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THE FRAUDULENT TRANSFER OF LIFE INSURANCE POLICIES

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"But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel." ¹

Of all the topics in the field involving creditors' relationships with the insured and his life insurance, the one involving the fraudulent transfer of life insurance policies is one of the most interesting. There is no other subject where the problem is so elemental, the solutions so varied, the court so adept in the creation of diverse concepts. One of the primary reasons for this diversity, and important in the choice of these various concepts is the manner in which the problem is presented to the court. It is true that the question arises from a relatively simple factual situation—wherein *X*, an insolvent who is carrying insurance on his life for the benefit of his estate, voluntarily designates a named beneficiary, *Y*. But the particular circumstances of each case differ widely. Thus, the issue may arise while *X* and *Y* are still alive, or after *X* has died. Furthermore, the existence of any one or more of several additional factors may be involved, and may in some way influence or determine the result. For example, the policy may or may not have any cash value at transfer; *Y* may or may not be *X*'s wife; the local code may contain some form of Verplanck Act;² the transfer may have been made by designating *Y* as beneficiary and *X* may have retained the power to cancel that designation; he may have transferred a "vested" interest, or he could have "assigned" the policy to *Y*. Still

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1. HOLY BIBLE, 1 Timothy, V:8, quoted by Perkins, J., in *Foster, Assignee v. Brown*, 65 Ind. 234, 238 (1879).

2. This designation refers to some form of insurance protective statute which follows the pattern of the original New York Act of 1840. N. Y. Laws 1840, c. 80, p. 59.

further, the problem may be presented to the court under somewhat different facts: *X* may have "taken out" the policy while insolvent and designated a beneficiary at the initiation of the contract; or the transfer may have been made by the beneficiary, or some other person who had some transferable interest in an insurance policy on another's life.

That the presence or absence of one or more of these factors in the given case might radically alter the answer given by a court may not be denied. But that alone is not responsible for all the concepts which have been judicially created. Basically this problem remains: what is "insurance" for the purpose of fraudulent conveyance law? What "part" of it may be "transferred"? What is the "asset" which passes hands? There is nothing in the Hohfeldian scheme which would, if carefully applied to the present pattern, determine the inevitable and accurate result. The respective rights, powers, liabilities, immunities, etc. can be ascertained only when judicial decisions have, by passing on many cases, created a pattern from which we may deduce that so and so has such and such a power or immunity. But this re-statement of judicial judgments will not help anyone in reaching the original decisions. Hohfeld's scheme, like formal logic, will not work unless you know the correct content of the definitions. So, in considering the problem at hand, it is necessary to concentrate on the life insurance contract as it is in the insurance business, on its economic relationship to the general community, on its history, and on past judicial behavior in attempting to reach the correct solution of a problem presented in a given set of facts.

I. TRANSFER BY THE INSURED OF HIS INTEREST

1. *Rights of Creditors During X's Life*

Generally, where *X*, while insolvent, transfers a policy for no consideration, his creditors are allowed to petition the court to have the transfer set aside as a fraudulent conveyance. From this basic proposition, however, develops the question of the extent of recovery to which the petitioners are entitled. One answer was given in *Del Valle v. Hyland*,³ where it was held that in the absence of a substantial cash equity, *X's* creditors could not recover. It is highly questionable, however, whether the creditor's relief should be measured by the amount of the cash value in every such case arising during *X's* life. True, for ordinary business purposes, the value of a policy is deemed its cash equity. And that conception has been written into the Bankruptcy Act.⁴ But the latter was done, admittedly, to reserve something of

3. 76 Hun 493, 27 N. Y. Supp. 1059 (1st Dep't 1894).

4. 30 STAT. 565 (1898), 11 U. S. C. A. § 110 (1934).

value to the bankrupt. In addition, the ordinary prudent business man will not loan more than the cash equity of the policies he is taking as collateral, assuming he will loan even that amount. Apart from that, if *X* owes *A* \$1,000, *A*, if he is looking for immediate payment, will not accept in full payment policies whose cash value is less than \$1,000. But that is because *A*, wanting payment at once, desires to cancel the policies for their then payable value.

It does not follow, however, that the cash value is the sole measure of what a policy is worth. We know differently. Clearly, if the face value of the contracts were \$25,000 and *X* had Hodgkin's disease, the value of the policies, even if they had no "equity", would equal nearly \$25,000 by discounting the sum only for the probable short period of *X*'s term of life which any doctor could, with reasonable accuracy, predict. Thus it is a truism well to bear in mind that the "value" of a policy may be different for different purposes. At any time it has at least two values: its cash value, and the probable present value of the company's agreement to pay the face amount on *X*'s death. The former is usually fixed by the contract itself. The latter depends on a knowledge of factors affecting *X*'s term of life, as yet a subject which in the ordinary case will not permit of prediction with any assurance of accuracy even within broad limits. Nevertheless, the fact that a policy does have such a value, albeit indefinite and undefined, should be given due significance in solving these problems.

So, if creditors should bring an action to set aside a transfer of *X*'s insurance made for no consideration, a decision adverse to them based solely on the absence of cash value at the time of transfer would be incorrect from any consideration of the insurance contract as a function of the insurance business. Viewing that relationship accurately, the court should permit, and even require, the introduction of such evidence as is available which might cast any light on the probable length of *X*'s future term of life. Each case would then be solved in accordance with the evidence adduced. But each solution would start with a judgment in favor of the creditor setting aside the transfer. The remaining interests of the parties could then be simply arranged. If the creditor so elected, he could be named the beneficiary and be given a complete ownership of the policy, subject to certain conditions. Thus, he would be required to promise to keep the policy alive by paying premiums. On *X*'s death the creditor would be permitted to collect his claim plus the amounts he expended for premiums, with legal interest. The balance, however, should go to the beneficiary *X* originally designated, for that designation is valid except as it may have violated the rights of *X*'s creditors. Another solution that suggests itself is to permit the designation of *Y* as beneficiary to stand, subject to the

recordation with the company of the creditor's judgment as the measure of his lien. *Y* would be required to pay premiums, but on *X*'s death, the creditor would be paid and his liens discharged. On the other hand, if *Y* has paid so much in premiums that the proceeds of the policy are not sufficient to pay both claims, then *Y*'s claim should in all fairness be discharged first. The judgment should of course always remain open, subject to amendment and change if the conditions of the parties so require.

The former result—whereby the amount paid by the insurance company is applied to the payment of the creditors' claims—obtained in *Reynolds v. Aetna Life Insurance Co.*⁵ And this conclusion was reached despite the contention of the defendants that the creditors were entitled only to the cash value as of the time of the appointment of the receiver.

A similar contention again proved unavailing in an English case,⁶ decided at common law,⁷ where despite a showing that the policies were not of any value at the time of the transfer and that a purchaser could not have been found for them in the open market, a decree was nevertheless entered for the creditors for the entire proceeds. That the cash equity is not the only element of recovery is quite obvious from what the Master of the Rolls declared in justifying the decision:

"In this case, it was suggested that the policies were worth nothing in the market, . . . But the Court cannot go into the question whether they would sell for a large or a small sum in the market. I assume they were of much value, and the value of a policy does not depend so . . . on the number of payments made, as on the age of the assured and the state of his health at the time the assignment takes place . . . I am of opinion, on the evidence, that at the date of the assignment, everybody concerned well knew that the man was dying, and could not live out the year. Not only his habits and state of debility, but the species of illness under which he was suffering, convince me that in *October* everybody knew he could not live long.

"It is true that if the policies had been put up for sale by auction, they would not have fetched much, but the persons about him knew the improbability of his living, and the evidence shews that in that year they knew that the policies were of much greater value than £174, and so far as the premiums were concerned, that it was not likely they would ever have to pay any . . .".⁸

5. 160 N. Y. 635, 55 N. E. 305 (1899).

6. *Stokoe v. Cowan*, 29 Beav. 637, 54 Eng. Rep. R. 775 (1861). *X* insured his life for the benefit of his estate in policies issued in 1857 and 1858. On November 9, 1859, he assigned those policies to his mother in consideration of a debt of approximately £175. The face value of the policies was £800. The decree for the creditors was limited only by a provision to pay the transferee the amount of her claim.

7. "Common Law" is used to designate the juridical condition existing in any given jurisdiction before the enactment of any insurance protection (or exemption) statute.

8. *Stokoe v. Cowan*, 29 Beav. 637, 640, 54 Eng. Rep. R. 775, 776 (1861).

Tested by these considerations, the decision in *Del Valle v. Hyland*⁹ is valid only insofar as the conception that an insurance policy is worth no more than its cash value is correct. But it has been shown that the economics of the life insurance business require that the contract be given a value quite distinct from its available cash equity. And it is this conception of value that affords the basic test of validity. Which one courts will take as the major premise for their syllogisms can not be predicted.

2. Rights of Creditors After X's Death

a. The Rule at "Common Law"

In the early English cases, which arose prior to the enactment in England of their statute analogous to the New York Verplanck Act,¹⁰ fraudulent transfers of policies on the debtor's life were set aside at the request of creditors. In those cases, where the insured had already died, no great point was made of cash value at the time of transfer, and the creditors were allowed to reach the entire insurance fund which came due on X's death.¹¹

The attitude of the English courts is illustrated by the case of *Taylor v. Coenen*¹² where the insured kept up the policies after their transfer by paying the premiums, and the defense contended that the creditors could only complain as to the amount of those premiums. In reply the Vice Chancellor stated that

"there is certainly a semblance of truth in that contention, but the answer to it is that the creditors have a right to all the property which would have belonged to him, and a considerable amount of property has been produced by these policies. In the state of his affairs he was not at liberty to reduce the amount of his property by the payment of the premiums, but as by paying the premiums he has kept on foot the policies, the creditors are entitled to have that property which resulted from such payment. It is true that if he had supposed the proceeds of the policies would go to his creditors he would very likely have allowed them to drop, and it was only for the sake of his wife and family that he paid the premiums. This view of the case may well be taken into consideration by the creditors themselves when they see the position to which

9. 76 Hun 493, 27 N. Y. Supp. 1059 (1st Dep't 1894).

10. This statute was designed to enable the wife to insure her husband's life in a policy which would inure to her benefit. See pp. 779-786 *infra*.

11. In none of the following cases was there any mention of cash value at the time of the transfer as having any bearing on the issue: *Freeman v. Pope*, L. R. 9 Eq. 206 (1869); *Jenkyn v. Vaughan*, 3 Drew 419, 61 Eng. Rep. R. 963 (1856); *Penhall v. Elwin*, 1 Sm. & G. 258, 65 Eng. Rep. R. 112 (1853); *Skarf v. Soulby*, 1 Mac. & G. 367, 41 Eng. Rep. R. 1306 (1849). In *Schondler v. Wace*, 1 Campbell 487 (1808), the only thing that might be construed as a comment on this point was the remark by Lord Ellenborough that there "was a possibility of benefit, to which the assignees were entitled as part of the effects of the bankrupt." *Id.* at 488.

12. 1 Ch. D. 636 (1876).

the testator's widow is reduced, but . . . all the property realized upon them must go to the creditors. . . ."¹³

Thus, while the English courts did not measure the remedy of the creditors by the cash value of the policy at transfer, in America, a series of diverse conclusions was reached by the courts. In the two earliest cases,¹⁴ no mention was made of cash value as the yardstick of the creditors' recovery; there was nothing said concerning "value" as a measure of the asset transferred. Both decisions reflect the older view of insurance, that it was merely a contract to pay on the insured's death. No criticism is intended by this; clearly insurance in the nineteenth century could mean to the courts no more than it meant to everyone else at that time.

However, by the time *White v. Pacific Mutual Life Insurance Co.*¹⁵ was decided, cash surrender value had become an established part of the insurance contract; and it was there held that value was identical with cash value for the purpose of determining creditors' rights. From this conception it was a logical step to hold, as in *Coalter v. Willard*,¹⁶ that when the creditors failed to allege that the policies had a cash value at transfer, their complaint was deficient. "In Virginia" said the court, "it is clear that . . . a life insurance policy before it has matured, and which has no cash surrender value, is not property in contemplation . . ." of the sections regulating fraudulent transfers.¹⁷

The cash value rule has recently received new converts,¹⁸ and in some cases, the courts have sought support for the rule in the "policy"

13. *Id.* at 641.

14. The earliest case is *Catchings v. Manlove*, 39 Miss. 655 (1861). There the court assumed that the creditors would get the entire fund, without mentioning cash value. This may have been due in part to two factors: (1) cash value as a function in the business of life insurance had not yet become developed; (2) counsel for the defense may have felt that he had a better chance to win on the ground that insurance, as a chose in action, could not be the subject of a fraudulent conveyance.

There was likewise nothing said in *Appeal of Elliott's Executors*, 50 Pa. 75 (1865), although it was a little more explicit. The creditors were again permitted to recover without being limited to the value of the policies at transfer. As a matter of fact the policies probably had little salable value. They were effected in February and March and assigned in September of 1859. The insured died in November of that year. Since the transfer had been made for the benefit of X's wife, the defendants relied entirely on the argument that was to be adopted later in the *Hume* case that it was the "policy of the law to encourage insurance for the benefit of widows and orphans". See note 80 *infra*.

15. 150 Va. 849, 143 S. E. 340 (1928). Although the insured died only nineteen days after he made the transfer, that fact failed to remind the court of the different values which could be ascribed to the contract.

16. 156 Va. 79, 158 S. E. 724 (1931), 18 Va. L. Rev. 95.

17. *Id.* at 83, 158 S. E. at 725. The same conception is reflected in *Davis v. Cramer*, 133 Ark. 224, 202 S. W. 239 (1918). The court there reasoned that since X's creditors could not reach more than the cash value by execution during his life, they therefore could not get more than the cash value at transfer after X has died.

18. *Union Central Life Ins. Co. v. Flicher*, 101 F. (2d) 857 (C. C. A. 9th, 1939).

of the Exemption and Verplanck Acts.¹⁹ Thus, where *X* while on his deathbed and knowing himself to be dying, changed the beneficiary of a policy on his life from his estate to his brother, both the Circuit²⁰ and the Nebraska²¹ Courts have held that since the policy had no cash surrender value, the creditors could recover the entire fund. This was done because the court felt that under the circumstances

“ . . . it cannot be said that the transferred policy was valueless. On the contrary, . . . the fact of impending death, the practical certainty that the life of the insured would end within a few days, operated to remove the element of contingency, and gave the policy at the time of its transfer an actual pecuniary value closely approximating its face amount. . . . ”²²

In both these cases the court seemed to have been of the opinion that cash value at transfer was the proper measure of recovery except for the special circumstances displayed which rendered immediate payment on the policies more or less certain. But the very nature of the exception indicates the incorrect conception of the insurance contract assumed by the courts. Two days, two months, two years,—the time of payment under the policy, so far as its face value is concerned, will, if the conditions are fulfilled, inevitably approach. “Death as it must to all men” runs the familiar phrase. As in *Savings Bank v. McLean*,²³ the obligation to pay the face of the policy is a valuable contract, and, if it is helpful, may be considered as in the nature of a deferred payment. A promissory note due at some future time is property. But the courts which look to the cash equity as a measure of value seem to have a horrendous fear of the contingent nature of the face value as an asset. In a fairly recent West Virginia case,²⁴ where the same result obtained, the court felt that “the only . . . property value that an insurance policy has before . . . death . . . is the (cash) value. . . . The payment of the face value of the policy is dependent upon a future contingency. . . . ”²⁵

So strong is this conception that recently the Michigan court reversed its prior decision in the *McLean* case, and held, in *Equitable Life Assurance Society v. Hitchcock*,²⁶ that

19. See pp. 779-786 *infra*.

20. *Navassa Guano Co. v. Cockfield*, 253 Fed. 883 (C. C. A. 4th, 1918).

21. *La Borde v. Farmers' State Bank*, 116 Neb. 33, 215 N. W. 559 (1927).

22. *Navassa Guano Co. v. Cockfield*, 253 Fed. 883, 885-886 (C. C. A. 4th, 1918).

23. 84 Mich. 625, 48 N. W. 159 (1891).

24. *Mahood v. Maynard*, 114 W. Va. 385, 171 S. E. 884 (1933), (1934) 40 W. Va. L. Q. 383.

25. *Id.* at 387, 171 S. E. at 884.

26. 270 Mich. 72, 258 N. W. 214 (1935), 33 MICH. L. REV. 1108. See also Note (1937) 106 A. L. R. 596.

"the evil which prompted the holding . . . can be avoided, while at the same time a certain measure of protection to the wife and children can be provided through insurance, by limiting the creditors' right to the recovery of the cash surrender value of the policy at the time of the transfer. Although it is true that a policy is property, it is only so in a limited sense. . . . Outside of the cash surrender value . . . an insurance policy represents a mere expectancy. . . . Until the death of the insured nothing except the cash surrender value . . . is property within the meaning of the statute declaring fraudulent conveyances assignments void." 27

Insofar as these decisions are predicated on a conception of value which is limited to cash equity only, they are undoubtedly wrong. But if, as seems to be hinted at in the *Hitchcock* case, they are made with an eye toward saving insurance for the helpless widows and orphans, it is useless to dispute over the reasons set forth by the courts in justification of their decisions. No one denies that to achieve such a result courts may have words mean what they want them to mean. In fact, such holdings are best disposed of as a labored effort to protect the widow and children. On that basis the reasoning of the courts loses whatever content it may have had.

But whatever may be said of cash value as the proper measure of the creditor's relief, at least this much may be offered in its support: it may give the creditor *something*, no matter how small. The same cannot be said, however, for the decisions of the Indiana courts made when that state had no Verplanck statute. In *Johnson v. Alexander*,²⁸ for example, the court stated that creditors could not get more than cash value at transfer, which had not been shown, but hastened to add that at least to the extent of his personal exemption X could transfer a policy with a lower cash value without fear of creditors. It is the inevitable conclusion that the Indiana courts were determined, without the benefit of any special statute, to make a special exception to the Fraudulent Transfer Acts and permit an insolvent husband to convey his insurance to his wife.

27. *Equitable Life Assurance Society v. Hitchcock*, 270 Mich. 72, 78, 258 N. W. 214, 216 (1935). The same view has been taken in Missouri: *Judson v. Walker*, 155 Mo. 166, 55 S. W. 1083 (1900); and Wisconsin: *First Wisconsin Nat. Bank of Milwaukee v. Roehling*, 224 Wis. 316, 269 N. W. 677 (1936), *rehearing denied and opinion corrected*, 224 Wis. 329, 272 N. W. 664 (1937).

28. 125 Ind. 575, 25 N. E. 706 (1890). See also *State ex rel. Wright v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116 (1897). In this case X took out a policy on his life in 1892 payable to his estate. While insolvent, he assigned it to his wife in 1894, and died shortly thereafter. The court adhered to the view expressed in the *Johnson* case and indicated that the most that X's creditors could complain about was his payment of two small premiums.

b. The Decisions under the Verplanck and Exemption Statutes

Many states have passed insurance protective statutes patterned, directly or indirectly, on the original New York Verplanck Act. In the light of some such legislation, it appears to be the general rule in most jurisdictions that where X has made a fraudulent conveyance of his life insurance policy, his creditors are entitled to the entire fund. For example, there is the so-called New York rule, prior to the amendments of 1939,²⁹ as first propounded in *Continental National Bank v. Moore*.³⁰ There the policies did have a cash value and the transferee sought to have the creditors' recovery limited to that value at the time of transfer. She relied on the analogy of value established in the Bankruptcy Act. In holding that the creditor was entitled to the entire fund the court reasoned that the bankruptcy provision was included as a special favor to the bankrupt; that when the transfer was set aside the insurance became payable to the debtor's estate; in that condition it was liable to be taken to pay X's debts; and on that view, then, the creditors were entitled to all the fund. In further explanation the opinion stated that

"the case is not, we think, distinguishable in principle from those holding that where a transfer of property made by a debtor is set aside on the ground of fraud at the instance of his creditors, their rights attach not merely to the value of the property prior to the assignment, but to the property itself, including appreciation or increase in value . . .".³¹

29. See p. 803 *infra*.

30. 83 App. Div. 419, 82 N. Y. Supp. 302 (1st Dep't 1903).

31. *Id.* at 424, 82 N. Y. Supp. at 306. Likewise in two subsequent cases, the New York courts have adhered to the rule that the policies have value apart from their cash position at any given time. *Stoudt v. Guaranty Trust Co.*, 150 Misc. 675, 271 N. Y. Supp. 409 (Sup. Ct. 1934); *Gould v. Fleitmann*, 188 App. Div. 759, 176 N. Y. Supp. 631 (1st Dep't 1919), *aff'd*, 230 N. Y. 569, 130 N. E. 897 (1920). In the *Gould* case, the fact that the policies had no cash value at the time they were conveyed was deemed of no importance. The court said that the "policies were valuable contracts. They constituted property, and their transfer . . . must be governed by the same rules as the transfer of other property." *Id.* at 767, 176 N. Y. Supp. at 636.

There is this to be said further about the New York cases: none of them discussed the applicability of the Verplanck statute in favor of the transferee. In *Continental National Bank v. Moore*, 83 App. Div. 419, 82 N. Y. Supp. 302 (1st Dep't 1903), although the transferee was X's wife, the court nevertheless did not comment on the reasons why the statute did not apply. Likewise in the *Stoudt* case, *supra*, the wife and other relatives were transferees, and they set up the statute as a defense. The court held that the defense was of no avail, explaining that the relevant section did not apply "to a policy not originally payable to a third party". Also, the statute was not applicable in the *Gould* case, *supra*, since the transferee was X's sister. Cf. *Shaver v. Shaver*, 35 App. Div. 1, 54 N. Y. Supp. 464 (3d Dep't 1898), where a policy payable to the estate was assigned to X's brother (in whose favor a previous policy had lapsed) and the court held that "the case stands as if the policy had been made payable to the brother, and the assignment was but a mode of so providing". (Italics supplied.) It is submitted that the reasoning is extremely tenuous and the decision, clearly not the New York view, wrong. *Bryson v. Manhart*, 11 Cal. App. (2d) 691, 54 P. (2d) 778 (1936) is in accord with the New York rule.

In thus drawing on the principles governing fraudulent conveyances generally, the court indicates that even if the value that is considered to be transferred be deemed the cash equity of the policy, nevertheless the creditors should get the entire fund accruing as a death claim since that is an appreciation of the value transferred. Although any actuary would turn pale at this conception of insurance, it is a plausible concept for lawyers to this extent: even if not used as a measure of *value*, it at least is indicative of an *appreciation* of something which has been transferred, as to which the cash value rule fails to make due allowance in the creditor's favor.

Moreover, this same view—allowing recovery by the creditors of the entire proceeds, despite the existence of a Verplanck or Exemption act—is in effect in several other jurisdictions. In a case so holding, the Alabama court explained away the Verplanck statute in this language:

"It is definitely settled that a policy payable to one's estate cannot by assignment or change of beneficiary be brought within the statutory exemption. . . ." ³²

It is to be noted that this statement, while broad enough to include transfers made while solvent, undoubtedly was not meant to refer to such a situation.

Likewise in a case denying the transferees the protection of the Act, the Michigan court dealt with its exemption statute ³³ in similar fashion:

"The argument is not sound because he could insure his life under this statute for the benefit of his wife and daughter, therefore, he can assign a policy which was not taken out for their sole benefit, and thus place it beyond the reach of creditors. The distinction between the two is obvious. He might have transferred this, like any other property, to his wife or children without consideration, when solvent; but when, being insolvent, he transferred it without a valuable consideration, it was subject to the payment of his debts, and the assignment was void. . . ." ³⁴

Finally, in Pennsylvania also, the creditors are not restricted to cash value as of transfer but may reach the entire fund. This conclusion, first reached in *Matter of Elliott's Executors*,³⁵ was later

32. *Love v. First Nat. Bank of Birmingham*, 228 Ala. 258, 262, 153 So. 189, 192 (1934). *Accord*, *Cook v. Clark, Davis & Co.*, 212 Ala. 257, 102 So. 213 (1924); *Pope v. Carter*, 210 Ala. 533, 98 So. 726 (1924).

33. 3 MICH. COMP. LAWS (1929) § 12451.

34. *Ionian County Savings Bank v. McClean*, 84 Mich. 625, 629, 48 N. W. 159, 160 (1891); see p. 777 *supra*. Ohio has likewise reached the same result as the New York cases, but without referring in any way to the question of value. *Child v. Graham*, 8 Ohio Dec. R. (N. S.) 294 (1882).

35. 50 Pa. 75 (1865).

enacted into a protection statute.³⁶ But here is another court which refused its application in the case of a transferee, even if within the protected class, i. e., wife, child or dependent relative, on the grounds that its protection extends, in case of transfers, only where the latter are "bona fide".³⁷ The attitude of the Pennsylvania courts seems well expressed thus:

"It is certain if (X) . . . had not made the last change of beneficiary, that the proceeds would have gone to (X's) estate. . . . There was no consideration for directing the course of the proceeds from his estate. Once an expectancy in the estate, they remained so for all purposes . . . unless properly conveyed for fair consideration. . . ." ³⁸

But it is significant to note that more recently the decisions in that state indicate a tendency to repudiate—or at least, a refusal to follow—the position originally taken.³⁹

Furthermore, there has developed another line of cases under the Verplanck Acts, which in their original pattern, permitted a married woman to insure the life of her husband and hold the proceeds exempt from his creditors. Among the many variants of the statutes there developed a form which began with "an insurance policy" or "every insurance policy" etc. taken out for the benefit of a married woman

36. See p. 790 *infra*.

37. *McKown's Estate* (No. 1), 198 Pa. 96, 47 Atl. 1111 (1901); *Schad's Appeal*, 88 Pa. 111 (1878). In both cases, the widow transferee gained nothing by the statute since the "bona fide" of the transfer was tested by the ordinary rules of conveyancing.

38. *Fidelity Trust Co. v. Union National Bank of Pittsburgh*, 313 Pa. 467, 489, 169 Atl. 209, 218 (1933). In that case appeared the only mention of value as a measure of recovery, and the court disposed of the point with the remark that "each policy was . . . an obligation to pay the insured's (estate) on his death. . . . That obligation was of value to the insured's creditors; . . . the proceeds, when received by his executors, would help pay his debts . . .". *Id.* at 481, 169 Atl. at 215.

39. *Newman v. Newman*, 328 Pa. 552, 196 Atl. 30 (1938); *Stutzman v. Fidelity Mutual Life Ins. Co.*, 315 Pa. 47, 172 Atl. 302 (1934); *Price's Estate*, 26 Pa. D. & C. 141 (1935). In the *Stutzman* case, X carried a policy of \$25,000 payable to his estate; while insolvent he named his wife as beneficiary. At the same time, he was carrying \$20,000 of insurance payable to his wife, Y. Although no statement to that effect is made in the opinion, it is inferable that X had the reserved power to change the beneficiary. X and Y assigned the \$20,000 policy to a creditor of X. At that time this policy had a cash value of \$700. To "restore" his wife "the protection she had lost" he named her the beneficiary in the \$25,000 policy—which then had a cash value of \$50. On X's death his administrator sought to recover the fund. His right to recover was denied. It is submitted that even if Y had a vested interest in the \$20,000 policy, the plaintiff should have recovered at least \$5,000 since by the transfer, Y gained that sum at the expense of creditors. But, undoubtedly, Y did not have a vested interest; rather X had complete power to cut off her interest by naming the creditor as beneficiary. Y was releasing nothing which X could not take away without her consent. To say that under such circumstances no fraudulent transfer occurred is to refuse to look at insurance with open eyes.

The evil of the case is illustrated in *Price's Estate*, *supra*, where the court used the *Stutzman* decision to avoid the established doctrine that transfers from the insured's estate while insolvent can be attacked by creditors. In holding that a transfer, made while X was insolvent, to a second wife would not be set aside, the court said that such a transfer was not "regarded as fraudulent as to X's creditors".

inured to her use, free from her husband's creditors, or from the creditors of the person "effecting" the insurance. It frequently happens that such statutes are put in the form which was adopted in Massachusetts:

"Every policy of life . . . insurance made payable to or for the benefit of a married woman, *or after its issue assigned, transferred or in any way made payable to a married woman . . .* shall inure to her separate use and benefit . . . (free from the claims of creditors of the insured etc.)."⁴⁰

There is nothing in the words above italicized which absolutely require the conclusion that they introduced an exception to the rules of fraudulent conveyance. As a matter of fact, as the Ohio court pointed out in *Child v. Graham*,⁴¹ the words are quite consistent with an interpretation which retains intact the principles of fraudulent conveyance law. Stated differently, the statute could properly be construed to cover two separate set-ups: (1) where the policy was first written for the benefit of the wife; and (2) where the policy was first written for the benefit of the insured's estate or some third person and subsequently assigned, or the beneficiary changed, to a married woman. Thus if X insured his life for the benefit of his estate, he could change the beneficiary to his wife; or, if X insured his life for the benefit of a third person, A, without reserving the power to change the beneficiary, A could assign to a married woman. In both instances the married woman was entitled to the benefit of the policy. But nothing in the statute obviated the duty on the part of X or A not to assign if insolvent. In other words, the rules of fraudulent conveyancing were not destroyed for that purpose. That this is the proper conception of the function of a genuine exemption act was the holding in a Maine case.⁴²

40. 2 MASS. GEN. LAWS (1932) c. 176, § 126 (italics supplied).

41. 8 Ohio Dec. R. (N. S.) 294 (1882); see note 34 *supra*.

42. *Wyman v. Gay*, 90 Me. 36, 37 Atl. 325 (1897). X, an insolvent debtor, preferred one of his creditors by transferring to him two insurance policies, apparently payable to his estate. The "value" of the policies—otherwise not described—was fixed, although how it was arrived at is not shown. Maine then possessed a real exemption act applicable to insurance which, as the court summarized it, "exempts all such policies where the annual premium is less than \$150 (meaning on each one) from attachment and from all claims of creditors, during the life of the assured". The assignee in the state insolvency proceeding (the Federal Bankruptcy Act had not yet been passed) brought trover to recover the agreed value of the insurance policies; the defendant relied on the exemption act. In sustaining a judgment for the trustee, the court said that the statutes meant "to allow the assured such property, while he holds it, free from the claims of creditors, but when he sells it for cash, he will have received its equivalent, and the purchaser will hold an investment, a security that is just as much a part of his estate as a bond or promissory note would be. So, when the assured assigns his policy in payment of a debt, the policy becomes an asset in the hands of a creditor, and he should not, thereby be permitted to gain a fraudulent preference in his own favor over other creditors of the same debtor. When the assured parts with his policy, he places it without the protection of the statute . . .". *Id.* at 39, 37 Atl. at 326.

On principle, then,—at least on the ordinary principles of statutory construction—a transfer to a married woman by an insolvent should not deprive creditors of the power to resort to the insurance. If social policy be invoked to achieve a different result in favor of the married woman, it would be an adequate retort to point out, (1) that the creditor should be as much favored in the conscience of the court as the widow; (2) that unless property is expressly exempted from creditors by the legislature it is no business of the court to deprive creditors of their contract rights; and (3) that the entire basis of our economy is capitalistic, requiring protection of creditor-rights. In helping the widow at the bar, the court is forgetting the widows of the creditors.

Be that as it may, the Massachusetts court felt that the form of the statute was sufficient justification for a deviation from the established rule. Thus, in *Bailey v. Wood*,⁴³ where the transfer of the policy was to a married woman, she was absolutely protected as against creditors of the transferor even though the latter may have committed the most flagrant violation of the Fraudulent Transfer Acts. But this protection extends only to her; a transfer to anyone else is subject to the ordinary disabilities;⁴⁴ and it is interesting to notice that in the case so holding the creditors recovered the entire face amount of that part of the policy transferred to the son.⁴⁵ Although no point was made of cash surrender value as a measure of recovery—the policy was heavily borrowed against and probably had no such value—the case is an implicit adoption, on this point, of the New York rule.⁴⁶

43. 202 Mass. 549, 89 N. E. 147 (1909).

44. *York v. Flaherty*, 210 Mass. 35, 96 N. E. 53 (1911).

45. *Ibid.*

46. See p. 774 *supra*. The strange attributes of a present-day insurance policy—the direct result of judicial worship of insurance, and legislative acquiescence therein—is revealed in situations of which *Goldman v. Moses*, 287 Mass. 393, 191 N. E. 873 (1934) is typical. The ordinary categories of creditors' remedies have no place for it; it is rather a mongrel, revealing by its bizarre appearance, the mating of diverse breeds. In this case *X* carried insurance for the benefit of *Y*, his wife; *X*, of course, had the power to change the beneficiary. *C* obtained a judgment against *X* and *Y*. To prevent collection *X* assigned the policy to his married daughter, the defendant. On *X*'s death *C* sought to have the proceeds applied on his judgment. In permitting the plaintiff to recover, the court said that *Y*, as the beneficiary, was the owner of such an interest as could not be destroyed except by change of beneficiary. *X*'s assignment merely passed on his interest—which died with him, *Y* not consenting.

In achieving a proper result, the court, because of its past action, had to rely on a construction of ownership which is fast becoming discredited. That *X* was the real owner of the policy none can doubt; and that *X* should be allowed to destroy *Y*'s interest by assignment is a proper result of *X*'s dominion. The plaintiff should have recovered, but on a construction which would make *X*'s assignment to his daughter the transfer of his property in fraud of creditors. See note 42 *supra*. To do that, however, would have required the court to go back on its peculiar exception in favor of married women outlined in *Bailey v. Wood*—and that the court apparently was not prepared to do.

There was, indeed, another decision the court could have made, which would have had the merit of further limiting *Bailey v. Wood*. Since the defendant was not *X*'s wife, the court could have limited the exception to insureds' wives. But the court was not prepared to invoke such a restriction. Rather, it assumed, without deciding, the validity of the defendant's argument that the statute extended to any married woman. It then proceeded to apply the above construction.

The Kentucky statute⁴⁷ follows the Massachusetts pattern (from which, indeed, it was taken) except that the legislature inserted "duly" before "assigned"—which may have been taken as an expression of intent that the rules of fraudulent conveyances were not to be modified by the statute. And such was the view adopted in *Stokes v. Coffey*,⁴⁸ which applied the New York rule without any discussion beyond saying that the transaction was void as to creditors. However, the Massachusetts exception has since been applied even in Kentucky,⁴⁹ in cases which neither explain, distinguish, or even refer to the *Stokes* case.

Furthermore, the Massachusetts statute has become the model for many others. Accordingly, the unusual interpretation adopted in *Bailey v. Wood* would, if followed; as in Kentucky, make considerable inroads into property areas which should be subject to the claims of creditors. Obviously, from the judgment creditors' point of view, this is a matter to be deplored.⁵⁰ And it is naturally a cause for some rejoicing that the New York courts have not followed that decision. Other courts, however, have not only followed that case, but they have gone so far as to extend its rationale to include all beneficiaries.

For example, in *Teague v. Insurance Co.*,⁵¹ where the insolvent insured changed the beneficiary from his estate to his infant children, the North Carolina court permitted the children to hold as against creditors despite the Massachusetts decision to the contrary.⁵² The case is unjustified by any reasonable construction, whether measured by logic, the terms of the statute, or otherwise. It was undoubtedly dictated by a wholly praiseworthy concern for the orphans; but that should have been the concern of the legislature.

The New Jersey statute⁵³ is likewise patterned according to the Massachusetts form, and there again the construction given by the courts removes insurance policies from the scope of the fraudulent transfer statutes. In *Borg v. McCroskery*,⁵⁴ X had policies payable to his estate, and while insolvent he designated his brother as beneficiary. Despite these facts the court felt that no fraudulent transfer had taken place. Since the statute stated that a "lawful beneficiary" was entitled to the proceeds of the policy, the court argued that any beneficiary

47. KY. STAT. (Carroll, 1936) § 654.

48. 71 Ky. 533 (1871).

49. *Farley v. First Nat. Bank*, 250 Ky. 150, 61 S. W. (2d) 1059 (1933); *Smith's Adm'r v. Milton*, 171 Ky. 819, 188 S. W. 877 (1916); *Morehead's Adm'r v. Mayfield*, 109 Ky. 51, 58 S. W. 473 (1900).

50. *Pearsall v. Bloodworth*, 194 N. C. 628, 140 S. E. 303 (1927). Under a statute copied practically verbatim from the Massachusetts model, the court reached the same result which obtained in the Massachusetts case.

51. 200 N. C. 450, 157 S. E. 421 (1931).

52. *York v. Flaherty*, 210 Mass. 35, 96 N. E. 53 (1911); see p. 783 *supra*.

53. 2 N. J. COMP. STAT. (Insurance 1910) p. 2850, §§ 38, 39.

54. 120 N. J. Eq. 80, 184 Atl. 187 (1936).

designated by the insured was a "lawful beneficiary". As the court put it, ". . . any beneficiary named by the insured . . . is a lawful beneficiary and as such shall have the same benefit of the statute as a beneficiary to whom the policy is made payable in the first instance. . . ." ⁵⁵ Thus, in New Jersey, as in North Carolina, there can be no fraudulent conveyance of an insurance policy. In judging the merit of this construction it should be remembered that the New York courts, where the statutory language is similar, have gone the other way. ⁵⁶ It is certainly at least arguable that a beneficiary whose designation is made in fraud of creditors is not a "lawful" beneficiary within the meaning of the insurance statutes.

It is interesting to note also, in passing, the rather peculiar reasoning displayed by the Illinois court. In *Cole v. Marple*, ⁵⁷ X assigned the policy to his wife and died the next day, insolvent. X sent notice of assignment to the company, which "assented" to it, as the court quaintly puts it. Despite the fact that the Illinois statute was almost pure Verplanck—so that none of the Massachusetts heresy could be imported—the court nevertheless reversed a judgment declaring the transfer in fraud of creditors. If, said the court, the policy were originally made payable to the wife, the creditor could not have any rights to the fund, and the Verplanck Act, while not "strictly an exemption" law is of that nature, and to be liberally construed. When the company "accepted" the assignment it was, in substance and effect, a new insurance policy written for the wife's benefit, and it was felt that the requirements of the statute were thus substantially met. It is submitted this is a rather fantastic treatment of something as if it were something else and deserves reverent anathema. ⁵⁸

About the same attitude has been indicated in Maryland, where the statute provides that all policies "bona fide assigned to the wife or children or any relatives dependent upon such person" should inure to the beneficiary so protected free from the creditors of the insured. ⁵⁹ If nothing else, at least the words "bona fide" preceding the word "assigned" should have been a clear indication that no inroad into fraud-

55. *Id.* at 86, 184 Atl. at 190.

56. See p. 779 *supra*.

57. 98 Ill. 58 (1880).

58. Another instance of the same sort is exhibited in *Lytle v. Baldinger*, 84 Ohio St. 1, 95 N. E. 389 (Super. Ct. 1911). In that case, a fraudulent transfer of a life insurance policy is not a fraudulent transfer because (a) the debtor is under no "obligation" to his creditors to keep a policy payable to his estate "alive"; and (b) the policy would become valuable only on the debtor's death; but the possibility of it ever becoming assets of the debtor's estate are so "remote"—so "dependent" on his "will and pleasure" that an assignment by him just cannot be held to be fraudulent. See Note, *Transfer of Insurance Policy on Debtor's Life as Transfer in Fraud of Creditors*, ANN. CAS. 1912 B, 896. See also p. 777 *supra*.

59. Md. Laws 1878, c. 200. This statute was enacted subsequent to an earlier one; which was almost an exact copy of Verplanck's Act.

ulent conveyancing law was intended by the legislature. Apart from that, the statute is almost an exact copy of the Pennsylvania Act of 1868⁶⁰ and there the courts always recognized that distinction. Yet in *Earnshaw v. Earnshaw*,⁶¹ the court said that while "it may not be easy to understand what the legislature meant by 'bona fide' . . .", nevertheless it was "clear . . . that . . . the legislature meant to confer upon the insured the right to make a voluntary assignment of a life policy to his wife or children. . . ." ⁶² In reaching this decision the court did not cite, nor indicate that it had considered the Pennsylvania cases⁶³ passing on an almost identical statute.

II. INVESTMENT IN LIFE INSURANCE FOR ANOTHER'S BENEFIT AS A FRAUDULENT CONVEYANCE

If *X*, while insolvent, buys a house and has title thereto taken in the name of *Y*, no one would dispute that *X*'s creditors could reach the house and have it sold under execution to pay for *X*'s debts. Likewise, if *X*, while insolvent, deposits funds with *A* for which *A* promises to pay money, or deliver property to *Y*, for which *Y* has given no consideration, *X*'s creditors could reach this. So, it is generally accepted that if *X* transfers property to *Y* in fraud of creditors they can seize this with all its increment and accretions. Substantially, there is no difference if *X* insures his life, while insolvent, for *Y*'s benefit; the insurance is property which has been transferred to *Y*. In simple terms the contract is just this: *A* agrees to pay *Y* a definite sum on a contingency bound to occur—*X*'s death—upon *X*'s payment of annual premiums. It is not different from this transaction: *X* agrees to pay *A* a definite sum every year so long as he lives; *A* agrees that when *X* dies he will deliver to *Y* good title to a dwelling for her own use. In all these cases *X* has made a gift to *Y* which—if *X* is insolvent—is voidable so far as his creditors are concerned.

Admittedly, the bulk of fraudulent transfer cases involving life insurance do not turn on facts like these. Ordinarily they are concerned with transfers from the debtor's estate to a named third party. But this is not due to any anomalous condition in human affairs; it is the result of the special history of life insurance in America. As we know, the life insurance business really got its birthright in Verplanck's Act in 1840. That statute endeavored to free married women from the disabilities of coverture as to one item; it gave married women the power to make insurance contracts with respect to the lives of their

60. Pa. Laws 1868, No. 64, p. 103.

61. 64 Md. 513, 2 Atl. 734 (1886); *accord*, *Elliott v. Bryan*, 64 Md. 368, 1 Atl. 614 (1885).

62. *Earnshaw v. Stewart*, 64 Md. 513, 514, 2 Atl. 734-735 (1886).

63. See discussion at p. 781 *supra*.

husbands. The same result might have been accomplished—it was later—by general emancipation through a Married Women's Property Act.

But the peculiarity of the reform, and the special practical problems it raised, created the intellectual climate which in turn supplied the incentive for a rather unique judicial treatment. The peculiarity of the statute is obvious; it permitted a married woman to make a life insurance contract with respect to, not her own, but only her husband's life. It is manifest that the contract could not be made in secret; the husband had to acquiesce, submit himself for physical examination at the hands of the company's doctor, and in other ways become involved in the transaction. The physical acts being what they were, it was difficult to say, after the event, who "took out" the policy. True, if the application for the policy and the contract itself were alone looked to as the sole evidence, the form could be so cast as to reveal the wife as the applicant and contracting party. There was, however, an added practical factor which tended to confuse this pattern. Married women, being subject to the disabilities of *couverture*, did not have the money to pay the premiums. These had to come from the husband. Apparently, the practice soon developed of the husband insuring his life for the benefit of his wife. Admittedly, the early policies were written in the "wife's" form. However, we do not yet have at hand the evidence which will tell us with exactness whether the husbands themselves first began to insure their lives in great numbers for their wives' benefit, and whether judicial exegesis followed this trend, or whether the situation was reversed; that is, whether the courts first treated a husband's contract as if it were a wife's policy and thus initiated the backhanded practice which was not to receive legislative recognition until later.

However that may be, the courts from a fairly early date began a course of interpretation which obliterated the distinction between the "wife" policy and the husband's contract. It did this by simply constituting the husband his wife's agent for the purpose of insuring his life for her benefit.⁶⁴ The next step was to construe the Verplanck Act as an exemption, which, obviously, it was not. Since the original Act permitted the wife to hold the policy free from her husband's creditors, it was apparently an attempted effectuation of the intended purpose to avoid the disabilities of *couverture*. But in phrasing the emancipation the legislature said, for example, that "this *exemption* shall not apply where the amount of premiums annually paid shall exceed three hundred dollars".

64. Foster, *Assignee v. Brown*, 65 Ind. 234 (1879).

This could be viewed, at least, in two different ways. It might have been considered as a mere measure of the extent of emancipation. In other words, apart from statute, all the insurance taken out by the wife belonged to the husband; the statute merely released to her only so much as was purchased by the premiums of less than \$300 annually; the excess still belonged to the husband. Or it might have been thought of as permitting the wife to insure the husband's life, and allowing him to pay up to \$300 annually for that insurance and *exempting* such payments and the insurance fund from his creditors. The practical urge for the adoption of the latter conception of the statute, lay, as has been indicated, in the fact that it was the husband who usually had the money, and not the wife.

It will be seen at once that the statute, if it did not mix separate conceptions, certainly afforded the courts every opportunity to do so—an opportunity they did not neglect. An indication of the nature of the mixture is given by the amendment to the statute enacted by the New York Legislature in 1858 when it provided that the “exemption shall not apply where the amount of premiums annually paid *out of the funds or property of the husband* shall exceed three hundred dollars”.⁶⁵

The statute, added to the judicially created agency of the husband, permitted the courts to treat it on a plane completely divorced from its original purpose. Originally, to restate, the Act was one of emancipation. A mixture of concepts enabled the judge to consider it as one of exemption, allowing the husband to buy insurance for his wife's benefit, out of his own funds, free from his creditors' claims—and this despite the opening words of the act⁶⁶ making it lawful for “a married woman” to cause to be insured . . . the life of her husband. . . .”

As the statute was originally intended, the husband could have been allowed to pay the premiums—but such payment would have been valid only if he were solvent. But, by mixing the associated ideas, a court could argue that the statute was one of *exemption*, and that there was therefore no objection if the husband paid the statutory minimum *even while insolvent*. Even construing the statute as an exemption, however, certain difficulties were still presented. Although exemptions free a certain portion of the *debtor's* property from his creditors' claims, here the insurance *belonged to the wife*, under the vested interest rule adopted by the courts at about the same time the other ideas were germinating. It follows that it was not the statutory “exemption”, but rather her vested interest, that rendered the insurance free from her

65. N. Y. Laws 1858, c. 187 (italics supplied).

66. N. Y. Laws 1840, c. 80.

husband's creditors. Nor was there any property of the husband exempted by the statute; he had none as far as the insurance was concerned. Properly speaking, then, none of *his* property was being saved to him; all the statute allowed was his paying premiums on his wife's contract. Inferentially, after 1858, the wife could have paid any amount of premium and the fund would belong to her if she paid premiums out of her *separate* property,⁶⁷ whereas if the husband paid the premiums she could only hold so much as was bought with the statutory minimum. In other words, it permitted him to make gifts to her. However, once the Married Woman's Property Acts had been enacted, whereby the solvent husband was enabled to make unlimited gifts to his wife, the courts, in seeking a justification for the statute, considered it a special exemption for the benefit of the family. And despite the fact that it did not in so many words authorize these gifts to be made while he was insolvent, they treated the statute as a legislative mandate authorizing the husband to buy insurance and pay premiums within the statutory minimum even while insolvent.

If this analysis is correct, it offers some explanation for the scarcity of fraudulent transfer cases turning on facts where *X*, while insolvent, insured his life for the benefit of his wife and children and maintained the contracts during a period of insolvency. The reactions of the judges probably represented the feeling of the bar; certainly, it must have influenced lawyers in their decisions as to the feasibility of litigation. Today, of course, with the enactment of statutes drafted along the lines of Section 55a of the New York Insurance Law⁶⁸ the case could not arise; all that creditors would ever be entitled to in such event would be an amount equal to premiums paid fraudulently by the debtor.

But among the decided cases there are some which throw additional light on this explanation and give it added content. For example, where *X*, while insolvent, insured his life for the benefit of his wife and children, and paid a total of \$2100 in premiums annually, the creditors were allowed to compel the beneficiaries to pay the plaintiff's judgment against *X* out of the insurance funds.⁶⁹ The court felt that "the great weight of authority holds that payments on account of life policies for the benefit of another must be considered as made in fraud of creditors. . . ." ⁷⁰ In construing the New Jersey Verplanck statute, Vice Chancellor Pitney stated that it did not empower

67. I. e. in a jurisdiction which had enacted a modification similar to the one made in New York.

68. N. Y. CONS. LAWS (Cahill, 1939) c. 30, § 55a. See p. 803 *infra*.

69. Merchants' and Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895), 9 HARV. L. REV. 155.

70. *Id.* at 287, 31 Atl. at 274. In support of this statement were cited English cases involving transfers of policies payable to the estate, the court observing that they were

"a husband . . . to invest his own money in a policy for his wife which she might hold as against his creditors. The result of such construction, after the limit was removed, would be to enable a husband to settle all his property in a lump sum on his wife at the expense of his creditors. . . ." ⁷¹

Likewise in *Lehman v. Gunn*,⁷² the Alabama court properly considered insurance as an investment, as property which could be transferred only if the insured were solvent. These cases are particularly significant in view of the fact that at the time, insurance had long since become a peculiar institutional development. To most courts it assumed the dignity and sanctity of the protector of the home, and by that time the Supreme Court had adopted the same view in the *Hume*⁷³ decision.

The Pennsylvania cases offer an interesting example of the acceptance of a particular concept without analysis or careful thought. In 1865, when *Appeal of Elliott's Executors* was decided, the court closed its opinion with this parting shot:

"We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors and are not touched by this decision. . . ." ⁷⁴

Three years later the Pennsylvania variant of Verplanck's law was enacted, providing that "all policies . . . taken out for the benefit of . . . the wife . . . shall be vested in such wife . . . free and clear from all claims of the creditors" of the insured.⁷⁵

"unable to perceive any difference between such a case and that of a policy taken out in the first instance in the name and for the benefit of a third party. . . ." *Id.* at 288, 31 *Atl.* at 274. This view was directly opposite to that taken by the United States Supreme Court in *Bank of Washington v. Hume*, 128 U. S. 195 (1888). In refusing to follow that case, the New Jersey court relied on Professor Williston's criticism. Williston, *Can an Insolvent Debtor Insure His Life for the Benefit of His Wife?* (1891) 25 *AM. L. REV.* 185.

71. *Merchants' and Miners' Transportation Co. v. Borland*, 53 N. J. Eq. 282, 294, 31 *Atl.* 272, 276 (1895). The court felt that the purpose of the statute was twofold, to permit married women to contract as to life insurance on their husband's lives, and, to obviate any objection that such contracts were void as wagers. Under this view, "there is nothing in the language which indicates an intention to enable the husband to set aside a portion of his property or income to the use of his wife as against his creditors." *Ibid.* See also *Cornwell v. Surety Fund Life Co.*, 44 S. D. 391, 184 N. W. 211 (1921), 21 *COL. L. REV.* 819.

72. 124 Ala. 213, 27 So. 475 (1900). The local Verplanck Act was not applicable here because it covered only wife and children, and the beneficiary was X's parents. The case is especially noteworthy because actually, X did not pay the premium out of his money; it was paid rather out of his note. See also *Fearn v. Ward*, 65 Ala. 33 (1880); *Thompson v. Cundiff*, 11 Rush 567 (Ky. 1875). See also *Notes* (1893) 29 *AM. ST. REP.* 360; (1902) 82 *AM. ST. REP.* 165.

73. 128 U. S. 195 (1888); see note 70 *supra*.

74. 50 Pa. 75, 83, 84 (1865); see note 14 *supra*.

75. Pa. Laws 1868, § 64, p. 103. That statute has since been replaced by an enactment that substantially codifies the rules the courts had been creating. PA. STAT. ANN. (Purdon, 1930) tit. 40, § 517: "The net amount payable under any policy of life insur-

Just what the court meant by "effected without fraud directly" in its dictum cannot be made out. Whether it drew a distinction between policies taken out by *X* while solvent and those taken out in fraud of creditors; or whether it drew a distinction between the kinds of fraud and desired to indicate a limitation in this instance to cases where there was proof of fraudulent intent—which is a practical impossibility if words must be proved and no recourse to inference from acts is allowed—is just another enigma. And the same can be said for the statute.

But, under the influence of this dictum, the Pennsylvania cases refuse any relief to creditors, and defend themselves, of course, by pointing to the statute. In *McCutcheon's Appeal*,⁷⁶ for example, where *X*, while insolvent, insured his life for his wife's benefit, creditors were denied recourse to the funds. The court explained that "there is no anomaly in this, nor any conflict with the letter or spirit of the Statute of Elizabeth, because in such cases the policy would be at no time the property of the insured, and hence no question of fraud in its transfer could arise, as to his creditors . . .".⁷⁷ It was felt that the question of good faith arose only when *X* assigned a policy originally payable to his estate. When the beneficiary's "title exists by force of an original

ance . . . heretofore or hereafter made for the benefit of or assigned to the wife or children or dependent relative of such person, shall be exempt from all claims of the creditors of such person . . . whether or not the right to change the named beneficiary is reserved by or permitted to such person."

76. 99 Pa. 133 (1881).

77. *Id.* at 137. The same undesirable result was reached in *Bennett v. Rosborough*, 155 Ga. 265, 116 S. E. 788 (1923), 33 YALE L. J. 207, Note (1923) 23 COL. L. REV. 771. There *X* while insolvent took out insurance for his wife's benefit and paid the premiums with funds stolen from the bank which employed him. The Georgia statute declared that the insured "may direct the money to be paid to his . . . widow. . . . Upon such direction given . . . no other person may defeat the same. . . ." Ga. Code (1933), § 56-903. The majority of the court felt that the statutory language barred all relief from *X*'s creditors. It would seem to be a case of judicial inversion of the Verplanck statute.

The same attitude was expressed in a Minnesota case where the court throbbed that "one of the highest duties of a husband and father is to provide for his family . . . after his death", indicating that the creditors were to receive some cold treatment. And so they did, the court even refusing to give them the premium which the statute seemed to reserve to them. *Ross v. Minnesota Mutual Life Ins. Co.*, 154 Minn. 186, 189, 191 N. W. 428, 429 (1923), 21 MICH. L. REV. 937, (1924) 2 WIS. L. REV. 316. The statute involved was 1 MINN. STAT. (Mason, 1927) § 3387: "Whenever any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the persons effecting the same. All premiums paid for insurance in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy . . .". On its face, this statute did not embrace the situation which was presented to the court. The first sentence was a mere restatement of the vested interest rule and could be interpreted as not affecting policies in which the insured reserved the power of changing the beneficiary. But it did not expressly apply to policies taken out by *X* while insolvent, and a proper construction would so have parsed the language. Nor is the second sentence necessarily in conflict with this interpretation, for it could properly be interpreted to apply to those instances where the policy was issued to *X* when solvent, and insolvency subsequently overtook him. See Williston, note 70 *supra*, at 190. The court's view was buttressed by the broadside from the United States Supreme Court in the *Hume* case to the effect that to the end of furnishing protection to his family, *X* could devote a moderate portion of his earnings to insure his life in his wife's favor. *Bank of Washington v. Hume*, 128 U. S. 195 (1888).

issue, in the name, or for the benefit of the beneficiary, the title is good notwithstanding the claims of creditors . . .".

The recital of these various decisions—generally reaching conclusions adverse to the creditors, and thus opposed to the contentions advanced here⁷⁸—may seem to create an air of inevitability, as though the only proper results were the ones reached by the courts. The constant reiteration of the same sort of statutory construction obviously tends to produce such a reaction in the uninitiated observer. Actually, however, the courts were construing the statutes as their hearts dictated, even though history and logic required a different interpretation. Since it must be conceded that they could have read the acts as the creditors requested, it becomes apparent that it was the courts' conception of the more desirable social policy which was the factor which must have swayed them. That this is true is substantiated by the decisions where a thief had invested stolen funds in insurance policies on his life for the benefit of his wife and children. Such policies would, according to their form, fall within the scope of the usual insurance statutes. But here the courts were torn between the desire to protect the family and the age-old emotional desire to punish the thief. In legal parlance this was expressed by way of the equitable principles of "tracing the res" and giving the resultant products to the person from whom the original property had been stolen. The pull of the latter emotion turned out to be stronger than the resisting force of that evoked by the insurance statutes. And in deciding for the creditor in this instance,⁷⁹ the courts were not troubled by the Verplanck Acts. The crucial distinction, according to the judges, lay in the fact that the "exemption" statutes were not "intended" to repeal ancient "equitable" principles. But this, of course, was just verbiage to obscure the real basis for decision. Where the same problem was presented as between the fraudulent conveyance laws and the "exemptions" they had no difficulty in finding that the "intention" was just the reverse.

III. RECEIPT BY BENEFICIARY OF PROCEEDS OF POLICY WHEREIN THE INSURED RESERVED COMPLETE DOMINION AS AN INVALID TRANSFER

In *Schad's Appeal*⁸⁰ X carried insurance on his life payable to his estate. He died insolvent, and his wife sought to recover the fund

78. One case which supports these views and granted relief to the defrauded creditors is *Exchange State Bank v. Poindexter*, 137 Kan. 101, 19 P. (2d) 705 (1933). The court there found it impossible to decide for the beneficiary because of the unusually outrageous fraud on the part of the debtor-insured.

79. See, e. g., *Holmes v. Gilmon*, 138 N. Y. 369, 34 N. E. 205 (1893). The cases are collected in 3 SCOTT, TRUSTS (1939) § 508.4.

80. 88 Pa. 111 (1878).

under an instrument executed by *X* (and found after his death) wherein he "assign(ed) the whole amount . . . to my wife . . . after my death . . .". The document was not given validity because it was clearly a testamentary provision and failed to comply with the legal mode prescribed for such documents. And, as the court sagely noted, even if it were admissible the legatee would get nothing since the estate was insolvent.

Probably, at this late date, one could not accomplish much by pointing to the striking similarity between a life insurance policy, with a power reserved to revoke the beneficiary, and a will. The policy is simply a third party donee-beneficiary contract. The power reserved to the insured to change the beneficiary, however, makes the resultant pattern a will in all but legal name: it is a "living-will" in the insurance business, if their advertisements are to be credited. Even if courts are not yet apt to treat life insurance like a will, it will aid in understanding the subsequent cases to note this similarity: in both cases *X* owns property and has complete dominion. Yet, in one, if he devises it, it first goes to pay creditors' claims before the legatees can share; in the other instance orthodoxy abhors any conception which favors creditors. Again, to understand the cases to be discussed, consider equity's treatment of powers of appointment: if *X* is the donee of a power of appointment and exercises it in favor of *Y*, equity will, after *X*'s death, see to it that the property appointed is first used to satisfy the claims of *X*'s creditors.⁸¹ But if an insurance company promises to pay as *X* should by his policy appoint, and *X* appoints for *Y*'s benefit, *Y* will, except for strange heterodox cases, take the proceeds and creditors cannot even edge up to the trough. Further, if *X* makes an "inchoate" gift to *Y*, not to take effect until his death, *Y* cannot take if there are creditors to be paid. So if *X* creates a revocable Totten trust account—which is the same thing—for *Y*'s benefit, *Y* never precedes *X*'s creditors.⁸² Yet in fundamental structure there is little difference between

81. *Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889 (1918).

82. *Matter of Reich's Estate*, 146 Misc. 616, 262 N. Y. Supp. 623 (Surr. Ct. 1933), 33 COL. L. REV. 548; *Beakes Dairy Co. v. Berns*, 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't 1908). In comparing judicial attitudes with respect to fact situations which are inherently the same—i. e., a depositor's control over a Totten savings account which he has set up for his wife's benefit and the same person's control over the cash surrender value of policies designating his wife as beneficiary—what the court said in the *Berns* case is interesting:

"But the gift is completed only at the instant of death. Up to that time the money is that of the depositor to draw out and do with it as he pleases. That being so it must be subject to his creditors during his lifetime, and for the same reason after his death also. One may no more get his money out of reach of his creditors after his death by depositing it in such a way, not to belong to his *cestui* until he dies, than he could do so by means of a will giving it to such *cestui*. His right to the absolute disposition of it during his lifetime makes it his and therefore subject to his creditors." *Id.* at 138, 112 N. Y. Supp. at 529.

a Totten account and an insurance policy (save for the application of the laws of probability to a defined group).

Of course, in achieving results apparently so opposed to all the usual patterns of the law, the courts have been influenced by what they felt to be the purpose (if not the language) of the Verplanck Acts, and a weird sort of idolatry which was lavished on insurance—but not the company. But, as far as the Verplanck Acts were concerned, they were not drafted with any special prescience. Verplanck's Act was intended to have insurance inure to the benefit of the married woman. This—if nothing else—made it clear that ownership vested in the wife, not the husband. In their multiple efforts to achieve the same result the courts created the vested interest rule; but this, as we know, was part of a reverse development which sought to make the wife the owner of her husband's policy, as opposed to the so conceived "wife's policy". Likewise history is with us, for the power to change was not generally invented in policies until late in the nineteenth and early in the twentieth centuries. And some of our bankruptcy cases throw the same sort of illumination on the scene, holding that a Verplanck Act was not intended to apply to a policy wherein the insured had reserved a power to change the beneficiary.⁸³

With this in mind, *Weil v. Marquis*,⁸⁴ assumes significance. Although the case was passed on in 1917, the original Pennsylvania Act of 1868⁸⁵ was the only applicable statute. There *X* died insolvent, leaving insurance payable to *Y*, his wife, under contracts wherein *X* had the power to change the beneficiary. The personal representative of *X*'s estate, suing on behalf of creditors, sought to reach the entire proceeds on the ground that a constructive fraud had been shown. The plaintiff's position was simple: policies with powers reserved to the insured to change the beneficiary were not such as were contemplated by statute; therefore what the court had before it was property of *X* transferred to *Y* by his death at a time when he was insolvent. The court, however, refused to accept that contention and said that *X*'s powers

"ended at the very instant of his death. . . . The moment he breathed his last the happening of the condition subsequent which might have divested the defendant's rights in the policies became impossible. If, up to that time, her interest in the policies amounted to nothing more than a bare expectancy, that expectancy then ripened and her interest in the policies . . . immediately became a vested one.

83. E. g., *In re White*, 174 Fed. 333 (C. C. A. 2d, 1909).

84. 256 Pa. 608, 101 Atl. 70 (1917).

85. Pa. Laws 1868, § 64.

"Thus the air was cleared; and the position of the creditors became forthwith what it would have been if, when the policies were originally issued or subsequently assigned to her, no right to change their beneficiary had been reserved by the insured. Setting aside the question of fraud, any right that the creditors of (X) . . . had to object to the statute . . . rested solely on the ground that he still had a control over them equivalent to ownership. That foundation has slipped away."⁸⁶

In *Irving Bank v. Alexander*⁸⁷ the creditors were shooting for \$500,000 worth of insurance which the wife received. The husband's estate, of course, was insolvent. But by the time that case came to be heard, the Pennsylvania Legislature had amended the statute in line with the modern form; it provided that the wife could still take all against creditors of the insured whether the right to change the beneficiary were reserved or not.⁸⁸ Thus, the court was able, with much more grace, to dispose of the same sort of attack as was made in *Weil v. Marquis* by referring the creditors to the legislature.

*North British & Mercantile Insurance Company v. Ingals*⁸⁹ represents another attempt by creditors to have the same sort of argument adopted by the court. There, despite a previous decision that when X named Y as beneficiary under a policy reserving the power of revocation, "he initiated a gift which . . . became complete by the death of the insured without revocation . . .",⁹⁰ the California court rejected the creditor's argument that the gift, by insurance, became effective when X died insolvent, and being voluntary, was fraudulent as to creditors. The court reasoned that the transfer was effected by X's death and by the operation of law.⁹¹

In these cases⁹² creditors sought to have a court adopt the position advanced here. Its soundness as far as history and logic are concerned seems to have been conceded by default. But by the time the argument was made the cause was well-nigh hopeless. The courts had created a religion and were sticking to its tenets relentlessly, despite

86. *Weil v. Marquis*, 256 Pa. 608, 614, 101 Atl. 70, 71 (1917).

87. 280 Pa. 466, 124 Atl. 634 (1924).

88. PA. STAT. ANN. (Purdon, 1930) tit. 40, § 517. See note 75 *supra*.

89. 109 Cal. App. 147, 292 Pac. 678 (1930), which involved CAL. CODE CIV. PROC. (Deering, 1931) § 690 (18).

90. *New York Life Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 606, 214 Pac. 61, 62 (1923).

91. 109 Cal. App. 147, 158, 292 Pac. 678, 682 (1930).

92. Other instances where creditors' similar arguments were rejected are: *Gurnett v. Mutual Life Ins. Co. of New York*, 356 Ill. 612, 191 N. E. 250 (1934), 19 MINN. L. REV. 135; *G. P. Farmer Coal and Supply Co. v. Albright*, 90 N. J. Eq. 132, 106 Atl. 545 (Ch. 1919); *Colgate v. Guaranty Trust Co. of New York*, 159 Misc. 664, 288 N. Y. Supp. 463 (Sup. Ct. 1936); 40 West 57th Street Realty Corp. v. Starr, 149 Misc. 470, 267 N. Y. Supp. 740 (Sup. Ct. 1933).

any attack. The occurrence of future litigation along this line seems doubtful, now that the legislatures have begun to codify the widest sort of freedom from creditors.

IV. TRANSFER BY INSURED-DEBTOR OF CASH AND LOAN VALUES OF HIS POLICIES

Thus far, we have been largely concerned with the transfer of the entire beneficial interest in a policy by a debtor. But today, insurance comprises a major field for investment purposes. In the cash and loan values the investor has at hand ready cash which he can use for any purpose. Where the investor is not burdened with debts his dealings with the cash equities is of no concern to creditors. But if he is saddled with judgments he will be uninterested in reducing the cash equity to a form which may be reached by his creditors; he will be more than interested in remaining judgment proof. This poses a problem to him: how can he use the cash and loan values of his policies without making himself vulnerable to attack by creditors? Assume that *X*, the judgment debtor-insured, has reserved all the options in the policy—those of obtaining loans, cash values and power to change the beneficiary—in a jurisdiction which possesses an insurance protective statute. *X*, desirous of using the cash equities of his policies to start some business venture, has the cash to be “invested” in the venture “come” from *Y*, his wife and beneficiary, who will, as a matter of course, become the stockholder. Therefore, when *X* borrows the funds from the insurance company on the security of his policies, or when he receives the funds from the company as a result of his surrender of the policies, he will turn them over to his wife, who will then “invest” them in the business venture. But, since *X* is the only person under his policies entitled to the cash equities, the insurance company will make the check payable to him. To get these funds into *Y*’s hands *X* will have to endorse the check over to her. And here the difficulty arises: assuming that the transaction occurs in New York, is this a transfer sanctioned by Section 55a of the New York Insurance Law,⁹³ or is it prohibited by the fraudulent conveyance statutes? Section 55a states clearly—at least as clearly as words can—that the protection extends only to the “proceeds and avails” payable to a beneficiary other than *X*. In other words, the protection is not extended to *X*, the insured, because when he receives the cash equity of his policies, they are moneys belonging to him just as fully as if he had originally kept them in a bank. This solution seems inevitably the only correct one. If *X* had designated his estate or himself as beneficiary, his creditors

93. N. Y. CONS. LAWS (Cahill, 1939) c. 30, § 55a; see p. 804 *infra*.

could reach the cash equity under the doctrine of *Rockwood v. Trop*.⁹⁴ Likewise, if the policy were payable to *X* as an "endowment" if he survived a given term, those funds when paid to him would become available to his creditors.⁹⁵ It is submitted that these conclusions are based on the only correct view of the statute: its protection does not extend to funds received by *X*.

In the light of this background, it is important to re-examine the factual situation here at issue. When *X* received the cash equity of his policies, whether by way of loan or surrender, he may be considered as having converted his policies into matured endowments. This analogy is not without point. In the usual case of an endowment, *X* insures his life for *Y*'s benefit with the reserved right to receive the face of the policy if he survives a fixed term. The moment before the endowment comes due the entire policy is protected as to *Y* under the statute in view of the present climate of judicial opinion. But the moment the endowment is paid to *X*, *Y*'s interest disappears and the funds belong to *X*, subject to the claims of his creditors. Similarly, by electing to obtain the cash and loan values *X* cuts off *Y*'s interest to that extent. The fundamental factor underlying the entire transaction is the fact that *X* had title to the cash equity and could get it despite *Y*'s wishes; he is the owner, and for that reason it is paid to him by the company.

The result of all this is obvious: since *X* is the owner of the cash value his transfer thereof to *Y* is within the prohibition of the fraudulent conveyance statutes and accordingly may be voided by his creditors. If *X* transfers the funds to a third person, *A*, then *X*'s creditors should be able to set aside the transfer if *X* were insolvent or failed to receive an adequate consideration, since the statute protects only the named beneficiary. Clearly, the same result should follow if the transfer were made to *Y* under the analysis set out above, because the statute protects the proceeds and avails of an insurance policy payable to her as beneficiary. But, when the funds are paid to *X* they lose their character of insurance proceeds and become only cash moneys in *X*'s hands. *Y* does not receive proceeds of an insurance policy as beneficiary from the insurance company; instead, she receives only cash moneys from *X*, the insured.

Despite the obvious nature of this analysis the Circuit Court of Appeals for the Second Circuit reached an opposite conclusion in

94. 211 App. Div. 421, 207 N. Y. Supp. 507, *aff'd* 212 App. Div. 883, 208 N. Y. Supp. 459 (2d Dep't 1925).

95. *Scobie v. Connor*, 94 Misc. 429, 157 N. Y. Supp. 567 (Sup. Ct. 1916). See p. 800 *infra*.

Schwartz v. Holzman.⁹⁶ There the insurance company drew the check payable to the order of X and Y jointly. This was an obvious effort to protect itself against all possible claims from insured and beneficiary by obtaining both of their endorsements. But the proceeds belonged to X. Nevertheless, the court denied to X's trustee in bankruptcy the right to reclaim the funds. It declared:

" . . . she was the person described in the statute as the one entitled, as against creditors of the insured, to the proceeds and avails of the policies. The money she actually received when the policies were surrendered was the proceeds of the policies. When she got it she became entitled to hold it against the claims of creditors of the insured under the terms of the statute, for the statute is to be given a liberal construction . . . Strictly . . . the named beneficiary is not a beneficiary so far as the proceeds and avails are concerned when the policy is surrendered by the insured during his life for the cash value. The statute, however, applies the term 'proceeds and avails' generally, and, while it does not require them to be paid to the lawful beneficiary named in the policy, it does permit such beneficiary to whom they are paid to hold them against the claims of creditors of the insured. Otherwise, the statutes would apply to the potential proceeds and avails while the insurance was in force, and we cannot believe the language used can be given so narrow an interpretation without nullifying in part the intention of the legislature." ⁹⁷

It is apparent from the court's opinion that it was fully aware of the arguments in favor of the creditors' position; nor was its decision dictated by the terms of the statute as written. The court conceded as much. But to construe the statute as written would have violated the "intention" of the legislature—very often a shorthand expression whereby judges justify their own statutory revisions. Unfortunately, the Supreme Court refused to review the case. Although it still stands as the rule in the second circuit, it was not followed by the district court in *Butler v. Rand*.⁹⁸ The cases were distinguished upon the fact that in the *Butler* case the check was made payable only to X. But it would seem that the distinction has no valid basis in fact.

It is difficult to close this discussion without adverting to the inherently implausible basis of judicial decision as reflected in the various constructions of the insurance protective statutes. For example, *Schwartz v. Holzman* is based upon the conception that during X's

96. 69 F. (2d) 814 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 565 (1934). The result in *Matter of Rubin*, 102 N. Y. L. J. 542 (S. D. N. Y. 1939) proceeded from a similar rationale without citing the *Schwartz* decision.

97. *Schwartz v. Holzman*, 69 F. (2d) 814, 815 (C. C. A. 2d, 1934). See also *Bank of United States v. Glickman*, 170 Misc. 390, 9 N. Y. S. (2d) 349 (Sup. Ct. 1939) for a decision involving a similar conception of the statute.

98. 11 F. Supp. 343 (E. D. N. Y. 1935).

life his creditors cannot reach the cash values of his policies so long as a third person is designated as beneficiary. This was what the court meant when it referred to them as "potential" values. It would seem, however, that under a correct construction of the statute, X's creditors could reach the cash values during his life despite the existence of a named beneficiary. Obviously the statute should be construed as protecting funds paid to the beneficiary after X had died, not before. But as the matter stands today, X, if he is astute, need not embroil himself in any controversies with his creditors. By merely designating Y, the beneficiary, as the sole person entitled to exercise the various options in the policy, X makes Y the only person who may cash it. The check would be paid to her, and X would not appear in the transaction at all. In the present judicial climate such a transaction would be beyond the scope of attack by X's creditors.⁹⁹ And such a result will freeze for good and all a large segment of property beyond the ordinary incidents of commercial liability. It seems difficult to believe that it will not react to the considerable harm of the commercial community. Perhaps, before then, both courts and legislatures will attempt to undo the harm wrought thus far.

V. TRANSFER BY THE INSURED WHERE BENEFICIARY IS A CORPORATION IN WHICH HE OWNS ALL THE STOCK

In *Huff's Estate*¹⁰⁰ X insured his life, and designated the A corporation as beneficiary. X reserved power to change the beneficiary; as the court put it, X "was the . . . company, and in effect, the beneficiary under the policy . . . when the . . . company, which was X . . . was made beneficiary of the life insurance, it became an asset of his estate . . .". While insolvent X transferred the policy so as to prefer one creditor over his others. Under Pennsylvania law such a transaction inured to the benefit of all creditors. When X died insolvent his administrator, who, as trustee under the policy for the benefit of the preferred creditor, had paid the funds to that creditor, was surcharged with the amount of the fund. This was affirmed on the ground that the policy was an asset of X's estate and could not "when he was insolvent be given in trust to prefer one creditor over another."

This case represents an important realism in the field. The conception is simple and the reasoning sound. But its real significance

99. This follows from the usual construction given to the insurance protection statutes. To upset the transaction the courts would have to consider the insured as the owner by reason of his reserved powers and hence treat a cancellation of such powers in favor of a named beneficiary as a transfer of the insured's interest.

100. 299 Pa. 200, 203, 204, 149 Atl. 179, 181 (1930).

lies in two things: the opportunities afforded by the 55a statute¹⁰¹ for business investment in life insurance; and the removal of such investment from the ordinary liabilities of our capitalistic structure. At present, an insured, if he uses his insurance for business purposes, is apt to make his estate the beneficiary, a procedure whereby his creditors may acquire an opportunity to share in the fund. This could be avoided if *X* named his personal corporation as beneficiary, and if such a contract were held exempt from creditors. In obviating the danger of such a rather shocking result, the Pennsylvania case marks an important advance in judicial thinking. It will, indeed, be a major force for good if it will persuade other courts faced with the same problem.

VI. ENDOWMENT POLICIES AS FRAUDULENT TRANSFERS

Had insurance not developed into a sacred institution in American law, evoking ideas associated with the protection of the home and the sanctity of womanhood, it is at least probable that the courts would have placed the Verplanck statutes in their proper historical setting and given the creditors their measure of right. When the Verplanck Act was first enacted it was intended to apply to a contract for the wife's benefit; any extension of the statute to a policy for the husband's sole benefit was unthinkable. But, the companies soon evolved a policy which combined savings with insurance; the endowment by way of the tontine. The endowment feature of the policy is simply savings: *X* deposits with the company an annual sum for a term of years, at the end of which it is returned to him, with interest. Insurance was added to this by a provision that on his death before the expiration of the term, the face amount would be paid to the named beneficiary. Insofar as the policy represents accumulated savings for the husband, it was clearly not within the scope of the Verplanck Act; and obviously, the entire arrangement was not covered by the statute since it presupposed an event whereby the wife would be deprived of any chance to share in the fund. This, of course, is entirely apart from the fact that endowments were not generally used in America until long after 1840.

Nor was the law devoid of concepts which could have been used to help creditors when *X* died leaving such a contract for his wife's benefit, should he predecease her. The common law, and statutory codification as well, recognized that transfers made in trust for the transferor were void as to creditors. And in *Tompkins v. Levy* the court said, in speaking of an endowment:

101. I. e., statutes drafted along lines similar to Section 55a of the New York Insurance Law.

"A reservation of this kind would be such a locking up of the debtor's property from creditors for his own beneficial use as to evince an intent to . . . defraud creditors has never been doubted since the doctrine settled in *Tynes* case decided near three centuries ago. . . ." ¹⁰²

The precise question was presented for decision in *Kimball v. Cunningham Hardware Company*,¹⁰³ where *X* died leaving his wife as the beneficiary of an insurance contract which contained an endowment feature. *X*, of course, had not survived the endowment term. The majority of the court felt that endowment contracts were included in the general scope of the Verplanck statute; if not, then all policies which reserved to *X* the power to change the beneficiary were subject to the same objection. And the court had previously ruled in favor of the beneficiary on such a point.¹⁰⁴ Considering endowment insurance on this plane, it merely remained to consider the effect of the Verplanck Act, which was construed to permit such reservations, upon the Fraudulent Transfer Act making secret trusts for the settlor void as to creditors. As to that the answer was simple: the court explained that the statutes had to be construed "in pari materia . . . and, if a case falls within the exemption statutes, then it is . . . taken out" of the sphere of influence of the Fraudulent Transfer Act.¹⁰⁵

VII. THE TRANSFER CONSIDERED AS A FRAUD ON WIFE'S "MARITAL RIGHTS"

There has developed the doctrine that a husband may not during his life settle his property so as to deprive his wife of her "marital rights". The bounds of the concept are as yet very vague; no formulated course has been fixed which separates the inhuman conduct of the husband from the permissible conduct. It is yet to be determined which is broad enough to allow him to dispose of his property so long as he does not infringe upon the rights of creditors. The interplay between this concept and those which pertain to life insurance is especially interesting. If *X* has a policy on his life payable to his estate, it is "property" and therefore within the scope of the doctrine of "marital rights". Thus, in *Gaines v. Gaines*,¹⁰⁶ *X*'s otherwise complete power of dominion was subject to the immunity of the wife from having her "marital rights" impaired—and part of the fund was saved to her. This holding is significant for the manner in which the court disregarded the insured's designation of a beneficiary—ordinarily a

102. 87 Ala. 263, 269, 6 So. 346, 348 (1888).

103. 192 Ala. 223, 68 So. 309 (1915).

104. *Young v. Thomason*, 179 Ala. 454, 60 So. 272 (1912).

105. *Kimball v. Cunningham Hdw. Co.*, 192 Ala. 223, 229, 68 So. 309, 311 (1915).

106. 30 Ky. L. Rep. 710 (1907).

sacred matter. Apart from the few exceptions made in fraudulent transfer cases, the courts' regard for life insurance has, as exemplified by the "vested interest" rule, tended to remove it from the ordinary incidents of mundane property. To the extent that the *Gaines* case ignored this attitude, it was a step in the right direction; the Verplanck statute should not be used as a buffer to prevent the application of equitable principles.

Just recently the Kentucky court had occasion to repudiate the doctrine of marital rights so far as it affected life insurance. In *Farley v. First National Bank*¹⁰⁷ X changed the beneficiary of his insurance from his estate to his children. His insolvency at that time did not affect the right of the children to take, as has been shown under the so-called Massachusetts rule.¹⁰⁸ But the wife felt that her "marital rights" were being breached and sued to recover her fair share. In refusing to afford her any relief and in reversing the *Gaines* case, the court relied on the fact that life insurance had attributes different from other forms of property.

"... the right of the insured to make the change is absolute It is an essential part of the contract that he retains control of the policy . . . to the extent of changing the beneficiary . . . (That) is wholly under his control and the manner of making it is entirely a matter between him and the insurer. . . ." ¹⁰⁹

Judge Dietzmann, in his dissent found it

"impossible . . . to see how the right to change the beneficiary in a life policy stands on any better ground than the right to sell stocks and bonds or any tangible personal property the husband may own. His right to change the beneficiary may be exercised at his will, but, in the exercise of that right he must not perpetrate a fraud upon his wife's marital rights" ¹¹⁰

It would seem that if the special doctrine of "marital rights" was to be given any content at all, the dissent is correct. The power which X had reserved certainly should not give the insurance property any special attributes: X had the same power as to his bank accounts, and that property was within the reach of the wife.

This, however, presented a dilemma: if X had named Y, his wife, as beneficiary, he would have the power, under his policy, to deprive her of her expectancy. If that were so, apparently all X would have to do to honor the *Gaines* rule—and still flaunt his wife's rights—was to name her as beneficiary, and immediately remove her. Although

107. 250 Ky. 150, 61 So. 1059 (1933).

108. See p. 784 *supra*.

109. *Farley v. First National Bank*, 250 Ky. 150, 154, 61 So. 1059, 1061 (1933).

110. *Id.* at 155, 61 So. at 1062.

Judge Dietzmann's answer is not precisely plain, it would seem that if the "marital rights" concept is to be of any effect it should certainly apply to deprive *X* of any opportunity to exercise his reserved power in his insurance contract where that would "work a fraud" on his wife's rights. That conception is not without precedent; witness the similar cases where *B*, whom *X* has promised for consideration to retain as beneficiary, is given prior rights to the fund over *A* whom *X* has nominated as beneficiary in violation of his contract.¹¹¹

VIII. TRANSFER BY BENEFICIARY OF HER INTEREST

The ordinary Verplanck statute merely entitled the beneficiary to the proceeds exempt from the claims of the insured's creditors; this has no application to her creditors. Since the vested interest of a beneficiary is property, transfer of such property if made while insolvent can be set aside. But this apparently simple set-up has been beyond the comprehension of some courts. For example, in *Sebring v. Brickley*,¹¹² insurance was issued on the life of the wife, payable to her husband, who while insolvent assigned to his son. The statute involved referred to insurance on "the life of any person" taken out or assigned to the wife or children "of such person".¹¹³ Although it would seem that the statutory language very clearly indicates that it did not refer to insurance on the life of the wife in this case, the court nevertheless so misapprehended the statute as to deem it applicable to the facts set out.

A more difficult case is the relationship of a contingent beneficiary. Although the interest may be "inchoate", "defeasible", etc., it is nevertheless "property" and has been protected by the courts. If *V*, the beneficiary of insurance on *X*'s life, while insolvent, assigns it to *Z*, the right of her creditors to recover should not be measured by the fact that *X* could have, but did not, destroy her interest while alive.

IX. THE NEW YORK AMENDMENTS OF 1939

In conclusion, it is interesting to note the most recent legislative expression upon this subject, namely, the New York Amendments of 1939.¹¹⁴ This statute, which came as quite a surprise to the legal profession,¹¹⁵ instituted some rather revolutionary changes. For ex-

111. See e. g., *Beed v. Beed*, 207 Iowa 954, 222 N. W. 442 (1928).

112. 7 Pa. Super. 198 (1898).

113. Pa. Laws 1868, No. 64, p. 103.

114. N. Y. CONS. LAWS (Cahill, 1939) c. 30, § 1-601.

115. Although it was well known that the Legislature was revising the Insurance Law, the revisions were generally thought to be a matter of recodification, with changes reserved to that part of the law pertaining to the regulation and functioning of insurance companies. At no time was there any public mention of the fact that a substantially new statute was to be substituted for the existing protective provisions. It is interesting to speculate concerning the part played by the insurance companies.

ample, it grants to the wife beneficiary an exemption of the proceeds from *her* creditors.¹¹⁶ Although it is true that this provision is limited to cases where the wife is the person *effecting* the insurance, it is likely that judicial benevolence will operate so as to apply the exemption in every instance where she is beneficiary. It is indeed doubtful that the clause will be interpreted as written.

The scope of the exemption is further enlarged so as to include "death benefits, cash surrender and loan values, premiums waived, and dividends used in reduction of the premiums or in whatsoever manner used or applied, excepting only where the debtor has, subsequent to the issuance of the policy actually elected to receive the dividends in cash . . ." ¹¹⁷ By this clause, the new Act ensures the continuation of the rule in *Schwartz v. Holzman*.¹¹⁸

The most revolutionary introduction, however, is comprised within this language of the fourth subdivision:

"Every assignment or change of beneficiary, or other transfer, shall be valid, except in cases of transfer with actual intent to hinder, delay or defraud creditors, as such actual intent is defined by Article X of the Debtor and Creditor Law; in case of transfer with such actual intent, creditors shall have all the remedies provided by said Article X. Where a policy of insurance, theretofore payable to the estate of the insured, is, by assignment, change of beneficiary or otherwise, made payable to a third person, beneficiary, such assignments, change of beneficiary or other transfer shall be valid, unless made with such actual intent. . . ." ¹¹⁹

As any lawyer knows, the successful prosecution of a fraudulent conveyance action is more or less of a nine days' wonder. And in the accomplishment of such an achievement the creditor obtains his greatest aid from that section of the Uniform Fraudulent Conveyance Act which conclusively presumes a transfer fraudulent if made by an insolvent without fair consideration.¹²⁰ And this, in the language of the Act, is without regard to the debtor's actual intent. The statute provides also that a transfer made with "actual intent" (as distinguished from intent presumed in law) . . . to defraud creditors is voidable.¹²¹ But how does one prove "actual intent"? Either by the debtor's own words—a fantastic conception—or by the laborious accretion of circumstantial detail from which such intent can be inferred. And here one wonders whether the laborers in the vineyard of exempt insurance may not

116. N. Y. CONS. LAWS (Cahill, 1939) c. 30, § 166.

117. *Ibid.*

118. 69 F. (2d) 814 (C. C. A. 2d, 1934). See p. 797 *supra*.

119. N. Y. CONS. LAWS (Cahill, 1939) c. 30, § 166.

120. UNIFORM FRAUDULENT CONVEYANCE ACT § 4.

121. *Ibid.*

have been designedly pointing to the almost impossible case—namely, proof out of the debtor's own mouth. For, clearly, the inference of an actual intent to defraud which is predicated on circumstantial minutiae is not substantially different from that which is based on the conclusive presumption drawn from an insolvent's voluntary conveyance; the latter is merely a delimitation of the number and quality of the facts from which the inference will be drawn. Accordingly, there is reason to suspect that "actual intent" may be construed so as to require an impossible quantum of proof. This, of course, will be quite in keeping with the devious nature of the process whereby the creditor has been gradually deprived of his real remedies; a remedy is open to him, but only God or Daniel Webster could use it.