Volume 60
Issue 4 *Dickinson Law Review - Volume 60, 1955-1956*

6-1-1956

Life Insurance and The Statute of Wills: The Wisconsin Statute

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LIFE INSURANCE AND THE STATUTE OF WILLS: THE WISCONSIN STATUTE

By

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I have an occasion to return to the thought of contract and life insurance. I have written elsewhere: "The symbol of 'testamentary disposition' never had a place in the field of life insurance. Life insurance rests in the field of contract".[1] The occasion that brings me back is the enactment in the state of Wisconsin of Chapter 73 of the Laws of 1955 as amended by Chapter 586 of the same year. Chapter 73 adds section 206.52(2) to the statutes. It provides that a life policy may designate as beneficiary a trustee or trustees whom the insured has named or will later name in his will. The designation must be made under the provisions of the policy and the rules of the insurer. The court may appoint the trustee or trustees on the proving of the will. The insurer upon the appointment and qualification of the trustees will then pay the proceeds to the trustee or trustees who shall hold and dispose of the proceeds under the terms of the will as they exist at the testator's death and subject to the statutory rules of testamentary trusts. If a qualified trustee does not make a claim to the proceeds within one year after the insured's death or if the insurer is satisfied within that period that no trustee can qualify, the insurer then pays the proceeds to the estate of the insured unless the insured has made a different agreement with the insurer. The proceeds, when paid to the trustee or trustees, are not subject to the debts of the insured. The inheritance tax on the proceeds shall be no greater than if they were payable to a beneficiary other than the insured's estate. The court may administer the trust of the proceeds as if they had been payable to the insured's estate. The proceeds shall not, however, be otherwise considered as payable to the estate. The proceeds shall be inventoried, for tax purposes only. They may be commingled with the other assets that come into the trust. The statute is to be deemed as declaratory of the law; it does not invalidate designations which an insured had made prior to the statute.

I may perhaps give a fuller meaning to the abstract expressions of the statute if I take an example. An insured has a wife and two minor children. He is creating means for their support, in the event of his death, by life insurance. If he dies, he may pass the insurance proceeds to his wife by designation as beneficiary. Yet his wife may die prior or at the same time. May he provide in the designation of beneficiary that if his wife so dies, the proceeds will pass to an aunt of the children and a trust company as trustees under a testamentary trust which the insured has set up in his last will and testament? The

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1 *Contract and Life Insurance,* 59 DICK. L. REV. 40 (1954); INS. L. J. 799 (1954).

proposal looks to the material and personal welfare of the children. It may avoid the delays and expense of guardianship. It is a family provision and within the purposes that life insurance serves.

If we turn to the papers which were read before the Real Property, Probate and Trust Law section of the American Bar Association at Philadelphia last August, we will be left with a doubt. The papers say that it might be much better to create a living trust. When we move beyond the living trust, we find doubt if the proceeds may then be passed from the living trust to the trust the insured has set up in his will.[2] These doubts are not consistent with the purposes of life insurance. In life insurance, folks want to be sure that their money will be paid and that it will be paid to the parties to whom they intended it to go. The many-sided action does not have the simplicity that institutional administration requires. There, simplicity is necessary if administration is to be prompt and certain.

In this paper I have two purposes. I wish to show that the Wisconsin statute is a valid act in that it reflects the basic law which controls life insurance whereby life insurance is a contract. I also wish to remove some of the confusion from this field by showing that the word "testamentary" has no application to life insurance. The statute may have clarified also some points in the law of trusts. The statute removes doubt on the point of taxation. It defines the insurance as free from the claims of creditors. It may have defined indirectly the right of dower and of election. I shall discuss all of these points.

The Wisconsin statute treats the proceeds of a life insurance policy as property arising from a contract. The statute reflects thereby the law which the courts have worked out in the cases. The Supreme Court of Florida reviewed thoroughly this point in *Milam v. Davis*.[3] The case required interpretation of the special Florida Statute which is now section 222.13 and also the basis of the exemption statutes in respect to life insurance proceeds. The court described insurance as "peculiar" property which arises out of contract. It is not a part of the general assets of the insured's estate. The exemption statutes were justified upon this ground. The Supreme Court of North Dakota considered the exemption statutes in two cases, *Farmers State Bank v. Smith*[4] and *Lapland v. Sterns*.[5] In each of the cases, the court sustained the exemption statutes as a legal exercise of the legislative power on the ground that the proceeds of a life insurance policy arise by contract and do not become a part of the insured's estate. In *Maher v. Ramsey County*,[6] a transfer tax case, the Supreme

[2] Carl F. Shipper, Jr., *Designating the Trustee under the Insured's Will as Beneficiary of Insurance Policy* (1955); Robt. J. Lawthers, *Designating the Trustee under the Insured's Will as Beneficiary of Insurance Policy,* HOME OFFICE PROBLEMS (1955); See also Robt. J. Lawthers, *Testamentary Trusts as Beneficiaries under Life Insurance Policies,* IX J. AM. SOC. C.L.U. 307 (1955).

[3] 98 Fla. 202, 123 So. 668 (1929).

[4] 36 N.D. 221, 162 N.W. 302 (1917).

[5] 79 N.D. 62, 54 N.W. 2d 748 (1952).

[6] 75 N.D. 760, 32 N.W. 2d 679 (1948).

Court of North Dakota held that the proceeds of a policy which are payable to a beneficiary pass by contract and do not become a part of the estate. The Supreme Court of Connecticut in *Sigal v. Hartford Nat'l. Bank and Trust Company*[7] expressed the thought in these words: "The policy is a contract to pay a sum of money to a third party, performance of which is postponed until the death of the insured." In *Johnson v. Scott*[8] the New York Supreme Court held that the proceeds of a policy payable to a named beneficiary depend upon contract. They do not go to the insured's estate or become a part of his assets after death. The rule whereby the proceeds pass by contract to a named beneficiary is supported by numerous cases and it underlies many of the statutes which pertain to life insurance. It is perhaps unnecessary to support by authority a rule so widely accepted. I have referred to some of the case law because the nature of life insurance proceeds and the transfer of the proceeds by contract must be given a place in any thought which relates to the subject matter which the Wisconsin statute covers. It is necessary in reviewing such a statute to bring into the thought the idea of contract. Otherwise "testamentary" may lead to a confusion. The idea of contract removes some of the confusion which the concept of testamentary disposition has brought in to the field of life insurance designations of beneficiaries.

The contract becomes effective in respect to the beneficiaries' rights at the moment the designation is made. The insured may reserve a power to change the beneficiary, but the designation remains effective while the insured leaves it so, and the right vests in the beneficiary on the insured's death. In *Tyler v. Treasurer and Receiver General*[9] Chief Justice Rugg wrote:

> "Rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. They are in no wise modified or increased at the time of the death of the insured." The Chief Justice then added ". . . a reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last. Whatever the insured does in way of designation of the beneficiary takes effect forthwith."

The Supreme Court of Illinois in *Gurnett v. Mutual Life Ins. Co.*,[10] a leading case in the field of insurance trusts, considered a trust arrangement where the insured reserved the right to change the beneficiary. The court wrote in reference to the insurer's obligation:

> "Their obligations to pay and the right of the trustee to receive the proceeds of the policies upon the happening of the contingency specified were determined when the companies noted upon the face of the policies the exercise, by the insured, of his right or privilege to change the

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[7] 119 Conn. 570, 177 Atl. 742 (1935).
[8] 76 Misc. 641, 137 N.Y. Supp. 243 (1912).
[9] 226 Mass. 306, 115 N.E. 300 (1917).
[10] 356 Ill. 612, 191 N.E. 250 (1934).

beneficiaries. The date of the death of the insured merely fixed the time when the obligation of the insurers to pay and the right of the beneficiary to receive the proceeds of the policies became enforceable."

The court cited *Frick v. Llewellyn,*[11] where the Federal court had written: "Here the right of the beneficiaries to receive the insurance did not spring from the death of the testator. Their rights arose under contracts of insurance. The date of death is simply the time when the insurers became obligated to pay, and the beneficiaries entitled to receive the proceeds of the policies under their contract." The Wisconsin statute follows these cases in treating the designation of the trustee as the inception of a contract by which the rights of the trustees which the insured designates in his will arise, a contract which carries the proceeds from the insurers to the trustees as the rightful owners under the contract. The proceeds of a life policy arise by contract which may be for the benefit of a third party. The act of designating the beneficiary fixes the right. The right accrues at that moment. The act of designation is therefore not testamentary since it represents a right which accrues before the insured's death. The insured's death does nothing more than accrue the contract under its terms.

The statute moves on to state that the proceeds arise from contract and the trustee-beneficiaries' rights become fixed by the designation when the insured designates a trustee or trustees of a trust which he sets up in his last will and testament. The Legislature had ample authority from the considered case law. The early mutual benefit certificates had often a provision that the Association would pay the proceeds as a benefit to the devisees of the insured as provided in his last will and testament. In 1901 the Illinois Supreme Court considered the case of *People v. Petrie*.[12] The insured, who held such a certificate, gave and bequeathed the proceeds to A. P. Petrie in trust with directions that the proceeds were to be kept at interest until the death of the insured's wife or until the insured's youngest child then living should attain the age of twenty years, if the insured's wife died before that time. The interest was to be paid to the insured's wife. A. P. Petrie was also the executor of the insured's estate. Petrie received the proceeds on the insured's death and did not account for the principal. In a suit upon the executor's bond, the court held that the proceeds of the certificate were not assets of the insured's estate; they were not the insured's property at the time of his death; only the beneficiary named in the certificate takes the money. The certificate was a contract by the Association to pay the money due to the beneficiary named upon the face of the certificates who takes as a purchaser. The Association had contracted to pay the benefit to the insured's devisees as provided in his last will and testament. The contract was made directly for the benefit of the devisees. The will gave the proceeds to A. P. Petrie in trust to be disposed of as the will provided. The court found that it could refer to the statute to determine the heirs and to the

11 298 F. Supp. 803 (W.D. Pa. 1924), *aff'd,* 268 U.S. 238 (1925).
12 191 Ill. 497, 61 N.E. 499 (1901).

will to determine the devisees. "In neither case, however, is the right to the money derived from the statute or the will, but solely from the contract embodied in the policy." Petrie had taken the proceeds as trustee and not as executor. We have a current case which cites and approves a decision that was made in the intervening period of time. In *Gordon v. Portland Trust Bank*[13] the Supreme Court of Oregon considered a living insurance trust which the insured's executrix alleged was a testamentary disposition or last will and testament and revoked by a will that the insured made a few days before his death. The court traced out the development of the law of the beneficial interest from the time when the interest was considered vested to the present where it is an expectancy. The court sustained the trust. "We observe, therefore, that both under the old view, where the beneficiary is considered the owner, and under the new view where he has only an expectancy, the result is the same, for even in the new view, the third party beneficiary has a present right to fulfilment of the insurer's promise to pay." The court then approved the decision of the New Jersey courts in *Bose v. Meury*,[14] and quoted this excerpt from the opinion of the New Jersey court: "The proceeds are the fulfilment of promises by the insurance company to the Montclair Trust Co., trustee, to pay the stipulated sums, upon the death of the insured. The insured paid the consideration for the promises and he had the right, under the terms of the policies, to change the promises at will, but when the day came—the insured's death—the obligations of the insurance company were due to the Montclair Trust Co., trustee. *Its source of title was the promise in the policies, not the trust agreement.*" (Emphasis added.)

The Oregon Supreme Court disposed of the testamentary point in these words: "In the insurance trust device, the trustee-beneficiary takes a divided interest in the property, but this is specifically a trust problem and has no bearing on the testamentary character of the device."

The statute permits the insured to designate as beneficiary a trustee or trustees which he has named or will name by his will if the designation is within the policy provisions and the rules of the insurer. The statute assumes that the insured will name a trustee or trustees who may be identified and that the trust will be definite in respect to the disposition which the trustees are to make of the proceeds. If these steps are taken, then the proceeds pass by contract to the designated trustee or trustees and the qualification of the trustees is a declaration by them of the trust. The Legislature might have treated the designation as having testamentary effect. The New York Law Revision Commission has pointed out that institutional directives have a seriousness of purpose and an administrative form. The Legislature did not proceed upon that ground. It followed the rules in the field of trusts by which the designation of a beneficiary on a life policy is sufficient to support a trust. Chapter 73

13 201 Ore. 648, 271 P.2d 653 (1954).
14 112 N.J. Eq. 62, 163 Atl. 276 (1932).

amended section 206.52(1) of the statutes by a provision that where life insurance is payable to a trustee as beneficiary, no other trust asset is needed than the right of the trustee to receive the proceeds as beneficiary. This provision was no doubt directed to the field of living trusts. Section 206.52(2) validated designations which made the trustee or trustees which the insured designated by will beneficiaries. The Legislature had ample precedent in the case law as to each of these trusts. The rule that the right of a trustee to receive the proceeds will support a trust goes far back in our law. The New York case of *Hirsh v. Auer*,[15] decided in 1895, has been cited and approved by many of our state courts. The insured held a certificate in the Ancient Order of United Workmen. He designated his sister, Clara, as beneficiary. The lower courts had found as a fact that Clara had agreed with the insured that when she received the proceeds of the policy she would spend not more than $500 for his funeral expenses and for a monument and would divide the balance equally between his children. Clara received the proceeds on the insured's death. The children sued Clara upon the agreement. The court of appeals affirmed judgment for the plaintiffs. "The fact that the trust dealt with a contingent interest of the insured in the certificate of insurance is of no moment; that interest became vested at the death of the insured, and the beneficiary, having collected the insurance money, the trust under the agreement creating and acknowledging it, attached to the fund." The court pointed out that courts of equity recognize as valid assignments of contingent interests; and the courts of equity will enforce a trust created by the agreement of a legatee under a will. The Massachusetts Supreme Court decided *Kerr v. Crane*[16] in 1912. The insured had taken a benefit certificate in a fraternal insurance company. He designated Crane as beneficiary. He delivered the certificate to Crane and informed Crane of a desire that he should pay the proceeds when collected to the plaintiff. The plaintiff was not in the class of beneficiary whom the insured could designate under the statute which authorized this type of mutual benefit insurance. There was a written memorandum signed by the insured, his wife, his relations and by the beneficiary. The court found as a fact that Crane understood that he was not to receive the proceeds for his own use and that he had agreed to collect and hold the proceeds for the use of the plaintiff. Those who claimed the proceeds argued that the interests of both the insured and of Crane as beneficiary-trustee were merely contingent and not vested rights of property in an existing fund. The court wrote that this was true:

> "The beneficiary had no other interest than a mere expectancy dependent upon the will and pleasure of the assured member. But it does not follow that the holder of such a merely expected or contingent interest, growing or expected to grow out of actually existing, though defeasible, contractual rights, has no power of dealing with it, or that

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[15] 146 N.Y. 13, 40 N. E. 397 (1895).
[16] 212 Mass. 224, 98 N.E. 783 (1912).

his engagements made with reference to such an interest while it is merely expectant and contingent, may not be enforced in equity after the interest shall have become vested and absolute."

The court went on to hold that it could deal with the beneficiary even if he were not a member and compel him to collect the money and pay it according to the agreement he had made. The right of the beneficiary during the lifetime of the insured is like the expectation of a farmer to raise a crop which he intends to plant upon his land and which he pledges to obtain the necessary seed. The court wrote that there was enough if there was a present interest from which the expected article or right is to be directly produced. The actual property need not pass in the future product or result of something presently in existence. An agreement as to the future product or result has validity and is capable of enforcement. In *Gurnett v. Mutual Life Insurance Company,*[17] which the Supreme Court of Illinois decided in 1934, there is a holding that a life policy is property and may be the subject matter of a trust: "The designated beneficiary of the policy may, by the provisions of a collateral trust agreement, be named as the trustee. Vance on Insurance (2d Ed.) p. 606. When the beneficiary promises the insured to pay either the whole or a portion of the proceeds of the policy to a third person, the proceeds will be impressed with the trust to the extent of the promise made."

Professor Scott has stated the rule:

> "Where a person takes out a policy of insurance upon his life payable to a third person as trustee, and reserves the power to change the beneficiary of the policy, and perhaps in addition the power to change the beneficiaries in the trust, the question arises whether the disposition is testamentary and invalid for failure to comply with the requirements of the Statute of Wills. It is arguable that the trust does not arise until his death, and that since his death is a condition precedent to the creation of the trust, the disposition is testamentary. The answer is, however, that the beneficiary of the policy as soon as he is named trustee holds his rights as beneficiary of the policy in trust . . . The courts have, therefore, had no difficulty in upholding insurance trusts, although they are not executed with the formalities necessary for a will."[18]

The right to designate a beneficiary flows from the policy. It is a part of the insurance arrangement. Just now we have read through authorities that a designation will support a trust in the sense that the designation creates a res, an asset, which is a proper subject for a trust. The statute of Wisconsin has declared this point. There are some cases at which we may look now for the purpose of contrast of acts which are in or out of the insurance arrangement. These cases also rest in the two adjacent fields which define the respective rules of insurance and of trust law. The Massachusetts Supreme Court decided *Kendrick v. Ray*[19] in 1899. The insured had designated "to and for the sole and separate

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[17] See note 10 *supra*.
[18] SCOTT, TRUSTS § 84.1 (1939).
[19] 173 Mass. 305, 53 N.E. 823 (1899).

use and benefit of E. A. Taft, trustee". Among the insured's papers was a sealed letter addressed to Mr. Taft which pointed out Ray as the cestui que trust with a direction that the proceeds be paid on the insured's death. There was evidence of conversations between the testator and Ray, one shortly before the insured's death, stating that the proceeds would pass to Ray. The policy remained in the insured's possession. The court sustained Ray's right to the proceeds: "We discover nothing which rendered the trust invalid on ground of public policy, or inoperative, as an attempted testamentary disposition of property." The court had before it a designation of beneficiary. It applies a different rule when there is an assignment. Thus, in *Silbert v. Equitable Life Insurance Society of the United States*,[20] the insured drew an indenture of trust with words of assignment and delivered a duplicate to the insurer with a request that the beneficiary be changed to the trustee. Neither the insured nor the insurer communicated the trust to the trustee or the cestuis. The court construed the indenture to be an absolute assignment and irrevocable trust. When the insured made a further designation of beneficiary for the benefit of his wife and children, the insurer refused. The court held that a transfer by assignment of a res to a trustee must meet the requirements of transfers not in trust. Here there was no delivery to the trustee and no evidence that the insurer acted on behalf of the trustee or the beneficiaries of the trust when it received the assignment. The rule rests on relinquishment of control and finality. The trust failed for lack of delivery. The court distinguished *Kendrick v. Ray*:[21] "In that case the policy was originally issued payable to the trustee as such, and there was no question of delivery of an instrument." The rule of many jurisdictions, the court noted, was different. The Massachusetts rule reached back into the early reports. The court cited *Frost v. Frost*.[22]

The decision in *Frost v. Frost*[23] must be read against the background of contrast in the last paragraph. Mr. Frost held five policies which were payable to his estate or his legal representatives. He made assignments of all of his right, title and interest in the policies subject to their terms and conditions, to "the trustees to be named in my will" for the sole use and the benefit of his wife. He retained the assignments. He made three wills after the assignments. The court read the words "my will" to refer to the document that was finally admitted to probate as the insured's will. It held that the assignments could not be delivered to the assignees until after the insured's death. The insured had made no delivery to anyone for the trustees. There was nothing to show that he intended to hold the assignments for the trustees. There was no operative assignment during the insured's lifetime. The assignments were, therefore, of a testamentary nature. The sole question was whether the assignments ever became opera-

20 314 Mass. 406, 50 N.E. 2d 57 (1943).
21 See note 19 *supra*.
22 202 Mass. 100, 88 N.E. 446 (1909).
23 See note 22 *supra*.

tive. The court distinguished *Kendrick v. Ray*:[24] "There the trustee was the beneficiary named in the policy; and the question was as to the terms of the oral trust upon which he received the insurance, and not as to the validity of the appointment of the trustee."

The Wisconsin statute reads: "A policy of life insurance may designate as beneficiary a trustee or trustees named or to be named by will, if the designation is made in accordance with the provisions of the policy and the requirements of the insurance company." The statute leans, therefore, upon *Kendrick v. Ray*.[25] It treats the designation of beneficiary as passing a res to the trustee or trustees. Having gone to that ground, the statute does not regard the transaction as a contract between the insured and the trustee-beneficiary to create a trust at the insured's death. The Supreme Court of Oregon stated the ground upon which the statute rests: "In the insurance devise, the trustee-beneficiary takes a divided interest in the property, but this is specifically a trust problem and has no bearing on the testamentary character of the devise. This view was adopted by . . . New Jersey . . . and . . . . Illinois . . . ." The Court of Chancery of New Jersey and the Supreme Court of Oregon were both of the opinion "that actually the beneficiary is the one who declares the trust where he has been named trustee." The statute goes on the footing of "a trustee or trustees named or to be named by will. . . ." The court may appoint the trustees "immediately after the proving of the will". The insurer may make payment upon the appointment and qualification of the trustees. The trust rests, therefore, upon an instrument which the court has found to be executed according to the statute of wills.

A brief reference to cases which cover the entire field of the statute insofar as we have considered it will serve as a summary and bring out some of the matters that we will wish to look at later. *Tootle-Lacey Nat. Bank v. Rollier*,[26] was decided by the Missouri Supreme Court in 1937. The insured held three policies in Penn Mutual Life Insurance Co. and five policies in the Mutual Life Insurance Co. of New York. The designation on the former directed that the proceeds be held under an interest option for a period of 30 days. If the Tootle-Lacey National Bank filed an affidavit with the insurer during the period, stating that the insured's wife, Emma, is living, that the insured died testate, that his will contained a trust and that the will had been admitted to probate, then the proceeds were to be paid to the Tootle-Lacey National Bank as trustee. Otherwise, the proceeds were to be paid to the insured's estate. The mutual policies contained a designation that if the insured's wife survived the insured, the proceeds would be payable to the trustees under the insured's last will and testament. If the insured died intestate, or if the will contained no trust or if the trustee was not acting and had not qualified, or if the insured's wife

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24 See note 19 *supra*.
25 See note 19 *supra*.
26 341 Mo. 1029, 111 S.W. 2d 12 (1937).

did not survive, then the proceeds were to be paid to the insured's estate. Later the insured made a will. He put the residuary estate in trust for the use and benefit of his wife, for her proper maintenance and support during her life. The trustee was directed upon her death to pay her funeral expenses and to deliver over any property remaining to the insured's son. He named Tootle-Lacey National Bank as trustee of the testamentary trust. The bank was also executor of the state. The bank qualified as executor. The bank, as trustee, payee and beneficiary, collected the proceeds. The bank was designated as trustee-beneficiary in the policies; it was trustee of the testamentary trust; it was executor of the will. The bank brought a suit in equity for directions and instructions to determine its title in its capacity as trustee and executor and the rights of other parties. A legatee, a party to the action, took the position that there was a resulting trust whereby the proceeds become a part of the insured's estate. The chancellor found that the insured by the designations and the trust provisions in the will had created a trust for the benefit of his wife and that the bank held the proceeds as trustee. The supreme court affirmed. The court approached the case through the insured's intent. It found from the circumstances that the insured intended clearly to create a benefit for his wife who was insane and that he did not intend, if his wife survived, that the proceeds become a part of his estate. It found further that the insured intended to create a trust for the purpose. The court found that it could not disregard the words "a trust operating under my will" in the designations on the Penn Mutual policies. "Rollier intended to adopt and make the terms and conditions and beneficiary of the testamentary trust applicable to the trust in the proceeds of the insurance policies and when the endorsements and that provision of the will are interpreted and construed together, an express trust in the proceeds of these policies, as claimed by the respondents and found by the trial chancellor, must be held to have been made out." The court held that the designations in the Mutual Life policies passed the proceeds to the bank as trustee. "Guided by a reasonable construction and interpretation of the language used, construed in the light of the surrounding facts and circumstances, heretofore mentioned, we think it a reasonable conclusion that Rollier intended that a trust of the same kind and character and on the same conditions as that declared in the will should apply to the proceeds of these policies." The court did not discuss but accepted by implication the thought that the designations were sufficient to support a trust res. The silent and deep current in the opinion is that equity will not permit a trust to fail where the court is satisfied with the intent.

The statute insofar as it treats the designation as a trust res and the insured's will as relating back to the designation finds support in *Union Trust Company of Pittsburgh v. McCaughn,*[27] decided in 1927. The Revenue Act of 1918, section 402, defined the gross estate of a decedent as all property, real

[27] 24 F. 2d 459 (E.D. Pa. 1927).

or personal, tangible or intangible, to the extent of the interest which the decedent had at the time of his death or subject to charges against his estate and to distribution as part of the estate. The court, in deciding the tax issue, found it necessary to pass upon points which the statute covers. The insured held a policy in the amount of $101,000 payable to "Anna L. Park, wife of Richard G. Park, in trust". The insured's will had this provision: "To my dear wife, Anna L. Park, I bequeath one-half (½) the proceeds of the insurance on my life in the Equitable Life Assurance Society of the United States, absolutely". The designation was found to be ineffective as to one half of the proceeds since there was no beneficiary designated who could enforce the trust. The clause in the will was treated as a declaration of trust as to the other half of the proceeds and thereby the insured's wife took the beneficial and the legal interest. The court wrote that it could not treat the contract of insurance and the proceeds as separate things. The beneficiary's right rested on the contract of insurance. The trust was completed by the provision of the will which related back to the time when the policy had been taken.

We find in the statute the words "a trustee or trustees named or to be named by will". In *Tootle-Lacey Nat. Bank v. Rollier*[28] we find this excerpt: "No particular, formal or technical words are required in the creation or declaration of an express trust and the declaration of such trust need 'not be contained in or endorsed on the instrument which transfers the legal title. It may be set out in one or several instructions executed at other times than that of the transfer of title, provided, when construed together', they show the existence of the trust." *Union Trust Co. of Pittsburgh v. McCaughn*[29] referred to Perry on Trusts, section 82, that the trust, once proven, however late the proof, will relate back to its creation.

When a trust fails, the res reverts to the estate of the person who created the trust. The law creates a resulting trust. In *Union Trust Co. of Pittsburgh v. McCaughn*[30] the court held that there was a resulting trust as to one half of the proceeds of the policy. The opinion noted that if there is an attempt to create an express trust and it fails, the result is as if the attempt had not been made. No rights or interests are created. The beneficiaries do not take the property nor does the trustee; "in such a case a trust results in favor of the donor or his heirs." The court cited *Bancroft v. Russell,*[31] a case decided in Massachusetts and *Emmons v. Grand Lodge,*[32] a case decided in Delaware. These cases concern the proceeds of insurance policies. The statute follows this rule. It provides: ". . . but if no qualified trustee makes claim to the proceeds from the insurance company within one year after the death of the insured, or if satis-

[28] See note 26 *supra.*
[29] See note 27 *supra.*
[30] See note 27 *supra.*
[31] 157 Mass. 47, 31 N.E. 710 (1892).
[32] 4 Boyce Del. 272, 88 Atl. 459 (1913).

factory evidence is furnished, the insurance company within such one-year period showing that no trustee can qualify to receive the proceeds, payment shall be made by the insurance company to the executors, administrators or assigns of the insured, unless otherwise provided by agreement with the insurance company during the lifetime of the insured." The statute in this provision creates a change of beneficiary in order that the resulting trust may take effect. The change depends upon a qualified trustee making claim within one year after the death of the insured. If the insured has created a valid trust and there is a delay in the qualification of a trustee, the insured might not wish the proceeds to be diverted by the statutory change of beneficiary to his estate. The statute makes it possible, however, for the insured to make an agreement with the insurer for the purpose of covering such a contingency.

We have looked thus far at the provisions of the statute which concern the designation of a trustee or trustees named or to be named by a will as the beneficiary of a life policy. The review that we have made concerned the theories of law and the court decisions which justify a statute whereby the designation of trustees named or to be named in a will may receive the proceeds of a life policy. A designation of beneficiary has a relation to other rules of law than those which give the designation validity. The Wisconsin statute in addition to making the designation of a trustee or trustees named or to be named in a will a valid act considers the relation which that act will have to the debts of the insured and the inheritance tax on his estate. It also considers the jurisdiction of the court in respect to the trust and the estate. It considers the proceeds of the insurance in relation to the other assets of the insured's estate. We turn at this point from the validity of the act of designation to consider the consequences of the designation in the fields of law which the statute covers and which lie beyond the validity of the designation alone.

The effect of the designation of a trustee or trustees named or to be named by will in respect to inheritance taxes, creditors and the interests which spouses have in an estate depends upon statutes. The answers which we seek in these fields of the law will depend upon the construction that we give the statutes.

In the field of inheritance taxes the statute which we have at hand provides that the proceeds of the designation of a trustee or trustees named or to be named by will shall not be subject to an inheritance tax to "any greater extent than if the proceeds were payable to any other named beneficiary other than the estate of the insured."

The designation will have the same exemption under the Inheritance Tax Statutes as other designations of beneficiary. Perhaps a statement of some cases that have arisen under the Inheritance Tax Statutes will be of value in that it will make the points that arise actual and specific. The Pennsylvania statute gave an exemption where the proceeds were payable otherwise than to the estate of the insured "and whether paid directly by the insurer to beneficiaries designated in the policies, or to a trustee designated therein, and held, managed, and distributed by such trustee to or for the benefit of such persons or class of persons under such plan and in such estates as may have been prescribed by the insured under agreement with such trustee, shall not be included in imposing any tax under this section." The Pennsylvania Supreme Court reviewed the point in a case decided in 1933, *In re Myers' Estate*.[33] The decedent held six life policies. He executed a trust and he designated trustees as beneficiaries of the policies. The trust provided that the trustees "shall pay over the income therefrom and the principal in accordance with the provisions set forth in the settlor's will." The insured executed a will in which he named the same trustees. The will gave the residue of the estate to his executors in trust for certain relatives. There was no reference to the life insurance trust. The court held that the scheme was not within the exemption. The court pointed out that there was no effective trust. The distribution depended upon the insured's will. The court further found that the purpose of the deed of trust was to evade payment of the tax. Later, in 1950, the Supreme Court of Pennsylvania in *In re Wilson's Estate*[34] considered the same statute in different circumstances. The insured executed a living trust. The life policies were made payable to named trustees for the benefit of named nephews and nieces and their issue. On the same day the insured executed a will. The residuary estate was bequeathed to the same trustees and for the same uses and trusts. The deed of trust was brought into the will through incorporation by reference. The court held that the trust was entitled to the exemption. It distinguished the *Myers*[35] case on the ground that there the insured had direced that the proceeds be distributed in accordance with the terms of the insured's will. When we turn to the statute, we note that the exemption is limited to trusts "as may have been prescribed by the insured under agreement with such trustee. . .", and when we relate the language of the statute to the facts of these cases, we find a ground of decision in that the statute had by express language excluded a testamentary trust.

The Ohio court, construing the statute of that State (section 5332-4 General Code, effective July 24, 1931) in *In re Rothenbuecher's Estate*,[36] held that a trust under the insured's will was not within the exemption. The insured held nine policies. He designated as beneficiary the Security Central National Bank of Portsmouth, Ohio, a corporation as trustee. The designation in all except two of the policies referred to a trust created by the insured's will. The insured in his will left the residuary estate to Security Central National Bank of Portsmouth as trustee. There was a direction that the trustee collect the monies due under the life policies "the beneficiaries of which are said trustee or my

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33 309 Pa. 581, 164 Atl. 611 (1933).
34 363 Pa. 354, 70 A. 2d 354 (1950).
35 See note 32 *supra*.
36 76 Ohio App. 425, 64 N. E. 2d 680 (1945).

estate". There were provisions for the distribution of the estate. The Inheritance Tax Statute provided that the proceeds of life policies payable otherwise than to the estate of the insured would not be considered property passing within the meaning of the taxing provision: "Whether paid directly by the insurer to the beneficiaries designated in such policies or to a trustee designated therein, and to be held and managed by such trustee and distributed to designated beneficiaries under an agreement or declaration of trust in the manner as may have been prescribed by the insured in said agreement or declaration of trust." The court noted that where the proceeds are payable to a beneficiary named in the policy, they pass by a contract entered into for a valuable consideration. Where the proceeds pass to the estate, the recipients take by means of transfers which are within the taxing statute, succession by will or by the intestate laws. The court construed the exemption as limited to a living trust. The words did not let in for exemption a trust set up under the provisions of a decedent's will. The cases of *McGuire v. School District of Pittsburgh*[37] in Pennsylvania and *Goldman v. Robert E. Bentley Post No. 50*[38] in Ohio throw much light on the decisions in Pennsylvania and Ohio which we have analyzed. In both of these States exemption statutes are strictly construed and there is no presumption favorable to exemption.

The statutes which we have considered, since they classify transfers by will or intestacy and transfers to a trust, fall by their very natures within the rule that requires strict construction of the exemption.

The Wisconsin statute, after confirming that a trustee or trustees named or to be named in a will may be designated as beneficiaries of a life policy, goes on to provide: "The proceeds of the insurance as collected by a trustee or trustees shall not be subject to the debts of the insured and inheritance tax to any greater extent than if such proceeds were payable to any other named beneficiary other than the estate of the insured." I will take now that part of the statute which refers to the exemption of the proceeds from the debts of the insured. The statute gives to the designation of a trustee or trustees named or to be named in a will the same exemption from the debts of the insured that the state law gives where the proceeds are payable to a beneficiary other than the estate of the insured. There is some case law. I shall analyze it. It throws light on the nature of a life insurance contract. Section 272.18 (19) permits the proceeds of a life policy to pass to a beneficiary or assignee free from claims of the creditors and representatives of the insured, if the beneficiary is a person other than the insured or the person who effected the insurance, and the designation was made without an intent to defraud creditors. Neither the reservation of the right to change the beneficiary nor a provision of reversion to the insured if the beneficiary dies first changes the rule. The amount of premiums paid

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[37] 359 Pa. 602, 60 A.2d 44 (1948).
[38] 158 Ohio St. 205, 107 N.E. 2d 528 (1952).

with an intent to defraud creditors and interest inure to the benefit of the creditors from the proceeds of a policy.

In *First Wisconsin Nat. Bank of Milwaukee v. Roehling*[39] the supreme court considered Section 272.18 (19) and section 242.01 of the Uniform Fraudulent Conveyance Act. The insured had three policies which were payable to his estate. He designated his wife as beneficiary. He owed money to the plaintiff bank which had asked for an assignment of his life policies as collateral. The insured declined. Six days previous he had made the change of beneficiary. Section 242.04 made a conveyance which rendered a person insolvent, fraudulent as to creditors without regard to the actual intent if made without a fair consideration. The trial court found that the insured was not insolvent at the time of the change and that the change was not made with an actual intent to defraud creditors. The supreme court found there was sufficient evidence to support the findings. The court went on, however, to hold that a change of beneficiary was not a conveyance capable of being fraudulent except as to the cash surrender value of the policy. The court believed that the change was not within the definition of a conveyance which the statute defined: "It is merely the appointment of a person to take property which arises only upon the death of the insured. It does not, standing alone, involve or include an assignment of the policy itself." Nothing except the cash surrender value is property within the fraudulent conveyances statute: "Although it is true that a policy is property, it is only so in a limited sense. It is clearly distinguishable from a promissory note payable at some future date." Here we have that definition of insurance as property which was present in the cases that I have analyzed in the earlier part of this paper.

Perhaps we may turn now to a decision of the Supreme Court of Pennsylvania in *In re Kenin's Trust Estate.*[40] It will generally be present in any discussion of the field which the Wisconsin statute covers. The insured assigned to a trustee policies on his life with a direction that the trustee collect the proceeds and pay the proceeds to the trustee which the insured named in his last will and testament who was to hold the proceeds under the same uses and trusts which the will set out as to the residuary estate. The insured in his will bequeathed a residuary estate in trust for the benefit of his wife and his descendants. The insured executed the deed of trust and the will on April 12. He died insolvent on June 1. On the accounting of the trustee, creditors claimed that the proceeds were part of the insured's estate and were payable to the insured's executor and thereby subject to the claims of creditors. The decision of the court will have more interest to us if we first turn back to an earlier case which the court had decided in 1865, *Appeal of Elliott's Executors.*[41] Elliott had four policies on his life. He had assigned three of the policies to a trustee for

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[39] 224 Wis. 316, 269 N.W. 677 (1937).
[40] 343 Pa. 549, 23 A.2d 837 (1942).
[41] 50 Pa. 75 (1865).

his wife "in trust for the only use and benefit of my wife, Eliza T. Elliott, her heirs and assigns." The policies had remained in the insured's safe deposit box. The assignments were made in February, March and September. The insured died in November insolvent. The court referred to the English law that a voluntary alienation of property by a party who at the time of the alienation was insolvent may be set aside by his assignees under the Insolvent Debtors Act. That the property was not subject to execution in the insured's lifetime made no difference. In Pennsylvania an executor or administrator of an insolvent estate is a trustee for creditors and may set aside a fraudulent conveyance. The court found that the insured was hopelessly insolvent in the year in which he made the assignments and for some time previous. The court held the assignments fraudulent and void and held that the proceeds belonged to the creditors and the estate of the insured. The court, however, wrote this sentence: "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."

I have quoted the sentence from the court's opinion. The thought which we find in the sentence will simplify for us *In Re Kenin's Trust Estate*.[42] The thought of the sentence was later carried into a statute. The revision of 1923, now section 517 of title 40 of Purdon's Statutes, controlled the court decision in respect to the steps that Mr. Kenin had taken in the insurance matters. The statute states that where a life policy or annuity contract is "made for the benefit or assigned to the wife or children or dependent relative" of the person upon whose life the life policy or annuity is written, the net amount payable is exempt from the claims of the creditors of that person. The exemption applies whether the right to change the beneficiary is reserved or not. The point which the court had to determine was whether Mr. Kenin had made the policies for the benefit of or assigned the policies to his wife, children or dependent relatives. Perhaps I had better make a further brief reference here to the arrangement. There was a deed of trust dated April 12. The insured had assigned the policies to the trustee. The trust directed that the trustee collect the proceeds and pay them over to the trustees that the insured had named in his last will and testament who were to hold the proceeds under the trusts and with like distribution as the insured had set forth in respect to his residuary estate. The insured had left his residuary estate in trust for the benefit of his wife and descendants.

The opinion cites cases in which the court had held that an insured might by a trust agreement provide for the payment of the proceeds of life insurance to his wife and children; it pointed out that such a provision is not unlawful nor a fraud upon the insured's creditors even where the insured is insolvent.

In the arrangement that Mr. Kenin had made he had retained control of the disposal of the proceeds through his will. He could change the disposal

42 See note 40 *supra.*

of the proceeds by altering his will. He could have revoked the will and died intestate and thereby the proceeds would have reverted to his estate. The court was of the opinion that the insured had not committed the insurance under the statute for the benefit of his wife or children or dependent relatives.

The space in which the court must work had definite limits. The words of the statute were: ". . . made for the benefit of or assigned to the wife or children or dependent relative". The arrangement was not within a literal reading of the words. The case law had let in a trust for the purpose. In *Fidelity Trust Company v. Union Nat. Bank of Pittsburgh*[43] the court had written: ". . . the beneficiary-trustee had an expectancy in the insurance proceeds which would become the res of the trust . . . ." Here the living trust, however, directed the trustee to collect the proceeds and pay them over to the trustees named in the insured's last will and testament. It went further and directed the trustees named in the last will and testament as to the uses and trusts and the distribution by a reference to the residuary estate in the insured's will. The court held that this direction was an act which fell within the Statute of Wills. The trust, therefore, failed for the purpose of the exemption statute. Since the proceeds were outside of the exemption which the statute gave, the proceeds were subject to the claims of the insured's creditors. The court held that it might not refer to the insured's will since the rights of the creditors had attached at the time of the insured's death. The Wisconsin statute directs that the policy may designate as beneficiary a trustee or trustees named or to be named by will and that the proceeds will be paid to the trustee or trustees who will hold and dispose of the proceeds under the terms of the will as they exist at the testator's death. Thus, the statute rests on a different legal base from that which the Pennsylvania Court considered. The statute rests on the concept of contract, of the designation of the trustee as a sufficient res to support the trust; and it bases the disposal of the proceeds upon the insured's will, admitted to probate, a legal act which complies with the Statute of Wills.

Property that passes into a decedent's estate becomes subject to the obligations which a person has to those who have been dependent upon him. The changes in this field of social thought and the reflection of them in our law would be a fascinating study. Over the past generation we have adopted some of the thought of the civil law. These changes touch the subject matter that we have here. The Wisconsin Statutes, sections 233.12, 233.13 and 233.14, give a widow in circumstances which the statutes define a right of election in respect to her husband's property. If a widow makes an election, she becomes entitled to the same dower in lands and the same right to the homestead and the same share of the personal estate as if her husband had died intestate. I state the statute in general terms. There are some refinements which I do not need for the point that I consider now.

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43 313 Pa. 467, 169 Atl. 209 (1933).

The statute which concerns the designation as beneficiary of a trustee or trustees named or to be named by will provides that for the purpose of trust administration the life insurance proceeds shall be subject to the jurisdiction of the court as though the proceeds had been payable to the estate of the insured ". . . but shall not otherwise be considered as payable to the estate of the insured." The statute then directs that the proceeds shall be listed in the general inventory of the estate "for tax purposes only". The statute then states that the proceeds may be mingled with the other assets which may come into the trust as provided in the will. The statute passes the proceeds of the insurance to the trust through contract. The cases have held that the proceeds of insurance which pass to a designated beneficiary are not a part of the insured's estate. This distinction is the basis on which the validity of the exemption statutes rests in many of the states. If the Wisconsin courts treat the proceeds as passing to the trust by contract and read literally the words of the provision in the statute, "but shall not otherwise be considered as payable to the estate of the insured", the widow's right of election will not reach the proceeds. The construction of statutes and especially of those which affect social relations requires long and thorough study of statutory history. There enters also in that field perhaps more than any other the thought which gives Justice Holmes perhaps all his grandeur, namely, the necessity of reconciliation. One case in this field has come to my notice, *Bickers v. Shenendoah Valley National Bank,*[44] decided in the Supreme Court of Appeals of Virginia. A statute, section 64-13, gave a husband or wife the power to renounce a provision in the consort's will and section 64-16 gave the consort, if her renunciation be made, one-third of the surplus of the decedent's estate if the decedent left direct descendants and one-half, if none. Mr. Bickers, the insured, made a written agreement with the bank that the bank would act as trustee of the proceeds of policies on Mr. Bickers' life. He designated the bank as trustee-beneficiary and delivered the policies to it. He amended the agreement by a provision for revocation and for the withdrawal of the policies. "The trustee's only rights in the trust policies placed in safe keeping prior to the death of the settlor are to hold the policies in safe keeping until and unless they are withdrawn by the settlor." If the insured's wife survived and renounced the provision in his will and claimed the statutory right in his estate, the trustee would then divide the insurance proceeds into four equal parts and pay a part to each of his adult daughters and pay a part to the bank as trustee under the settlor's will for each of his two infant daughters. If the insured's widow elected to take under his will, the trustee would divide the proceeds into five equal parts and pay one part to the widow, one part to each adult daughter and the shares of the two infant daughters to the bank as trustee under the insured's will. The agreement then fixed the period of time and the manner in which the trustee would hold and administer the shares of the two infants and the disposition the trustee would make of the shares if either bene-

44 197 Va. 145, 88 S.E. 2d 889 (1955).

ficiary died. The insured's will made on the same day directed that the residue of his estate be divided into five equal parts, one to be paid to his wife "in lieu of her dower and marital claims upon my estate", one part to each of his two adult daughters and the other two parts to the bank as trustee for two infant daughters. When the insured died his wife filed a bill alleging that the agreement was ineffective as an inter vivos trust, asked that it be declared invalid and that the proceeds of the insurance be paid to the executors of the insured's estate. She also asked for additional time in which to decide if she would renounce the provision in the will. The bank, as executor and trustee, and the insured's daughters demurred to the bill. The trial court sustained the demurrer to all parts of the bill except the request for an extension of time. On appeal the supreme court of appeals reversed. The majority and dissenting opinions discussed many issues in the law of life insurance trusts. Perhaps it would be well for us to keep in mind that the court was construing two statutes, one of which gave a husband or wife a power to renounce a provision in the consort's will and a second statute which read that if a surviving husband or wife made a renunciation, the surviving consort would then be entitled to certain parts of the decedent's personal estate. This approach is made more distinct by a passage in the opinion:

> "If this instrument, ineffectual as it is without a will, were held valid as an *inter vivos* trust, then there is nothing to prevent a married man at any time prior to death from executing a revocable writing, reserving to himself a life estate in all of his property but conveying the remainder in his estate to a trustee for designated parties other than his wife, *in case he leave a will* and then execute a will that merely appoints an executor, (57 American Jur., Wills, § 27, p. 55) and he will by such dependent writings, retain full control of and beneficial interest in his property until death, and at the same time successfully prevent his widow from sharing in his estate. That is what this instrument was intended to accomplish to an extent materially detrimental to the widow, and what it would accomplish if it were held valid. The insurance proceeds go to designated parties if Bickers leaves a will, with the widow's share only 1/5, and nothing if she elects to renounce the will, and yet they pass to his estate if he does not leave a will."

The statute did not let in trusts as does the New York statute. The case law which the court cites would lead us to believe that the insured might dispose of his property in his lifetime but if so he must part with it. We note in the reasoning on insurance trusts that the court construes the provisions whereby the trustee's rights in the policies would only be that of safe keeping prior to the insured's death as disclosing an intent on the insured's part that nothing whatever would pass to the trustee. We note in the dissent that this clause is construed as a retention of the incidents of ownership as distinct from the proceeds. We note also that the court holds that the trust would be ineffective without a will; and there we take the court to mean that the directions in the agreement for the testamentary trustee's action in respect to the two minor children were ineffective under the Statute of Wills, and thereby the insured had not parted with the property in his lifetime and the transfer must depend upon his will. The court stated that if the agreement had shown an intent to transfer a present interest regardless of whether the insured died testate or intestate, there would have been a valid inter vivos trust; and the right of the widow to share in the trust fund could have been made dependent on the subsequent condition of whether or not she renounced the provision in the will.

If we turn now to the Wisconsin Statute, we find first of all that the statute treats the designation of the trustee as beneficiary as sufficient to support a trust res. We find further that the statute leaves the directions as to the testamentary trust to rest in a will which has been duly admitted to probate. The papers are therefore not the same as those before the Virginia court. The reconciliation of the new statute with the Wisconsin Statute whereby a consort may make an election rests, however, if I may repeat what I have already written, with the Wisconsin courts.

A few summary thoughts come to me. You recall now my early reference to an insured who had two minor children and wished to appoint an aunt and a trust company as testamentary trustees. There the form came from the desire for the security of a family. It permitted life insurance to carry out its purpose. The Wisconsin Legislature accepted it as good life insurance and declared it to be good law. The legal concepts that support the law of life insurance and trusts that our courts have so patiently worked out support the designation of testamentary trustees as good trusts. The concepts are life insurance as contract and the designation of a trustee as sufficient res to support a trust. I have analyzed some distinctions in the decided cases for the purpose of keeping the basic concepts clear. There are many different obligations that society imposes. The testamentary trust may have a relation to duties that the insured owes in these varied obligations. There I have developed the thought that inheritance taxes, the rights of creditors and decedents' obligations in respect to their assets depend upon special statutes. I have analyzed some of the cases to that end. The task in these decisions is the interpretation of the statute which controls the special field of the law that relates to a testamentary trust. The Wisconsin statute goes beyond approving the use of testamentary trusts as good life insurance and trust law. It goes much further and declares the state's public policy in respect to the insured's other obligations such as inheritance taxes, creditors and family obligations in respect to a decedent's assets. Any valid writing reflects a special way of seeing. That is all this paper, if it has any worth, can be. The thought that life insurance is contract, that the designation of a trustee as beneficiary is sufficient to support a trust res, that the obligations in the other fields of the law rest on statutory interpretation may help to remove some of the confusion that the papers read at Philadelphia brought to our notice. The Wisconsin statute took steps of clarification and thereby of certainty and assurance. Such is the mission of law.