THE OPERATION OF THE LIFE ASSURANCE ACT 1774 (U.K.) IN RELATION TO THE INSURANCE OF BUILDINGS IN ENGLAND AND AUSTRALIA

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[*In this article Mr Evans examines the Life Assurance Act 1774 (U.K.) in order to establish its application to present day fire insurance of buildings in Australia. In the course of his detailed consideration of the Act the author suggests that due to an ambiguity the Act might afford insurers a defence to, or means of avoiding* bona fide *fire insurance policies when not all parties with an insurable interest are named in the contract of insurance. The author recommends that, as in New South Wales, the Act be repealed. Because of the Act's relative obscurity its repeal would cause little change in the insurance industry.*]

A major premise of insurance law is that the insured should have an insurable interest in the subject matter of the contract of insurance. One of the main reasons for this is to distinguish the insurance contract from contracts by way of wagering and gaming. At common law contracts by way of wagering and gaming were valid.[1] In 1745 the Marine Insurance Act (U.K.)[2] was passed. This act prohibited insurance policies which did not require proof of interest in relation to British ships and their cargoes.[3] In 1774 a further Act was passed 'for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured.'[4]

The provisions of the Life Assurance Act (U.K.) 1774 are as follows:

> Whereas it had been found by experience that the making of 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.]
>
> 1. That from and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons or on any other event or events whatsoever, wherein the person or persons for whose use benefit or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.
> 2. And be it further enacted that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use benefit or on whose account such policy is so made or underwrote.
> 3. And be it futher enacted, that in all cases, where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

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[1] For a succint discussion see Merkin R., 'Gambling by Insurance — A Study of the Life Assurance Act 1774' (1980) 9 *Anglo American Law Review* 331, esp. 333-7.

[2] 19 Geo. 2 c. 37 (1745).

[3] The Marine Insurance Act 1745 was repealed by the Marine Insurance Act 1906 (U.K.), s. 92, sch. 2; however it remains in effect in Victoria by virtue of the Instruments Act 1958, ss. 15-20. The 1906 Act provides that every contract of marine insurance by way of gaming or wagering is void; s. 4(1). See also the Marine Insurance (Gambling Policies) Act 1909 (U.K.).

[4] 14 Geo. 3 c. 48 (1774). This Act was formerly called the Gambling Act 1774. The short title 'The Life Assurance Act 1774' was given to this Act by the Short Titles Act 1896 (U.K.).

4. Provided always, that nothing herein contained shall extend, or be construed to extend, to insurances bona fide made by any person or persons on ships, goods, or merchandises; but every such insurance shall be valid and effectual in the law as if this Act had not been made.

The purpose of this article is to explore the general issues raised by the Act and its interpretation. Two difficulties should be borne in mind.

(i) With the effluxion of over 200 years since the passing of the Act, many of the modern aids and techniques of statutory interpretation are either unavailable or inappropriate.

(ii) In the same period the concept of insurable interest has developed and this of itself may have rendered a major consideration behind the Act redundant.

The Scope of the Statutory Requirements

Two points may be disposed of briefly.

(i) The Act clearly applies to insurances on lives.[5] The life insurance aspects of the Act have been exhaustively treated by Merkin.[6]

(ii) By virtue of section 4, the Act does not affect bona fide insurances effected on ships, goods or merchandises. It does not affect the law relating to fire insurance on chattels.

The meaning of 'other event or events' in sections 1, 2 and 3 of the Act and related issues will be examined. These words appear sufficiently wide to include fire insurances effected on real property. There is no clear authority on this and the learned authors are divided. Bunyon states 'Although the Act ostensibly deals with the life insurance, it has never been doubted that it applies to fire insurance policies'.[7] Welford and Otter-Barry say that 'the statute was never intended to apply, and does not in fact apply to policies of fire insurance'.[8] This view is echoed by Ivamy, who likewise concludes that the statute does not apply to fire - insurance.[9]

The major case law arising under the Act relates almost exclusively to policies of life assurance. These cases may be germane to the application of the Act to fire insurance on buildings insofar as they throw light on the construction of the Act. The application of the Act is important as it provides a defence for an insurance company if it choose to avail itself of it. Although insurance companies do not usually avail themselves of technical defences on bona fide claims, they do use such defences in the case of fraudulent claims or suspected fraudulent claims which, of their nature, are more likely to operate in fire insurance, and are more

[5] Even cases of life insurance upon the assured's own life for his benefit and insurance by spouses upon each other's lives have been held not to be within the provisions of the Act. See *Wainwright v. Bland and Others* (1836) 150 E.R. 334 (Ex. Pl.); *Reed v. Royal Exchange Assurance Co.* (1795) 170 E.R. 198 (N.P.); *Griffiths v. Fleming* [1909] 1 K.B. 805 (C.A.).

[6] Merkin, *loc. cit.*

[7] Quinn R. J., *Bunyon's Law of Fire Insurance* (6th ed. 1913); see also Birds J., *Modern Insurance Law* (1982) 37-40, 52-3.

[8] Welford and Otter-Barry, *The Law Relating to Fire Insurance* (3rd ed. 1932).

[9] Hardy Ivamy E.R., *Fire and Motor Insurance* (3rd ed. 1978) 174-81.

difficult to prove. Moreover in *Gedge v. Royal Exchange Assurance Corporation*[10] Kennedy J. held that where the plaintiff's case discloses that the agreement which is the basis of the claim is illegal, the court must not ignore the illegality or give effect to the claim, even if the illegality were not pleaded or relied on by the defendants. This principle would also be applicable in liquidation proceedings in which disbursements under an insurance were in dispute.

It is proposed to examine the operation of the first three sections of the Life Assurance Act 1774.

Section 1

Two types of arrangement are rendered 'null and void' by section 1, namely insurances on life or lives or any other event or events

(1) by way of a policy or policies wherein the person for whose benefit the policy is taken out has no interest.

or (2) by way of wagering or gaming.

(1) *By way of a policy*

Section 1 as a whole reflects the legislature's concern at various forms of gambling and wagering which were taking place under the guise of insurance. The moral and social consequences of gaming and wagering were not accepted truths and a clear division of opinion on these matters was reflected in the judiciary as elsewhere well into the nineteenth century.[11]

The first category aims at the practice whereby a formal insurance policy was used to cover arrangements where the beneficiaries had no interest in the person or event but only in the outcome. One of the first cases decided under the Act reflects this point. In *Roebuck v. Hammerton*[12] the defendant had in consideration of a certain sum agreed to pay the plaintiff a greater sum in case a certain *Monsieur* le Chevalier D'Eon should at any time prove to be female. Previously on the same day in *Da Costa v. Jones*[13] Lord Mansfield C.J. and a concurring court had ruled an action on a wager on the same issue would not lie at common law because it was contrary to public policy. In *Roebuck v. Hammerton*, where the wager was in the form of a policy made subsequent to the Act, Lord Mansfield C.J. ruled:

> The parties themselves have called it a policy, it is indorsed a policy, opened as a policy; and any number of persons whatever might have subscribed it as such. Therefore it is clearly within the Act; and a nonsuit ought to be entered.[14]

[10] [1900] 2 Q.B. 214 (marine insurance). See also *Scott v. Brown, Doering McNab & Co.* [1892] 2 Q.B. 724, 728 *per* Lindley L.J. (C.A.); *Australian Widow's Fund Life Assurance Society Ltd v. National Mutual Life Association of Australasia Ltd* (1912) 14 C.L.R. 141, 167, *per* Isaacs J. (H.C.).

[11] *Good v. Elliott* (1790) 100 E.R. 808; *British Commercial Insurance Co. v. Magee* (1834) Cooke & Alc. Rep. 182, Brunker's Digest 1243, 1250. (In the Exchequer Chamber, Ireland, Burke C.J. held that 14 Geo. 3 c. 48 was not declaratory of the common law, not law in Ireland and wagering policy on the life of another was not illegal.) In *Ramlall Thackoorsaydass v. Soojumnull Dhondmull* (1848) 13 E.R. 699 it was held that the Gaming Act 1848 (U.K.) did not apply in India and that at common law wagering was allowed and therefore a wager on the average price of opium was enforceable. *Cf. Atherfold v. Beard* (1788) 100 E.R. 328; *Fisher v. Waltham* (1843) 4 Q.B. 889.

[12] (1778) 98 E.R. 1335.

[13] (1778) 98 E.R. 1331.

[14] (1778) 98 E.R. 1335, 1336.

(2) *By way of wagering and gaming*

The second category aims at gaming and wagering arrangements which were dressed up as insurance agreements but were not in the form of a policy. What was the scope of this provision? The matter was considered in 1788 in *Atherfold v. Beard*.[15] This was an action of assumpsit on a wager that in respect of the collection of duties on hops for 1786, the amount would be more than the Canterbury collection of the preceding year. The Court of King's Bench held that the wager was unenforceable. Ashurst J. held that such a wager was illegal as being contrary to public policy. Buller J. ruled on similar grounds and went further to hold that the Act did not just apply to policies. He stated:

> For either the Courts must restrain that Act of Parliament to such cases as in form are policies, which would entirely repeal the statute; or, by pursuing the spirit of the Act, extend it to all cases. I think the latter is the true construction; for a policy is nothing but a promise. And it would be strange to determine that the party might do the same thing in one form, which the statute expressly prohibited to be done in another.[16]

Grose J. agreed with both his brother judges.

Two years later Grose J. recanted. In *Good v. Elliott*[17] the wager concerned whether before a certain day Susanah Tye had bought a waggon belonging to David Coleman. Having held that such a wager was not void at common law the court had to decide whether the arrangement fell within the Act. Grose and Ashurst JJ. together with Lord Kenyon C.J. held that the Act applied only to insurance policies. Grose J. held that it was only meant to apply to insurance on lives or events in which the assured had no interest. Parliament had not intended to outlaw wagers by calling them insurances. Ashurst J. and Lord Kenyon C.J. both interpreted section 1 by reference to section 2 which only referred to policies.

Buller J., in a forceful dissenting judgement, elaborated his previous reasoning. His view was that the Act not only applied to the form of the wager but to the substance of the wager itself. The case was within the mischief and inconvenience intended to be prevented by the Act. He concluded:

> The construction which I put upon the Act is that it has nothing to do with what in the true sense and meaning of the word is a policy, that is, a mercantile policy made on interest; but that it prohibits all wagers made on any event in which the parties have not an interest.[18]

It is regrettable that Buller J.'s construction of the Act was not adopted and all contracts of wager or gaming thereby invalidated. The interpretation of section 1 continued. In *Paterson v. Powell*[19] the declaration was upon an instrument, whereby, 'in consideration of forty guineas for £100, and according to the rate for every greater or less sum received', the subscribers promised to any person effecting the insurance the sum subscribed by them respectively should certain Brazilian mining shares 'be done at or above £100 per share on or before' a certain date. The court unanimously held that the instrument was an agreement to wager

[15] (1788) 100 E.R. 328.
[16] *Ibid.* 331.
[17] (1790) 100 E.R. 808.
[18] *Ibid.* 812.
[19] (1832) 131 E.R. 635 (Tindal C.J., Gaselee, Bosanquet and Alderson JJ.)

and that as it was in the form of an insurance policy it was rendered null and void by the Act. Buller J.'s interpretation was ignored. The 'or' was taken conjunctively and not disjunctively.

In *Morgan v. Prebrer*[20] there was a wager on the future price of Spanish stocks. The court, having held that time-bargains in foreign securities were not void either at common law or by statute, ruled that the contract was not within the provisions of the Act of 1774. Tindal C.J. said:

> As to the statute of 14 Geo. 3, c. 48, there is no case which has treated a simple wager as within the enactments against wagering policies on lives; and I do not see how a simple wager, unobjectionable upon other grounds, can be said to fall within this statute, when it does not even assume the form of a policy of insurance.[21]

To some extent the legislature dealt with this issue in section 18 of the Gaming Act 1845 (U.K.)[22] which rendered all contracts of gaming or wagering unenforceable. This statute and its successors helped clarify the distinction between gambling contracts and insurance contracts. In *Re London County Commercial Reinsurance Office Limited*[23] the arrangements were in the form of 'p.p.i.' policies whereby the insurer had originally agreed to indemnify the insured against any loss incurred in the event of peace not being declared by a certain date. P. O. Lawrence J. had to decide whether the policies were insurances within section 1 of the Life Assurance Act 1774 (U.K.). He held that they fell within the meaning of insurance as defined by Blackburn J. in *Wilson v. Jones*.[24] On the question of whether these insurances were by way of wagering or gaming P. O. Lawrence J. concluded that they were. They therefore fell within section 1 of the 1774 Act and were null and void. They were wagering and gaming contracts because the insured had no insurable interest.

(3) *The meaning of 'interest' in Section 1*

One of the early cases decided on this point was *Tidswell v. Ankerstein*.[25] Lord Kenyon held that an executor in trust had a sufficient interest to take out an insurance in his own name on the life of a person who had granted an annuity to the testator. The idea in property insurance that a legal or equitable interest is sufficient to prove an insurable interest is well established.[26] In life assurance it is impossible to apply such definitions. By 1830 in *Halford v. Kymer*[27] Lord Tenterden C.J. ruled that the word interest in the statute meant a pecuniary interest. This in effect prevented the father insuring the life of his son without proof of loss. Thus a creditor can insure the life of his debtor to the amount of the debt.[28] Despite some

[20] (1837) 132 E.R. 486 (Tindal C.J., Park and Vaughan JJ.)
[21] *Ibid.* 490
[22] Gaming Act 1848 (U.K.).
[23] [1922] 2 Ch. 67.
[24] (1867) L.R. 2 Ex. 139, 150. 'A contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to.'
[25] (1792) 170 E.R. 130.
[26] *Macaura v. Northern Assurance Co.* [1925] A.C. 69 (H.L.). A lesser interest such as possession or a right of enjoyment may qualify as an *insurable* interest, *e.g. Goulstone v. Royal Insurance Co.* (1858) 175 E.R. 725 (Pollock C.B.); *K. & F. Nurse Pty Ltd v. A.F.G. Insurances Ltd* (1974) 24 F.L.R. 170 (Connor J.).
[27] 109 E.R. 619. See also *Attorney-General v. Murray* [1904] 1 K.B. 165 (C.A.).
[28] *Hebdon v. West* (1863) 122 E.R. 218.

of these restrictive definitions of interest insurers continued to pay out on life policies and as has already been mentioned some forms of life assurance were held to be outside the provisions of the Act.[29] In *Cook v. Field*[30] a promise to assign an expected devise of property upon the death of a certain person was held in a reserved judgment delivered by Lord Campbell C.J. not to be a life policy within the provisions of 14 Geo. 3, c. 42. Even if it were an insurance on life the Court held 'that it was not without an interest'. Although Field had no vested interest, which he could sell, the property of Mrs. Smith,

> [nevertheless] a promise to assign a devise, which he expected, would be a sufficient consideration to support a promise to pay for it, in a contract not under seal; and the purchaser of such an expected devise would have an interest so far as to prevent his policy from being considered the gaming or wagering prohibited by the statute.[31]

The meaning of 'interest' in this context clearly holds problems for life assurance with its principle of pecuniary interest.[32] This has necessitated a redefinition of interest for an individual's own life or that of the spouse. A further problem occurs as to the time at which the insurable interest must be held.

(4) *The time for holding an insurable interest under Section 1*

(i) *At the time of the Event or Loss*

In *Godsall v. Boldero*[33] a creditor of the Rt. Hon. Wm. Pitt, being owed over £1,000, insured the life of the debtor for £500. The debtor died insolvent but the creditor was satisfied to the full amount of the debt out of funds provided by Parliament. In a reserved judgement Lord Ellenborough C.J. held that, whilst the creditor had insufficient interest in the life of his debtor for the purposes of section 1 of the 1774 Act, nevertheless the policy was one of indemnity. As a result the creditor's claim failed because the creditor had suffered no loss at the time of the event.

Despite the ruling which placed life insurance in the same category as indemnity insurance, insurers continued to pay out on life policies where the interest had lapsed at the time of death. The investment nature of life assurance was given effect and recognised as *sui generis* by the Court of Exchequer Chamber in *Dalby v. The India and London Life-Assurance Company*[34] which overruled *Godsall v. Boldero*; although a life assurance may be framed so as to give nothing more than an indemnification.[35]

In fire insurance it is necessary that the insured should show that at the time of the loss he had an insurable interest in the object destroyed.[36] If the insured had no

[29] *Supra* n. 5.
[30] (1850) 15 Q.B. 460.
[31] *Ibid.* 475.
[32] *Carter Bros. v. Renouf* (1962) 111 C.L.R. 140 (H.C.) (partnership); *Carapark Holdings Ltd v. Federal Commissioner of Taxation* (1967) 115 C.L.R. 653 (H.C.) (question whether a holding company has an insurable interest in the life and health of an employee in a subsidiary company referred to but not decided).
[33] (1807) 103 E.R. 500.
[34] (1854) 139 E.R. 465.
[35] *Southern Cross Assurance Co. Ltd v. Australian Provincial Assurance Association Ltd* (1935) 53 C.L.R. 618 (H.C.).
[36] *Lynch v. Dalzell* (1729) 2 E.R. 292 (H.L.); *Sadlers' Co. v. Badcock* (1743) 26 E.R. 733.

interest, he has suffered no loss and is therefore not entitled to an indemnity; although the insurer may waive the requirement of insurable interest and agree to pay an indemnity.[37]

(ii) *At the time of the Contract*

Dalby's case establishes that in the case of life insurance it is sufficient that the insurer has an interest in the life of the insured at the time of the contract.

In fire insurance the view has been expressed that the insured must have an interest both at the time of entering into the contract and at the time of loss.[38] There appears no reason for drawing this distinction between fire insurance and marine insurance which are both contracts of indemnity. The marine rule is clear in that although the insured must have an interest at the time of the loss, he need not have an insurable interest at the date of effecting the insurance.[39] In certain fire insurances where the contract contemplates the substitution of other property in place of that possessed by the insured at the date of effecting the insurance, as for example a shopkeeper insuring his stock-in-trade, the insured is entitled to recover even when the property destroyed was not acquired until after the date of the insurance.[40] In such circumstances the real subject matter of the insurance is the class designated by the description and a change in the identity of individual objects comprising the class does not affect the identity of the class. The insured could be said to have an insurable interest in the subject matter of the class at the date of the contract. A similar principle must apply to insurances taken out by carriers, bailees, warehousemen *etc.* on goods which from time to time come into their hands. Nevertheless this somewhat artificial reasoning should not draw such distinctions between classes of subject matter and specific objects. There is no apparent reason why a future interest in a specific property should not be insurable under a fire insurance policy, whether the interest is in real property to which the 1774 Act possibly applies or personal property to which the 1774 Act does not apply.

(5) *The Meaning of 'Null and Void'*

Arrangements covered by section 1 of the Life Assurance Act 1774 are rendered unenforceable. As to the recovery of premiums Tindal C.J. in *Paterson v. Powell* said:

> The concurrent effect of the decisions is, that if money be paid on an illegal contract to receive a larger sum upon a certain event, the contract is executed when the event takes place, and the money paid cannot be reclaimed.[41]

[37] *Prudential Staff Union v. Hall* [1947] K.B. 685 (Morris J.); *Thomas v. National Farmer's Union Mutual Insurance Society Ltd* [1961] 1 W.L.R. 386 (Diplock J.).

[38] *Sadlers' Co. v. Badcock, supra* n. 36 *per* Lord Hardwicke L.C. 556; *Bank of New South Wales v. North British & Mercantile Insurance Co.* (1881) 2 N.S.W.R. (L.) 239, 244 *per* Martin C.J.; (1882) 3 N.S.W.R. (L.) 60, 70 (*per* Martin C.J.), 77 (*per* Windeyer J.) (Innes J. dissenting); *Davjoyda Estates Pty Ltd v. National Insurance Co. of New Zealand Ltd* (1965) 69 S.R. (N.S.W.) 381, 387-90 *per* Brereton J.; *Truran Earthmovers Pty Ltd v. Norwich Union Fire Insurance Society Ltd* (1976) 17 S.A.S.R. 1 (Bright J.).

[39] Marine Insurance Act 1906 (U.K.) s. 6(1); Marine Insurance Act 1909 (Cth) s. 12(1).

[40] *Joel v. Harvey* (1857) 5 W.R. 488 (Crompton J.).

[41] (1832) 131 E.R. 635; *cf.* Merkin, *op. cit.* 353-9.

Similarly the amount insured cannot be recovered.[42] If an insurer chooses not to avail itself of the defence under the section and pays under the policy the question as to who is entitled to the money is to be determined as if the statute did not exist.[43]

(6) *The Meaning of 'Any Other Event or Events Whatsoever'*

Whilst the long title to the Life Assurance Act 1774 refers only to 'insurances upon lives', both the preamble and the operative words in section 1 refer to 'other events'. The section has been held to apply to contracts upon the sex of a person[44] and on the sum to be collected by way of private revenue.[45] In *Williams v. Baltic Insurance Association of London Ltd*[46] it was argued that a third party risks clause within a comprehensive motor vehicle policy fell within the ambit of the Act insofar as the interest affected was not that of the owner who held the policy. Roche J. rejected this argument and held that the Life Assurance Act 1774 did not apply in this case because the accident cover was incidental to the cover on the vehicle itself, which was an insurance on goods under section 4, and thereby excluded from the operation of the Act. Third party insurance cover is now dealt with by statutory provisions which exclude the operation of the Life Assurance Act 1774.[47] In *Prudential Staff Union v. Hall*[48] Morris J. held that in an insurance policy covering burglary and housebreaking, where money had been stolen, that money could be defined as 'goods' within section 4 of the Act and therefore the policy was outside the operation of the Act. The section might still be applicable to a third party risks insurance which is not incidental to cover on items excluded by operations of section 4 or the statutory provisions.[49]

Although the wording of the Act is sufficiently wide to include fire insurance contracts on real property within its provisions, there is no direct English authority bringing such insurances within the provisions of section 1. Even if section 1 were to include fire insurances within the definition of 'other events' two factors render the section redundant in all cases of fire insurance on real property:

(i) Under a policy of fire insurance the insured must have an insurable interest in the real property being the subject-matter of the contract. This rule had been

[42] *In re London County Commercial Reinsurance Office* [1922] 2 Ch. 67, 80-1 *per* P.O. Lawrence J. *cf.* at 85 (marine insurance).

[43] *Worthington v. Curtis* (1875) 1 Ch.D. 419, 424-5 (C.A.); *Attorney-General v. Murray* [1904] 1 K.B. 165, 172 (C.A.); *Carter v. Renouf* (1962) 111 C.L.R. 140, 167 (H.C.).

[44] *Roebuck v. Hammerton* (1778) 98 E.R. 1335.

[45] *Atherton v. Beard* (1778) 100 E.R. 328.

[46] [1924] 2 Q.B. 282.

[47] *Tattersall v. Drysdale* [1935] 2 K.B. 174 (Goddard J. held that the provisions of s. 36(4) of the Road Traffic Act 1930 (U.K.) excluded the operation of the Life Assurance Act 1774 (U.K.) (now s. 148(4) of the Road Traffic Act 1972 (U.K.) as amended by s. 61 of the Transport Act 1980 (U.K.)). Similar provisions are found in the Australian jurisdictions: A.C.T. Motor Vehicles Ordinance 1949-1959, s. 52(8) (as amended); Qld Motor Vehicles Insurance Act 1936-1979, s. 3(3); N.S.W. Motor Vehicles (Third Party Insurance) Act 1942, s. 10(7) (as amended); S.A. Road Traffic Act 1934, s. 70(3) (as amended); Tas. Traffic Act 1925, s. 64(3) (as amended); Vic. Motor Car Act 1958, s. 46(3) (as amended); W.A. Motor Vehicle (Third Party Insurance) Act 1943, s. 7 (as amended).

[48] [1947] K.B. 685 (Morris J.).

[49] *Cf. New Zealand Insurance Co. Ltd v. Tyneside Pty Ltd* [1917] N.Z.L.R. 569 (C.A.) discussed *infra*.

established in *Sadler's Co. v. Badcock*[50] in 1743 before the passing of the Act. This fact adds weight to the argument that the Act does not apply to fire insurance policies as the mischief of no interest had been cured already by the courts. This approach formed part of the Court of Appeal's reasoning in *Griffiths v. Fleming*,[51] when it held that a husband's insurance of his wife's life was not within the provisions of the Act.

(ii) By definition fire insurances are not contracts on events by way of gaming or wagering insofar as an insurable interest on the part of the insured is required.[52]

The point may also be taken that in *Dalby v. The India and London Life-Assurance Co.*[53] in the reserved judgment of the Court of Exchequer Chamber delivered by Parke B. there is an underlying assumption that fire insurance is not within the provision of the 1774 Act. He said:

> Policies of assurance against fire and against marine risks, are both properly contracts of indemnity, — the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects.[54]

The ruling in *Dalby's* case was that the insurable interest in life insurance need only be held by the insurer at the time of effecting the policy unlike the requirement in fire insurance that the date of the loss is essentially tied to the insurable interest. However a distinction might be drawn as to the time for holding the interest as between 'the life or lives of any person or persons' and 'on any other event or events whatsoever'.

Section 2

The wording of this section differs from that of the preceding section insofar as it only applies to policies. Two different interpretations may be made of section 2.

(i) It can be read as an independent provision having nothing to do with gambling or insuraces effected by persons without an insurable interest but affirmatively providing that it shall not be lawful to enter into a policy, even though the insurers have an insurable interest, unless the name or names of the person or persons interested therein or for whose use or benefit the policy is made, are inserted in the policy.

(ii) Alternatively it may be read as a supplementary or policing provision to section 1. This interpretation would mean that in a policy made by a person without an insurable interest (and thus *prima facie* a gambling policy) but in fact for and on behalf of a person or persons with an insurable interest, the name or names of all persons interested therein must be inserted in the policy.

The cases falling under section 2 are divided in their support for the two interpretations.

50 26 E.R. 733.
51 [1909] 1 K.B. 805.
52 *Macaura v. Northern Assurance Co.* [1925] A.C. 619 (H.L.). The requirement of insurable interest may be waived where the insurance is not by way of gaming or wagering, see *supra* n. 37.
53 (1854) 139 E.R. 465.
54 *Ibid.* 474.

(1) *The Requirements of Section 2*

In *Shilling v. The Accidental Death Insurance Company*[55] the reasoning of the court assumed that the 1774 Act was intended to prohibit one man effecting a policy on the life of another not having an interest in such life and that section 2 should be applied with that in mind. In similar vein is the Divisional Court's decision in *Forgan v. Pearl Life Assurance Co.*,[56] where section 2 requirements are interpreted in the light of the general policy of the Act to prevent people having an interest in destroying the life of another. Both these decisions can be said to support the second interpretation of a policing provision.

In favour of the first interpretation is *Hodson v. The Observer Life Assurance Company*.[57] The Court of Queen's Bench held that section 2 applied to all policies on lives whether *bona fide* or whether by way of gaming or wagering policies. Similarly in *Evans v. Bignold*[58] the omission of the name of the plaintiff's wife as the person interested in a life insurance policy was fatal to the plaintiff's claim on the policy. The Court of Queen's Bench made no reference to the general policy of the Act but regarded section 2 as standing on its own. Also in favour of the first interpretation is the different wording of section 2 and the fact that it is only arrangements in the form of policies that fall within the section.[59]

(2) *The Assignment of Policies*

In like fashion the cases concerning the assignment of policies are inconclusive in assisting with the general problem of the interpretative approach to be taken to section 2. In *Ashley v. Ashley*[60] Shadwell V-C. held that an assignment of a policy was not covered by the provision because there was no word about the assignment of policies in the statute. This approach would suggest that section 2 stood on its own. The first interpretation being favoured by such an approach.

In *Collet v. Morrison*[61] Turner V-C. took a wider view of the statute. He held that the 1774 Act did not prohibit a policy of life insurance from being granted to one person in trust for another where the names of both persons appear upon the face of the instrument as such an arrangement in no way contravened the policy of the statute. It is obvious that by an assignment the provision of section 2 could easily be circumvented by someone taking out a policy apparently for the benefit of the person interested and then assigning the benefit of the policy to himself. This device was proscribed by Pollock B. and Cave J. in *M'Farlane v. Royal London Friendly Society*.[62] Although in argument Pollock B. had pointed out that creditors' policies were never in the name of the creditor he said:

55 (1855) 157 E.R. 18 (Pollock C.B., Martin, Bramwell and Channell BB.).
56 (1907) 51 *Solictors Journal* 230 (Darling and Phillimore JJ.).
57 (1857) 120 E.R. 15.
58 (1869) L.R. 4 Q.B. 622.
59 *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q.B. 484, 493 *per* Hawkins J.
60 (1829) 57 E.R. 955 ('It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, as to bring an action in his name for the sum insured').
61 68 E.R. 458.
62 (1886) 2 T.L.R. 755.

> If *ab initio* the policy effected in the name of A is really and substantially intended for the benefit of B and B only, and that is kept back, a different state of facts is presented, and other considerations arise. That is within the evil and mischief intended to be met by the statute.[63]

This approach puts section 2 in the context of the statute as a whole and argues for a policing interpretation.

(3) *The meaning of 'other event or events' in section 2*

All the English cases which have fallen foul of section 2 have been on life insurances. If the second interpretation of section 2 as a policing provision is correct then 'other event or events' should carry the same meaning as in section 1. If the first interpretation of a completely separate and independent provision is correct then a different interpretation of the words 'other event or events' is permissible. This could mean that fire insurance on real property is within the provisions of section 2 although not within section 1. There is limited authority for this view in an *obiter dictum* contained in a dissenting judgment of Lord Denning M.R. in *Re King*,[64] when he said:

> You must remember that when you take out a policy of fire insurance of a building (as distinct from goods), you must insert in the policy the names of all the persons interested therein, or for whose use or benefit it is made. No person can recover thereon unless he is named therein, and then only to the extent of his interest. That is clear from the Life Assurance Act, 1774 (14 Geo. 3, c. 48), ss. 2, 3 and 4, which by its very terms applies to 'any other event' as well as life.

One could add that, by an application of the maxim *expressio unius exclusio alterius*, the specific mention of goods in section 4 excludes buildings from that section and brings the destruction or damaging of buildings within 'other event or events' of the other sections of the Act.

Limited support for this view may be found in the New Zealand Court of Appeal's decision in *New Zealand Insurance Co. Ltd v. Tyneside Pty Ltd.*[65] The case turned on whether the failure to insert the names of employees in an employer's policy indemnifying him against claims by employees fell within the provisions of the 1774 Act. The Court held that the Act had no application to the employer's liability indemnification policy because the accident was not an event within the Act. This was because this type of indemnity policy was unknown to the law when the Act was passed and not within the mischief of the Act.[66] Denniston and Chapman JJ. pointed out that the Act has been treated as extending to policies relating to property,[67] although they cited no authority for this. They also said that the policy under consideration differed essentially from a fire policy where there was a temptation to destroy over insured property.[68] The implication is that the Act does not apply to fire insurance on buildings.

Some support for this view also may be found in the rule that fire insurance policies cannot be assigned except with the express consent of the insurers. The

63 *Ibid.* 756.
64 [1963] Ch. 459, 485.
65 [1917] N.Z.L.R. 569.
66 *Ibid.* 579 *per* Stout C.J., Cooper J. concurring at 587.
67 *Ibid.* 582, Cooper J. concurring at 587.
68 *Ibid.* 583.

mischief covered by this rule was known before the passing of the 1774 Act. It appears in the arguments of the counsel for the successful respondents before the House of Lords in *Lynch v. Dalzell*.[69] Willes and Hamilton said:

> That the transactions in the present case, by changing the property backwards and forwards, and rendering it uncertain whose the true property was, manifestly showed a designed imposition, and fully justified the caution which the office had taken to prevent the policies from being assignable, without the special consent and concurrence of the managers; which method is pursued by all the insurance-offices, who are equally strict and careful in this respect.[70]

Their final argument pointed to a difficulty which overlaps section 3 of the 1774 Act. They said:

> Lastly, that the appellants' claim was at best founded only upon an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened.[71]

Section 3

Unlike section 2, section 3 is clearly related to the preceding section or sections insofar as the wording refers to '*such* life or lives, event or events'. No greater sum may be recovered from the insurers than the value of the assured's interest in the life or event insured. Bunyon suggested that three constructions of this section are possible.[72]

(i) No greater amount shall be recovered than the value of the interest at the time which the policy is entered into.

(ii) No greater amount shall be recovered than the value of the interest on the happening of the event.

(iii) The interest is required to be the same at both the date of the policy and the happening of the event.

Hardy Ivamy suggests that in considering section 3 the same conclusion must be put on fire insurance if covered by the Act as on life insurance.[73] This is not necessarily so as the 'interest' in a life may differ from the 'interest' in 'event or events' within the Act. Thus as we have seen already in *Dalby's* case the interest need only be at the time of the policy. Moreover there is something to be said for the view that, despite the clear wording of the Act, the Act should not apply to many life insurances insofar as a life is incapable in many instances of the monetary valuation that seems to be implied in section 3.[74]

One problem in section 3 is to determine to what preceding sections of the Act the word 'such' refers. If 'such' in section 3 refers to the situation covered by section 2, a contradiction arises. If a policy falls within section 2 it would be 'unlawful' and yet section 3 contemplates that an action be maintained in order to

69 (1729) 2 E.R. 292.
70 *Ibid.* 295.
71 *Ibid.*
72 Bunyon, *op. cit.* 28.
73 Hardy Ivamy, *op. cit.* 180-1.
74 For discussion of the issues in relation to life assurance see Merkin, *op. cit.* 340-53.

recover the limited amount mentioned in that section. It would appear from this that section 3 relates to insurances which do not fall foul of section 1. Further this can be supported by the fact that section 3 refers to 'interest' as does section 1.

With reference to fire insurances on buildings, as in the case of section 1, section 3 appears to be redundant. The rules relating to the amount recoverable under fire insurance on buildings and the interest necessary to maintain an action have developed without consideration of the Life Assurance Act. A fire insurance contract is clearly a contract of indemnity.[75] Under an indemnity the insured is only able to recover the actual value of the property damage or loss which has occurred irrespective of the amount stipulated in the policy.[76] The rules relating to subrogation and double-insurance re-emphasise this principle. It would appear section 3 points to a principle of indemnity which has caused difficulty in life assurance, but which is well established in relation to fire insurance on buildings, under rules which have developed independently of the 1774 Act.

Assuming that the 1774 Act does apply to fire insurances the statutory language could be interpreted as requiring that the insured proves not only an insurable interest but also its value. If this interpretation were correct, it would appear that any agreement between the parties such as a 'valued policy', dispensing with proof of the value of the interest would be invalid. However the mischief against which the statute is directed is that of insurance without interest. The legality of the insurance depends on the interest not its value. The effect of the valuation is to dispense with the proof of actual value and as it would be competent for the insurers to admit the value at trial, it would appear such an interpretation is incorrect. It may be concluded that a 'valued policy' of fire insurance on buildings is lawful provided that the valuation is a *bona fide* estimate of the value of the interest of the insured.[77] If the estimate is not *bona fide* then the policy may be a gambling policy and as such be unenforceable.[78]

Australia

The Act appears to be in force throughout Australia, subject to State legislation repealing and re-enacting it as has occurred in Victoria and New South Wales. Only in the latter State is there distinct wording of significance. The position may be elaborated as follows.

In *Griffith v. Montefiore*[79] in 1855, it was assumed by A'Beckett C.J. in the Victorian Supreme Court that the Act was in force. A husband had claimed on a fire policy taken out by him. The defendant pleaded that the plaintiff had no interest in the property because it was really his wife's property by succession. The

[75] *Castellian v. Preston* (1883) 11 Q.B.D. 380 (C.A.); *British Traders' Insurance Co. Ltd v. Monson* (1964) 111 C.L.R. 86 (H.C.).

[76] There is an exception in the case of 'valued policies' where the liability of the insurer is to pay the agreed value, or part thereof in relation to partial loss. However even such policies may be regarded as indemnities; see *Maurice v. Goldsbrough Mort & Co.* [1939] A.C. 452, 466-7 *per* Lord Wright (P.C.).

[77] *Lewis v. Rucker* (1761) 97 E.R. 769 (marine) (Lord Eldon) (H.L.).

[78] *Lucena v. Craufurd* (1806) 127 E.R. 630, 651, *per* Lord Eldon (H.L.).

[79] (1855) 1 V.L.T. 36.

Court held that the plaintiff had a sufficient interest. Specific legislation was passed in Victoria in 1864. In *Horden v. Federal Mutual Insurance Co.*[80] in 1924, the New South Wales Full Court, whilst not needing to decide the issue directly, stated that the requirements of the Life Assurance Act had been complied with if indeed the Act was applicable to fire insurances on buildings.[81] A similar assumption was made by Menzies J. in the High Court in *British Traders' Insurance Co. Ltd v. Monson*[82] with regard to Tasmania in 1964. In *Davjoyda Estates Pty Ltd v. National Insurance Co. of New Zealand Ltd*[83] the Full Court of New South Wales was required to rule in 1965, directly on the application of the Life Assurance Act 1774. The assumption was made that it was in force in New South Wales and that it applied to fire insurances on real property.[84]

The Law in Victoria

In 1864 the Instruments and Securities Act repealed the 1774 Act and re-enacted it in almost identical terms. The present legislation is to be found in the 1958 Consolidation and the same wording is in sections 21 to 24 of the Instruments Act 1958 (Vic.) being the equivalent to sections 1-4 of the 1774 Act.[85] The position in Victoria therefore appears no different from that which pertained in New South Wales prior to the passing of that State's Imperial Acts Application Act in 1969.

The Law in New South Wales

Section 5(2) and the First Schedule of the Imperial Acts Application Act 1969 (N.S.W.)[86] repeals the Life Assurance Act 1774 so far as it applies in New South Wales. Section 23 of the same act substitutes similar provisions to the 1774 Act except that section 23(4) reads as follows:

> Nothing in this Division shall extend to insurance made by any person on ships or goods, or to contracts of indemnity against loss by fire or loss by other events whatsoever.

The question of applicability of the 1774 Act to fire insurance on real property is accordingly no longer in doubt in New South Wales.

The Law in the Other States

The position in other states is similar to that in New South Wales prior to the 1969 Act. It is therefore necessary to consider the position in New South Wales

80 (1924) 24 S.R. (N.S.W.) 267.

81 *Ibid.* 274 *per* Campbell J. in a reserved judgment delivered on behalf of the court (Ferguson and James JJ.).

82 (1964) 111 C.L.R. 86, 98-9 (on appeal from Tasmania).

83 (1965) 69 S.R. (N.S.W.) 381.

84 *Ibid.* 394-8. Brereton J. accepted the Act applied at 413-4; Walsh J. left the matter unresolved as to whether the Act applied to fire insurance on buildings; Manning J. at 423-8 said that there was much to be said for the view that the Act does apply to fire insurance policies.

85 Act No. 6279 of 1958 (Vic.). The provisions do not apply to a policy of fire insurance on a chattel mortgage, see *Johnson v. Union Fire Insurance Co. of New Zealand* (1884) 10 V.L.R. (L.) 154. The current division is headed 'Life and Other Policies'.

86 Act No. 30 of 1969 (N.S.W.).

prior to the enactment of the Imperial Acts Application Act 1969, as was done by that State's Full Court decision in *Davjoyda Estates Pty Ltd v. National Insurance Co. of New Zealand.*[87]

In *Davjoyda's* case, Davjoyda Estates Pty Ltd (hereinafter D) had entered into a contract for the purchase of a building. D was in fact agent for Mortgage Development Corporation Ltd (hereinafter M.D.C.), the undisclosed principal in the purchase. D obtained a cover note in its own name. M.D.C.'s name was never inserted in any policy of fire insurance. Nevertheless the evidence showed that M.D.C.'s interest had been orally notified to the insurers, the insurers looked to M.D.C. for premiums and it was more likely than not the insurer's fault that M.D.C.'s name was not inserted. Before final completion a fire occurred causing damage to the building. At the time of the fire the vendor had a subsisting policy issued by another insurer indemnifying the vendor in case of damage by fire. D's insurance contained a contribution clause to operate in the event of double insurance. D's insurers denied liability on the claim made on the cover note. Notwithstanding any effects of the 1774 Act the court ruled that the equitable title to the property passed to the purchaser at the date of the contract even though the contract might not be specifically enforceable. The building was at the purchaser's risk at the date of the fire. Further the court held that at all material times D had an insurable interest in the property. The insurable interest consisted of the legal interest held by D as trustee and the interest held in trust for M.D.C. D could recover as trustee and agent in respect of any loss suffered by M.D.C. to its equitable interest in the building.

Their Honours took different approaches to the application of the Life Assurance Act 1774 (U.K.) to the facts before them. They were all agreed that the Act of 1774 did not require the name of M.D.C. to be inserted and the insurance was not rendered unlawful by the Act. Brereton J. said that D had insured the legal interest in the building and could sue directly on the insurance. He said:

> I can see no reason for so construing the *Life Assurance Acts* as to require the naming of all persons, who will benefit because one person by insuring in respect of his own interest has provided for compensation or reinstatement in the event of damage by fire. Reinstatement may inevitably be to the benefit of others than the named insured — for instance, tenants.[88]

His Honour further considered that the wording of the Act required a written document and that as the contract on the facts before him was partly oral and partly written the provision of the Act did not apply. Alternatively if this view were wrong M.D.C.'s name had been orally inserted because the insurer knew it and as it was erroneously omitted by the insurers and equity would rectify it. The insurer was not permitted to rely upon his own error.[89]

Walsh J. held that the wording of the Act could not be given its natural meaning. In discovering the 'true intent and meaning' with reference to the mischief his Honour simply ruled that the Act did not apply on the facts before him.[90]

87 (1965) 69 S.R. (N.S.W.) 381.
88 *Ibid.* 396.
89 *Ibid.* 395-8.
90 *Ibid.* 413-5.

Manning J. made an extensive historical examination of the Act. His Honour concluded that the Act only applied to fire insurances in which the insured had no insurable interest, that is to say a gambling policy. It did not apply to insurances which were true contracts of indemnity against loss by fire. He stated that section 2 was to be interpreted so as to do no more than supplement the provisions contained in section 1. The Act did not therefore apply on the facts.[91]

With deference, it is suggested that the approach of Manning J. is the correct one. The Act does not apply to a fire insurance on a building where the insurer agrees to indemnify the insured for any loss or damage when the insured has an insurable interest in the subject matter of the insurance. This is a clear principle of fire insurance law and stands on its own in the absence of the 1774 Act. The Act may be considered irrelevant to any enforceable contract of fire insurance on buildings within the various Australian jurisdictions.

Conclusion

There are clear reasons why the Life Assurance Act 1774 does not apply to fire insurances on buildings either in England or Australia.

(1) Section 1 of the Act has no relevance to fire insurance insofar as an interest is clearly required at common law to be held by the insured in the subject matter of the insurance and the same was required at the time of the enactment.
(2) If section 2 is a policing provision for section 1 it should apply to the limited section 1 situations and not to fire insurance on buildings.
(3) Section 3 clearly relates to the preceding sections. Like section 1 it is irrelevant to fire insurance insofar as the accepted principle is that fire insurance is a contract of indemnity and an insured suing on a fire insurance can recover no greater sum then the value of the interest either directly to himself or as a trustee for the interests of others.
(4) If section 2 is an independent provision, *sui generis*, then it could be used by insurers to avoid *bona fide* policies in many instances. In practice in the case of joint ownership of buildings, fire insurance policies are often drawn up in the name of one party without any mention of other parties or their interests. This seems to cause no difficulties and the silence of both insurers and the courts in this matter is not without significance.[92]
(5) Should any doubts remain as to the applicability of the Act to fire insurance on buildings, legislation in the form of section 23(4) of the Imperial Acts Application Act 1969 (N.S.W.) should provide an effective antidote.
(6) The Act could be repealed in its entirety without causing any noticeable difference in the operations of the insurance industry either in life or other forms of insurance.[93]

[91] *Ibid.* 423-8.

[92] Insurers can protect themselves by insertion of a statement to the effect that no other person is interested.

[93] See also *Australian Law Reform Commission Discussion Paper No. 7 'Insurance Contracts'* (1978) paras 25-6; *Australian Law Reform No. 20 'Insurance Contracts'* (1982) paras 117 & 143; Birds, *loc. cit.*