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THERE is a great deal of uncertainty and confusion in the decided cases in regard to the effect to be given to the assignment of a life insurance policy. This is unfortunate, since to a large extent life insurance has come to be regarded as an investment medium, and as an asset which can be hypothecated by the insured in times of financial emergency.

I

NATURE OF THE PROBLEM

The existing uncertainty grows very largely out of the fact that the modern life insurance contract, as it is commonly written, purports to confer rights upon two persons. On the one hand, we have the person who makes the contract with the insurer. He is the promisee, called the insured, and is usually, though not invariably, the one whose life is covered and who pays the consideration for the insurer's promise in the form of premiums. In addition, it is customary for the insurer to promise the insured that he will pay the proceeds of the contract to a third person, designated as beneficiary, if the contract matures because of the death of the person whose life is covered.

The problem is further complicated by the fact that the policy usually contains a number of other more or less stereotyped clauses. Among other things it may give the right (a) to borrow money on the contract, (b) to surrender it and to receive a specified cash value, (c) to exercise named options in regard to the mode of settlement, (d) to receive any dividends that may be declared on the contract, and (e) to change the beneficiary by complying with certain prescribed formalities. Sometimes the contract does not reserve the right to change the beneficiary and, more often than not, it does not distinctly specify who shall have the privilege of exercising the several rights created by it.

More recently, some insurers have been writing into their policies a provision expressly giving the insured the right to assign the contract, and making the rights of the beneficiary subject to any assignment made in the manner stipulated in the contract. More often, however, the policy does not contain any such stipulation, although it may state that no assignment made shall bind the insurer unless it is made in writing and unless the insurer is notified of the fact.

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II

ASSIGNABILITY OF PARTICULAR RIGHTS

Among the rights created by the contract, those whose assignability is most likely to be in question are the right to the cash or loan value, the right to change the beneficiary, and the right to the proceeds of the policy on maturity.

A. *Right to Cash or Loan Value*

It is a well settled rule of the modern law that contract rights are assignable in the absence of an express prohibition or restriction in the contract, unless the assignment will materially change the duty or increase the burden or risk of the other party to the contract, or unless the assignment is contrary to public policy.[1] The life insurance contract is not an exception to this general rule. Accordingly it is clear that the right to receive the cash surrender value is assignable in the absence of a restriction in the contract. It has been so decided in a number of cases.[2] The only question of doubt in these cases has been whether the assignment was made by the person in whom the right resided, and whether the assignee had exercised his rights in conformity with the terms of his assignment and of the contract of insurance. Moreover, it has also been decided that an assignment of the contract of insurance as a whole in general terms by those beneficially interested confers upon the assignee the right to receive the cash value without express stipulation in the contract of assignment to this effect.[3]

B. *Right to Borrow Money or Change Beneficiary*

It would also seem to follow that the right to borrow money on the policy is assignable, since under the usual policy provision the insurer does not rely upon the personal credit of the borrower as security for repayment but on the policy's cash value which it has in its hands.[4] There is more doubt about the assignability of the right to change the

[1] CONTRACTS RESTATEMENT, § 151 (1932).

[2] Snyder v. Home Life Ins. Co., 328 Pa. 424, 195 A. 895 (1938) (assignment by insured and beneficiary); N.Y. Life Ins. Co. v. Rees, (C.C.A. 8th, 1927) 19 F. (2d) 781 (assignment by insured and beneficiary); Jenkins v. Ins. Co., 112 Kan. 552, 212 P. 363 (1923) (assignment by insured. Policy expressly reserved to insured the right to receive the cash value); Cockrill v. Southwestern Life Ins. Co., (Tex. Civ. App. 1937) 103 S. W. (2d) 399 (assignment by insured and beneficiary); Mutual Benefit Life Ins. Co. v. First Natl. Bank, 160 Ky. 538, 169 S. W. 1028 (1914) (assignment by insured and beneficiary).

[3] See the cases in the preceding note, especially, Cockrill v. Southwestern Life Ins. Co., (Tex. Civ. App. 1937) 103 S. W. (2d) 399.

[4] No decisions have been found.

beneficiary. It is arguable that to permit the assignment of this right would tend to increase the risk of the insurer. The insurer selected the insured and may feel confident that he would not name a beneficiary who would have so little interest in the continuance of the life of the person whose life is covered that he would be inclined to yield to the temptation to shorten that life. An assignee might not exercise a similar discretion in the choice of a beneficiary. No decisions have been found on the question, although at least one court has said in a dictum that even this right is assignable.[5]

C. *Right to Proceeds on Maturity*

So far as the assignability of the right to the proceeds of a policy is concerned, the only question of doubt has been whether the assignment of this right may lawfully be made before its maturity to one who has no insurable interest in the person whose life is covered. The decided cases are in conflict on this question, but the numerical weight of authority clearly supports the view that lack of insurable interest in the assignee will not of itself invalidate an assignment of this right. According to the majority holding, the policy which condemns wagers is not materially involved, nor is the likelihood sufficiently great that murder will be encouraged to warrant invalidating an assignment of the proceeds of a life policy to one without insurable interest when the assignment itself was actuated by other and proper motives.[6] This is in line with the modern tendency to recognize the desirability of making valuable contract rights freely alienable. However, if there is reason to believe that the assignment is part of a preconceived plan of the assignee to indulge in a speculation on a life in which he has no insurable interest, and on which he could not, therefore, have taken out a policy of insurance in his own name, the assignment will be held to be invalid.[7]

Moreover, if the insured was a party to the illegal plan and if the illegal design was in contemplation at the time the contract of insurance was procured, the case is dealt with just as if the assignee were himself the insured. In such a case the result is that the contract of insurance is itself held to be illegal and unenforceable against the insurer because of the want of insurable interest in the assignee.[8] The court properly looks

[5] See Douglass v. Equitable Life Assur. Soc., 150 La. 519, 90 So. 834 (1922).

[6] The cases pro and con are collected in 73 A. L. R. 1036 (1931) and 87 Am. St. Rep. 506 (1902).

[7] See Hack v. Metz, 173 S. C. 413, 176 S. E. 314 (1934); Grigsby v. Russell, 222 U. S. 149, 32 S. Ct. 58 (1911) (dictum distinguishing earlier cases). Additional cases are collected in 73 A. L. R. 1048 (1911).

[8] O'Connor's Admr. v. Equitable Life Assur. Soc., 170 Ky. 715, 186 S. W. 502 (1916); Clement v. Insurance Co., 101 Tenn. 22, 46 S. W. 561 (1898); Powell v.

through the form of the transaction to get at its substance and deals with it accordingly. However, if the insurer is willing to pay or has paid without protest, the tendency is to hold that the representatives of the insured or his properly designated beneficiaries are entitled to the proceeds less any advances made by the assignee in connection with the transaction, and that a suit may be brought by one against the other if necessary to bring about this result.[9] It is said that the illegality here existing does not involve any moral turpitude and, consequently, does not call for application of the general rule that the court will not aid either party to an illegal transaction, but will leave them where it finds them. This holding would seem to be commendable in view of the fact that the deceased's beneficiaries are not themselves parties to the illegal transaction and it is better that they receive a windfall than that the assignee profit from his illegal venture. The argument that, if the insurer wishes to make the assignee a gift by paying him something which it is under no legal obligation to pay, no one else has any claim on the fund, scarcely merits consideration.

On the other hand, if the illegal design was not formed until after a valid contract of insurance had been consummated in favor of an insured who had an insurable interest, the tendency is to hold that the representative of the insured or his properly designated beneficiary is entitled to recover the proceeds just as if there had been no assignment, the assignee, however, being reimbursed, on equitable grounds, any consideration or premiums which he had paid.[10] While this result may also be somewhat inconsistent with the generally accepted rule that the law will not aid either party to an illegal transaction where the parties are in pari delictu, it can perhaps be justified on the ground that, since it is only the assignment that is tainted with illegality, the beneficiaries of the deceased do not need to rely on the illegal agreement to make out a case.[11]

Dewey, 123 N. C. 74, 31 S.E. 381 (1898); Hinton v. Insurance Co., 135 N. C. 314, 47 S. E. 474 (1904); Keystone Mut. Ben. Assn. v. Spangler, 115 Pa. 446 (1886). Nor does the incontestable clause bar the defense of illegality in such a case, Bromley's Admr. v. Washington Life Ins. Co., 122 Ky. 402, 92 S.W. 17 (1906).

[9] Warnock v. Davis, 104 U.S. 775 (1881); McRae v. Warmack, 98 Ark. 52, 135 S.W. 807 (1911); Finnie v. Walker, (C.C.A. 2d, 1919), 257 F. 698. (It is to be noted that the court in this case stated that the assignment only was invalid, which quaere).

[10] Quillian v. Johnson, 122 Ga. 49, 49 S. E. 801 (1904); N. Y. Life Ins. Co. v. Brown's Admr., 139 Ky. 711, 66 S. W. 613 (1902); Gilbert v. Moose's Admr., 104 Pa. St. 74 (1883); Quinn v. Catholic Knights, 99 Tenn. 80, 41 S.W. 343 (1897). Apparently contra, see Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 83 P. 410 (1905); Mo. Valley Ins. Co. v. McCrum, 36 Kan. 146, 12 P. 517 (1887).

[11] See 6 WILLISTON, CONTRACTS, rev. ed., § 1752 (1938).

It is commonly stipulated in the policy of insurance that no assignment shall be binding on the insurer unless it be made in writing and unless the original or a duplicate thereof be filed at the home office of the insurer. However, it is generally agreed that this provision is designed solely for the protection of the insurer and that no one else can claim any benefit from it.[12] Accordingly an assignment which complies with the usual requirements will normally be effective.

III

BY WHOM ARE THE RIGHTS ASSIGNABLE?

The principal difficulty which arises in connection with the assignment of a life policy is not one of determining whether a particular right is or is not assignable or whether it has been properly assigned. On these questions the authorities are fairly clear and consistent, as we have already seen. Rather the problem is one of determining in whom the right resides as between insured and beneficiary. It is clear that one cannot assign that which he does not own. If no beneficiary is named and the proceeds are made payable to "executors, administrators or assigns," or "legal representatives," all the beneficial rights reside in the insured and he can, of course, make an effective assignment of them without the consent of any other person.[13]

Also, if both the insured and the beneficiary join in an assignment there is no difficulty,[14] assuming that neither is under disability and that the assignment does not violate any statute.[15] Likewise, if the contract of insurance clearly defines the respective rights of insured and beneficiary, the problem is easily solved. Unfortunately, too often the language of the contract leaves this matter in doubt. When this is so, the problem must be solved on the basis of general principles.

A. *When No Right to Change Beneficiary Reserved*

It has been said that:[16]

> "The rule is well settled that, under an ordinary policy of life insurance in which there is no reservation of a right to cut off or

[12] Travelers Ins. Co. v. Mayo, 103 Conn. 341, 130 A. 379 (1925); Equitable Life Ins. Co. v. Mitchell, 248 Ill. App. 401 (1927); Hutsell v. Citizens' Natl. Bank, 166 Tenn. 598, 64 S. W. (2d) 188 (1933); Peel v. Reibel, 205 Minn. 474, 286 N. W. 345 (1939); Sundstrom v. Sundstrom, (Wash. 1942) 129 P. (2d) 782.

[13] Bancroft v. West, 128 Fla. 193, 174 So. 327 (1927); New York Life Ins. Co v. Flack, 3 Md. 341 (1852).

[14] Finegan v. Prudential Insurance Co. of America, 300 Mass. 147, 14 N. E. (2d) 172 (1938).

[15] The power of a wife, who is the beneficiary of her husband's insurance policy, to make an assignment is frequently regulated by statute. The cases on the subject are collected in Ann. Cas. 1917B 302; and 87 Am. St. Rep. 504 (1902).

[16] Mutual Benefit Life Ins. Co. v. Swett, (C.C.A. 6th, 1915) 222 F. 200 at 204.

> modify the interest of the beneficiary, the policy and the money to become due under it belong, from the time it is issued, to the person named in it as the beneficiary, and that the insured is without power, whether by deed, assignment or will, or by surrender of the policy for a new one, or by any other act of his, to transfer to any other person the interest of the person so named as beneficiary. In such a policy the beneficiary acquires, the moment it is issued, a vested right which cannot be affected by any act of the insured subsequent to the execution of the policy, except it be a breach of condition."

Thus, it has been held that the insurer must pay the irrevocably designated beneficiary even though he had previously granted a loan to the insured and had paid to him the cash surrender value provided for in the contract, where these rights had not been expressly reserved to the insured;[17] that an insured who makes an irrevocable designation of a beneficiary loses all right to the cash surrender value of the contract, and so sustains no loss upon the insolvency of the insurer entitling him to claim a deduction for income tax purposes;[18] that the surrender of the policy by the insured is ineffective to defeat the right of the irrevocably designated beneficiary;[19] that the assignee of the insured and a contingent beneficiary have no right to the cash surrender value where there are other contingent beneficiaries irrevocably designated;[20] that an assignment by the insured is ineffective to give the assignee any claim to the proceeds of the policy at its maturity.[21]

This seems to be the almost universally accepted rule,[22] and, from

[17] Mutual Benefit Life Ins. Co. v. Willoughby, 99 Miss. 98, 54 So. 834 (1911). See Ann. Cas. 1913D 836, and annotation at 838.

[18] Morse v. Commissioner of Internal Revenue, (C.C.A. 7th, 1938) 100 F. (2d) 593, 120 A. L. R. 961 (1939) with annotation at 967.

[19] Ferguson v. Phoenix Mut. L. Ins. Co., 84 Vt. 350, 79 A. 997 (1911). See 35 L. R. A. (N.S.) 844 (1912), and annotation.

[20] Entwistle v. Travelers Ins. Co., 202 Pa. 141, 51 A. 759 (1902).

[21] City Savings Bank v. Whittle, 63 N. H. 587, 3 A. 645 (1885); Block v. Valley Mut. Ins. Assn., 52 Ark. 201, 12 S. W. 477 (1889).

[22] Wisconsin alone goes to the opposite extreme in holding that the beneficiary has no rights which the insured cannot cut off by his own act alone, either by surrender, assignment, or by will. Clark v. Durand, 12 Wis. 248 (1860); Estate of Breitung, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17 (1890); Meggett v. N. W. Mut. Ins. Co., 138 Wis. 636, 120 N. W. 392 (1909).

However, a statute makes the rule prevailing elsewhere applicable when the beneficiary is the wife of the insured. See Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182 (1913).

It should be noted also, that, in some jurisdictions, it is held that one who is insured under a certificate issued by a mutual benefit society, as distinguished from a policy issued by an ordinary life insurance company, has the right to change the beneficiary, together with all the other rights that go with this privilege, as set forth infra, it, it would seem to follow that in such cases the beneficiary alone has the power to make an effective assignment of any or all of the rights created by the contract of insurance which are not expressly reserved to the insured. Strangely enough, however, it has been said, in a leading case, that, "it is probable that the beneficiary cannot obtain the loan value of the policy without the consent of the insured; it is probable that the surrender value cannot be obtained without the consent of the insured; but if either value is obtained, it belongs to the beneficiary."[23] One can well understand the doubt which the court expresses in regard to the propriety of permitting the beneficiary to cash in on the policy during the lifetime of the insured, even though he be an irrevocably designated beneficiary.

The fact of the matter is that this mode of approach to the solution of the problem is untenable both on logical and on practical grounds. It seems to proceed on the assumption that, in the absence of specification, a contract of insurance must be dealt with as a unit; and that all rights created by it must necessarily reside in one person at a time; that if the beneficiary has any irrevocable rights he must necessarily own all the rights created by the contract that are not *expressly* reserved to the insured. This is an obvious non sequitur. The problem properly dealt with is purely one of interpretation; of seeking to determine in whom it was intended by the parties to the contract that the particular right should reside. Inasmuch as the insured pays the premiums, and it is with him the contract is made, it would seem to be a more rational interpretation to say that he is entitled to any and all of the performance except that part of it which the insurer specifically promised to render to the beneficiary. In the normal case this would mean that the insured would be the owner of and have the disposition of all the rights created by the contract other than the right to the proceeds which are payable in case the policy matures because of the death of the person whose life is covered. Of course, he should not have any rights that cannot fairly be said to have been tacitly reserved to him by the contract. So, even under this mode of dealing with the matter, if no surrender value is provided for, neither he nor his assignee has any right to surrender the contract by agreement with the insurer.[24] Slight reflection would seem to justify the conclusion that this interpretation is much more in accord with the probable intention of the parties to the contract, and this, after

even though the right is not expressly reserved. See Carpenter v. Knapp, 101 Iowa 712, 70 N. W. 764 (1897); Baldwin v. Wheat, 170 Ga. 449, 153 S. E. 194 (1930).

[23] Mutual Benefit Life Ins. Co. v. Willoughby, 99 Miss. 98 at 108, 54 So. 834 (1911).

[24] See Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295 (1911).

all, is the only legitimate criterion for determining in whom the rights created by the contract should be held to reside.

It is probable that the rule generally adopted has had its origin in the reluctance which the courts of the last century felt in admitting that one who is not a party to a contract, in the sense that he is a promisee who has paid a consideration, can have any rights under the contract. The thought seems to have been that by dealing with the beneficiary as the complete and sole owner of the contract and, so to speak, eliminating the insured, we make the beneficiary more of a party to the contract and thus justify giving him an enforceable right.

B. *When Right to Change Beneficiary Reserved*

When the right to change the beneficiary is expressly reserved to the insured, the cases are not so harmonious. In such a case, of course, the insured can control all the other rights created by the contract, whether they are expressly reserved to him or not, by the expedient of naming himself or his estate as beneficiary. Even though a third person be named as beneficiary, it should undoubtedly be held that the right to borrow money on the policy and the right to surrender it and to receive the cash value thereof, when these are reserved in the contract, reside in him alone, in the absence of a specification to the contrary, for the reasons set forth above.[25] The only real doubt grows out of the question whether he can confer upon an assignee a right to the proceeds of the policy at its maturity, superior to that of the named beneficiary, without changing the beneficiary in the manner stipulated in the contract.

1. *View That Beneficiary Has Mere Expectancy*

A number of courts have held that an assignment by the insured, in general terms, of a policy in which the right to change the beneficiary is reserved confers upon the assignee a right to the proceeds at its maturity which is superior to that of the named beneficiary. While the reasons which have motivated this decision have not always been clearly and definitely articulated, apparently it is commonly justified on one or the other of two more or less distinct theories. One group of such cases seems to proceed on the theory that a revocably designated beneficiary has no right or ownership in relation to the proceeds of the contract during the lifetime of the insured; that all he has is a mere

[25] It has been so decided. Lamar Life Ins. Co. v. Moody, 122 Miss. 99, 84 So. 135 (1920); Morrison v. Mut. Life Ins. Co. of N.Y., 15 Cal. (2d) 579, 103 P. (2d) 963 (1940). But the right must be exercised in conformity with the terms of the contract. Thus, where the policy provided for surrender for a cash value after three full years' premiums had been paid, it was held that a surrender prior to that time was ineffective to bar the beneficiary. Roberts v. N. W. Natl. Life Ins. Co., 143 Ga. 780, 85 S. E. 1043 (1915).

expectancy. The insured is regarded as the present holder of the right, which consequently he can transfer by assignment.[26] Thus, in *Mutual Benefit Life Insurance Company v. Swett*, a leading case for this view, a wife who was named as beneficiary in her husband's life insurance policy joined with him in an assignment of the policy to a bank as security for her husband's debt and then contended that her joinder was invalid since she received no consideration. The court said:

> "...The wife had no vested interest which she could assign until the death of her husband—no assignable or transferable interest in the policy until some right of action on it accrued in her favor. ...As she had but a mere expectancy at the time of the assignment, she did not become surety for her husband, because the absolute right to assign the policy was lodged in him. Having no property right in the policy... she pledged nothing for his debts; nor was it necessary that she should receive a consideration for her

[26] Mut. Life Ins. Co. v. Swett, (C.C.A. 6th, 1915) 222 F. 200; Farmers State Bank v. Kelley, 155 Ga. 733, 118 S. E. 197 (1923); Mo. State Life Ins. Co. v. Cal. State Bank, 202 Mo. App. 347, 216 S.W. 785 (1919); St. Louis Union Trust Co. v. Dudley, (Mo. App. 1942) 162 S. W. (2d) 290; Davis v. Modern Industrial Bank, 279 N. Y. 405, 18 N. E. (2d) 639 (1939); Taylor v. Southern Bank & Trust Co., 227 Ala. 565, 151 So. 357 (1933); Equitable Life Ins. Co. v. Mitchell, 248 Ill. App. 401 (1927); Elmore v. Continental Life Ins. Co., 131 Kan. 335, 291 P. 755 (1930); Potter v. N. W. Mut. Life Ins. Co., 216 Ia. 799, 247 N. W. 667 (1933); Bank of Belzoni v. Hodges, 132 Miss. 238, 96 So. 97 (1923); Belknap v. N. W. Mut. Life Ins. Co., 108 Vt. 421, 188 A. 897 (1936); Mass. Mut. Life Ins. Co. v. Bank of Cal. N.A., 187 Wash. 565, 60 P. (2d) 675 (1936).

See also, Janesville State Bank v. Aetna Life Ins. Co., 200 Minn. 312, 274 N. W. 232 (1937), which holds that the insured can pledge the policy for a loan, and that the pledgee has priority over the beneficiary, even though the insurer objects and has already paid the beneficiary. The court said, at p. 314, "Appellants insist that there was no evidence to support a finding of an assignment of the policy to the bank, and if there was such evidence, that there could be no oral assignment that would bind the insurance company. We are inclined to share that view but think it not material here. The trial court found the deposit with the bank to be a pledge, and we think the evidence justifies such a finding. That an insurance policy that reserves to the insured the right to change the beneficiary may be assigned, without the consent of the beneficiary, is not open to serious question. . . . and we think it necessarily follows that such a policy may be the subject of a valid pledge by the insured without the beneficiary's consent. . . . It has been held, and we think correctly, that where there is a prohibition in a policy forbidding the assignment of a policy of insurance without the consent of the insurer the policy may still be the subject of a valid pledge"; Morgan v. Penn. Mut. Life Ins. Co., (C.C.A. 8th, 1938) 94 F. (2d) 129, which holds that an insured who has reserved the power to change the beneficiary has the right to surrender the policy by mutual agreement with the insurer, and thus to defeat the beneficiary without his consent and without changing the beneficiary, although no right to cancel the policy is provided for in the contract; and Carpenter v. Knapp, 101 Ia. 712, 70 N. W. 764 (1897), which holds that an assignment by a revocably designated beneficiary, prior to the maturity of the policy, passes no interest to the assignee, and hence, on maturity of the policy, the attaching creditor of the beneficiary has a claim superior to that of the assignee.

joining with him in the assignment in order to bind her, because in so doing she parted with nothing of appreciable value. The bank's rights were as secure without her joinder as with it. The ownership of the policy was not in her, but in her husband."[27]

This approach involves a confusion between property rights and contract rights. It seems to proceed on the assumption that an insurance policy purports to create a property right to a fund; that this right vests in the insured during his lifetime and passes to his designated beneficiary at death, if it has not been otherwise disposed of. Carried to its logical conclusion, it leads to the view that the designation of the beneficiary is testamentary in its nature. It should therefore follow that he can take nothing in any event since the statute of wills has not been complied with. No court has ever carried the argument to this extreme in an insurance case, but this conclusion has been reached on occasion in analogous cases in which this approach has been adopted.[28]

The fact of the matter is that it is based upon a false assumption. An insurance policy is not a conveyance or transfer of property. It is a contract by which the insurer, among other things, undertakes to make a payment to the named beneficiary on the death of the person whose life is covered, provided the insured has not exercised his reserved power to substitute someone else in his stead to receive the payment. A right is created immediately in the beneficiary. True, this right is contingent, not only upon the death of the person whose life is covered, but also upon the insured refraining from exercising his reserved power. However, the fact that the beneficiary's right is contingent does not put him in the position of one who has a mere expectation of inheriting property. It is almost universally agreed today that a person for whose benefit a contract is made may have rights under it just as if he were a party to the contract and had paid a consideration. This being so, it would seem that the revocably designated beneficiary is in no different situation than is any party to a contract whose rights are contingent or

[27] (C.C.A. 6th, 1915) 222 F. 200 at 205.

[28] Thus, where a mortgagor contracted with the mortgagee to pay the amount of the mortgage debt to named beneficiaries in the event that the mortgagee should die before the maturity of the debt, it was held that the beneficiaries could not recover on the agreement because it was testamentary in character. McCarthy v. Pieret, 281 N. Y. 407, 24 N. E. (2d) 102 (1939), commented on in 38 MICH. L. REV. 900 (1940). So also, it has been held that the designation of a beneficiary to receive payment of a war savings bond on the death of the owner before its maturity is testamentary in character. Decker v. Fowler, 199 Wash. 549, 92 P. (2d) 254 (1939); Deyo v. Adams, 178 Misc. 859, 36 N. Y. S. (2d) 734 (1942); Warren v. United States, 68 Ct. Cl. 634 (1929); Franklin Wash. Trust Co. v. Beltram, 133 N. J. Eq. 11, 29 A. (2d) 854 (1943); United States v. Dauphin Trust Co., (D.C. Pa. 1943) 50 F. Supp. 73, in re Di Santo's Estate (Ohio) 51 N. E. 2d 639 (1943), contra.

conditional. No one would assert that a contractor who has made a contract to do a piece of work and thereby entitle himself to a performance by the other party to the contract has no present right in relation to that performance, but a mere expectancy. The fact that one of the contingencies in the insurance contract, upon the happening of which the beneficiary's right is to become absolute, rests in the control of a third person, namely the insured, would seem to be immaterial. All that the insured has is the power to cause the contingency to happen which will defeat the beneficiary, by naming either himself or someone else in his stead. He does not have a right to the proceeds in any real sense at the moment and, not having that right, it would seem to follow that he has nothing other than the power to change the beneficiary which is capable of transfer by assignment or otherwise.

2. *View that Assignment is Equivalent to Change of Beneficiary*

Other cases have reached the same result by taking the view that, since the assignor intended the assignee to have a right to the proceeds superior to that of the beneficiary, the assignment must be deemed to be the equivalent of a change of beneficiary, because this is the only way in which his intention can be effectuated.[29] The objection that there has not been a compliance with the requirements incorporated in the policy for effecting a change of beneficiary is brushed aside with the assertion that these are intended only for the benefit of the insurer and that, if he is willing to forego the benefit of them, no one else can raise the question. However, no court adopting this view has carried the argument to its logical conclusion. It is recognized that the assignee is not really substituted in the place of the beneficiary, since he is allowed to take only to the extent of his interest. If the assignment is for security, it is held that any balance remaining after payment of the debt secured must be paid to the beneficiary designated in the policy.[30] Moreover, if the insured should happen to resist the assignee's claim because the formalities for change of beneficiary have not been complied with, it would seem that the originally designated beneficiary should prevail.[31]

[29] Atlantic Mut. Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933 (1901); Merchants Bank v. Garrard, 158 Ga. 867, 125 S. E. 715 (1924); Carnes v. Franklin Life Ins. Co., (C.C.A. 5th, 1936) 81 F. (2d) 800; Baldwin v. Wheat, 170 Ga. 449, 153 S. E. 194 (1930); Antly v. N. Y. Life Ins. Co., 139 S. C. 23, 137 S. E. 199 (1927); Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657 (1888); Shay v. Merchants Banking Trust Co., 335 Pa. 101, 6 A. (2d) 536 (1939).

[30] See the cases cited in the preceding note.

[31] See Davis v. Modern Industrial Bank, 279 N. Y. 405, 18 N. E. (2d) 639 (1939).

This approach to the solution of the problem is no more tenable than the other. In the first place, as has been pointed out a number of times, an assignment is a totally different transaction from that of changing the beneficiary. It has been said:

> ". . . the assignment of a policy and a change of beneficiary are not the same, but different, things. An assignment is the transfer by one of his right or interest in property to another. It rests upon contract, and, generally speaking, the delivery of the thing assigned is necessary to its validity. The power to change the beneficiary is the power to appoint. The power of appointment must be exercised in the manner agreed upon in the contract of insurance."[32]

Neither is there any very good reason for denying that the formal requirements for bringing about a change of beneficiary are intended for the benefit of the beneficiary as well as of the insurer.

The strongest argument that can be made for this view is to be found in the suggestion that the insured, not usually being versed in the law, does not know the difference and may think he has effected a change when he has made an assignment. However, it is doubtful whether this is so. The insured may not be cognizant of the exact legal distinctions between the two kinds of acts, but it is difficult to believe that he is unaware that they are two different things, since the policy normally speaks of both of them and lays down different requirements for their accomplishment. The fact of the matter is that the insured is frequently mistaken about his rights and powers under the contract. He assumes that all the rights reside in him so long as he lives. However, the fact that a person supposes he has a right which in fact he does not have can scarcely be regarded as a sufficient reason for permitting him to transfer that right to a third person to the detriment of the true owner of the right.

3. *View that Only Beneficiary Can Assign*

On the other hand, other courts, having more regard for the true nature of the transaction and its legal incidents, have held that the contract of insurance, in its inception, creates distinct rights in both the insured and the beneficiary. Since, by the terms of the contract, the beneficiary is given a conditional right to the proceeds of the policy at maturity, these courts hold that he alone has the power to transfer

[32] Mut. Benefit Life Ins. Co. v. Swett, (C.C.A. 6th, 1915), 222 F. 200 at 205; Taylor v. So. Bank & Trust Co., 227 Ala. 565, 151 So. 357 (1933); Equitable Life Ins. Co. v. Mitchell, 248 Ill. App. 401 (1927), accord.

this right by assignment. The insured has the power to destroy the conditional right of the beneficiary only by exercising one of the other rights which are expressly, or impliedly, conferred upon him by the contract, such as the right to surrender the policy; or by exercising his power to change the beneficiary in the manner provided for. They say that an assignment by the insured cannot be regarded as the equivalent of an exercise of the power to change the beneficiary. At most, it confers upon the assignee the rights and powers which reside in the insured-assignor.[33]

In *Anderson v. Broad Street National Bank*, a leading case for this view, the New Jersey court said:

> ". . . After a careful examination of the authorities, I am of the opinion that whether the interest be regarded as vested and defeasible, contingent, a mere expectancy, or whatever the characterization may be, if the policy stipulates the course by which the beneficiary's interest is to be nullified, he cannot be deprived of his right unless the prescribed mode for its destruction is followed, and that the assignment in this case by the insured had not that effect."[34]

This conclusion has been condemned by the New York court on the ground that:

> ". . . From an every-day, practical standpoint it is desirable to hold that an assignee of a policy containing a clause permitting a change of beneficiary and an assignment of the policy secures a right in the proceeds of the policy superior to the rights of the

[33] Anderson v. Broad Street Natl. Bank, 90 N. J. Eq. 78, 105 A. 599 (1918); Sullivan v. Maroney, 76 N. J. Eq. 565, 78 A. 150 (1909); Douglass v. Equitable Life Assur. Soc., 150 La. 519, 90 So. 834 (1922); Muller v. Penn. Mut. Life Ins. Co., 62 Colo. 245, 161 P. 148 (1916); Johnson v. N. Y. Life Ins. Co., 56 Colo. 178, 138 P. 414 (1914); Schoenholz v. N. Y. Life Ins. Co., 234 N. Y. 24, 136 N. E. 227 (1922) (In this case, however, the insurer resisted the claim of the assignee to whom an oral assignment had been made and the New York court, in a latter case which reached the opposite conclusion, distinguished the case on this ground. See Davis v. Modern Industrial Bank, 279 N. Y. 405, 18 N. E. (2d) 639 (1939)); Goldman v. Moses, 287 Mass. 393, 191 N. E. 873 (1934); Carter v. Thornton, (C.C.A. 8th, 1938) 93 F. (2d) 529. (In this case the policy, which was a group contract, prohibited assignment. The court held that the attempted assignment was not the equivalent of a change of beneficiary, although this was apparently what the parties had in fact intended.)

See also Indiana National Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289 (1913), which holds that cancellation of the policy by mutual agreement between the insured and the insurer, where the right to cancel is not reserved in the contract, does not defeat the right of a revocably designated beneficiary, whose rights can be cut off only in the manner provided for in the contract.

[34] 90 N. J. Eq. 78 at 82 (1918).

named beneficiary. If an assignee, in the absence of the consent of the beneficiary, does not obtain such right it will be practically impossible for an insured to borrow on a policy in time of need of financial aid in those cases where compliance with the form prescribed in the policy cannot be followed."[35]

Why it should ever be impossible to follow the form prescribed in the policy for effecting a change of beneficiary is not evident nor is any explanation of the nature of the supposed difficulty offered by the New York court. Even though it be admitted that such cases may and do arise, it is difficult to see what justification this furnishes for giving the insured greater rights than he can properly be said to be entitled to under the terms of the contract which he made. The proper solution of the difficulty should be found, not in distortion of the law and the contract, but rather by requiring insurers to draft their contracts in such a way as to eliminate the difficulty. Some insurers have already done this by stipulating in the contract that the right of the beneficiary shall be subordinate to that of an assignee of the insured, thus in effect giving the insured the express power to transfer part or all of the beneficiary's right without observing the formalities specified as necessary to revoke his designation.[36]

While the result aimed at in making an assignment can usually be readily accomplished by making appropriate changes in the designation of beneficiaries, the formalities commonly prescribed for doing this are somewhat cumbersome and time-consuming. If life insurance is to continue effectively to serve as an investment and saving medium as well as a protection to dependents, it would be desirable that the insured be given the power to transfer the beneficiary's interest in whole or in part without his consent and without an undue amount of red tape. It is something of a reproach to insurance company counsellors that in drafting the insurance contract they have not given more attention to this matter and to the problem of specifying in detail the respective rights of insured, beneficiary and assignee, so that there would be no room for misconstruction of the intention. In this way much costly and unnecessary litigation could be avoided without any prejudice to the interests of the insurer.

[35] Davis v. Modern Industrial Bank, 279 N. Y. 405 at 414, 18 N. E. (2d) 639 (1939).

[36] For a case involving a policy in which this was done, see Fisher & Co. v. Phoenix Mutual Life Ins. Co., 15 Tenn. App. 502 (1932). In this case the policy provided that, "If the right to change the beneficiary has been reserved to the insured an assignment, release or surrender of this policy or any interest therein by the insured shall operate to the extent thereof to assign, release or surrender the interest of any and all beneficiaries hereunder." (Quoted from id. at p. 506).