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Lecture II. Policies of Insurance as Securities and in Trust

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LECTURE II.

POLICIES OF INSURANCE AS SECURITIES AND IN TRUST.

(Delivered January 17th, 1895.)

THERE are various ways in which life policies may be made available as securities. An existing policy upon the debtor's life and in the debtor's name may be assigned to the creditor, or a policy may be taken out in the creditor's name, in which case no assignment is necessary. Unless, however, the policy has already acquired a value, the security is defective if there is no additional security for the payment of the premiums by the debtor. Consequently, policies are most frequently used as supplementary to other securities. For example, an annuity upon the debtor's life, or on some other life, is assigned to the creditor, of sufficient amount to cover the interest on the loan and the premiums upon a policy upon the annuitant's life. The policy secures the repayment of the principal sum when the annuity lapses. In the same way, a reversionary interest may be assigned along with a policy upon the life on whose survivance the reversion depends. In the latter case it is not unusual to burden the reversion not only with the principal, but with the whole or a part of the interest and premiums upon the policy. If this is done, there seems no reason, as I stated in my last lecture, why the policies should not cover the interest and premiums for which credit is given as well as the principal.

A policy on a man's own life, and in his name, may in the same way be assigned to trustees by a separate deed declaring the purposes of the trust ; or, on the other hand, under what are called settlement policies, the trust purposes may be declared and the trustees named in the policy itself. In some few cases the insurance company agrees to act as trustee and to hold the fund provided by the policy for the benefit of any persons named as beneficiaries in the policy. The most common form of settlement policies are those under the Married Women's Policies of Assurance (Scotland) Act, 1880, and the English Married Women's Property Act, 1882. Under these Acts, the insurance office does not act as trustee. The trustee is either appointed by the insured, or, if he fails to appoint, the trust vests in him and in his personal representatives.

The only beneficiaries under the trust authorised by the statutes are the husband or wife and the children of the insured.

1. *Assignment of Policies in Debtor's Name.*—I propose, in the first place, to consider the requisites of a valid assignment. The question of the right to a policy may obviously arise between different parties: between the assignor and the assignee; between different assignees; between an assignee and the trustee in a sequestration; or lastly, between the assignee and the insurance company. In the last case, the only interest of the insurance company is to obtain a valid and effectual discharge of their obligation; and it is to the conditions under which such a discharge can be given by an assignee that I mean mainly to direct your attention at present.

For any assignment to have this effect there are four conditions requisite. The first requisite is that the assignment should be in writing, either separate or indorsed on the policy. In England, deposit of the policy, in consideration of an immediate advance, constitutes an equitable assignment, and, like the Scottish written assignment, gives the assignee a valid right as against the assignor and his representatives, although in both countries intimation of the assignment is necessary to the completion of a valid title in a question with other assignees.

In Scotland an obligation or debt, such as a policy of insurance, cannot be assigned by a transfer of the document of title. In the *United Kingdom Life Assurance Company v. Dixon*^a it was held that a deposit of a policy conferred no right upon the holder, or those claiming through him, to the contents of the policy, in competition with an executor of the assignor who had made up a title by confirmation.

If the assignment is made in England, the law of that country determines its validity. Thus in the case of the *Scottish Provident Institution v. Cohen and Company*,^b the sum due under the policy was claimed by the trustee on the assured's sequestrated estate and by the defenders, who were money-lenders in Newcastle-on-Tyne, and with whom the policy had been deposited in security of an advance to the assured. The estate of the deceased was sequestrated several months after notice of the equitable assignment had been given to the company by the defenders. It was held that the assignment, being valid by the law of England, and having been followed by notice to the company prior to the date of the sequestration, conferred upon the defenders a title to the policy which was preferable to that of the trustee.^c

The second requisite is that the title under which the assignee

^a 16 Shaw 1277.

^b 16 Rettie 112.

^c See also *The Scottish Provident Inst. v. Robinson and Newett*, 1892, 29 S.L.R. 733.

holds should, either expressly or by implication, give him power to discharge the company on payment to him of the sum due in the policy.^a If the assignment is absolute, such a power is implied; and in England, by statute, where a mortgage is in writing, and subsequent to the Conveyancing Act of 1881, a clause to this effect is also implied; but this provision does not extend to Scotland, and therefore it is advisable that the clause should be expressed in Scottish assignations in security.^b

The question was considered in a recent case in Ireland in reference to an assignment prior to the Conveyancing Act of 1881. It was there held that when a policy is assigned in security, but without any provision empowering the assignee to grant a valid discharge to the company, the company is not bound to pay the sum due upon the policy except upon the joint receipt of the assignor and assignee. It was pointed out that the right to grant a valid discharge, conferred by section 1 of the Policies of Assurance Act of 1867, is limited to cases in which the assignee has received from the assignor the right to grant a discharge; and accordingly, that when there is no special provision in the mortgage deed conferring such a right, the company is not bound to pay upon the receipt of the assignee alone, but is entitled to demand that the assignor should join in the discharge.^c

By the English Conveyancing Act, 1881, a trustee's discharge is also made sufficient,^d and by the Trusts (Scotland) Act, 1867,^e trustees falling within the provisions of the Act are empowered, *inter alia*, "to uplift, discharge, or assign debts due to the trust estate," unless such acts are at variance with the terms or purposes of the trust.

The English Conveyancing Act of 1881 also authorises a mortgagee to sell the security in the same way as if the mortgage deed contained a power of sale, provided a contrary intention is not expressed.^f This provision only applies to mortgages by deed, and subsequent in date to the commencement of the Act. In Scotland there is no statutory power of sale, and the right either to sell or surrender the policy must be conferred by the mortgage deed. In the case of trusts, the Act of 1867 authorises the trustee to apply to the Court for power to sell when such power is not conferred by the terms of the trust.^g Where these statutes do not apply, and where no special mandate to sell or surrender is conferred by the deed creating the trust or mortgage,

^a Policies of Assurance Act, 1867 [30 and 31 Vict. c. 144], s. 1.

^b 44 and 45 Vict. c. 41, s. 22; Bell's *Lectures on Conveyancing*, vol. i. 331.

^c *Tench v. Eykyn*, 18 L.R. (Ireland) 45.

^d 44 and 45 Vict. c. 41, s. 36.

^e 30 and 31 Vict. c. 97, s. 2.

^f Section 19.

^g Section 3.

the discharge, to be valid, must be concurred in by all the parties interested. Sometimes this authority is conferred by a condition in the policy itself. Such a condition provides that "the holder of the policy as mortgagee or trustee may (unless to the knowledge of the company he is prohibited from doing so by the terms of his mortgage or trust), surrender the policy to the company for cash or any other consideration, and such surrender, so made, shall effectually discharge the company from liability under the policy after the date of such surrender."

Prior to the Policies of Assurance Act of 1867, the assignee, even if he had the power to grant a discharge, could not in England have sued upon the policy in his own name, but would have had to obtain the consent of the assignor or his representatives to use his or their name in any action against the company. He is still in this position unless the title under which he holds gives him expressly, or by implication, the right to grant a discharge. Even before the Act, an assignee in Scotland, if he were empowered by the assignor to receive and discharge the sum due upon the policy, could have sued in his own name, so that in this respect the Act made no change upon the law of Scotland.

In England, as we have seen, the deposit of a policy in security of an immediate advance, operates as an assignment, but it does not give the assignee any right, under the Policies of Assurance Act of 1867, to sue in his own name or to discharge the company, even if the conditions as to notice of the assignment required by that Act are fulfilled. The company are therefore not bound, and are not in safety, to pay to one who holds as a mere depositary, and has no written title, even if they have no notice of other claims, and no representatives of the assured have made up a title. In such a case an application to the Court is necessary to secure for the company a valid discharge, unless the representatives of the assured make up a title and concur in the discharge by the holder of the policy. The necessity for an application to the Court therefore arises when the representatives have no interest to make up a title and refuse to do so. In that case the costs of the necessary proceedings to obtain a valid discharge must be paid by the holder of the policy. Nor is the company liable for interest upon the sum due under the policy till the date of the decree authorising them to pay. It is only when a debtor is in default in not paying at a certain date that he is liable in interest. He is not in default until the person claiming payment is in a position to give him a valid discharge. These rules were laid down in the cases of *Crossley v. The City of Glasgow Life Insurance Company*,^a and in *Webster v. The British Empire Life Assurance Company*.^b They would seem to apply equally to the case where the

^a 4 Ch. D. 421.

^b 15 Ch. D. 169.

assignment in security is in writing, but does not contain either expressly or by statutory implication the power to grant a discharge.

The third requisite of a complete title in the assignee is that notice of the assignment should be given in writing to the head office of the insurance company. This is required by section 3 of the Policies of Assurance Act of 1867, which is as follows:—
“No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy, at their principal place of business for the time being, or, in case they have two or more principal places of business, then at some one of such principal places of business, either in England, or Scotland, or Ireland; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed.”^a

Almost no change is made by this section upon the law of Scotland; notice of the assignment of a debt always required to be given to the debtor or holder of the fund assigned, and the priority of claims by different assignees upon the fund depended upon the date of notice. But prior to the Act, notice might have been given in various ways; now, the method prescribed by statute must be followed. There is no decision on the question what constitutes “written notice of the date and purport of the assignment,” but it is thought that intimation in one or other of the methods prescribed by the Transmission of Moveable Property (Scotland) Act, 1862,^b would fall within these terms. Under that Act, which is expressly made applicable to the assignment of policies of assurance issued by Scottish companies, intimation may be given by the transmission to the company of a certified copy of the assignment. The company would thus receive intimation in writing of the date and purport of assignment, which is all that is required by the Act of 1867.

Section 6 of the Act provides that the company shall duly acknowledge notice of an assignment.

In England a much greater change was made in the law. Prior to the Act mere verbal notice to the insurance company would have been sufficient. Now the rights and duties of the company as regards notice depend on the provisions of the statute alone.

^a 30 and 31 Vict. c. 144, s. 3.

^b 25 and 26 Vict. c. 85, s. 2.

It has accordingly been held that verbal notice of an assignment is not sufficient to give a claim against the company in competition with that of an assignee who has given written notice in terms of the Act.^a The company is entitled to disregard the verbal notice, and pay to the assignee who has fulfilled the conditions required to complete his title and give a valid discharge. On the other hand, when the company have written notice of a prior incumbrance, they are not bound or entitled to pay to a subsequent assignee from the assured, although no claim is made by the first assignee. The claimants under the second assignment are bound to show that the prior incumbrance has been satisfied or discharged. A mortgagee giving notice in terms of the Act is entitled to sue in his own name, and therefore the company would not be safe in paying to a subsequent assignee. Nor is the company bound to find out the state of the prior incumbrance. The expense of making his title clear by showing that the prior incumbrance has been discharged, must be borne by the claimant.^b

The provision as to priority of notice in the third section of the Act only applies in regard to questions with the company. Questions of priority between assignees are determined by the common law. Hence when a first incumbrancer on a policy had failed to give notice in terms of the Act, it was held that a second incumbrancer, who knew of the first incumbrance, could not, in a question with the prior incumbrancer, acquire a preference by giving written notice to the company.^c On the same principle, an assignment not intimated at all would be valid against the assignor himself, although it would, independently of the statute, confer no right in competition with subsequent assignees in good faith. At common law, in England as well as in Scotland, notice is necessary to complete the assignee's title. Its effect is to prevent the debtor paying to the original creditor, and also to protect subsequent assignees from dealing with the assignor in ignorance of the limitation upon his right.

The notice to be given to the company is required to set forth "the date and purport" of the assignment. The interpretation of the term "purport" is not very clear, but it must at least include the identification of the policy assigned, and the name of the assignee, which, along with the date, would seem to be all that is essential to the notice. It may therefore be doubted whether the term necessarily includes the nature of the assignment, whether it is absolute, or in trust, or by way of security. It is true that, at a later stage, the company are entitled to this infor-

^a *In re Young*, 25 L. R. (Ireland), 372, 386.

^b *In re Haycock's Policy*, 1 Ch. D. 611.

^c *Newman v. Newman*, 28 Ch. D. 674, 680.

mation, because the proper stamp-duty in each of these cases is different, and the company are, by a statute to which I shall presently refer, liable to pay the stamp and penalty, if they pay the sum in the policy to the assignee upon an imperfectly stamped assignment. But at the stage of intimation, all that is necessary for the assurance company to know is that on a specified date a certain policy was assigned by A to B. The company are not called upon at that stage to inquire what is the extent of B's right, nor whether the stamp-duty is sufficient, nor even whether the deed is validly executed. It is only when they are called upon to make a payment in respect of the policy that they are entitled to make inquiries or to raise questions. Until then the responsibility rests not on them, but on the party taking the assignment, to see that the deed is in every way complete.

The concluding words of section 3, providing that "a payment *bonâ fide* made in respect of any policy by any Assurance Company before the date on which such notice shall have been received, shall be as valid against the assignee giving such notice as if the Act had not been passed," would seem to contemplate the case of the company having *bonâ fide* accepted a surrender of the policy, or having paid away the sum due upon it, before written notice of the assignment. The effect of the limitation that such payment shall be as valid against the assignee giving such notice as if the Act had not been passed, is to leave any ground of challenge open to the assignee which he could have urged against the payment by the company prior to the Act.

In England an assignee in bankruptcy must give notice like any other assignee, but in Scotland the confirmation of the trustee in a sequestration operates as an intimated assignation of all debts due to the bankrupt.^a Accordingly, in England an insurance company is discharged if it pay to any of the parties entitled under the terms of the policy or under an intimated assignment, without notice of the bankruptcy. The same rule applies if the company pay the surrender value of the policy in good faith to the bankrupt.^b In Scotland the company is held to have notice of the bankruptcy, and is not in safety in paying to an assignee of the bankrupt in terms of a notice subsequent to the confirmation of the trustee. The company are bound to inform themselves of the sequestration, and to treat the confirmation of the trustee as an intimated assignation of the bankrupt's whole right and interest

^a Bankruptcy Act 1856 ; 19 and 20 Vict. c. 79, s. 102.

^b *Sowerby v. Brooks*, 4 B. & Ald. 523 ; *In re Atkinson*, 2 De. G. M. & G. 140 ; *In re Barr's Trusts*, 4 K. and J. 219 ; *Palmer v. Locke*, 18 Ch. D. 381 per Jessel M. R. The decision in *In re Bright's Settlement*, 13 Ch. D. 413 deals with the vesting clauses of the Act of 1849, which are different from those of the present English Bankruptcy Act, 1883 (46 and 47 Vict. c. 52, ss. 20, 43, 44, 54).

in the policy at the date of the confirmation. To this rule an exception is introduced by section 111 of the Bankruptcy Act of 1856, which provides that if a debtor pays the amount due to the bankrupt himself in ignorance of the trustee's confirmation, he cannot be required to pay over again to the trustee. This provision would cover a payment by the company to the assured of the surrender value of the policy if made in ignorance of the fact that sequestration had been granted.

In the fourth place, it is essential that the assignment should be properly stamped. The Customs and Inland Revenue Act, 1888,^a provides that "no assignment of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the money assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless such assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

"If any payment shall be made in contravention of this section, the stamp-duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to Her Majesty from the company or person by whom such payment is made, and shall be recoverable as such accordingly. Every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the passing of this Act, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void."

Of course a company paying to an assignee upon an assignment, otherwise valid, but not properly stamped, would only incur liability for the stamp-duty and penalty. The payment would be perfectly valid against the parties concerned, and the company could not, on the ground that they had paid on an unstamped assignment, be required to pay over again. All that the statute does is to make the company liable to the revenue for the deficiency of the stamp. The proper stamp depends on the purpose of the assignment, whether it is absolute, in security, or contains a declaration of trust. In these three cases a different stamp is required.

The company is bound to see not only that the last assignment, in respect of which the claim is made, is stamped, but that all intermediate assignments, forming the chain of the assignee's title, are duly stamped. Of course if a prior mortgage of the policy has been discharged, so that it does not form a link in the

^a 51 Vict. c. 8, ss. 19 and 20.

assignee's title, it would not be necessary, in a question with that assignee, that it should be stamped.

2. *Policies in the Creditor's Name.*—Instead of taking an assignment of a policy from his debtor, a creditor may secure himself by taking out a policy on his debtor's life in his own name, the debtor being bound to pay the premiums. Where this is the nature of the arrangement, it will be presumed that the policy is held by the creditor in security merely, and he will be bound to assign it to the debtor on payment of the debt, or to account to his representatives for the proceeds beyond the principal, interest, and premiums which may be due to him. Thus, in the case of *Lindsay v. Barmcotte*,^a the policy was effected as part of a transaction between two brothers for the purpose of raising money to enable the younger to start in business. The elder consented to join in a bond to an insurance company for an advance of £500. At the same time he took out a policy on his brother's life in his own name for £1000. The premiums were paid by the younger brother, and he also paid interest on the loan, and certain sums towards extinction of the capital. It was held that the proceeds of the policy, after discharging the debt due to the company—for which the brothers were jointly liable—belonged to the representatives of the younger. On the other hand, a policy effected by a creditor in his own name upon his debtor's life without any agreement that the debtor should pay the premiums, belongs absolutely to the creditor.^b There appears to be no reason why the policy itself should not specify the limitation upon the right of the person in whose name the policy is taken, if he holds it merely in security.

The disadvantage of a security in the form of a policy upon the debtor's life in the name of the creditor is that, when effected, it has no immediate value, and that the creditor has to rely upon the debtor's personal obligation for the premiums. To obviate this it used to be a common practice for the borrower to grant an annuity on his life to the lender sufficient to pay the interest on the loan and the premiums of insurance. The form of deed usually adopted was a bond of redeemable annuity, secured on land, which contained a provision that the annuity might be redeemed, due notice being given, on repayment of a sum equal to the original advance, with a proportion of the annuity up to the date of repayment. In the event of this power not being exercised by the grantor, repayment of the principal was secured by the policy of insurance on his life. The bond of annuity, if properly drawn in the grantor's interest, contained a provision

^a 1851 ; 13 Dunlop 718.

^b *Stevenson v. Cotton*, 1846, 8 Dunlop 872, 880 ; *Bruce v. Garden*, L. R. 5 Ch. 32.

that on redemption of the annuity the policy should also be conveyed to him. The deeds contained no obligation upon the grantor of the annuity to repay the advance, and in this respect the transaction differed from a loan. At the same time, the tendency in Scotland was to regard the grant as a pledge of the annuity in security of the interest and premiums of insurance, and of the policy in security of the principal sum, and not as a sale with a power of repurchase. When this is the true effect of the transaction, it is immaterial whether the right of redemption is or is not expressly reserved in the deeds, or whether the policy is assigned to the lender or taken in his name. The law presumes that in a pledge the pledger has a right to redeem, and will imply such a stipulation if not expressed.^a In the case of *Shand v. Blaikie* the bond of annuity granted to the lender contained the usual provision that the annuity might be redeemed by repayment of the advance, but contained no provision that the policy of insurance, which was taken in the lender's name, should be conveyed to the borrower in that event. It was shown that the annuity was sufficient to cover the premiums on the insurance as well as interest on the sum advanced. This fact, in addition to others of a more special nature in the case, led the Court to the conclusion that the transaction was in substance a pledge, and that the policy, although in the lender's name, was the property of the borrower, and held by the lender in security merely. It was accordingly held that the lender's assignee was bound, on the death of the grantor of the annuity, to account to his estate for the surplus proceeds of the policy beyond the debt.

On the other hand, the tendency in England has been to regard the transaction as a sale of the annuity with a power of repurchase, and to hold that the grantor has no right or interest, apart from special stipulation, in a policy upon his life obtained by the purchaser of the annuity in his own name. This was held, although by the terms of the deed of sale the grantor agreed to pay the extra premiums required in the event of his residing abroad.^b There is, however, it is thought, no difference in the principle of these decisions; they depend on the view taken of the effect of the transactions; and in Scotland as well as in England the grantor of the annuity would be held to have no interest in a policy on his life obtained by the grantor, if the circumstances were such as to show that a sale and not a pledge was contemplated. Although these forms of security are now practically obsolete, the principles they lay down are still applicable, and have recently been applied

^a *Marquess of Queensberry v. Scottish Union Ins. Co.*, 1839, 1 Dunlop 1203; *Shand v. Blaikie*, 21 Dunlop 878.

^b *Knox v. Turner*, L. R. 5 Ch. 515; *Preston v. Neele*, L. R. 12 Ch. D. 760, 769.

in a case where the advance was made upon a *post-obit* security. Under this form of security, in which a reversion contingent on survivance is mortgaged to the lender, it is usual for the lender to insure his debtor's survivance, so as to provide an indemnity against the event of his never becoming entitled to the reversion. Such a policy is usually taken in the creditor's name, and the reversion is burdened with payment of a fixed sum or reversionary charge calculated as the equivalent of the capital, interest, and premiums on the insurance. If the policy belongs to the debtor, and is merely pledged in security, he is, on the principle already explained, entitled to a reconveyance if the debt is paid during the currency of the policy, or his representatives at his death are entitled to the surplus of the proceeds, if any, after the creditor's claim is satisfied.^a But if the creditor takes out the policy without any arrangement with the debtor, paying the premiums himself, he is entitled to the proceeds of the policy whether the debt is paid or not, and on the predecease of the debtor is not bound to account for the proceeds to his representatives.^b

If the transaction is properly a mortgage, then the right to redeem the subject pledged, on payment of the debt, is, as we have seen, an essential condition of the contract, and will be implied if not expressed. By an extension of the same principle, an express provision in the mortgage deed by which the debtor abandons his right to redeem the security, or by which his right to redeem is limited in point of time, will not be given effect to. In other words, a contract of pledge implies the right to redeem the pledge on payment of the debt and interest, and it is incompetent for parties to agree (except under the Pawnbroking Acts) that the right to redeem shall be forfeited after a given period.

The foundation of this doctrine would seem to be that the forfeiture agreed upon is really a penalty, against which equity gives relief to the extent of limiting the penalty to the actual damage sustained. The damage sustained by a mortgagee in consequence of his debtor's failure to pay at the period stipulated, or on demand, is held, under this rule, to be measured by the debt and interest from the date it became due or was demanded; and, therefore, upon the debtor making this good, the forfeiture is held to be avoided, and the interest of the creditor in enforcing the penalty satisfied.^c The judgment against the company in the *Marquess of Northampton's* case went mainly on the ground that the deeds

^a Cf. *Shand v. Blaikie*, *supra*.

^b Cf. *Knox v. Turner*, *supra*.

^c *Salt v. The Marquess of Northampton*, L. R. [1892], A. C. 1. The same principle is recognised in Scotland. *Morison's Dictionary*, voce 'Tritancy'; *Thomson v. Threshie*, 6 Dunlop 1106; *Smith v. Smith*, 6 Rettie 794.

by which the *post-obit* security was created provided that the debtor should be liable for premiums of insurance, and that the debt should be deemed discharged by payment under the policy. These conditions were held, by the majority of the Court, to be incompatible with the theory that the policy was taken out solely for behoof of the creditors, and to point to the conclusion that it was held by them as a pledge, and as the property of their debtor. It was pointed out that if the lenders wished to reserve to themselves the exclusive interest in the policy, they ought to effect it without any arrangement with the debtor; neither taking him bound for the premiums, or entitled to a release from the debt if the policy becomes payable.

The lesson to be drawn from the case would seem to be, that in advancing money upon a contingent *post-obit* reversion, an insurance company should transact on the footing of purchase and sale, rather than of mortgage. The borrower's personal obligation for repayment is usually valueless in such transactions, and it would therefore be sufficient to give him an option to redeem the reversion on specified terms, without taking him bound to repay the debt.^a If the principle of purchase be adopted, it must be possible to fix actuarially the proper relation between the advance and the charge on the reversion, independently of the principle of debt and interest, so as to take account of the contingency of the borrower failing to survive the period of vesting. Where this is done, there is no room for the presumption that the grantor of the reversion retains any of the rights of an owner who has pledged the property.

If an insurance company advance money to the holder of a policy, they have, apart from any assignment or deposit, a prospective right of retention upon the sum due under the policy, a right which would appear to be available against a claim by an assignee of the policy, acquiring a right subsequently to the advance. If during the currency of the policy the insured becomes bankrupt, the company is entitled to rank on his estate as a secured creditor, in virtue of its prospective right of retention.^b

The nature of this right was described in the case cited, as follows:—"Their right" (*i.e.* the insurance company's right) "is simply to withhold fulfilment of their obligations as obligees in the policies, so long as *Blaikie*" (the assured) "remains their debtor. The right must always be of a merely passive kind, and it will come into practical operation only when the sum in the policies shall become due. But though this prospective and contingent right does not now entitle them to take any active proceedings for forcing a settlement or otherwise, it constitutes at

^a Cf. *Knox v. Turner*, L. R. 5 Ch. 515.

^b *Borthwick v. Scottish Widows' Fund Society*, 1864; 2 Macpherson 595.

present a valuable security over the estate of the bankrupt, giving them a preference over the other creditors, and as such it must be valued and deducted from their claim. It is a right arising *ex lege*, which the defenders may ultimately make the means of operating a preference, and securing, wholly or in part, their claim against the sequestrated estate.”^a

3. *Trust Policies*.—We have seen that a policy may be assigned in trust by a separate deed ; but that the same result may be attained more simply by declaring the trust purposes in the policy itself. This is done by making the policy payable to A as trustee, for the purposes set forth. It has been held in Scotland that such a declaration of trust is not, at common law, effectual, unless the policy is delivered to the trustee.^b Such policies, where the beneficiaries are the wife or children of the assured, are dealt with by the Married Women’s Policies of Assurance (Scotland) Act, 1880, and by the corresponding English Act, the Married Women’s Property Act, 1882. These Statutes enable the assured to appoint a trustee or trustees of the moneys payable under the policy ; and, in default of such appointment, they provide that the policy shall vest in the assured and his personal representatives as trustees. The trust is declared by the Act to be irrevocable, and the money payable under the policy not to form part of the estate of the assured so long as any purpose of the trust remains unfulfilled. On the death of the assured, it has been held that the right to sue upon the policy vests in his executors, if no trustee has been appointed, and not in the beneficiaries.^c The policy in *Cleaver’s* case was upon the life of Maybrick, for the benefit of his wife, and payment was resisted on the ground that, according to the verdict in the Maybrick case, the death of the assured had been brought about by the felonious act of Mrs. Maybrick, and that it would be against public policy that she should take any benefit from the insurance. The Court rejected this defence on the ground that by the terms of the policy, the company had contracted to pay the sum insured to the executors of the assured and not to the beneficiary, and that no question of public policy could arise with them. It was pointed out that such considerations as were urged by the company might prevent the executors from making any payment to Mrs. Maybrick. If this were the case, the effect would be that the trust had become, by her act, incapable of performance, and the sum insured would then have to be dealt with as estate to which the assured himself was entitled in virtue of his reversionary right as trusteer.

^a 2 Macpherson, p. 605.

^b *Jarvies’ Trustees v. Jarvies’ Trustees*, 1887 ; 14 Rettie 411.

^c *Cleaver v. Mut. Reserve Fund Life Association*, L. R. [1892] ; 1 Q. B. 147, 154.

By the terms of Section 2 of the Scottish Act, "a policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and in his legal representatives in trust, for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office; but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency: And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance office." Under the English Act, it is provided that a policy of insurance for behoof of his wife or children may be effected by "any man," without the qualification that he must be married. The effect of the omission of the word "married" is undoubtedly to enable a widower to make provision for existing children under the protection which the Act affords. It is more doubtful whether an unmarried man, who has neither wife nor children, could validly effect a policy under the Act for the benefit of a future wife or children. No doubt an insurance may, apart from the statute, be effected by an unmarried man as a provision for his future wife, or widow, or children; and the fund so created would not be available to his creditors if the assured had no immediate interest in or control over it. This would be the case if the policy were, by its terms, not payable till the death of the assured, or till he reached a specified age unmarried, and if, in the meantime, he could not assign or otherwise deal with it as a fund of credit, or if it were held by trustees. It would seem to follow that a valid trust might be effected by an unmarried man, at least under similar conditions, under the Act. But if no trustee were named in the policy or by separate writing except the insured, it is difficult to see who would have any interest or right to prevent him dealing with the policy as his own property, and in such circumstances it is thought his creditors could not be excluded. In other words, the law would not allow a man, by means of the Act, to create a fund available to himself and not available to his creditors, by inserting in a policy that it was for the benefit of his wife and children, when there was no one in existence answering either description.

The English Act also protects an insurance by any woman on

her own life for the benefit of her husband and children. The word "married" is again omitted, so that in England an unmarried woman might, subject to the same conditions, insure her life for the benefit of a prospective husband and children. There is no such provision either applicable to married or to unmarried women in the Scottish Act.

The section quoted provides that the trust shall be "*for the purpose or purposes so expressed*"—i.e. expressed on the face of the policy. It is, therefore, necessary that the purposes of the trust shall be specifically set forth in the policy itself, and not by reference to any separate deed. In order to do this properly, the trust should state the respective rights of the wife and children in the fund provided.

If the trust is expressed to be for the wife and children, it has been held in England that it is intended that the fund shall be equally distributed among the wife and children, each taking an equal share.^a In Scotland the Courts have not been called upon to construe a similar form of provision; but the opinion has been expressed that it is ambiguous, and should not be left by itself as a final expression of intention.^b

A more usual provision is to give the wife a life interest of the fund, and the children equal shares in the fee at her death. The provisions in favour of the children may be declared not to vest until majority or marriage.

In the event of any of the children dying before their shares became payable, their children would, under the usual condition *si sine liberis decesserit*, be entitled to the parent's share; but grandchildren could not be expressly included in the trust. A power of apportionment among the children might also be reserved in favour of the husband or wife, but the policy should declare how the fund is to be distributed failing the exercise of the power. Whatever the terms of the trust, payment of the policy should only be made to the trustees duly appointed, or, failing such appointment, to the executors of the assured. In no case should the payment be made to the beneficiaries directly, as the trustee or the executor, if there is no trustee, may have claims on the policy—for expenses or charges connected with the trust, or may have notice of assignments of, or charges on, the interests of the beneficiaries.

In the English Act it is provided that the receipt of the legal personal representative of the assured shall be a sufficient discharge to the office in default of the appointment of a trustee, or in default of notice of such appointment to the insurance office. The latter provision is not expressed in the Scottish Act, and therefore, even if the company have no notice of the appointment of a

^a *Seyton v. Satterthwaite*, 34 Ch. D. 511.

^b *Jarvis' Trustees v. Jarvis' Trustees* 1887; 14 Rettie 411, 416.

trustee, they ought to inquire as to this before paying to the executors of the assured.

Just as in the case of ordinary policies, it may become necessary to realise the fund created by the policies under the Act during their currency. The Act imposes no obligation upon the assured to pay the premiums of insurance, and he may become unable to do so if insolvent. In these circumstances three possible courses would seem to be available to preserve the trust fund. The policy may either be surrendered for cash, or for a paid-up policy of less value, or money may be borrowed on the security of the policy to meet the premiums still due. In regard to the first of these courses, it has been held that the company is entitled to grant a surrender for cash upon the joint receipt of all the beneficiaries, including the assured himself, who has the reversionary interest, and of the trustee, who may either be the insured or a trustee specially appointed in terms of the Act. This was decided in a case where the insurance was effected by a husband on his own life, for the benefit of his wife as sole beneficiary, and when both the husband and wife concurred in the receipt for the surrender value.^a In the same case, Lord Shand expressed the opinion that the words of the section "and the receipt of such trustee for the sums secured by the policy or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance office," were intended, *inter alia*, to meet the case of a surrender before maturity of the policy for cash, and that the receipt of the husband as trustee would have been itself a sufficient discharge without the concurrence of the wife, provided the insurance office had no notice of a contemplated breach of trust. It may, however, be doubted whether the Act contemplated a surrender of the policy for cash to the assured himself as trustee. No doubt the fund would, when surrendered, remain trust money, but unless it was invested by the assured, or handed to trustees, or in some other way kept separate and distinct from his own funds, it would become subject to his debts, and the beneficiaries would only have a claim, as creditors upon his estate, in the event of his insolvency. The protection afforded by the Act would thus practically be lost, as it would only be in very rare cases that either of these courses referred to would be adopted. In other words, it is thought that the statute contemplated not merely that the assured should be trustee of the fund, but that it should be held in such a way as to make the trust effectual. Nor is it compatible with the objects of the Act, that by simply inserting the name of his wife and children in the policy, a man should, at the expense of his creditors, create a fund of which he may become possessed at any time. For these reasons it seems advisable, if it is necessary to realise the fund for the

^a *Schumann v. Scottish Widows' Fund Society*, 13 Rettie 678.

immediate use of the beneficiaries, that the company should require that an independent trustee should be appointed to administer the trust in accordance with the purposes expressed in the policy, or otherwise that the surrender, if made to the insured himself, should take the form of a surrender for a paid-up policy, subject to the original trust.^a Similar objections would seem to hold good against a policy upon the endowment principle, at least as regards the investment part of it, to be held in trust for the wife or children of the insured in the event of the assured's death before reaching a specified age, but to be payable to himself, for his own behoof, on his attaining that age. The Act declares that the trust shall not be revocable, and the provision in question is clearly at variance with this, because it provides for the fund being made over to the assured before the purposes of the trust are fulfilled. It is therefore thought that such a policy would not be within the protection of the Act. It would also be open to the objection that the creditors could not be justly excluded where the provision was not made exclusively for the benefit of the persons in whose favour the statutory trust is created. The protection against the creditor is, in other words, only given when an irrevocable trust is constituted for the purposes set forth in the statute.

As regards the third method suggested, the rule has been laid down in England that a trustee may advance the premiums of insurance and so acquire a lien upon the policy, or he may borrow money for this purpose and transfer his lien to the lender. The lender will also acquire a lien if he advances money for this purpose at the request of all the beneficiaries.^b An insurance company would therefore be entitled, if such a course were thought more advisable than surrender, to advance the premiums still due on the security of the policy in either of these cases, but in the former case only if the trustee were not the assured himself. The position of the assured is to a certain extent anomalous, because he is both a beneficiary with a reversionary right, and a trustee. On this account it is thought that an advance for premiums would not become a valid charge upon the policy if it were made at his request alone. If there is no independent trustee, the safer course would be to obtain the concurrence of all the beneficiaries.

There are as yet few decisions upon the proper construction of these important Acts, so that it is impossible to give a decided opinion on many of the questions which arise in relation to them.

^a *Schultze v. Schultze*, 56 L. J. Ch. 356.

^b *In re Leslie*, 23 Ch. D. 552; *Falcke v. Scottish Imperial Co.*, 34 Ch. D. 234. *Borthwick v. Scottish Widows' Fund*, 2 Macpherson 595.