the debt before his decease and the creditor had at that time no insurable interest in his life.^{36a} These problems can be better illustrated, however, by setting forth in more detail the attitude of the courts in the different situations in which the question of insurable interest in life has arisen.

A. INSURABLE INTEREST OF INSURED IN HIS OWN LIFE

In North Carolina, as elsewhere, there is the general requirement that in order for one to recover on a policy of insurance written on the life of another, he must have an insurable interest in the life of the person insured.³⁷ As to what constitutes such an interest, the Supreme Court of the state ruled, in the early case of *Trinity College v. Insurance Co.*,³⁸ a landmark case in the state on the question of insurable interest in lives, that "to have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life, or such an interest arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life."³⁹ This definition, though generally accepted, is applicable only to the situation where the insurance is taken out by someone other than the insured, for the general rule is—in North Carolina and elsewhere—that every one has an insurable interest in his own life which will warrant his taking out insurance on his own life, in any amount, and making the proceeds payable to whom-

³⁶ See *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, 254 (1877); VANCE, *INSURANCE* (2d ed. 1930) 149.

^{36a} *Empire Development Co. v. Title G. & T. Co.*, 225 N. Y. 53, 58, 121 N. E. 468 (1918). See note 46 *infra*.

³⁷ *Atkins v. Cotter*, 145 Ark. 326, 224 S. W. 624 (1920); *Trinity College v. Travelers Ins. Co. of Hartford*, 113 N. C. 245, 18 S. E. 175 (1893); *Wurzburg v. New York L. Ins. Co.*, 140 Tenn. 59, 203 S. W. 332 (1918).

³⁸ 113 N. C. 245, 18 S. E. 175 (1893).

³⁹ *Id.* at 247, 18 S. E. at 176. It is interesting to note that the question of insurable interest, contrary to the normal situation, arose in the *Trinity College* case by an attempt on the part of the beneficiary-assured to obtain the cash-surrender value of the policy. For a discussion of the statutory change made in 1925 (now N. C. GEN. STAT. (Michie 1943) §55-26, giving religious, charitable and educational institutions an insurable interest in the lives of former student or friends), purportedly as the result of the *Trinity College* case, see (1925) 8 N. C. L. REV. 146.

soever he chooses, whether such a designee be a relative, a creditor or a stranger.⁴⁰ In *Albert v. Insurance Co.*,⁴¹ the court posed the view thusly: "The jury, as instructed by the court, found that the plaintiff had no insurable interest; but they also found that the insured had herself taken out the policy and paid the premium. The finding, in support of which there was at least a scintilla of evidence disposes of that defense and all exceptions based thereon. It is, therefore, unnecessary for us to decide whether a step-daughter has an insurable interest. . . . There can be no doubt that a policy of insurance is valid when taken out in good faith and the premium paid thereon by the insured."⁴² It is observable from this statement by the court that the right of one to insure his life in favor of one who otherwise has no insurable interest therein is not unrestricted; the policy must be taken out in good faith and not as a cloak for illegal wagering agreement. The *bona fides* of the transaction is generally tested by whether or not the insured takes the initiative in procuring the insurance and pays at least the first premium. While the absence of either or both of these two factors does not necessarily imply a pre-conceived plan to wager on the life of the insured, it may be grounds for such a finding by a jury. In most of the North Carolina cases the court has emphasized the presence of these two factors, viz., procurement of the insurance by the insured and payment of the premiums by him, intimating that the presence of these factors was fundamental to the decision.⁴³ Where these factors are present, or at least the first, there is no doubt that the insured may insure his own life for the benefit of another, irrespective of the insurability of the interest of the latter.

B. INSURABLE INTEREST OF THIRD PARTIES IN INSURED'S LIFE

Before discussing the various groups of persons who come within this designation, it may be stated that this category of beneficiaries is restricted to the situation where the third party beneficiary initiates the contract for his own benefit and pays the premiums due thereon. It is this group with which the problem of insurable interest is chiefly concerned.

Creditors. In North Carolina, as elsewhere, creditors are deemed to have an insurable interest in the life of their debtors.⁴⁴ However, the

⁴⁰ *Howell v. Amer. Nat'l Ins. Co.*, 189 N. C. 212, 126 S. E. 603 (1925); *VANCE, INSURANCE* (2d ed. 1930) 151. Cf. N. C. Const., Art. X, sec. 7: "The husband may insure his own life for the sole use and benefit of his wife and children. . . ."

⁴¹ 122 N. C. 92, 30 S. E. 327 (1898).

⁴² *Id.* at 94, 30 S. E. at 327.

⁴³ See *Powell v. Dewey*, 123 N. C. 103, 104, 31 S. E. 81 (1898); *Albert v. Mut. L. Ins. Co. of New York*, 122 N. C. 92, 94, 30 S. E. 327 (1898).

⁴⁴ *Miller v. Potter*, 210 N. C. 268, 186 S. E. 350 (1936); *Mace v. Provident Life Assoc.*, 101 N. C. 122, 7 S. E. 674 (1888); *Maynard v. Life Ins. Co. of Va.*, 132 N. C. 711, 44 S. E. 405 (1903) (by implication).

very perplexing question of what must be the proportion between the amount of the debt and the amount of insurance procured has not been raised in the state thus far. The general rule on this point is, however, that the amount of insurance obtained must not be too disproportionate to the amount of the debt.⁴⁵ The courts have generally held that insurance to cover the amount of the debt, prospective premiums and interest is not too disproportionate an amount.^{45a} Also, the problem of the effect of payment of a debt before the death of the debtor upon the ability of the creditor to collect on the policy is still open. Outside of the state, upon the theory that insurable interest in life need exist only at the inception of the policy, the rule is that the creditor's interest does not cease upon the payment of the debt by the debtor.⁴⁶ It is questionable whether this should be the rule, for as was intimated before, insurance on the life of the debtor is not for purposes of investment, but for indemnity; so, when the debt is paid, there is no chance for loss to the creditor. On the point of possible loss of premiums paid by the creditor, the availability of cash surrender value in the ordinary policy would enable the creditor to recoup a portion of such premiums.

Relation by Blood or Affinity. The prevailing rule here is that mere relation by blood is not of itself sufficient to give an insurable interest,⁴⁷ exception being made generally where the relationship is that of parents and minor children, and vice versa.⁴⁸ Outside of this exception, in

⁴⁵ *Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459 (1898). *But cf.* *Fehr v. Cawthon*, 293 F. 152 (C. C. A. 6th, 1923). *See* VANCE, *INSURANCE* (2d ed. 1930) 165. It has been held that where there is excess insurance, the debtor's estate is entitled to the excess, irrespective of the fact that the creditor might have paid all of the premiums. *Exchange Bank of Macon v. Loh*, *supra*.

^{45a} It would appear that such a rule as this would permit taking out insurance for any amount. Take as an example a debt of ten dollars: ten dollars worth of insurance is necessary to cover the debt. The prospective premiums on ten dollars worth of insurance for the life expectancy of the debtor is, for example, ten plus dollars. The result is that under the rule, the creditor will be permitted to take out twenty dollars worth of insurance to recoup his expected outlay, viz., prospective premiums plus the amount of the debt. But, the premium on twenty dollars worth of insurance is twenty dollars; so, the creditor will have to take out forty dollars worth of insurance to cover his expected outlay, and so on, *ad infinitum*. Up to this point no provision has yet been made for interest on the creditor's outlay. The courts do not, as a matter of fact, however permit this sort of pyramiding of premiums [*but cf.* *Ulrich v. Reinoehl*, 143 Pa. 238, 22 A. 862 (1891)], which means that a creditor can only recover his outlay, if ever, in cases where the debtor dies soon after the insurance is obtained, or where he fails to measure up to his life expectancy.

⁴⁶ "In the United States it seems clear that, where the creditor procures insurance independently, his right to the proceeds is not affected by the state of accounts between him and the debtor-insured at the time of the latter's death." VANCE, *INSURANCE* (2d ed. 1930) 150, n. 47.

⁴⁷ *Wharton v. Home Security L. Ins. Co.*, 206 N. C. 254, 173 S. E. 328 (1934); *Crumpp v. Southern-Dixie L. Ins. Co.*, 204 N. C. 439, 168 S. E. 514 (1933); VANCE, *op. cit. supra* note 46, at 157.

⁴⁸ *Holloman v. Life Ins. Co. of Va.*, 192 S. C. 454, 7 S. E. (2d) 169 (1940); *Crismond v. Jones*, 117 Va. 34, 83 S. E. 1045 (1915). *See* *Nat'l Life & Acc. Ins. Co. of Nashville, Tennessee v. Alexander*, 226 Ala. 325, 147 So. 173, 174 (1933).

addition to the relationship it must appear that the one obtaining the insurance must be in a position to benefit pecuniarily from the continued existence of the insured, or to suffer possible pecuniary detriment by his death.⁴⁹ Also, it is usually accepted without question that husband and wife have an insurable interest in the life of each other; this is apparently the view in North Carolina, for no case on this point has as yet come before the courts.⁵⁰ It has been held, however, that the relationship of uncle and nephew does not of itself give an insurable interest;⁵¹ nor does that of half-sister;⁵² nor that of niece;⁵³ nor that of cousin.⁵⁴ It was held in *Webb v. Insurance Co.*,⁵⁵ however, that the relationship of brother was alone sufficient to constitute an insurable interest. There is no uniformity among the courts on this latter point. In the *Webb* case, the Supreme Court, stating that the matter was one of first impression in North Carolina, reached its conclusion, saying: "But we think the better reasoning supports the view that close relationship by ties of blood between brothers is alone sufficient to constitute insurable interest even when the beneficiary takes out the policy and pays the premium thereon."⁵⁶ While the soundness of the result reached in the *Webb* case is not necessarily to be doubted, it is questionable whether, when the rule is that relationship by blood is not alone sufficient to give an insurable interest, an arbitrary distinction should be made in the case of the relationship of "brother." If the theory of the *Webb* case is followed to its logical conclusion, it would appear that, although the point has not yet been before the court, parents and children who have reached their majority would have an insurable interest in the lives of each other, although it appears by the prevailing view, outside of the state, that such a relationship does not of itself give an insurable interest.⁵⁷

In *Slade v. Insurance Co.*,⁵⁸ the Supreme Court held that the plaintiff could not collect on a policy of insurance issued by the defendant company upon the life of an alleged adopted son. The court ignored

⁴⁹ *Cronin v. Vermont Life Ins. Co.*, 20 R. I. 570, 40 A. 497 (1898); VANCE, *op. cit. supra* note 46, at 158.

⁵⁰ *Cf.* N. C. GEN. STAT. (Michie 1943) §52-9: "Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use. . . ."

⁵¹ *Hardy v. Aetna Life Ins. Co.*, 152 N. C. 286, 70 S. E. 822 (1910).

⁵² *Crump v. Southern-Dixie L. Ins. Co.*, 204 N. C. 439, 168 S. E. 514 (1933).

⁵³ *Wharton v. Home Security L. Ins. Co.*, 206 N. C. 254, 173 S. E. 328 (1934).

⁵⁴ *See Mace v. Provident Life Assoc.*, 101 N. C. 122, 7 S. E. 674 (1888).

⁵⁵ 216 N. C. 10, 3 S. E. (2d) 428 (1939).

⁵⁶ *Id.* at 11-12.

⁵⁷ *Life Ins. Clearing Co. v. O'Neill*, 106 F. 800 (C. C. A. 3rd, 1901); *Worthing v. Curtis*, L. R. 1 Ch. Div. 419 (Court of Appeals 1875). *But cf.* *Parish v. Missouri Mut. Assoc.*, 8 S. W. (2d) 1018 (Mo. App. 1928) (adult son has insurable interest in life of mother).

⁵⁸ 202 N. C. 315, 162 S. E. 734 (1932).

completely the allegation of adoption; this was probably due to the fact that the plaintiff apparently had not legally adopted the insured. Although it is not apparent what would have been the effect of legal adoption on the question of insurable interest at the time the *Slade* case was decided, under the present statutory provision⁵⁹ the relationship of parent and child is established between parties to an adoption, thus raising a basis for insurable interest.

Partners. In North Carolina, partners have an insurable interest in the lives of each other under certain conditions.⁶⁰ The principal case in the state on this point is *Powell v. Dewey*.⁶¹ In that case, the plaintiff, as executrix of the insured, sued the defendant Dewey, former partner of the insured, to recover from the latter the proceeds of a policy of insurance written on the life of the insured which had been paid the defendant by the insurance company. Plaintiff contended that as defendant has no insurable interest in the life of the insured, where recovery was permitted under the policy by the insurance company, the estate of the insured was entitled to the proceeds. The basis of plaintiff's contention of lack of insurable interest in the defendant was that at the time the policy was taken out on the life of the insured the partnership relationship between the parties was about to cease, and as the insured was not indebted to the partnership, the latter had no insurable interest in his life. The court sustained the contention of the plaintiff on the point of inability of defendant to collect on the policy because of lack of insurable interest, but held that for the same reason neither could the plaintiff, as representative of the estate of the deceased, maintain an action based on the policy.⁶² The court's ruling on the point of insurable interest, in spite of the general rule that insurable interest in life need exist only at the inception of the contract, appears to be founded in reason. The theory of insurance on the lives of partners is not that of investment, but of indemnification—to recoup to the business loss resulting from the death of the insured. Thus, to permit insurance in instances where such persons' connection with the business is not a vital factor in its existence or its ability to make profits (a fact which may be evidenced by severance of connection with the business for reasons other than death before its termination without disrupting it as a

⁵⁹ N. C. GEN. STAT. (Michie 1943) §48-6 provides: "... Further, for all other purposes whatsoever (after consideration of right of succession to property) a child adopted for life and his adoptive parents shall be in the same legal position as they would be if he had been born to his adoptive parents. ..."

⁶⁰ See *Trinity College v. Travelers Ins. Co. of Hartford*, 113 N. C. 245, 248, 18 S. E. 175 (1893).

⁶¹ 123 N. C. 103, 31 S. E. 81 (1898).

⁶² Cf. *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274 (1894), wherein the Texas Supreme Court held that where the named beneficiary cannot collect on the policy because of lack of insurable interest, he may collect under the policy as trustee of the estate of the insured.

going concern) would be to permit wagering no less than in other situations where there is no insurable interest in the life insured. If, in situations of this nature, the insured was indebted to the partnership at the time his connection therewith ceased, the partnership might be permitted to insure his life on the basis of the relationship of debtor and creditor.

Although the court held that no action could be maintained on the contract of insurance because of the absence of insurable interest, it is questionable whether under the facts in the case—where the insurance company did not avail itself of the defense of lack of insurable interest in the beneficiary—the beneficiary should be allowed to retain the proceeds of the policy as against the insured's estate. The effect of permitting him to do so is to allow him to recover in fact while at the same time recognizing that he had no insurable interest. Of course, offsetting this view is the accepted principle among the courts that no action of any kind may be maintained upon a contract void by reason of public policy,⁶³ but it is questionable whether or not an exception should not be made in cases of this kind where the controversy is between the beneficiary under the policy and the estate of the insured, the insurance company having elected to pay.⁶⁴ Weighing the relative position of the parties, it would seem more in line with the public policy behind the requirement of insurable interest to permit the insured's estate to claim the proceeds,⁶⁵ although the beneficiary may be allowed to retain an amount equal to the premiums which were paid to keep the policy in force.^{65a}

Finally, on the point of insurable interest of partners in the lives of each other, it might be noted by statute, partners are explicitly given the right to insure the lives of each other where by agreement the right to buy the shares of each other in the partnership arises upon the death of a party so agreeing.⁶⁶

⁶³ *Standard Fashion Co. v. Grant*, 165 N. C. 453, 81 S. E. 606 (1914). Cf. *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839 (1891). 5 WILLISTON ON CONTRACTS (rev. ed., 1937) §1630.

⁶⁴ Cf. 5 WILLISTON, *loc. cit. supra* note 63: "It is true that a court could only under very exceptional circumstances enforce specifically an illegal bargain, but the rule of public policy that forbids an action for damages for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages; in itself that would generally be a desirable thing. When relief is denied it is either because the plaintiff is a wrongdoer, and such a person the law does not aid, or, in exceptional cases, because the transaction is declared absolutely void by the law." As to whether policies lacking insurable interest are in North Carolina void or voidable, see the discussion *infra*.

⁶⁵ *But cf. Smith v. Coleman*, 52 S. E. (2d) 704 (Va. 1945), holding executors of decedent's estate could not recover. This case is criticized in (1945) 45 Col. L. Rev. 662.

^{65a} Cf. *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924 (1882).

⁶⁶ N. C. GEN. STAT. (Michie 1943) §58-204. This statutory change, made in 1941, is discussed in (1940-41) 19 N. C. L. Rev. 490.

Corporations. The question of insurable interest of corporations in the lives of officers and employees is settled in North Carolina by explicit statutory provision.⁶⁷ This statutory provision was the outgrowth of two early cases, viz., *Victor v. Mfg. Co.*⁶⁸ and *Victor v. Cotton Mills*,⁶⁹ in which the Supreme Court, brushing aside the question of whether or not a corporation had an insurable interest in the life of an officer, sustained the plaintiff's petition for an injunction against the company's carrying such insurance, on the ground that insurance by a corporation on the life of officers or employees was an *ultra vires* act.

On the point of insurable interest, the situation in *Victor v. Cotton Mills*^{69a} was analogous to that in *Powell v. Dewey*,⁷⁰ in that the officer whose life was insured was about to sever his connection with the corporation. The court appeared to be of the opinion that, assuming that a corporation had the power to insure the lives of its officers, it was doubtful whether its insurable interest based on that relationship alone could endure beyond their connection with the company. In *Victor v. Mfg. Co.*,^{70a} its companion case, however, although the officer was still connected with the company, the same result was reached on the theory that carrying insurance on the lives of officers was an act *ultra vires* the corporation.

There is little need now to attempt to pass judgment upon these two decisions, for the legislature was quick to the rescue, apparently realizing the necessity and appropriateness of corporations' obtaining insurance on the lives of valuable officers and employees whose untimely death may frequently take from the corporation services which it might well take years to replace, the absence of these services, in the meantime, resulting in decreased profits, which the proceeds of insurance are intended to some extent to restore.

Before leaving the discussion of the insurable interest of corporations in the lives of corporate officers and employees, it might, as an incidental matter, be noted here that by explicit statutory provision stockholders who otherwise have no insurable interest in the lives of each other for any purpose where their sole relationship to each other radiates from and through the corporation, are given an insurable interest in each others lives where agreement exists for the sale by one to the other of his share in the corporation in the event of death.⁷¹

⁶⁷ N. C. GEN. STAT. (Michie 1943) §55-26 provides: ". . . And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent for its benefit. . . ."

⁶⁸ 148 N. C. 119, 61 S. E. 653 (1908). ⁶⁹ 148 N. C. 107, 61 S. E. 648 (1908).

^{69a} *Id.*

⁷⁰ 123 N. C. 103, 31 S. E. 81 (1898).

^{70a} 148 N. C. 119, 61 S. E. 653 (1908).

⁷¹ N. C. GEN. STAT. (Michie 1943) §58-204. Discussed in (1940-41) 19 N. C. L. REV. 490.

C. ASSIGNMENT TO ONE HAVING NO INSURABLE INTEREST

The rule here is that one may make a valid assignment of a policy of insurance to one having no insurable interest in his life, where the policy was taken out in good faith by the insured prior thereto and made payable to his estate. This rule is a logical extension of the rule that one may in good faith take out insurance on his life and make whomsoever he elects the beneficiary. With a few exceptions it prevails throughout the United States,⁷² and, despite some views to the contrary, appears always to have been the rule in North Carolina.⁷³ Here, as in other jurisdictions, however, the courts have frequently applied this rule to factual situations which were not in fact the type of assignments contemplated by the rule. The rule is applicable to the situation where the transfer of the policy takes place after there has been an issue of the policy to the insured in his own right, and not the situation in which the assignment is contemporaneous with the issue of the policy, the assignee paying the first and all subsequent premiums.⁷⁴ The effect of the latter transaction is, in the final analysis, the same as in situations where the contract is in the first instance taken out by parties who have no insurable interest in the lives they purport to insure.

The failure of the courts to distinguish these situations is illustrated by *Hardy v. Insurance Co.*⁷⁵ and *Johnson v. Insurance Co.*⁷⁶ In the

⁷² *Grigsby v. Russell*, 222 U. S. 149, 56 L. ed. 133 (1911); *VANCE, INSURANCE* (2d ed. 1930) 167.

⁷³ In *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1032 (1906), the Georgia Supreme Court, without citing any cases to support its contention, listed North Carolina among those states which required an assignee of a life policy to have an insurable interest. On this point, however, the North Carolina Supreme Court, in *Hardy v. Aetna Life Ins. Co.*, 152 N. C. 286, 70 S. E. 822 (1910), said, at 290: "Undoubtedly, however, there are decisions which directly hold that a life insurance policy, though valid at its inception may not be assigned to persons having no insurable interest in the insured; and North Carolina has been referred to as upholding this view both in the textbooks and in decisions of other courts. If this is a correct interpretation of our cases on the subject, we would not hesitate to hold that they were not well decided; but, while some of them certainly give color to this view, we think that a more careful consideration of our decisions will disclose that in all of them, where the contract was declared void or set aside, it appeared that the assignment of the policy to one having no insurable interest was made in pursuance of a preconceived purpose, and that the assignee had suggested the arrangement or had been a party to it."

A reference to the assignability of life policies in North Carolina is made in Van Hecke, *North Carolina Annotations—Restatement of the Law of Contracts*, (1934-35) 13 N. C. L. Rev. 116.

⁷⁴ See Patterson, *Insurable Interest in Life* (1918) 18 Col. L. Rev. 381, 389. Cf. *Fehr v. Cawthon*, 293 F. 152 (C. C. A. 6th, 1923), distinguishing *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924 (1882) (one "termed" assignee could not collect face value of policy where he lacks insurable interest) from *Grigsby v. Russell*, 222 U. S. 149, 56 L. ed. 133 (1911) (assignee in good faith may recover although he has no insurable interest). In the *Cawthon* case, at 153, the court said: "We cannot see that the rule of *Warnock v. Davis* can now go beyond a case where the original payee, or the one who, by simultaneous arrangement, is to be assignee, does not have the required interest. . . ."

⁷⁵ 152 N. C. 286, 70 S. E. 822 (1910). ⁷⁶ 157 N. C. 106, 72 S. E. 847 (1911).

Hardy case the court sustained as valid an assignment which was made contemporaneously with the issuance of the policy to an assignee, a nephew of the insured, who paid the first and all subsequent premiums thereon. The court held that although the mere relationship of uncle and nephew would not alone give rise to an insurable interest, the nephew might recover on the policy as the assignee thereof. The *Johnson* case was decided approximately one year after the *Hardy* case. The court held it to be indistinguishable from the latter, although, as a matter of fact, the assignment in the *Johnson* case was independent of and took place some time after the issuance of the policy, a fact which, though not conclusive of the *bona fides* of the transaction, tends to negative any possible imputation of wagering. In situations like that presented in the *Hardy* case it is difficult to conceive of a *bona fide* assignment for value, for at an early period in the life of the contract there is likely to be little of value to assign and little worth purchasing. It is an almost unavoidable conclusion that the purpose of such transaction is the evasion of the requirement of insurable interest. In *Hinton v. Insurance Co.*,⁷⁷ the Supreme Court held that where an agreement for assignment existed before the policy was taken out, the assignee could not recover on the policy. Thus recognizing this latter rule, the courts should be careful to distinguish assignments of the *Hardy* type from that which existed in the *Johnson* case.

The use of life insurance policies for purposes of investment warrants adoption of the view that, where taken out in good faith, they may freely be assigned. If the insured is denied the right to dispose of his insurance policies, which are frequently valuable, if not the most valuable of his assets, to persons excepting those who have an insurable interest in his life, the value of his insurance as an investment is materially decreased, for not too infrequently the only source from which an insured may realize the full measure of this investment is by assignment to persons having no insurable interest in his life. And, necessarily, such persons would not accept assignment for value where realization on the contract would be denied by the courts. It would appear that where the policy of insurance had a *bona fide* inception, the assignment of the contract is no more of a wager than insurance on the life of a debtor by a creditor.

D. MISCELLANEOUS ON INSURABLE INTEREST IN LIFE

The problems of insurable interest in connection with life insurance policies issued by fraternal orders and societies have been more or less narrowed by court decisions and statute. It was held by the courts⁷⁸

⁷⁷ 135 N. C. 314, 47 S. E. 474 (1904).

⁷⁸ *Wooten v. Grand United Order of Odd Fellows*, 176 N. C. 51, 96 S. E. 654

that such organizations may legally restrict the class of persons who may be beneficiaries under policies they issue. This restriction is now made mandatory by statute.⁷⁹ However, the problem of whether or not a given person comes within the restricted class of beneficiaries sometimes arises. This is illustrated by *Applebaum v. Commercial Travelers*,⁸⁰ where the Supreme Court held that a bigamous wife was not a wife within the meaning of the constitution and by-laws of the defendant society and therefore, could not recover as beneficiary under the policy of insurance issued by it.

Aside, possibly, from *Powell v. Dewey*,⁸¹ the question of the duration of insurable interest in life appears not to have been raised thus far in the state. The prevailing rule is, as was pointed out before, that it need exist only at the inception of the contract. Considering the attitude of the court in the *Dewey* case, it is to be questioned whether in North Carolina this rule would be applied to all cases involving the problem. This theory is to some extent borne out by a provision in the statutes applicable to fraternal insurance. The statute provides that where a husband and wife are divorced, each loses his ability to be the beneficiary under the policy of the other.⁸² While this rule has not been applied outside of fraternal insurance, it appears founded in logic and reason and should be adopted generally, despite the fact that the contrary appears to be the rule prevailing outside of the state.⁸³ Since, as was stated before, life insurance has a dual purpose, sometimes partaking of the nature of property insurance, i.e., for purposes of indemnification, and at other times for investment purposes, the rule as to the duration of insurable interest that should be applied should be determined by the purpose the particular contract of life insurance is designed to serve.

IV. GENERAL OBSERVATIONS

It is difficult to determine from the cases in the state just what is the effect of the lack of insurable interest on the right to maintain

(1918); *Applebaum v. Order of United Commercial Travelers*, 171 N. C. 435, 88 S. E. 722 (1916); *Pollock v. The Household of Ruth*, 150 N. C. 212, 63 S. E. 940 (1909).

⁷⁹ N. C. GEN. STAT. (Michie 1943) §58-281 provides: "The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member, or, with the consent of the society, any charitable institution maintained by the society. . . . Within the above restrictions each member shall have the right to designate his beneficiary. . . ."

⁸⁰ 171 N. C. 435, 85 S. E. 722 (1916).

⁸¹ 123 N. C. 103, 31 S. E. 81 (1891), cited *supra* note 61.

⁸² N. C. GEN. STAT. (Michie 1943) §58-281.

⁸³ *Connecticut Mut. L. Ins. Co. v. Shaefer*, 94 U. S. 457, 24 L. ed. 251 (1887); *VANCE, op. cit. supra* note 72, at 596. *Contra: Lewis v. Lewis' Admr.*, 234 Ky. 227, 27 S. W. (2d) 575 (Tex. Comm. App., 1920). For the Texas rule on this point see notes 4, 5, 6 *supra*.

actions on contracts of insurance. This difficulty arises from the fact that the courts have been noticeably inconsistent in their treatment of this question. The theory of the court, as expressed in *Slade v. Insurance Co.*,⁸⁴ is that the absence of insurable interests voids the policy from its inception and renders it unenforceable as a matter of public policy. If this theory is adopted, should it be possible for an insurance company which has issued a policy not based upon insurable interest to waive lack of insurable interest? Should the presence of an incontestable clause in a policy preclude the defense of lack of insurable interest?

In answer to the first query stands *Hardy v. Insurance Co.*,⁸⁵ in which the Supreme Court ruled that where the agent of the insurance company knew that the beneficiary had no insurable interest in the life of the *cestui que vie* and the beneficiary had acted in good faith in taking out the policy, the insurance company was estopped to deny lack of insurable interest. On the other hand, concerning the second question, the court held in *Wharton v. Insurance Co.*⁸⁶ that the policy of insurance, void because of lack of insurable interest, could not be validated by the presence of an incontestable clause in the policy; the contract being against public policy, it could not be made good by any act of the parties. If the theory of the *Wharton* case be correct, it is evident that the principle expounded in the *Hardy* case cannot logically be followed, for if a contract is void by reason of public policy, neither should estoppel, waiver nor any other act of the parties be able to revive it.

Whether the view that insurance contracts lacking insurable interest are so utterly void that no actions may be maintained thereon is sound or not, it is questionable whether it should be followed in all cases. That the view should be applied when lack of insurable interest is urged by the insurance company as a defense to an action on the policy is not to be denied; however, as was stated in connection with the discussion of *Powell v. Dewey*, *supra*, it seems that public policy would be better effectuated, in instances where the insurance company has elected to pay, by permitting the estate of the insured or some other through the insured to collect the proceeds as against the beneficiary having no insurable interest, and this despite the usual rule that only the insurance company can avail of the plea of lack of insurable interest.⁸⁷

⁸⁴ 202 N. C. 315, 162 S. E. 734 (1932).

⁸⁵ 154 N. C. 430, 70 S. E. 828 (1911) (rehearing).

⁸⁶ 206 N. C. 254, 173 S. E. 328 (1934).

⁸⁷ *Maynard v. Life Ins. Co. of Va.*, 132 N. C. 711, 44 S. E. 405 (1903); *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467 (1890); *Worthington v. Curtis*, L. R. 1 Ch. Div. 419 (Court of Appeals 1875).

Finally, as to the effect of the incontestable clause on the lack of insurable interest, the *Wharton* case is in line with the prevailing view, viz., the incontestable clause is no bar to a defense based upon lack of insurable interest.⁸⁸

⁸⁸ *Dakota Life Ins. Co. v. Midland Nat. Bank of Minneapolis*, 18 F. (2d) 903 (C. C. A. 8th, 1927), *rev'd on other grounds* in 277 U. S. 346, 72 L. ed. 911 (1928); VANCE, *op. cit. supra* note 72, at 829. Cf. *American Trust Co. v. Life Ins. Co. of Va.*, 173 N. C. 558, 92 S. E. 706 (1917).