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Insurance -- Recovery of Attorney's Fees in Suit to Enforce Policy

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Insurance -- Recovery of Attorney's Fees in Suit to Enforce Policy, 7 U. Miami L. Rev. 122 (1952)
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accord that, while the verdict will not be upset, the remarks are improper and should be excluded from the trial record.\(^1\)

The three justices dissenting in the instant case\(^2\) pointed out that the jury has a right to recommend, or decline to recommend, mercy with or without any reason, and is entitled to know whether a life sentence really means that the defendant will serve for life. An earlier case,\(^3\) in which the same circumstances were before the court, resulted in the conviction being upheld. The majority opinion cites this case as being not contrary to the decision here. They do not, however, attempt to distinguish the two, and a distinction is not apparent. A long line of Georgia decisions\(^4\) has upheld convictions in cases where the solicitor general has remarked to the jury concerning the parole law. Some of the remarks have been highly prejudicial.\(^5\) This was probably\(^6\) the first direct holding in Georgia that it constitutes reversible error for the court to instruct the jury on the function of the parole board.

It is submitted that this is one of the elements to be considered by the jury.\(^7\) When the court so informs them, it is merely charging the law.\(^8\) All the cases in which this question is presented involve heinous crimes. It is evident that the jury, while willing to extend mercy and thus prevent capital punishment, desire assurance that the defendant will not be turned loose upon society. This is a meritorious consideration in determining, once guilt has been established, whether a recommendation should be made.

\section*{INSURANCE--RECOVERY OF ATTORNEY'S FEES IN SUIT TO ENFORCE POLICY}

Plaintiff beneficiary, having successfully sued the defendant for disability benefits on a foreign life insurance policy, claimed reasonable attor-

\begin{itemize}
  \item 12. Wechter v. People, 53 Colo. 89, 124 Pac. 183 (1912); State v. Junkins, 147 Iowa 588, 126 N.W. 689 (1910).
  \item 15. McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949); Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943); Thornton v. State, 190 Ga. 783, 10 S.E.2d 746 (1940);
  \item 16. McLendon v. State, 205 Ga. 55, 52 S.E.2d 294, 299 (1949) ("If you give the defendant a life sentence, his lawyers and some politicians will get him out of jail, and have him walking the streets in a few years"); White v. State, 177 Ga. 115, 169 S.E. 499, 504 (1933) ("... it means that after three years this defendant has a right to ask for a parole by going over with a sob sister from the interracial commission.").
  \item 17. But see Thompson v. State, 203 Ga. 416, 47 S.E.2d 54 (1948) (Trial judge answered jury that the parole law is changed so often, he didn’t know what it was at the moment. In reversing, the court said in effect that the jury was instructed that next week, next month or next year defendant might be released).
\end{itemize}
ny’s fees as provided for by Florida statute. Such fees were not recoverable in the state where the contract was executed. Held, the statute is procedural and applies to Florida suits on insurance contracts made anywhere. Feller v. Equitable Life Assur. Soc’y of the United States, 57 So.2d 581 (Fla. 1952).

Statutes penalizing insurance companies for failure to pay claims within a specified time or for refusal to pay until brought to judgment are invoked under the police power of a state in the regulation of a business affected with a public interest. The penalties imposed are either a percentage of the amount recovered or a sum equal to reasonable attorney’s fees, or both, the purpose being to discourage insurers from delaying payments or contesting claims and to reimburse beneficiaries who are forced to sue for benefits to which they are entitled.

Such statutes have long been held constitutional when applied to local contracts, locally enforced. But when a penalty statute is applied in an action on a foreign contract, made in a state where such penalty does not attach, the question arises as to whether such application contravenes the full faith and credit clause of the Federal Constitution.

The case controlling this problem has been Aetna Life Ins. Co. v. Dunken, concerning an action on a foreign contract by a Texas citizen in a local court, wherein the United States Supreme Court held that since the law of Tennessee, where the contract was made, entered into and became part of the contract, the Texas penalty statute could not be constitutionally applied. The instant case is distinguished by the majority opinion from the Dunken case on the ground that the Texas statute was intended to

1. Fla. Stat. § 625.08 (1951) (reasonable attorney’s fees are to be included in any decree or judgment in any Florida court in favor of a beneficiary against the insurer).
8. E.g., Life & Cas. Ins. Co. of Tennessee v. McClary, 291 U.S. 566 (1934) (Arkansas statute allowing twelve per cent penalty plus attorney’s fees was not a violation of the due process or equal protection clauses); Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129 (1921) (Missouri statute imposing damages up to ten per cent of amount of loss and reasonable attorney’s fees was not a violation of the Fourteenth Amendment); Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123 (1914) (Texas statute allowing twelve per cent damages plus reasonable attorney’s fees, not a violation of the Constitution); Farmers’ & Merchants’ Ins. Co. v. Dobney, 189 U.S. 301 (1903) (Nebraska statute allowing attorney’s fees upon judgment against insurer, not a violation of the equal protection clause).
10. 266 U.S. 389 (1924).
11. Tennessee Code § 6434 (1919) (penalty for refusal to pay within specified period, if in good faith, did not include attorney’s fees).
create a substantive right in the beneficiary by becoming part of every local contract, whereas the Florida statute is procedural, applicable only to suits in Florida courts. Just how this distinction bears on the ultimate issue is open to question, because state characterization of its own statute as substantive or procedural for conflict of laws purposes does not bind the federal courts on the question of constitutionality. If the effect of its application is to give the *lex fori* unwarranted control over foreign contracts in disregard of the *lex loci contractus*, the statute may be deemed unconstitutional when used in that manner. Some control is tolerated, depending on the forum's interest in the subject matter of the contract, but the mere fact that one of the litigants is a citizen of that state, as in the instant case, does not constitute sufficient interest to warrant such extraterritorial power.

It becomes apparent then, that characterization by the state court of the Florida penalty statute as procedural does not circumvent the rule in the *Dunken* case on the basis that the Texas statute was substantive, because the effect in both instances is exactly the same—the foreign insurer would be subjected to forum penalties which were not assessable in the state where the contract was executed. Thus, agreeing with the dissent, it is submitted that the holding in the instant case is directly opposed to the prevailing rule as set forth in the *Dunken* case.

SALES — LITERARY PROPERTY — IMPLIED WARRANTY

Plaintiff, purchaser of all rights in a story, sued for alleged breach of an express warranty of marketability of title after notice that a third party was claiming a portion of the proceeds of the sale. *Held,* that despite the use of the words "complete," "unconditional" and "unencumbered," describing the title, an express warranty was not created and a warranty of

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14. Ibid.
18. Id. at 149.
19. *Feller v. Equitable Life Assur. Soc'y of the United States*, 57 So.2d 581, 587 (Fla. 1952) (referring to *Aetna v. Dunken*, Thomas J., dissenting, said, "We are in no position to disagree when the Supreme Court of the United States has spoken on a matter involving the interpretation and application of the Constitution of the United States.").
20. Cf., *Mutual Ben. Health & Acc. Ass'n v. Bowman*, 96 F.2d 7, 10 (8th Cir. 1938) (where the court said, "While there are facts in this case not like those in *Aetna v. Dunken*, [cit. omitted], yet that case is controlling here because the facts leave no doubt that this policy is a contract made in New Mexico and, therefore not subject to the Nebraska statute allowing attorney's fees."