Fordham Law Review

Volume 4 | Issue 1 Article 3

1935

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Recommended Citation

Osmond K. Fraenkel, *Creditors' Rights in Life Insurance*, 4 Fordham L. Rev. 35 (1935).
Available at: https://ir.lawnet.fordham.edu/flr/vol4/iss1/3

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Cover Page Footnote

Member of the New York Bar.

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CREDITORS' RIGHTS IN LIFE INSURANCE

OSMOND K. FRAENKEL†

At Common Law

THE history of the rights of creditors in the proceeds of life insurance policies has been varied. In the absence of legislation a creditor of an insured person can, after his death, reach the proceeds of policies payable to that person's estate.[1] But he cannot reach the proceeds of policies payable to any other beneficiary[2] except upon proof

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1. Milan v. Davis, 97 Fla. 916, 123 So. 668 (1929), *cert. denied,* 280 U. S. 601 (1929); Rawson v. Jones, 52 Ga. 458 (1874); Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159 (1891); Remley v. Travelers Ins. Co., 108 Minn. 31, 121 N. W. 230 (1921); Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894); Stoudt v. Guaranty Trust Co., 150 Misc. 675, 271 N. Y. Supp. 409 (Sup. Ct. 1933), *aff'd,* 241 App. Div. 801, 269 N. Y. Supp. 997 (1st Dep't 1934); Skinner v. Holt, 9 S. D. 427, 69 N. W. 595 (1896); Dulaney v. Walsh, 37 S. W. 615 (1896), *aff'd,* 90 Tex. 329, 38 S. W. 748 (1897); *In re* Heilbron's Estate, 14 Wash. 536, 45 Pac. 153 (1896).

In Cohen v. Gordon Ferguson Inc., 56 N. D. 545, 218 N. W. 209 (1928), the court held that a statute which exempted policies payable to the insured's estate did not apply to a policy payable to the insured himself.

In some jurisdictions a policy payable to "heirs or representatives" is construed as not payable to the insured's estate, and therefore exempt: Loos v. Insurance Co., 41 Mo. 538 (1867); and similarly as to "heirs and assigns": Hubbard v. Turner, 93 Ga. 752, 20 S. E. 640 (1894); Mullins v. Thompson, 51 Tex. 7 (1879). See also Weisert v. Muehl, 81 Ky. 336 (1883).

And some courts accept extrinsic evidence to show that the insured meant wife or heirs although the policy was payable to his "legal representatives" or "estate." Pace v. Pace, 19 Fla. 438 (1882); Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464 (1891); Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458 (1895). *Contra:* Wason v. Colburn, 99 Mass. 342 (1868).

2. Central National Bank of Washington v. Hume, 128 U. S. 195 (1888); *In re* Reiter, 58 F. (2d) 631 (C. C. A. 2d, 1932), *cert. denied,* 287 U. S. 652 (1932); Hendrie & Bolthoff Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 209 (1899); Shaver v. Shaver, 35 App. Div. 1, 54 N. Y. Supp. 464 (3d Dep't 1898); Lowenstein v. Koch, 165 App. Div. 760, 152 N. Y. Supp. 506 (1st Dep't 1915), *aff'd,* 217 N. Y. 689, 112 N. E. 1063 (1916); Elliott's Appeal, 50 Pa. 75 (1865); Mason v. Martin, 37 S. D. 299, 232 N. W. 29 (1930); Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458 (1895).

Some cases hold that if the insured was insolvent the policy will be treated as a voluntary gift subject to creditors' claims regardless of fraud. Fearn v. Ward, 80 Ala. 555, 2 So. 114 (1886); Stokes v. Coffey, 8 Bush. 533 (Ky. 1871); Merchants' and Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895).

Other jurisdictions, while rejecting this rule, have allowed creditors to recover premiums paid during insolvency and subsequent to the incurring of the debt. Stigler's Ex'x v. Stigler, 77 Va. 163 (1883). See also Hendrie, etc. Mfg. Co. v. Platt, *supra.*

of fraud.[3] For it is only the debtor's property which may be reached by a creditor and a policy in which a person is named as beneficiary is in effect a gift to the beneficiary. However, if the insured reserved the right either to change the beneficiary or to surrender the policy, then his creditors may, during his lifetime, enforce the right which was vested in him.

The Supreme Court of the United States in *Cohn v. Samuels*[4] definitely determined that in bankruptcy the trustee succeeds to any rights which the insured reserved to himself. Earlier decisions of the Court had defined the extent to which a trustee in bankruptcy could obtain the surrender value of policies payable to the estate of the bankrupt and, of course, the same rulings are applicable to policies payable to a named beneficiary in which a right to change the beneficiary or to surrender the policies is reserved. All that the trustee can obtain is the surrender value as of the date the petition was filed so that if the bankrupt dies thereafter and before adjudication his executors are entitled to the proceeds of the policies less such surrender value.[5] Likewise if, because of loans outstanding on the policy, there is at the time of the filing of the petition no surrender value nothing passes to the trustee.[6] By express provisions of the Bankruptcy Law[7] a bankrupt may retain

3. See cases cited in note 2, *supra*.

There is some question, however, whether the creditor could recover the proceeds of the policy or only the aggregate amount of the premiums fraudulently paid. See Pence v. Makepeace, 65 Ind. 345, 360 (1879).

See also Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205 (1893), in which trust funds were used for the payment of premiums and the whole policy held subject to the trust because it amounted to less than the total defalcation, although larger than the trust funds applied upon the payment of the premiums. Substantially to the same effect was Shaler v. Trowbridge, 28 N. J. Eq. 595 (1877).

Creditors may set aside a fraudulent transfer of a policy originally payable to the estate of the insured. Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159 (1891); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917). But see Cole v. Marple, 98 Ill. 58 (1881), and Bailey v. Wood, 202 Mass. 549, 89 N. E. 147 (1909), to the effect that an assignment to a wife protects her to the same extent as though the policy had originally been payable to her.

In Davis v. Cramer, 133 Ark. 224, 202 S. W. 239 (1918), the court, while declaring the assignment fraudulent, refused to allow the creditor to hold the policy until maturity and so obtain the full proceeds of the policy, but held he could reach only the surrender value at the time of his application to subject it to his claim.

4. 245 U. S. 50 (1917). See also Cohn v. Malone, 248 U. S. 450 (1919).

5. Everett v. Judson, 228 U. S. 474 (1913).

6. Burlingham v. Crouse, 228 U. S. 459 (1913); Coppard v. Bankers' Life Co., 294 S. W. 237 (Tex. Civ. App. 1927). But this rule applies only when the bankrupt is the insured, not when he is the beneficiary. Clements v. Coppin, 61 F. (2d) 552 (C. C. A. 9th, 1933).

7. 30 STAT. 565 (1898), 11 U. S. C. A. § 110 (a) (1926). But when a corporation, which later becomes bankrupt, had insured an officer he could not redeem the policy.

the benefit of the policy either for himself or for his beneficiary by paying the trustee the equivalent of the surrender value at the time of the filing of the petition.

Where no bankruptcy proceedings have been instituted a creditor, by appropriate proceedings supplementary to execution, may likewise compel the surrender of the policy.[8] But unless this has been accomplished before death, or at least a lien has been established, no right accrues to the creditor.[9]

Statutory Changes

Statutes have, however, marred the simplicity of the picture just drawn. Before discussing the various kinds of statutes which have been enacted it should be pointed out that under the Bankruptcy Law the extent to which the insurance policies are exempt from creditors' rights depends upon the statute of the state of the residence of the assured.[10] The great weight of federal authority is to the effect that a statute which exempts from execution the proceeds of life insurance policies payable to a named beneficiary is effective to prevent the trustee in bankruptcy from claiming the surrender value, even though the policy reserved the right to surrender or to change the beneficiary and the statute did not authorize such reservation.[11] The rule of the federal courts in New

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Wolter v. Johnston, 34 F. (2d) 598 (C. C. A. 3d, 1929); Lincoln Nat. Life Ins. Co. v. Scales, 62 F. (2d) 582 (C. C. A. 5th, 1933). But see *In re* Kern, 8 F. Supp. 246 (S. D. N. Y. 1934), to the effect that this statute does not apply to disability benefits.

8. See Reynolds v. Aetna Life Ins. Co., 160 N. Y. 635, 55 N. E. 305 (1899), which allowed such a receiver to recover the full proceeds. See also Lowenstein v. Koch, 165 App. Div. 760, 152 N. Y. Supp. 506 (1st Dep't 1914). But see Farmers' Merchants' Bank v. National Life Ins. Co., 161 Ga. 793, 131 S. E. 902 (1926), and Columbia Bank v. Equitable Assur. Soc., 79 App. Div. 601, 80 N. Y. Supp. 428 (1st Dep't 1903), to the effect that until the insured has exercised an option to receive the cash surrender value the creditor could not reach it.

9. Lowenstein v. Koch, 165 App. Div. 760, 152 N. Y. Supp. 506 (1st Dep't 1915).

10. Holden v. Stratton, 198 U. S. 202 (1905). It should be borne in mind, however, that state constitutions sometimes restrict the power of the legislature to grant exemptions unlimited in amount. *In re* Jones, 249 Fed. 487 (D. Md. 1917); *In re* How, 59 Minn. 415, 61 N. W. 456 (1894); Whiting v. Squires, 6 F. (2d) 100 (C. C. A. 4th, 1925); Duncan v. Barnett, 11 S. C. 333 (1878); Skinner v. Holt, 9 S. D. 427, 69 N. W. 595 (1896).

But in other states similar constitutional provisions have been held not to restrict the legislature. Miller v. Marx, 55 Ala. 322 (1876); Milan v. Davis, 97 Fla. 916, 123 So. 668 (1929) (an insurance case); Towle v. Towle, 81 Kan. 675, 107 Pac. 228 (1910); Talcott v. Bailey, 54 N. D. 19, 208 N. W. 549 (1926).

11. *In re* Pfaffinger, 164 Fed. 526 (W. D. Ky. 1908); *In re* Whelpley, 169 Fed. 1019 (N. H. 1909); *In re* Orear, 189 Fed. 888 (C. C. A. 8th, 1911); *In re* Morse, 206 Fed. 350 (D. Kan. 1912); *In re* Young, 208 Fed. 373 (N. D. Ohio 1912); Jens v. Davis, 280 Fed. 706 (C. C. A. 8th, 1922); Magnuson v. Wagner, 1 F. (2d) 99 (C. C. A. 8th, 1924); Ralph v. Cox, 1 F. (2d) 435 (C. C. A. 8th, 1924); *In re* Stansell, 8 F. (2d) 363 (W. D.

York, as well as that of a few other jurisdictions,[12] has, however, been otherwise. It appears to have originated from a misconception of the New York cases and doubts have recently been expressed as to the correctness of the earlier rulings.[13] Nevertheless, in a recent case these rulings were adhered to.[14]

The weight of authority has also construed the statutes which create an exemption and authorize the reservation of a right to change the beneficiary or to surrender the policy as exempting completely the surrender value of such policies.[15] And the Circuit Court of Appeals has similarly construed the present New York law on the subject.[16]

Nevertheless, it has generally been held that no matter what such exemption statutes may provide, they cannot constitutionally deprive creditors whose claims were in existence at the time of their enactment from reaching the surrender value of policies in which there had been reserved the right to change the beneficiary or to surrender.[17] In a recent state case the court limited the existing creditors to policies which were in existence at the time the new law went into effect and denied their rights to policies which were subsequently issued.[18]

Tenn. 1925); *In re* Cunningham, 15 F. (2d) 700 (E. D. S. C. 1926); *In re* Bendell, 28 F. (2d) 999 (E. D. Mich. 1928); Hickman v. Hanover, 33 F. (2d) 873 (C. C. A. 4th, 1929); *In re* Erstine, 41 F. (2d) 559 (E. D. Ark. 1930); Smith v. Metropolitan Life Ins. Co., 43 F. (2d) 74 (C. C. A. 3d, 1930); *In re* Reiter, 58 F. (2d) 631 (C. C. A. 2d, 1932). In Whiting v. Squires, 6 F. (2d) 100 (C. C. A. 4th, 1925), a different result was reached because of provisions of the state constitution.

12. *In re* White, 174 Fed. 333 (C. C. A. 2d, 1909); *In re* Samuels, 254 Fed. 775 (C. C. A. 2d, 1918); *In re* Greenberg, 271 Fed. 258 (C. C. A. 2d, 1921); *In re* Ellis, 1 F. (2d) 341 (W. D. N. Y. 1924); *In re* Solomons, 2 F. Supp. 572 (S. D. N. Y. 1932). But see Grems v. Traver, 87 Misc. 644, 148 N. Y. Supp. 200 (Sup. Ct. 1914), *aff'd*, 164 App. Div. 968, 149 N. Y. Supp. 1085 (4th Dep't 1914), reaching a different conclusion; *In re* Herr, 182 Fed. 716 (M. D. Pa. 1910); *In re* Shoemaker, 225 Fed. 329 (E. D. Pa. 1915). See also Ehrhart v. New York Life Ins. Co., 45 F. (2d) 804 (S. D. Ill. 1929), holding not within the statute a policy which reserved the right to change the beneficiary; and *In re* Hammells, 5 F. (2d) 879 (D. Ariz. 1925) and Morgan v. M'Caffrey, 286 Fed. 922 (C. C. A. 5th, 1923), holding the statutes applicable only after death.

13. *In re* Reiter, 58 F. (2d) 631 (C. C. A. 2d, 1932), *cert. denied* 287 U. S. 652 (1932).

14. *In re* Lipton, 4 F. Supp. 799 (S. D. N. Y. 1933).

15. Ralph v. Cox, 1 F. (2d) 435 (C. C. A. 8th, 1924); *In re* Weick, 2 F. (2d) 647 (C. C. A. 6th, 1924); Brown v. Home Life Ins. Co., 3 F. (2d) 661 (E. D. Okla. 1925); *In re* Lang, 20 F. (2d) 236 (E. D. Pa. 1927), *aff'd*, as Dussoulas v. Lang, 24 F. (2d) 254 (E. D. N. Y. 1928), *cert. denied* 277 U. S. 593 (1928).

16. *In re* Messinger, 29 F. (2d) 158 (C. C. A. 2d, 1928), *cert. denied* 279 U. S. 855 (1929). The court, however, ruled that if the insured changed the beneficiary to his personal advantage the trustee might recover the surrender value as of the date of filing.

17. *In re* Messinger, 29 F. (2d) 158 (C. C. A. 2d, 1928). See also cases cited in notes 62, 72-77, *infra*.

18. Cecilian Operating Corporation v. Berkwit, 151 Misc. 814, 272 N. Y. Supp. 291 (Sup. Ct. 1934).

So many different kinds of statutes exist on this subject, and there have been so many changes in the statutes of many of the jurisdictions that it would be impracticable to deal with them all. In general it may be said that there are or have been in the past statutes in which the exemption depends upon the total amount of insurance carried, regardless of the person to whom it is payable;[19] in which it depends upon the character of the beneficiary named, regardless of the amount of insurance carried;[20] and in which all insurance is exempt.[21]

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19. See statutes referred to in *In re* Hammells, 5 F. (2d) 879 (D. Ariz. 1925); Chattanooga Sewer Pipe Works v. Dumler, 153 Misc. 276, 120 So. 450 (1929); Whiteside v. Fischer, 250 N. W. 60 (S. D. 1933). (In the first and third of these statutes the exemption is only for the benefit of a surviving spouse or child.)

Under such statutes the surrender value is also exempt up to the full amount allowed as exempt proceeds. Dreyfus v. Barton, 98 Miss. 768, 54 So. 254 (1911); Schuler v. Johnson, 246 N. W. 632 (S. D. 1933).

20. Some of these statutes cover policies payable to the estate of the insured or his heirs. Mitchell v. Allis, 157 Ala. 304, 47 So. 715 (1908); Larrabee v. Palmer, 101 Iowa 132, 70 N. W. 100 (1897); Jorgensen v. De Viney, 57 N. D. 63, 222 N. W. 464 (1928).

Others apply only if the policy is payable to the wife, or sometimes to the wife or some other dependent relative. Denkins v. Cornish, 41 F. (2d) 766 (E. D. Ark. 1930); Pace v. Pace, 19 Fla. 438 (1882); Milan v. Davis, 97 Fla. 916, 123 So. 668 (1929), *cert. denied* 280 U. S. 601 (1929); Houston v. Maddux, 179 Ill. 377, 53 N. E. 599 (1899); Scott v. Wamsley, 253 N. W. 524 (Iowa 1934); Hathaway v. Sherman, 61 Me. 466 (1872); Ionian County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159 (1891); Baxter v. Old National City Bank, 46 Ohio App. 533, 189 N. E. 514 (1933); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917); Cannons v. Lincoln Nat. Life Ins. Co., 208 Wis. 452, 243 N. W. 320 (1932). In Goldman v. Moses, 191 N. E. 873 (Mass. 1934), it was suggested that the words of the statute being "married woman" the exemption might benefit not only the wife, but also a married daughter.

In some jurisdictions the statute provides that insurance taken out by a husband enures to his widow or children free from creditors' claims unless it is made payable to some other named beneficiary without specifying that the policy must name either wife or child. Cooper v. Taylor, 54 F. (2d) 1055 (C. C. A. 5th, 1932); Scott v. Wamsley, *supra;* Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894); Skinner v. Holt, 9 S. D. 427, 69 N. W. 595 (1896); Dawson v. National Life Ins. Co., 156 Tenn. 306, 300 S. W. 507 (1928). Such policy is exempt though taken out before marriage. Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458 (1895).

And some states exempt by statute all policies payable to any person other than the insured. Cooper v. Taylor, *supra;* Thompson v. Latimer, 209 Ky. 491, 273 S. W. 65 (1925); Wason v. Colburn, 99 Mass. 342 (1868); Murphy v. Casey, 150 Minn. 107, 184 N. W. 783 (1921); *In re* Commissioners v. Yelverton, 204 N. C. 441, 168 S. E. 505 (1933); First State Bank v. Conn., 136 Okla. 294, 277 Pac. 928 (1929); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917).

21. Succession of Le Blanc, 142 La. 27, 76 So. 223 (1917); Succession of Erwin, 169 La. 877, 126 So. 223 (1930); Talcott v. Bailey, 54 N. D. 19, 208 N. W. 549 (1926); Barnovitch v. Horwatt, 173 Atl. 676 (Pa. 1934); Flood v. Libby, 38 Wash. 366, 80 Pac. 533 (1905).

But a general exemption statute will be deemed repealed by the enactment of a statute specifying that exemption is limited to policies payable to persons other than the insured. Elsom v. Gadd, 93 Wash. 603, 161 Pac. 483 (1916).

Statutes Benefiting Wives

There are also statutes which create exemptions for the wife or children which depend upon the amount of premium paid annually.[22] These were originally enacted at a time when a married woman suffered common law disabilities and when it was doubtful whether she had an insurable interest in the life of her husband.[23] It was, therefore, provided that she might insure her husband's life for her own benefit. And such statutes have been interpreted to include cases in which the husband took out the policy upon the fiction that he was acting as agent for the wife.[24] In the following discussion reference will be made chiefly to the New York statutes, although cases will be cited from other jurisdictions as well.

The first law, enacted in 1840, did not permit the husband to pay any part of the premiums but the proceeds were exempted only if the premiums did not exceed $300.[25] Later this was modified so that the exemption was lost only if the premiums paid by the husband exceeded $300 a year.[26] In 1870 the creditors were limited to the excess of premiums paid above the prescribed limit, which was increased to $500.[27]

22. See notes 25-28 *infra*. In Pullis v. Robison, 73 Mo. 201 (1880), the court held that a statute of this type was intended to restrict only insolvent husbands, leaving solvent ones free to take out insurance for their wives in unlimited amounts, subject, however, to apportionment to creditors of so much of the insurance as was produced by the payment of premiums after insolvency. See criticism of the latter portion of this decision following an amendment of the statute, in Sternberg v. Levy, 159 Mo. 617, 60 S. W. 1114 (1900). In accord with the chief ruling is Red River National Bank v. DeBerry, 47 Tex. Civ. App. 96, 105 S. W. 998 (1907).

Some statutes do not limit the benefit of the exemption to the wife. See Holmes v. Marshall, 145 Cal. 177, 79 Pac. 534 (1905); Lemp v. Lemp, 32 Idaho 397, 184 Pac. 222 (1919).

23. Felrath v. Schonfield, 76 Ala 199 (1894); Bertram v. Hopkins, 71 Conn. 505, 42 Atl. 645 (1899); Merchants', etc., Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895); Barry v. Equitable Life Assurance Society, 59 N. Y. 587 (1875); Whitehead v. N. Y. Life Insurance Co., 102 N. Y. 143, 6 N. E. 267 (1886).

24. Felrath v. Schonfield, 76 Ala. 199 (1894); Houston v. Maddux, 179 Ill. 377, 53 N. E. 599 (1899); Whitehead v. New York Life Insurance Co., 102 N. Y. 143, 6 N. E 267 (1886); Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852 (1st Dep't 1910), *aff'd*, 201 N. Y. 546, 95 N. E. 1129 (1911); Anderson v. Northwestern Mut. L. Ins. Co., 261 N. Y. 450, 185 N. E. 896 (1933).

25. N. Y. Laws 1840, c. 80. See also statutes referred to in *In re* Brown's Estate, 123 Cal. 399, 55 Pac. 1055 (1899); Merchants' and Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895).

26. N. Y. Laws 1858, c. 187. See also statutes referred to in Felrath v. Schonfield, 76 Ala. 199 (1894); Davis v. Cramer, 133 Ark. 224, 202 S. W. 239 (1918); Pullis v. Robison, 73 Mo. 201 (1880); Red River Nat'l. Bank v. DeBerry, 47 Tex. Civ. App. 96, 105 S. W. 998 (1907).

27. N. Y. Laws 1870, c. 277. See also statutes referred to in *In re* Orcar, 189 Fed. 888 (C. C. A. 8th, 1911); Harriman National Bank v. Huiet, 249 Fed. 856 (C. C. A. 4th,

In 1896 the law was amended to provide that the amount of insurance purchased with premiums in excess of $500 might be reached by the creditors.[28] That provision later became Section 52 of the Domestic Relations Law. In 1927 this law was impliedly repealed by the enactment of Section 55A of the Insurance Law.[29]

Problems have arisen in determining the amount available to creditors. Premiums paid for the purpose of carrying loans must be deducted from the total premium in order to determine whether the prescribed amount has been exceeded,[30] and likewise an assessment paid to a benefit insurance society cannot be considered.[31] It is doubtful whether premiums paid before the creditor's debt arose are to be taken into consideration.[32] In any case the burden of proof is on the creditor to show what premiums were actually paid by the husband out of his own property.[33]

These statutes have been described as creating a lien on the policies,[34] but statements so general must be scrutinized with care. At the time when the creditors' rights were in the excess premiums, an action was permitted during the lifetime of the insured to impress the creditor's lien on the policy itself.[35] No instance has been found of a similar action

1917); *In re* Weick, 2 F. (2d) 647 (C. C. A. 6th, 1924); Bertram v. Hopkins, 71 Conn. 505, 42 Atl. 645 (1899).

28. N. Y. DOMESTIC RELATIONS LAW (1909) § 52. See also statutes referred to in Kimball v. Cunningham Hardware Co., 197 Ala. 631, 73 So. 323 (1916); Baxter v. Old National City Bank, 46 Ohio App. 533, 189 N. E. 514 (1933). In Calif. U. S. Bond & Mortgage Corp. v. Crodzius, 34 P. (2d) 192 (Cal. App. 1934), it was held immaterial that the widow had spent part of the money.

29. Chatham & Phenix National Bank v. Crosney, 251 N. Y. 189, 167 N. E. 217 (1929).

30. Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433 (1903); Klee v. Hess, 188 App. Div. 322, 177 N. Y. Supp. 242 (3d Dep't 1919).

31. Dominick v. Stern, 79 Misc. 271, 139 N. Y. Supp. 59 (Sup. Ct. 1912), *aff'd*, 157 App. Div. 944, 142 N. Y. Supp. 1115 (4th Dep't 1913), *aff'd*, 213 N. Y. 675, 107 N. E. 1075 (1914), because N. Y. INSURANCE LAW (1909) § 212 completely exempts policies in such societies.

32. Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474 (1885).

But in Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852 (1st Dep't 1910), it was held immaterial when the premiums were paid on the ground that the action was for the benefit of all the creditors, although it did not appear whether any premiums had been paid before the earliest debt had been contracted.

33. Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474 (1885); *In re* Thompson, 184 N. Y. 36, 76 N. E. 870 (1906); Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852 (1st Dep't 1910), *aff'd*, 201 N. Y. 546, 95 N. E. 1129 (1911). Accordingly, where the wife has paid all the premiums the creditors can recover nothing. *In re* Goss' Estate, 71 Hun. 120, 24 N. Y. Supp. 623 (Sup. Ct. 1893).

34. Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433 (1903); *In re* Thompson 184 N. Y. 36, 76 N. E. 870 (1906); Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852 (1st Dep't 1910), *aff'd*, 201 N. Y. 546, 95 N. E. 1129 (1911); Addiss v. Selig. 264 N. Y. 274, 190 N. E. 490 (1934).

35. Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819 (1889).

under the later form of the statute, where the creditors' rights were only in the proceeds.

The action, whether to recover premiums or proceeds, is a representative one for the benefit of all creditors and is maintainable only after it appears that the insured's estate is insufficient for the payment of his debts.[36] It is not, however, necessary for the creditor to wait until the estate of the insured has been completely administered.[37] As the proceeds are no part of the insured's estate the creditors' rights cannot be administered in the probate court but should be the subject of an independent action.[38]

Statutes of this type have no extra-territorial effect.[39] Therefore creditors cannot under a statute of the state in which the insured died lay claim to policies which were taken out in a different state, even though the insured had become a resident of the state whose statute was invoked and had paid premiums in that state for a number of years.[40]

General language has been used to the effect that statutes such as these were mere grants as concerns both the wife and the creditors.[41] And it has therefore been held that a wife could not claim that an increase in creditors' rights violated the constitutional prohibition against impairment of contracts.[42] Whether the creditor could, after the insured's death, similarly complain of diminution of his own rights was involved in the recent case of *Addiss v. Selig*[43] and not decided. That case I shall later discuss in detail.

What rights the creditors have during the lifetime of the insured remains uncertain. In New York the courts have been reluctant to permit a receiver in supplementary proceedings to reach the surrender value

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36. Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433 (1903); *In re* Thompson, 184 N. Y 36, 76 N. E. 870 (1906); Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852 (1st Dep't 1910), *aff'd,* 201 N. Y. 546, 95 N. E. 1129 (1911); Quinby v. Quinby, 221 App. Div. 532, 223 N. Y. Supp. 638 (1st Dep't 1927) (including real estate).

37. Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852 (1st Dep't 1910), *aff'd,* 201 N. Y. 546, 95 N. E. 1129 (1911).

38. *In re* Thompson, 184 N. Y. 36, 76 N. E. 870 (1906). See also Wagner v. Thieriot, 203 App. Div. 757, 197 N. Y. Supp. 560 (1st Dep't 1922), *aff'd,* 236 N. Y. 588, 142 N. E. 295 (1923).

39. United States Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, 179 N. E. 250 (1932).

40. United States Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, 179 N. E. 250 (1932).

41. Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474 (1885); Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433 (1910); *In re* Thompson, 184 N. Y. 36, 76 N. E. 870 (1906).

42. Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474 (1885); Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433 (1903).

43. Note 34, *supra.*

of policies payable to a wife, even though the insured reserved the right to change the beneficiary.[44]

On the other hand, where the insured had himself applied for the surrender value, a receiver was appointed to collect the sum due from the insurance company.[45] In the federal courts, as already noted, the trustee in bankruptcy has been allowed to obtain the surrender value.[46] None of these cases seems, however, to discuss the problem which arises where the premiums paid are in excess of $500, so that it would be necessary to apportion the surrender value, leaving to the insured the portion purchased with the premiums of $500, and to creditors the balance. It is probable that the amendment of the law in 1927 has deprived this problem of any further practical significance.

General Exemption Statutes

Section 55A of the Insurance Law of New York declares that the beneficiary of a policy made payable to any one other than the insured, or the assignee of a policy which has not been transferred in fraud of creditors, is entitled to the proceeds of the policy free from claims of creditors of the insured, whether or not the right to change the beneficiary is reserved, allowing, however, to the creditors the right to recover any premiums paid with intent to defraud them.[47] Statutes of other states vary in one way or another, sometimes exempting the policies rather than their proceeds.[48]

44. Maurice v. Travelers Ins. Co., 121 Misc. 427, 201 N. Y. Supp. 369 (Sup. Ct. 1923), approved in Gershman v. Berliner, 214 App. Div. 196, 211 N. Y. Supp. 881 (1st Dep't 1925). Earlier cases had permitted such policies to be reached by creditors: Cavagnaro v. Thompson, 78 Misc. 687, 138 N. Y. Supp. 819 (Sup. Ct. 1912); Clark v. Shaw, 91 Misc. 245, 154 N. Y. Supp. 1101 (County Ct. 1915); Hall v. Hess, 97 Misc. 331, 161 N. Y. Supp. 418 (Sup. Ct. App. Term 1916); Ecker v. Meyer, 118 Misc. 356, 194 N. Y. Supp. 320, 118 Misc. 443, 194 N. Y. Supp. 654 (N. Y. City Ct. 1922), *reversed on question of practice*, 119 Misc. 375, 196 N. Y. Supp. 268 (Sup. Ct. App. Term 1922).

45. Scobie v. Connor, 94 Misc. 429, 157 N. Y. Supp. 507 (Sup. Ct. 1922).

46. See cases cited in notes 12-14, *supra*.

47. See N. Y. Debtor and Creditor Law (1925) §§ 273, 275 for cases discussing such fraud. *In re* Sturdevant, 29 F. (2d) 795 (W. D. N. Y. 1928); *In re* Newberger, 1 F. Supp. 685 (W. D. Okla. 1932); Cole v. Marple, 98 Ill. 58 (1881); Houston v. Maddux, 179 Ill. 377, 53 N. E. 599 (1899); York v. Flaherty, 210 Mass. 35, 96 N. E. 53 (1911).

See also references to statutes in: Murphy v. Casey, 150 Minn. 107, 184 N. W. 783 (1921); First State Bank v. Conn., 136 Okla. 294, 277 Pac. 928 (1929); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917).

In Johnson v. Bacon, 92 Miss. 156, 45 So. 858 (1908), the court held that the insurance above that exempted by law was liable for premiums paid by an insolvent to maintain the exempt amount. In York v. Flaherty, *supra*, payments made within six years of death were recovered and no deduction permitted because there were loans on the policy.

48. Ralph v. Cox, 1 F. (2d) 435 (C. C. A. 8th, 1924); *In re* Weick 2 F. (2d) 647 (C. C. A. 6th, 1924); Irving Bank v. Alexander, 280 Pa. 466, 124 Atl. 634 (1924).

In general these statutes have been interpreted to apply to endowment policies.[49] Disability payments are exempt when payable to the beneficiary or assigned to the beneficiary,[50] but not when the payments are made to the insured himself,[51] or when the assignment was in fraud of creditors.[52] In 1934, however, New York enacted on the subject of disability payments a specific section which exempts payments made by any life, health or casualty insurance corporation, regardless of the person to whom such payments are to be made.[53]

As has already been pointed out, these statutes are construed to include the surrender value of the policies.[54] In the recent case of

49. *In re* Churchill, 209 Fed. 766 (C. C. A. 7th, 1913); Smith v. Metropolitan Life Ins. Co., 43 F. (2d) 74 (C. C. A. 3rd, 1930); *In re* Hurwitz, 3 F. Supp. 16 (N. Y. 1933); Charles Hing v. Joe Lee, 37 Cal. App. 313, 174 Pac. 356 (1918); Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076 (1903); Flood v. Libby, 38 Wash. 366, 80 Pac. 533 (1905).

In the Hurwitz case, but not in the Smith case, the court ruled that if the insured lived to the expiration of the endowment period the trustee might recover the surrender value as of the time of filing.

When the endowment period has expired creditors can reach the proceeds regardless of who is named as beneficiary in the event of death. Wason v. Colburn, 99 Mass. 342 (1868); Talcott v. Field, 34 Neb. 611, 52 N. W. 400 (1892); Ellison v. Straw, 119 Wis. 502, 97 N. W. 168 (1903).

In some jurisdictions endowment policies are expressly included in the exempting statute. Scott v. Wamsley, 253 N. W. 524 (Iowa 1934); Schuler v. Johnson, 246 N. W. 632 (S. D. 1933) (limited in amount).

50. Wittman v. Littlefield, 142 Misc. 916, 256 N. Y. Supp. 471 (Sup. Ct. 1932), *aff'd*, 235 App. Div. 831, 257 N. Y. Supp. 885 (1st Dep't 1932). But not if insured is the sole beneficiary. Lion Credit Union v. Gutman, 148 Misc. 620, 265 N. Y. Supp. 979 (N. Y. City Ct. 1932). However, where the statute exempts policies payable to the insured, disability payments are likewise exempt. Barnovitch v. Horwatt, 173 Atl. 676 (Pa. 1934)

51. *In re* Kern, 8 F. Supp. 246 (S. D. N. Y. 1934); Murdy v. Skyles, 101 Iowa 549, 70 N. W. 714 (1897); Chattanooga Sewer Pipe Works v. Dunbar, 153 Miss. 276, 120 So. 450 (1929); Herbach v. Herbach, 148 Misc. 33, 265 N. Y. Supp. 14 (N. Y. City Ct. 1933); Baxter v. Old National City Bank, 46 Ohio App. 533, 189 N. E. 514 (1933). But see *In re* Commissioner of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505 (1933) (permitting the insured to retain the monthly disability payments under a statute exempting all property to a limited amount).

52. Edgar A. Levy Leasing Co., Inc. v. Wishner, 147 Misc. 828, 147 Misc. 829, 265 N. Y. Supp. 184 (Sup. Ct. 1933).

53. N. Y. INSURANCE LAW § 55-b effective May 14, 1934, expressly applies to debts incurred before, as well as after, the disability. In accordance with the ruling in Addiss v. Selig, 264 N. Y. 274, 190 N. E. 490 (1934), this section will not apply to debts in existence at the time of its enactment.

For statutes of other states see: Holmes v. Marshall, 145 Cal. 177, 79 Pac. 534 (1905); Scott v. Wamsley, 253 N. W. 524 (Iowa 1934).

54. In addition to the cases cited in notes 11, 15, 16, *supra*, see: Holden v. Stratton, 198 U. S. 202 (1905); Davis v. Cramer, 133 Ark. 224, 202 S. W. 239 (1918); Grems v. Traver, 87 Misc. 644, 148 N. Y. Supp. 200 (Sup. Ct. 1914), *aff'd*, 164 App. Div. 968, 149 N. Y. Supp. 1085 (4th Dep't 1914); Dawson v. National Life Ins. Co., 156 Tenn. 306, 300

Schwartz v. Holzman[55] the Circuit Court of Appeals held exempt the surrender value which, at the direction of the husband, was paid to the beneficiary, his wife, shortly before his own bankruptcy. The court recognized, of course, that a different rule would have been applied had the husband himself obtained the money. It reached this result, although the wife could not have compelled the surrender of the policy, on the ground that the statute should be liberally construed.

Dividends are probably also exempt when allowed to accumulate for the benefit of the beneficiary[56] or if applied in reduction of current premiums.[57] According to the cases just referred to it is only when the insured has elected to receive the dividend that it can be reached by his creditors.

Retroactivity

These statutes are not applicable to policies which, either because of the expiration of an endowment term or because of the insured's death, have matured prior to their enactment.[58] In such cases the rights of creditors had already attached. Many of the statutes expressly apply to policies already in existence.[59] It has been intimated that in the absence of such provision the law would not apply to such policies.[60] I submit that this is a misconception of the nature of an exemption statute, such as these insurance statutes are. The general rule is that all exemption statutes apply as of the time they are invoked.[61] It can make no differ-

S. W. 507 (1928); Cannons v. Lincoln Nat'l Life Ins. Co., 208 Wis. 452, 243 N. W. 320 (1932).

In some states the statute is explicit on the subject; Cooper v. Taylor, 54 F. (2d) 1055 (C. C. A. 5th, 1923); Murphy v. Casey, 150 Minn. 107, 184 N. W. 783 (1921); Dreyfus v. Barton, 98 Miss. 768, 54 So. 254 (1911); Schuler v. Johnson, 246 N. W. 632 (S. D. 1933).

55. 69 F. (2d) 814 (C. C. A. 2d, 1934).

56. See New York Plumbers Specialties Co. Inc. v. Stein, 140 Misc. 161, 140 N. Y. Supp. 220 (Sup. Ct. App. Term 1931). *Contra:* where insured has right to withdraw them. Ellison v. Straw, 119 Wis. 502, 97 N. W. 168 (1903).

57. Randik Realty Corp. v. Moseyeff, 147 Misc. 618, 263 N. Y. Supp. 440 (N. Y. City Ct. 1933).

58. United States Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, 179 N. E. 250 (1923); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917). *Contra:* Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 160 (1887).

59. *In re* Morse, 206 Fed. 350 (D. Kan. 1912); Addiss v. Selig, 264 N. Y. 274, 190 N. E. 490 (1934); *In re* Commissioners v. Yelverton, 204 N. C. 441, 168 S. E. 505 (1933); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917); Skinner v. Holt, 9 S. D. 427, 69 N. W. 595 (1896).

60. Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917).

61. Quackenbush v. Danks, 1 Denio 127, *aff'd,* 1 N. Y. 129 (1848); Morse v. Goold, 11 N. Y. 281 (1854); Laird v. Carton, 196 N. Y. 169, 89 N. E. 822 (1909); Brearley v. Ward, 201 N. Y. 358, 94 N. E. 1001 (1911).

ence when the property on which the creditor seeks to levy was acquired, although it may make a difference when the creditor's claim arose. There is no reason why insurance policies should be subjected to a treatment different from that accorded to any other property. Consequently these statutes should be declared applicable to insurance policies no matter when taken out.

It remains to be considered to what extent the policies may be applicable to pre-existing creditors and, if so applicable, whether they violate the contract clause of the Constitution. The question of interpretation will be considered irrespective of the difficulty presented by the constitutional problem. Most of the decisions commonly cited on this subject fail to keep the distinction clear.[62] But for the shadow of the contract clause it is doubtful whether any court would declare that a statute which states that the proceeds of insurance policies shall be free from the claims of creditors was intended to apply only to creditors whose claims subsequently arose.

However, the Court of Appeals of New York in *Addiss v. Selig*,[63] mindful of the constitutional problem,[64] held that Section 55A of the Insurance Law was not intended to apply to existing creditors. The court reached this conclusion partly on the ground that the creditors had a lien[65] which should not be disturbed in the absence of clear language in the amending law, and partly on the ground that this law, by expressly mentioning pre-existing policies and not mentioning pre-existing creditors, must have meant to exclude them.[66] Judge Crane said:

62. *In re* Bonvillain, 232 Fed. 370 (E. D. La. 1916), *aff'd*, 237 Fed. 1015 (C. C. A. 5th, 1917), *cert. dismissed*, 248 U. S. 588 (1918); *In re* Messinger, 29 F. (2d) 158 (C. C. A. 2d, 1928), *cert. denied*, 279 U. S. 855 (1929); Fearn v. Ward, 65 Ala. 33 (1880); Addiss v. Selig, 264 N. Y. 274, 190 N. E. 490 (1934); *In re* Commissioners v. Yelverton, 204 N. C. 441, 168 S. E. 505 (1933); Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917); Trust Co. v. Fay, sometimes cited as *In re* Heilbron's Estate, 14 Wash. 536, 45 Pac. 153 (1896).

The courts in these cases appear to have misapplied the maxim that a statute should be so construed as to save it from being declared unconstitutional. That maxim is practically applicable only when by such construction the purpose of the statute can be accomplished. For cases of this character see Sage v. Brooklyn, 89 N. Y. 189 (1882); People v. Feitner, 191 N. Y. 88, 83 N. E. 592 (1908). The maxim has no validity when a construction which upholds the constitutionality of the act destroys the purpose for which the act was enacted. Nothing is thus accomplished except to save the court from passing on the constitutional problem.

63. 264 N. Y. 274, 190 N. E. 490 (1934).

64. Citing Gunn v. Barry, 82 U. S. 610 (1872); Edwards v. Kearzey, 96 U. S. 595 (1877); Bank of Minden v. Clement, 256 U. S. 126 (1921); Coombes v. Getz, 285 U. S. 434 (1932).

65. Citing Matter of Thompson, 184 N. Y. 36, 76 N. E. 870 (1906).

66. The statute reads: "If a policy of insurance, whether heretofore or hereafter issued . . ."

"Note must be taken of the phraseology of the section. It makes no reference to pre-existing creditors although it does apply to a policy of insurance theretofore issued. This statute may be read so as to apply to pre-existing policies without affecting pre-existing creditors. In other words, it is quite reasonable to suppose that cases would arise where policies were existing prior to March 31, 1927, although the debts were not incurred until after that date. As to such subsequent creditors this section was valid. We give this section such a meaning, rather than one of doubtful legality, in making it apply to creditors in the plaintiffs' class. This no doubt is what this court had in mind when it said in *United States Mortgage & Trust Co. v. Ruggles* (258 N. Y. 32, p. 39), referring to the repeal of the exception in Section 52 of the Domestic Relations Law, 'The rights of the plaintiff were not affected by the repeal, as nothing indicates that it was the intention of the Legislature to prejudice the rights of creditors in the proceeds of policies due or paid prior to the new enactment (*Hollenbach v. Born,* 238 N. Y. 34), and if such was the intention the Constitution would frustrate it. (*Bank of Minden v. Clement,* 256 U. S. 126.)' Although this statement was not necessary to the decision, and appears to apply to past due policies, yet it indicates the impression which the court had at the time that this legislation was prospective in all particulars except for the one express reservation—its application to pre-existing policies. It does not apply to pre-existing claims of creditors."

With the mystery of legislative draftsmanship only the courts of last resort can deal. It may be observed, however, that the express mention of pre-existing policies was devoid of meaning unless the legislature intended the statute to apply to pre-existing creditors. Subsequent creditors would have no rights in any policies, whether they existed at the date of the new law or not. Existing creditors might have none in newly created policies.[67] It is probable that the legislature had in mind that existing creditors might, however, have rights in existing policies. In connection with the proper interpretation of the New York law it should be borne in mind that prior to its enactment, Pennsylvania had amended a general law[68] so as expressly to exclude the claims of pre-existing creditors[69] in order to obviate the suggestion that the earlier law, if applied to pre-existing creditors, might be unconstitutional.[70] The case illustrates the necessity for the greatest care in draftsmanship.

67. See Cecilian Operating Corp. v. Berkwit, 151 Misc. 814, 272 N. Y. Supp. 291 (Sup. Ct. 1934). This holding may, however, be contrary to the decisions of the Supreme Court of the United States discussed hereafter, notes 76, 77, *infra.*

68. PA. STAT. (1920) § 12262.

69. PA. STAT. (1930) Tit. 40, § 517.

70. Weil v. Marquis, 256 Pa. 608, 101 Atl. 70 (1917).

Constitutional Problems

In considering the constitutionality of a statute which attempts to deprive existing creditors of their rights, the important question is whether the proceeds of insurance were the property of the insured or of the beneficiary. There can be no doubt that if the property is that of the insured, who is the debtor, no statute can deprive existing creditors of their rights.[71] This doctrine was established by the United States Supreme Court when it condemned remedial legislation enacted following the depression which succeeded the panic of 1837.[72] Shortly after the Civil War the doctrine was extended to apply to increases in exemptions.[73] In some of the states these principles were not long thereafter applied in condemnation of statutes exempting the proceeds of life insurance policies.[74]

And since a creditor is entitled to rely upon his debtor's industry to the end of time,[75] the Supreme Court held in *Bank of Minden v. Clement*[76] that it can make no difference that the policy was acquired after the debt was incurred. The Supreme Court has recently reaffirmed these principles in *W. B. Worthen Company v. Thomas.*[77] That case dealt with a statute of Arkansas which not only exempted the proceeds of policies but also declared that no process should issue to reach them. The benefit of this statute was claimed by the beneficiary under a policy which had matured by the death of the insured prior to the enactment of the new law. Indeed, a writ of garnishment had been served upon the insurance company before the law was enacted. The state Supreme Court held the law applicable and constitutional.[78] Chief Justice Hughes, in reversing this determination, said:

"Such an exemption, applied in the case of debts owing before the exemption was created by the legislature, constitutes an unwarrantable interference with the obligation of contracts in violation of the constitutional provision. . . . The argument of appellee that a judgment is not in itself a contract within the constitutional protection, and that it is competent for the State to alter or modify forms of remedies, is unavailing. The judgment and garnishment in the instant case afforded the appropriate means of enforcing the contractual

71. See cases cited in notes 16, 62 *supra* and notes 72-77 *infra*.

72. Bronson v. Kenzie, 42 U. S. 311 (1843); McCracken v. Hayward, 43 U. S. 608 (1844).

73. Gunn v. Barry, 82 U. S. 595 (1873); Edwards v. Kearzey, 96 U. S. 595 (1877).

74. Skinner v. Holt, 9 S. D. 427, 69 N. W. 595 (1896); Trust Co. v. Fay, 14 Wash. 536, 45 Pac. 153 (1896); Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894).

75. See Marshall, C. J., in Sturges v. Crowninshield, 17 U. S. 122, 198 (1819).

76. 256 U. S. 126 (1921).

77. 292 U. S. 426 (1934).

78. 65 S. W. (2d) 917 (Ark. 1934).

obligations of the firm of which appellee was a member and the statute altered substantial rights."

An attempt to justify the statute by reason of an existing emergency[79] was disposed of and the Minnesota moratorium case[80] was distinguished on the ground that the exemption in the Arkansas law was not limited "as to time, amount, circumstances or need." In connection with this phase of the case Justice Sutherland, speaking also for Justices Van Devanter, McReynolds and Butler, reiterated their views in the Minnesota case:

"We were unable then, as we are now, to concur in the view that an emergency can ever justify, or, what is really the same thing, can ever furnish an occasion for justifying, a nullification of the constitutional restriction upon state power in respect of the impairment of contractual obligations. Acceptance of such a view takes us beyond the fixed and secure boundaries of the fundamental law into a precarious fringe of extraconstitutional territory in which no real boundaries exist. We reject as unsound and dangerous doctrine, threatening the stability of the deliberately framed and wise provisions of the Constitution, the notion that violations of those provisions may be measured by the length of time they are to continue or the extent of the infraction, and that only those of long duration or of large importance are to be held bad."

In bankruptcy, as previously mentioned, the contract clause had generally been successfully invoked to protect the rights of existing creditors in surrender value.[81] However, in a recent case the creditor was deprived of any rights in the insurance policy because his claim at the time of the enactment of the exemption law was merely a contingent one and therefore not then provable, although at the time of bankruptcy the contingency had occurred and the claim had been proved.[82]

But all these cases under the contract clause rest upon the proposition that a creditor is entitled to the same relief against his debtor's property as he had when he contracted the debt, these rights of enforcement having become part of the contract and therefore not to be impaired under the Constitution. No case has been found in which a creditor's rights to pursue property not that of his debtor has been held within such protection.

Cases such as *Hawthorne v. Calef*[83] and *Coombes v. Getz*,[84] which deal with the right of a creditor of a corporation to enforce the statutory

79. The statute, however, made no express mention of any emergency.

80. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934).

81. See cases cited notes 12-14, 16, *supra*.

Except where state statutes exempt—see notes 11, 15, 16, 54, *supra*.

82. *In re* Crayton, 56 F. (2d) 282 (W. D. N. Y. 1932).

83. 69 U. S. 10 (1865).

84. 285 U. S. 434 (1932).

liability of stockholders or directors, are not really examples to the contrary. Although the right is enforced against a person other than the debtor, it is really a property right of the debtor which is in itself in question. Therefore, the supposed analogy with insurance cases falls because the estate of the insured never has a claim against the beneficiary.

Ordinarily a life insurance policy payable to a named beneficiary is in no sense the debtor's property and is not reachable by his creditors. As has been said, a man's life constitutes no part of his assets.[85] The creditor may be able to reach the products of his debtor's industry so long as they remain his own. He cannot, in the absence of fraud, reach gifts his debtor has made to another.[86] And life insurance policies payable to a wife or other beneficiary are in effect such gifts. Where, as under the Domestic Relations Law, Section 52, creditors have been given limited rights in the proceeds of policies although payable to some third person, can such rights be lessened or taken away?

It has already been pointed out that in the *Addiss* case[87] it was held that the legislature did not intend to affect these rights; and the court suggested that to do so might be unconstitutional. The problem will now be considered on the assumption that the New York legislature may in the future expressly include existing creditors in Section 55A of the Insurance Law, the present exemption statute. What are the constitutional consequences?

In the *Addiss* case, it was argued on behalf of defendant, that the contract clause had not been violated because the insurance policies were never the property of the debtor. Counsel for the plaintiffs contended that this argument did not apply as to policies in which there was a right reserved to change the beneficiary, and that where such right was reserved the policies are the property of the debtor, so that creditors' rights are protected by the contract clause. It can make no difference after the death of the insured whether or not a right to change the beneficiary had been reserved.

All the cases which have interpreted Section 52 of the Domestic Relations Law have emphasized that policies taken out under that section are the property of the wife, not of the husband.[88] It has already been pointed out that no part of the proceeds are properly administered as part of the husband's estate in the Surrogate's Court[89] and that a receiver

85. Bailey v. Wood, 202 Mass. 549, 89 N. E. 147 (1909). See also Shaver v. Shaver 35 App. Div. 1, 54 N. Y. Supp. 464 (3d Dep't 1898.)

86. Central National Bank of Washington v. Hume, 128 U. S. 195 (1888).

87. Note 34, *supra*.

88. Whitehead v. New York Life Ins. Co., 102 N. Y. 143, 6 N. E. 267 (1886); Anderson v. Northwestern Mut. L. Ins. Co., 261 N. Y. 450, 185 N. E. 896 (1933).

89. *In re* Thompson, 184 N. Y. 36, 76 N. E. 870 (1906).

in supplementary proceedings cannot reach such policies.[90] Nor is it possible to attach their possible cash surrender value on a debt of the husband, even though he has reserved the right to change the beneficiary.[91] It is true that many courts have said that where such right is reserved the wife has no vested interest but merely a contingent one.[92] However, these cases speak as of the husband's lifetime. It would, therefore, be more correct to say that such reservation does not affect the wife's ownership but merely acts as a conditional limitation upon such ownership, and that her interest in the proceeds is ultimately vested.[93] The courts almost unanimously recognize that after the husband's death the beneficiary is the sole owner of the policy so that a creditor of the beneficiary may reach the proceeds.[94] (Of course, there

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90. See cases cited in note 44, *supra*.

91. Chelsea Exchange Bank v. Travelers Ins. Co., 173 App. Div. 829, 160 N. Y. Supp. 225 (1st Dep't 1916).

92. Eltonhead v. Travelers Ins. Co., 177 App. Div. 170, 163 N. Y. Supp. 838 (1st Dep't 1917); McGowin v. Menken, 223 N. Y. 509, 119 N. E. 877 (1918); Schoenholtz v. New York Life Ins. Co., 234 N. Y. 24, 136 N. E. 227 (1922); Jorgensen v. DeViney, 57 N. D. 63, 222 N. W. 464 (1928); Oetting v. Sparks, 109 Ohio St. 94, 143 N. E. 184 (1923); Katz v. Ohio Nat'l Bank, 127 Ohio St. 531, 191 N. E. 782 (1934). In Resnerk v. Mutual Life Ins. Co., 190 N. E. 603 (Mass. 1934), the beneficiary's interest is described as a "qualified vested interest".

93. Chase Nat'l Bank v. United States, 278 U. S. 327, 334 (1929); *In re* Rose, 24 F. (2d) 253 (E. D. Pa. 1927, *aff'd*, 24 F. (2d) 254 (C. C. A. 3rd, 1928), *cert. denied* 227 U. S. 593 (1928); Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937 (1896); Tyler v. Treasurer and Receiver General, 226 Mass. 306, 115 N. E. 300 (1917); Grems v. Traver, 87 Misc. 644, 148 N. Y. Supp. 200 (Sup. Ct. 1914), *aff'd*, 164 App. Div. 968, 149 N. Y. Supp. 1085 (1914); Chelsea Exchange Bank v. Travelers Ins. Co., 173 App. Div. 829, 160 N. Y. Supp. 225 (1st Dep't 1916); Wagner v. Thieriot 203 App. Div. 757, 197 N. Y. Supp. 560 (1st Dep't 1922), *aff'd*, 236 N. Y. 588, 142 N. E. 295 (1923); Maurice v. Travelers Ins. Co., 121 Misc. 427, 201 N. Y. Supp. 369 (Sup. Ct. 1923); Mahoney v. Eaton, 123 Misc. 231, 205 N. Y. Supp. 707 (Sup. Ct. 1924), *aff'd*, 212 App. Div. 867, 208 N. Y. Supp. 898 (1st Dep't 1925); Weil v. Marquis, 256 Pa. 608, 110 Atl. 70 (1917); Irving Bank v. Alexander, 280 Pa. 466, 124 Atl. 634 (1924).

94. Reighart v. Harris, 6 Kan. App. 339, 51 Pac. 788 (1897); Goldman v. Moses, 191 N. E. 873 (Mass. 1934); Goza v. Provine, 140 Miss. 315, 105 So. 534 (1925); Amberg v. Manhattan Life Ins. Co., 171 N. Y. 314, 63 N. E. 1111 (1902); Jackson v. Tallmadge, 246 N. Y. 133, 158 N. E. 48 (1927); Sam Levy & Co. v. Davis, 125 Tenn. 342, 142 S. W. 1118 (1911); Reiff v. Armour & Co., 79 Wash. 48, 139 Pac. 633 (1914).

Some courts, however, have interpreted statutes as exempting from debts of the beneficiary despite their apparent restriction to debts of the insured. Schillinger v. Boes, 85 Ky. 357, 3 S. W. 427 (1887); Brown v. Balfour, 46 Minn. 68, 48 N. W. 604 (1891); First State Bank v. Conn., 136 Okla. 294, 277 Pac. 928 (1929); Whiteside v. Fischer, 250 N. W. 60 (S. D. 1933).

In other states similar results have been reached because of the particular language of the statute, although it contained no express mention of the debts of beneficiaries: Holmes v. Marshall, 145 Cal. 177, 79 Pac. 534 (1905); German-American Bank v. Goodman, 83 are statutes, particularly those relating to cooperative or fraternal benefit societies, which exempt the proceeds not only from the creditors of the assured but also from the creditors of the beneficiary.)[95]

From the constitutional point of view it can make no difference after the insured's death, that there was ever a reserved right to change the beneficiary if, during the insured's lifetime, the creditor has not taken advantage of such rights as he had under the law to reach the surrender value. At no time has the insured any property interest in the proceeds which are to become available upon his death. Any rights which the insured's creditors might therefore assert under Section 52 of the Domestic Relations Law in the proceeds of a policy payable to a wife are not rights in the debtor's property. Such rights are not within the contemplation of the contract clause of the Constitution. It is suggested, therefore, that the New York legislature might constitutionally amend the law either by repealing Section 52 of the Domestic Relations Law or by changing Section 55A of the Insurance Law so as to exempt from the claims of pre-existing creditors the proceeds of life insurance payable to the wife. In this way the legislature could round out the main purpose of Section 55A of the Insurance Law, which is to remove that anomaly, as the result of which a wife stands in a position less favorable than any other named beneficiary.[96]

Wash. 231, 145 Pac. 221 (1915) (In this case, this was limited, however, to debts of the beneficiary existing at the time she was entitled to receive the proceeds).

In New York, because of prohibitions in the statute against assignment of policies by the wife without the husband's consent, it has been held that during the lifetime of the husband creditors of the wife can obtain no rights in policies payable to her. Eadie v Slimmon, 26 N. Y. 9 (1862); Smillie v. Quinn, 90 N. Y. 492 (1881); Miller v. Campbell, 140 N. Y. 457, 35 N. E. 651 (1893); *cf.* Ellison v. Straw, 116 Wis. 207, 92 N. W. 1094 (1903).

For statutory protection afforded beneficiaries see note 95, *infra.*

95. *In re* Tellier's Estate, 201 Iowa 126, 230 N. W. 545 (1930) (the exemption does not enure to the benefit of the wife's heirs). *Contra:* Coleman v. McGraw, 71 Neb. 801, 99 N. W. 663 (1904); Scott v. Wamsley, 253 N. W. 524 (Iowa 1934) (the exemption enures to the benefit of the wife although she was not named in the policy since she took by operation of law); Mason v. Martin, 57 S. D. 299, 232 N. W. 29 (1930). (The statutes of these states limit the amount of exemption to $5,000 and to debts incurred by the wife before her husband's death).

In New York, PERSONAL PROPERTY LAW, (1909) § 15, exempts from garnishment benefits accruing under an agreement whereby the proceeds of a policy are left with the insurance company in trust for the beneficiary, provided the agreement so provides. Accordingly, monthly payments due under such a policy, whether principal or income, are exempt. Crossman Co. v. Ranch, 263 N. Y. 264, 188 N. E. 748 (1934).

For cases dealing specifically with cooperative assessment or fraternal benefit societies see Etterson v. Schwartz, 38 Misc. 669, 78 N. Y. Supp. 231 (Sup. Ct. 1902); Peoples Bank of Buffalo v. Cushman. 109 App. Div. 349, 95 N. Y. Supp. 882 (4th Dep't 1905), *aff'd*, 187 N. Y. 518, 79 N. E. 1113 (1907).

96. Chatham & Phenix National Bank v. Crosney, 251 N. Y. 189, 167 N. E. 217 (1929); United States Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, 179 N. E. 250 (1932).