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# INSURANCE TRUSTS—THE INSURER AS TRUSTEE

M. T. VAN HECKE\*

During the last few years, there has been a greatly accelerated tendency to resort to life insurance for the conservation as well as the creation of estates. In the main, two devices have been used. One is the insurance trust,<sup>1</sup> funded<sup>2</sup> or unfunded, with a trust company acting as trustee. The other is the deferred payment settlement.<sup>3</sup> A third arrangement is made by perhaps six or eight life insurance companies, most of which are organized under the laws of Connecticut, New York and Vermont, whereby the insurer, after the death of the insured, purports to become trustee of the proceeds of the policy.<sup>4</sup> Some, if not all, of these companies write both the second and third types. One company, in 1927 alone, wrote "trustee" contracts in connection with policies aggregating one hundred and forty-two millions of dollars, of which eighty-seven millions was new insurance. The recently reported case of *New York Life Ins.*

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<sup>1</sup> The problems of draftsmanship, both in transferring the insurance to the trustee and in preparing the trust agreement are particularly intricate. See Horton, *Problems and Pitfalls in Devising Life Insurance Trusts*, Trust Companies (June, 1928); HORTON, *SOME LEGAL ASPECTS OF LIFE INSURANCE TRUSTS*, Montpelier, Vt. (1927); SHATTUCK, *THE LIVING LIFE INSURANCE TRUST*, Boston (1928); STEPHENSON, *LIVING TRUSTS*, New York (1926); SCULLY, *INSURANCE TRUSTS*, New York (1927).

<sup>2</sup> The chief difficulty in the funded insurance trust is the rule against accumulations, especially where the common-law rule has been modified by statute. See Stephenson, note 1, 145 *et seq*; BOGERT, *TRUSTS*, St. Paul (1921), 176-180; Bogert, *Funded Insurance Trusts and the Rule Against Accumulations*, 9 CORN. L. Q. 113 (1924). The New York statute was held inapplicable in *In re Hartman's Estate*, 126 Misc. 862, 215 N. Y. S. 802 (1926), discussed in note, 27 COL. L. REV. 197 (1927). The statute has since been amended so as to provide for a similar result: N. Y. Pers. Prop. Law, §16, as amended by Laws (1927), ch. 384, ch. 681. See Scully, note 1, 39-41.

<sup>3</sup> For discussions of the relative advantages of insurance trusts as administered by trust companies and deferred payment insurance settlements, see Scully, note 1, ch. 3; Stephenson, note 1, 78-100; JOINT LIFE INSURANCE AND TRUST COMPANY SERVICE, issued by the Nat. Ass'n. Life Underwriters, New York; Linton, *Life Insurance Options Versus Trust Service*, American Bankers Ass'n. Journal (January, 1927); Allen, *Conserving and Managing Proceeds of Life Insurance*, Life Association News (October, 1928), 148 *et seq.*; editorial, *The Truth about Insurance Trusts*, Trust Companies (Sept., 1928).

<sup>4</sup> Statements of fact in this paper, where no specific authority is given, are based upon sample policies and contracts, and other information made available by officials of some fifteen insurance companies.

*Co. v. O'Brien*<sup>5</sup> suggests an inquiry into some of the more important characteristics and consequences of this third plan, chiefly as compared with the second. For convenience, the deferred payment settlement under the second plan will be referred to as the policy provision, the other as the trust agreement.

Several of the older life insurance companies are empowered by their charters to act as trustees. Indeed, an hundred years ago, trust and insurance functions were commonly performed, pursuant to express charter provisions, by the same company.<sup>6</sup> One of the New York companies, which has been entering into trust agreements under life policies for forty years, is thus authorized. The others depend upon statutes enacted in Connecticut,<sup>7</sup> Iowa,<sup>8</sup> Vermont<sup>9</sup> and Wisconsin.<sup>10</sup> Although the statutes,<sup>11</sup> in Massachusetts, New York and Pennsylvania, deal with various aspects of such trust agreements, they probably do not amount to grants of power. These grants are made in Connecticut and Vermont only to companies incorporated there; in Iowa and Wisconsin, the privilege is conferred upon companies doing business in the state. It has been argued<sup>12</sup> that even in the absence of charter or statutory authority, a trust agreement with respect to the proceeds of a life policy should be regarded as so germane to the function of life insurance, namely, to create a fund for the support of one's dependents, as not to be *ultra vires*. The point has not been decided.

The policy provision is embraced either in the policy or in a rider attached to and made a part of the policy. Its effectiveness is probably governed by the law of the state in which the application was made, the first premium paid and the policy delivered.<sup>13</sup> The

<sup>5</sup> (W. D. Mich., 1927) 27 F (2d) 773; appeal dismissed by stipulation (C. C. A. 6th, 1927), 22 F (2d) 1016, 1017.

<sup>6</sup> SMITH, *THE DEVELOPMENT OF TRUST COMPANIES IN THE UNITED STATES*, New York (1928) 164, 238-282.

<sup>7</sup> Conn., Gen. Stat. (1918), §4155, as amended, P. A. (1927), ch. 77.

<sup>8</sup> Ia., Code (1927), §8674.

<sup>9</sup> Vt., Gen. Laws (1917), §5579.

<sup>10</sup> Wis., Stat. (1927), §207. 13.

<sup>11</sup> See notes 20-22.

<sup>12</sup> Dickenson, *Trusts Under Life Policies*, a paper read before the Ass'n. of Life Insurance Counsel (May 25, 1916); Loomis, note 13. Compare Hunter, *Trust Agreements in Connection with Life Insurance Policies*, Best's Insurance News (Nov. 1, 1928).

<sup>13</sup> HORTON, *THE POWER OF AN INSURED TO CONTROL THE PROCEEDS OF HIS POLICIES*, Montpelier, Vt. (1926), 15-16; Loomis, *The Insurance Trust Estate*, a paper read before the Ass'n. of Life Insurance Counsel (Dec. 6, 1922); Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198

trust agreement, however, is embodied in a wholly separate instrument. By virtue of the fact that it is mailed direct to the insured from the home office,<sup>14</sup> after the policy has been delivered by the local agent, as well as by express stipulation,<sup>15</sup> it is intended to be controlled only by the law of the state in which the home office is located.

The designated beneficiary, in the policy provision, is the one intended by the insured to enjoy the funds. In a policy accompanied by a trust agreement, the insurer, as trustee, is named as beneficiary. The company undertakes, in the former, to pay the proceeds to the beneficiary in instalments; in the latter, it undertakes to pay itself, as trustee, the face of the policy in one lump sum. The supplementary or trust agreement then provides that the company, as trustee, is to hold this amount in trust for the ultimate beneficiary or beneficiaries according to the provisions of the agreement.

These provisions are of the same basic type, both in the policy settlement and in the trust agreement. Subject to two exceptions to be noted, they are always for the payment of designated amounts, at specified times, to named beneficiaries.<sup>16</sup> Not even in the trust agreement will the companies undertake to meet contingencies incapable of exact and mechanical administration. Thus they will not agree to exercise discretionary powers, to make payments to others on behalf of beneficiaries, or to see that the funds are used for a stated purpose.

Under both plans, interest on the proceeds retained is paid at the same rate. A minimum in the neighborhood of three per cent is guaranteed. Actually, however, and this is one of the exceptions mentioned above, additional allotments of interest are always made, the precise amount depending upon the annual disposition by the directors of the earnings of the company. Thus, in practice, the

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(1919) and notes in 63 L. R. A. 834, 23 L. R. A. (N. S.) 968, 52 L. R. A. (N. S.) 275; Hunter, note 12, 342. As to North Carolina, see note 57.

<sup>14</sup> Thus taking advantage of the effect of the mailing of an acceptance. See GOODRICH, *CONFLICT OF LAWS*, St. Paul (1927), 219, note 12; Jennette Bros. v. Hovey and Co., 184 N. C. 140, 113 S. E. 665 (1922).

<sup>15</sup> As to the effect of such an agreement, see Goodrich, note 14, 232-238, and, in North Carolina, note 57.

<sup>16</sup> Bataille, *Practical Basis of Coöperation in Developing Life Insurance Trust Business*, Trust Companies (February, 1924); *Report of the Special Committee on Modes of Settlement Under Policy Provisions to the Association of Life Insurance Counsel* (Dec. 5, 1923); Dickenson, note 12; Hunter, note 12; Horton, note 13, 5-9; and materials cited in note 3. Mr. Hunter's comparative statistical material is especially interesting.

interest payments under both plans range from 4.5% to 5.25%, the variations being between companies rather than between the two plans.<sup>17</sup>

Under neither plan are the funds segregated from the general assets of the company. The proceeds are not invested in any earmarked securities, whether the agreement speaks in terms of a trust or of a deferred settlement. All of the trust agreements specifically authorize this practice. Indeed, one company executive has expressed the fear that unless the trust agreement so provided, a court might require segregation.<sup>18</sup> Statutes authorize the companies to "mingle" these proceeds with the general assets, in Connecticut,<sup>19</sup> Massachusetts,<sup>20</sup> New York,<sup>21</sup> Pennsylvania<sup>22</sup> and Wisconsin,<sup>23</sup> both under trust agreements and under "other agreements" relating to the retention of proceeds. Deferred payment policy contracts do not as a rule mention the matter. As results of this "mingling," the accounts get the protection and benefits of the legal reserve and of a wide diversification of investment. And there is freedom from tax difficulties and risk of loss that might follow allotments of particular securities to each account.

The procedure in the event of the insured's death is substantially the same in both instances.<sup>24</sup> The policy is taken up, a release obtained, and a certificate issued to the beneficiary which recites the terms of payment. The company credits itself as insurer with a death claim paid at the face value of the policy, and charges itself with an equal amount, to be paid out in accordance with either the policy settlement or trust agreement. Separate records are of course kept for each account.

The most important differences between the policy provision and the trust agreement relate to the facilitation of complex contingencies<sup>25</sup> and to "spendthrift" provisions.<sup>26</sup> Most companies think that

<sup>17</sup> See the materials cited in note 3, and Hunter, note 12.

<sup>18</sup> Hunter, note 12.

<sup>19</sup> Note 7.

<sup>20</sup> Mass., Gen. Laws (1921), ch. 175, §119; Acts (1921), ch. 168; Mass. Cum. Stat. (1927), ch. 175, §119a.

<sup>21</sup> N. Y., Pers. Prop. Law, §15, as amended, Laws (1911), ch. 327.

<sup>22</sup> Pa., P. L. (1923), ch. 104, §1; Pa. Stat., Cum. Sup. (1928), §12264.

<sup>23</sup> Note 10.

<sup>24</sup> Horton, note 13, 9; Loomis, note 13.

<sup>25</sup> See Hunter, note 12; Bataille, note 16; Horton, note 13, 6. An official of a New York company has said: "In latter years, we have extended, through the instalment features . . . practically all of the privileges formerly extended only through our trust agreements, but there are frequently cases, particularly

there must be a separate policy provision for each policy. Many persons hold policies of different types and amounts, issued at different times, in the same company. Moreover, the explicit provision for complicated contingencies (it is characteristic of the life insurance business that all *possible* contingencies must be exactly met in advance) is frequently almost impossible in one instrument. In states whose statutes require the vesting of all future interests within two lives in being<sup>27</sup> an insured making a provision for say a wife and three children will execute perhaps three agreements, in each of which the wife is named as primary and a different one of the children as secondary beneficiary.<sup>28</sup> For these reasons, the flexibility of provision is greater when one may have one trust agreement to cover several policies, or conversely, when one may dispose of the proceeds of one large policy under a complex plan by means of several trust agreements.

Statutes today authorize the insertion in policies and supplemental agreements of "spendthrift" provisions in California,<sup>29</sup> Colorado,<sup>30</sup> Connecticut,<sup>31</sup> Massachusetts,<sup>32</sup> Minnesota,<sup>33</sup> Nebraska,<sup>34</sup> New York,<sup>35</sup> Ohio,<sup>36</sup> Pennsylvania,<sup>37</sup> Vermont<sup>38</sup> and Wisconsin.<sup>39</sup> That is to say, they validate an agreement between the insured and the

where large amounts of insurance are involved, or where there are a number of different beneficiaries, or other complications, in which the trust certificate can more nearly meet the desires of the insured than any other program we have been able to devise." JOINT LIFE INSURANCE AND TRUST COMPANY SERVICE, note 3, 45.

<sup>26</sup> This is the outstanding reason for trust agreements. In general, on this subject, see Horton, note 13, *passim*; Hunter, note 12; Bataille, note 16; Dickenson, note 12; Loomis, note 13; Peterson, *Protection of Proceeds of Installment Settlement Contracts Against Claims of Creditors of the Beneficiary*, a paper read before the Ass'n. of Life Insurance Counsel (May, 1923); Davis, *Spendthrift Trusts and Life Insurance Policies*, *ibid*; (Dec., 1923), 5 BOSTON UNIV. LAW REV. 91 (1925). As to North Carolina, see notes 55-60.

<sup>27</sup> As to when this period begins, whether at the date of the contract or at death, see Horton, note 13, 51-56; and Loomis, note 13.

<sup>28</sup> See Horton, note 13, 51-56; Bogert, *Trusts*, St. Paul (1921), 165-171. North Carolina has the common-law rule, *Vinson v. Gardner*, 185 N. C. 193, 116 S. E. 412 (1923).

<sup>29</sup> Calif., Stats. (1927), p. 1117; Deering, *Consol. Sup. (Civ. Code)*, §2768. <sup>30</sup> Colo., L. 1925, p. 310, §1; 2 *Courtright's Mills Anno. Stat.* (1926), p. 1586, §3606Z.

<sup>31</sup> Note 7.

<sup>32</sup> Note 20.

<sup>33</sup> Minn. L. 1913, ch. 426, §§1-3; Mason's Stats. (1927), §§3403-3405.

<sup>34</sup> Nebr., *Comp. Stat.* (1922), §7898.

<sup>35</sup> Note 21. Claims for necessities are excepted.

<sup>36</sup> Ohio, L. 1917, H. B. 250, p. 606.

<sup>37</sup> Note 22.

<sup>38</sup> Note 9.

<sup>39</sup> Note 10.

company that the interest of the beneficiary shall be free from the claims of his creditors, not subject to legal proceedings such as execution, attachment, garnishment or creditors' bills, and shall not be capable of alienation, assignment, anticipation, commutation or encumbrance. The statement just made is of the maximum scope of the provisions and is true with variations in degree of explicitness of the statutes in all the states mentioned except Connecticut, Vermont and Wisconsin. In these three states, the statutes, in general terms, provide merely for contracts exempting the interest of the beneficiary from the claims of his creditors.

In Vermont, the privilege is accorded only to trust agreements; in California, Minnesota, Nebraska and Ohio, the statutes seem to speak only of policy provisions; but in Colorado, Connecticut, Massachusetts, New York, Pennsylvania and Wisconsin, the legislation contemplates, apparently, the inclusion of such limitations both in policy provisions and trust agreements.

All the trust agreements contain clauses designed to assure the continued receipt by the beneficiary of the designated payments regardless of what either he or his creditors may have done. It will be remembered that all of the trust agreements are supposed to be governed by the law of the state where the home-office is located, irrespective of the law of the insured's or beneficiary's state. And it will be recalled that statutes in all of these home-office states, Connecticut, New York and Vermont, definitely authorize such provisions in trust agreements.

Taking advantage of the legislation here summarized, however, several companies, with or without trust powers, are now entering into policy contracts with similar clauses. These, it will be noted, are probably governed by the law of the state where the insured resided. Until this legislation, most companies seem to have thought that the relationship between the insurer and the beneficiary in the policy contract was that of debtor and creditor, prohibiting any "spendthrift" provision save either forfeiture and remainder over, or forfeiture of right to receive the stipulated amounts and substitution of a discretionary power upon the part of the insurer to make such payments and in such amounts as it deemed wise. This is the second exception previously reserved to the statement that both in policy contracts and trust agreements, the company always undertakes only to make payment of designated amounts, at specified times,

and that it does not assume discretionary duties. And, as one company executive has testified, the administration of the insurer's discretionary responsibility in a situation of the sort just mentioned has caused no little distress to the routine of management.<sup>40</sup>

Some of the companies issuing trust agreements announce that they will not, in spite of the effort to have the favorable law of the home-office state control, issue such an agreement where the law of the state in which the insured or beneficiary resides appears to be inimical to its enforcement. These announcements perhaps have reference both to the local law relating to remoteness of vesting of future interests and to "spendthrift" provisions. Where, however, the local law is not likely thus to be offended, some actuaries and life counsel are of the opinion that even in the absence of statute, the same type of "spendthrift" provision should be equally valid in policy settlements and in trust provisions.<sup>41</sup>

Assuming that instalment payments under life policies are not objectionable merely because of the deferred time of payment, and no one contends for that, it would seem, unless more regard is to be had for labels than for what the company actually does, that even in the absence of statute or charter provisions, a trust agreement would not be held *ultra vires*.<sup>42</sup> The point referred to earlier in the paper respecting germaneness is well taken. But a better reason is that the trust agreement appears not to be essentially different from the policy provision. Control by the law of the home-office state more nearly guarantees the applicability of the law of the sovereign which issued the charter than does the practice with reference to the ordinary life policy. The use of the trust agreement as a consolidated disposition of the proceeds of several policies creates no difficulty except that of an accurate integration of the several policies. And a number of companies are making a precisely similar agreement, leaving out words denoting a trust, with reference to groups of what were originally lump-sum policies. A court might feel so strongly the purpose of the rule against remoteness as to upset the evasion of that rule by means of several trust agreements under one policy, but the ground taken need not be lack of capacity. Unless

<sup>40</sup> Avery, *The Nature of An Annuity*, a paper read before the Association of Life Insurance Counsel (May 26, 1928).

<sup>41</sup> Hunter, note 12; Peterson, note 26; Davis, note 26; Strong, *TRANSACTIONS*, Eighth International Congress of Actuaries, 364.

<sup>42</sup> See the materials referred to in note 12.



the law of the state of incorporation were inimical to spendthrift trusts generally, so as to induce the court to delve deeply for some ground on which to base its attack, the spendthrift aspect of the trust agreement should not be a factor in the *ultra vires* question. For it does not extend the affirmative activities of the company beyond that of insurance functions. Rather, it safeguards literal compliance, by requiring the payments to be made direct to the beneficiaries, and to no one else. And as has been seen, while some policy provisions impose, in the event of forfeiture, discretionary duties on the company, no trust agreement does.

Mr. Stephenson<sup>43</sup> has asked the question: "Can a New York insurance company clothed with trust powers by the State of New York administer a trust arising from insurance for the benefit of a resident of North Carolina when the laws of North Carolina do not permit a foreign trust company to do business in the state?" His context indicates that he is thinking of a "contract that undertook to give discretionary powers to an insurance company." There is as yet, however, no reason to believe that the insurance companies now entering into trust agreements will accept discretionary functions. On the contrary, they advise customers desiring such service to seek a trust company. But the laws of North Carolina do not forbid a foreign trust company to do any business in the state. Section 1180 of the Consolidated Statutes merely provides: "A corporation created by another state . . . is not eligible or entitled to qualify in this state as executor, administrator, guardian or trustee under the will of any person domiciled in this state at the time of his death." An insurance company handling deferred payments under a trust agreement is not acting under a will. No other statute has been found applicable. Neither the Insurance Commissioner nor the Corporation Commission of North Carolina has had occasion to rule on the question.

Trust agreements are so handled by one Vermont company (which uses the word "fiduciary" instead of "trust") as not to be subject to the control of state insurance departments.<sup>44</sup> The New York Insurance Department reports: "If forms of fiduciary or trust agreement for use in connection with life policies were presented to this Department for approval, by either a domestic or authorized

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<sup>43</sup> LIVING TRUSTS, New York (1926), 86.

<sup>44</sup> Horton, note 13, 8.

foreign life insurance company, they would be required to conform to our statutes, inasmuch as the Department would presume that their presentation for approval was an admission that our statutes controlled them. Whether or not our statutes [relating to perpetuities] control may depend largely upon one or more of several factors: (1) insured's domicile, (2) trustee's domicile, (3) cestui's domicile, (4) place where trust is to be administered, (5) jurisdiction with which on the whole the trust appears to have the most substantial connection." An Iowa statute expressly provides that trust agreements shall not be subject to the state banking or trust company laws, but shall, instead, be supervised by the Insurance Commissioner.<sup>45</sup> The question seems not to have arisen in North Carolina. For the reasons suggested above in connection with the matter of corporate capacity, the Iowa statute is believed to state the desirable rule. An insurance company ought not to be able to escape all supervision of its administration of trust or fiduciary services, by use of a term which does not alter its principal function, especially when that term denotes an assumption of an unusual responsibility. And the insurance department, by virtue of its other contacts with the insurance business and with this company, is better fitted than the banking department to deal with the matter.

In spite of the fact that deferred payment settlements in policies have been common since the late '90s, that statutes have authorized trust agreements in the states previously noted for periods of from ten to seventeen years, and that one company has entered into trust agreements under its charter for forty years, the case law with respect to their essential juristic character consists of only two trial court decisions. This is perhaps due to the care with which every conceivable contingency has usually been prepared for in advance, and to the absence of broad discretionary powers. There has been little or no occasion for the companies to bring either bills for instructions, interpleader or declaratory judgment proceedings.

The first of the two cases just mentioned was *Cronbach v. Aetna Life Insurance Company*.<sup>46</sup> It was a suit in a Tennessee Court of

<sup>45</sup> Note 8.

<sup>46</sup> 284 S. W. 72 (1926), discussed in Comment, 36 YALE L. J. 394 (1927). The statements in the text with reference to the Chancellor's opinion are taken from the YALE LAW JOURNAL and from information furnished by an insurance company. The case on appeal related exclusively to the attempt to change beneficiaries.

Chancery by a widow, who, with her children, was a beneficiary under policy contracts in connection with eight policies on the life of her late husband, to effectuate a parol declaration to her of intent to make her a lump sum beneficiary. In the alternative, she asked that the aggregate amount of the policies be paid over to a certain trust company, upon the ground that thereby a larger amount of income might be realized. Relief was denied, principally because of the ineffectiveness of the attempted change of beneficiary. The decision on appeal was limited to that question. The Court of Chancery, however (its opinion is not reported), is said to have discussed the request for a substitution of a trust company for the insurance company on the assumption that the relationship between the parties was that of *cestui que* trust and trustee. Both parties had argued the matter on that basis. The Chancellor found no violation of a trust and held "that the greater security afforded the principal and interest . . . effectuating the intent of the insured, justified a rate of interest lower than might ordinarily be secured." It does not appear whether the court was thinking in terms only of the guaranteed rate of 3.5% or of the actual rate of 4.8%, then being paid by the insurer. (The net income<sup>47</sup> made available by trust companies have averaged between 5.2% and 5.5%.)

A more enlightening case is that of *New York Life Ins. Co. v. O'Brien*,<sup>48</sup> referred to at the opening of this paper. The insurance company had issued three policies on the life of a Dr. O'Brien, a resident of Michigan, payable on death to itself as trustee. Two trust agreements required the insurer as trustee to hold the proceeds for the widow and two minor children. Under each agreement, the widow as primary and one of the children as secondary beneficiary, was to receive \$50.00 a month for twenty years. Three weeks before the death of the insured, the company brought suit in a Federal District Court in Michigan to cancel the policies because of fraud. The ultimate beneficiaries were made parties defendant in both suits; the insurer as trustee was not. The defendants filed motions asking that the insurance company be removed as trustee and that a certain trust company be substituted.

The company resisted on five grounds: "Plaintiff urges that under [the Michigan statute] it may be removed as trustee only by

<sup>47</sup> See the materials referred to in notes 3 and 17.

<sup>48</sup> Note 5.

petition or bill of complaint and not in a summary manner; that the federal court in equity has no jurisdiction to remove a trustee under a trust which by its express terms is to be governed solely by the laws of New York; that no trust fund exists unless and until this litigation terminates favorably to the defendants; and that the trust is passive, imposing no duty on the trustee until the fund is actually 'received.' It is also argued that to appoint the [trust company] as trustee would defeat the express terms of the trust, in that the plaintiff's right to mingle the proceeds of the policies with its general corporate funds and to pay in monthly instalments will be lost." The court held the Michigan statute could not affect the power of a Federal Court of Equity; ignored the contention relating to New York law; apparently acquiesced in the lack of a trust fund *pendente lite*; refused to countenance the asserted right of the company to be considered a passive trustee after the death of the insured; and granted the relief sought by the motions. The gist of the court's decision is embraced in the following: "It seems farcical to assert, in a proceeding where the trustee is actively engaged in an effort to deny and defeat the very existence of the trust, that a court of equity is without power to afford protection. . . . Nor may it assert that a substitution will defeat the terms of the trust agreement. . . . When an insurer assumes to act also in the capacity of trustee to receive the proceeds for the benefit of *cestuis que* trust, it may not, after the institution of suits to cancel the policy for fraud, continue to assert rights as trustee. It became its duty immediately . . . to renounce the trust and file a disclaimer."

As in the *Cronbach* case, both parties took the position that the relationship was that of trust, and the court made the same assumption. Indeed, it put its decision solely on that basis, whereas in the former case, the substitution of trustees point was incidental to the change of beneficiary issue and was abandoned on appeal. Moreover, in the *New York Life* case, there was more basis for a trust, the trust agreement. But what the company was to do under that agreement was precisely of the same character as the Aetna's duties under the policy provision, except that the latter arrangement became subject to more complex contingencies at the election of the beneficiary after twenty years. Both results were obviously inevitable under the circumstances. The important thing, however, is that the two courts unhesitatingly proceeded on a trust instead of

a debtor and creditor basis, and this, in the *New York Life* case, in the face of a full revelation, by way of objections to the motions, of all of the novel aspects of the situation: the definiteness of time and amount of payments, the "mingling" of the proceeds with the corporate assets generally (lack of segregation of a specific res), the stipulation that New York law should control, and the dual function, first as insurer, then as trustee, of the same company.

Whether these two cases point in the direction which courts will or should go in dealing with policy provisions and trust agreements, is a question. When the issue is squarely presented as to whether the relationship should be put in the debt or trust category, a considerable number of analogies will be found available to help overcome the absence of discretionary responsibility and the lack of a specific subject matter for a trust. These are ably and exhaustively dealt with in Mr. Horton's scholarly little book on *The Power of an Insured to Control the Proceeds of His Policies*<sup>49</sup> and in a note in the *Yale Law Journal*.<sup>50</sup> Several factors should be remembered, however, in attempting to argue from the situations there discussed, in which courts have dealt in terms of trust with what would by conventional tests be regarded normally as debts. One is that parallel situations of fact are not likely to arise in connection with life insurance proceeds. Thus, under modern regulations as to legal reserve, reinsurance and state supervision generally, while companies do fail with resulting loss to stockholders, policyholders are uniformly protected in full. Nor do the companies fail in the sense that they become unable to meet their obligations to policyholders. A few are the victims of unscrupulous officers, but most of them find the cost of acquiring new business prohibitive and they get out of the insurance business, turning over assets to cover policy obligations to other companies. Indeed, one actuary has reported,<sup>51</sup> "most of these 'failures' have been of distinct benefit to the policyholders, since the reinsurer is generally a strong, ably managed company which can offer the policyholder many advantages which he might never have enjoyed had the original company kept up the struggle." The point is, that cases where courts have resorted to

<sup>49</sup> Note 13, 17-50.

<sup>50</sup> Note 46.

<sup>51</sup> He has also furnished the basis for the statement in the text immediately preceding the quotation, and has suggested a reference to the 1928 edition of Best's LIFE INSURANCE REPORTS.

trust concepts to justify preferences among creditors of insolvent banks, for example, will be of little force in connection with insurance problems other than the insurer's insolvency.

Another factor is that in the cases referred to, as the *Yale Law Journal* indicates, those courts which have not blindly followed precedent have been motivated largely by a desire to reach a result, unattainable in the debtor and creditor category, the desirability of which has been dictated by the often inarticulate considerations of fact and policy in the situation presented. It will be necessary to find elements of a similar appeal in the relationship between the company and the beneficiary, and in the popular attitude toward life insurance, if the debtor and creditor analysis is not to control.

For a third, it is not believed that much help can be obtained from the status usually attributed to the beneficiary, before the death of the insured, as a *cestui* whose trustee is the insured, and whose *res* is the chose in action against the company. This relationship probably does not exist, where, as has more frequently been the case, a power to change the beneficiary is reserved.<sup>52</sup> And, it has usually been held that once death occurs, the beneficiary becomes, at least under lump sum settlements, a mere creditor, whose action against the company is at law.<sup>53</sup> As between the policy provision and the trust agreement, however, the latter has the advantage, both because of the trust label on the contract, and because of the statutes in the home-office states which in the same passage authorize a trust relation and exempt the company from the duty of segregating the funds, plus the stipulation that the foreign law shall govern. In the absence of some countervailing policy inherent in the law of the state where the question arises, there is considerable authority for giving effect to such a stipulation.<sup>54</sup>

Since the principal objective of the trust agreement has been the effectuation of "spendthrift" restrictions, the question remains: What attitude should be adopted toward these clauses by the courts in North Carolina, which have consistently denied to the settlor in

<sup>52</sup> Vance, *The Beneficiary's Interest in a Life Insurance Policy*; 31 *YALE L. J.* 343, 358 (1922); *Wooten v. Grand United Order*, 176 N. C. 52, 96 S. E. 654 (1918).

<sup>53</sup> Thus, in the New York Life case, note 5, the plaintiff prayed for an injunction to prevent defendants from bringing any action at law. See generally, Richards, *INSURANCE*, New York (1921), §342; Cooley, *BRIEFS ON INSURANCE*, Kansas City (2d ed., 1927), vol. 7, p. 6537.

<sup>54</sup> See Goodrich, note 15; Horton, note 13, 11-16.

a conventional trust, the privilege thus to limit the rights of the creditors of the *cestui*?<sup>55</sup> There seems to be no decision in point, here or elsewhere. In the majority of American states, where "spendthrift trusts" are upheld, there would seem to be little doubt that, for the reasons given in earlier parts of this paper, "spendthrift" provisions will be upheld, even in the absence of statute, both under policy provisions and trust agreements. In the minority of states, however, and particularly in North Carolina, the reverse is not necessarily true. There are complicating factors. The statute<sup>56</sup> permitting exemptions under trusts created by will or deed, where the annual income does not exceed five hundred dollars, and where that income is to be expended for support and maintenance in behalf of the *cestui*, does not apply. For the trust under consideration, if there be one, does not arise under a will or deed, and no company will undertake to pay the funds into hands other than those of the beneficiary. The fact that the statute<sup>57</sup> makes void any stipulation in a "contract of insurance" that it is to be governed by the law of another state,<sup>58</sup> does not settle the matter, even if it be conceded that there is no distinction, in view of the purpose of the statute, between policies and trust agreements. Rather, the conflict will be, it is predicted, between the policy found in the decisions denying effect to "spendthrift trusts," and that emanating from two new statutes, one enacted in 1925<sup>59</sup> and the other in 1927.<sup>60</sup> These statutes do not purport merely to authorize or validate "spendthrift" provisions in connection with life insurance; they go farther, and automatically exempt insurance payments from the claims of the creditors of the beneficiary, first, as to group insurance, and second, as to non-profit life benefit association insurance. There is no necessary limitation on the amount of such policies; nor any indication

<sup>55</sup> *Mebane v. Mebane*, 39 N. C. 131, 44 A. D. 102 (1845); *Vaughn v. Wise*, 152 N. C. 31, 67 S. E. 33 (1910); *Mizell v. Bazemore*, 194 N. C. 324, 139 S. E. 453 (1927) (limitation on legal life estate in land); and see the cases cited in note 56.

<sup>56</sup> N. C., Consol. Stat. (1919), §1742; Code (1927), §1742; *Bank of Union v. Heath*, 187 N. C. 54, 121 S. E. 24 (1924); *Fowler v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

<sup>57</sup> N. C., Consol. Stat. (1919), §6287; Code (1927), §6287; *Blackwell v. Mut. Res. Fund Life Ass'n.*, 141 N. C. 117, 53 S. E. 833 (1906); *Horton v. Life Ins. Co. of Virginia*, 122 N. C. 498, 29 S. E. 944 (1898).

<sup>58</sup> A similar effect has been given to foreign charter privileges inconsistent with the law of North Carolina. *Wilson v. Supreme Conclave*, 174 N. C. 628, 94 S. E. 443 (1917).

<sup>59</sup> N. C., L. 1925, ch. 58, §4; Code (1927), §6466 (d).

<sup>60</sup> N. C., L. 1927, ch. 30, §6; Code (1927), §6476 (f).

in the statutes that their provisions are limited to benefits under local companies. Add to these statutes the constitutional provision<sup>61</sup> exempting the proceeds of the husband's insurance, in the hands of his widow and children, from claims of creditors of the insured, and it may be that the court would now hold that the policy of the law of North Carolina against "spendthrift trusts" generally<sup>62</sup> can be said to have been relaxed in favor of the beneficiaries of life insurance.

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<sup>61</sup> N. C. Constitution, Art. 10, §7; Consol. Stat. (1919), §6464, Code (1927), §6464.

<sup>62</sup> It is interesting, too, that England and Virginia, by recent legislation, have lowered the bars against "spendthrift trusts" of the traditional sort. Trustee Act (1925), §33; 23 Chitty's Stats. (6th ed., 1925), 572; Va. Code (1919), §5157; *Dunlop v. Dunlop's Ex'rs.*, 144 Va. 297, 132 S. E. 351 (1926).