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STATUTORY RIGHTS OF BENEFICIARIES OF INSURANCE POLICIES.

1. Introductory.—The practice of employing life insurance policies as a medium for setting apart a fund for the support of dependent relatives is so widespread that the construction of the statutes by which trusts of this description are regulated is a matter of special interest and importance, not merely to the legal profession, but to every member of the community. It is hoped, therefore, that an analysis and collation of all the reported English and Canadian decisions with regard to this kind of legislation will be acceptable to our readers. In the following discussion no notice will be taken, except incidentally, of any cases except those in which the effect of the statutes themselves was directly in question. For information as to the rights of beneficiaries of policies, in so far as such rights are determined by the general doctrines of insurance law, or by the rules of the insurers, the various standard treatises may be consulted. The scope of the article, as well as the limited space available, will also preclude our commenting upon any statutory provisions, except those which have become the subject of litigation.

I. GENERAL PRINCIPLES.

2. Object and effect of the statutes as a whole.—The broad principle which the legislature has sanctioned by the Acts with which we are concerned is "that a man may provide for his wife and children at the possible expense of his creditors, and may devote his earnings to keep up insurances which are unassailable

by those to whom he may be, or may die, heavily indebted" (*a*). The assured, accordingly, has no power to defeat the claim of a "preferred beneficiary," except by non-payment of premiums (*b*). Whether, supposing he should deliberately undertake to disappoint his beneficiary in this manner, he might be checkmated if the premiums were tendered by, or in behalf of, the beneficiary, is a question which does not seem to have been discussed. That a section dealing with such a contingency might advantageously be inserted in the statutes scarcely admits of a doubt; though it may be conceded that, in view of the large privileges which in some jurisdictions insurers now possess with respect to transferring the benefits from one beneficiary to another (see III, post), such a provision would be of practical advantage only in cases where the beneficiary already designated is the only living representative of the class of persons to which new apportionments are restricted.

3. Insolvency of the assured not fatal to the validity of a trust under the statutes.—It has been held that a policy taken out under the provisions of the English Married Woman's Property Act of 1870 (see sec. 5, post), for the benefit of wife and children is not settled property within the meaning of sec. 91 of the Bankruptcy Act of 1869, which avoids settlements of property by a trader upon his wife and children, in case he becomes bankrupt within two years after the settlement. To this extent the earlier Act is modified by the later one, the intention of the legislature being to alter the law so far as regards the insurance of a man's life for the benefit of his wife and children, and to declare that the creditors

(*a*) *McKibbon* v. *Feegan* (1893) 21 Ont. App. 87, per Hagarty, C.J.O. Similar views are expressed in other cases. "When once a policy is issued in favour of wife or children, it becomes an irrevocable trust, placing it not only beyond the reach of creditors, but beyond the control of the husband." *Fisher* v. *Fisher* (1898) 25 Ont. App. 108, per Burton, C.J.O. The spirit of the Act is that, "such settlements once made are beyond the control of the settlor." *Fisher* v. *Fisher* (1898) 25 Ont. App. 108, per Maclennan, J.A. (p. 117). See also the remarks of Osler, J. A., on p. 118. "The object and intent of the Legislature was that the insurance money in such a policy should be paid directly to the wife and children, in their several rights, and not to the personal representatives of the insured. *Campbell* v. *National L. Ins. Co.* (1873) 34 U.C. Q.B. 35, (said of the earliest Canadian Act on the subject, 29 Vict., c. 17). Speaking of this Act in another case, Osler, J. A. remarked that its effect "was to enable a man by means of a policy of insurance on his life to make a sort of post nuptial settlement upon his wife and children which should be free from the claims of his creditors." *Wicksteed* v. *Monro* (1885) 13 Ont. App. 286. But the more recent legislation provides also for declaration of trust prior to and in contemplation of marriage. See sec. 6, post.

(*b*) *Fisher* v. *Fisher* (1898) 25 Ont. App. 108.

could only get what they would fairly be entitled to, namely, the refunding (as provided by the Act) of such premiums as were paid in fraud of them (*a*). Where the premiums have been paid by the beneficiary himself, the insolvency of the assured is of course not a ground for paying them over to the creditors (*b*).

4. Conflict of laws.—An indorsement on a policy declaring it to be for the benefit of a wife (see secs. 5, 6, post) is governed by the law of the province where it is made and the assured is domiciled, and not by the law of the province where the insuring company has its principal offices and the payment of the insurance money is to be made (*a*).

II. CREATION OF THE TRUST UNDER GENERAL STATUTES.

5. Summary of English Acts.—In order that the rulings referred to in the ensuing sections may be comprehended, it will be necessary to summarize briefly the effect of the various English and Canadian statutes, so far as they are pertinent.

England: The English Married Women's Property Acts of 1870, c. 93, sec. 10, and of 1882, c. 75, sec. 11, declare that a policy of insurance effected by any married man on his own life, and, expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall be deemed a trust for their benefit, and that the moneys payable under such policy "shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his debts."

6. Summary of Canadian Acts.—The Acts in *Newfoundland:* (Consolidated Statutes, 1892, c. 81, sec. 11), and in *Nova Scotia* (Rev. Stat. (5th Ser.) 1884, c. 94, sec. 12) follow the English Acts of 1870, 1882.

Ontario: The provisions of the Ontario Act which regulates the manner in which the trust is created, first assumed a shape not materially different from its present one in 47 Vict., c. 20, sec. 5, afterwards

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(*a*) *Holt* v. *Everall* (1876) 2 Ch. D. C.A. 266. In this case the special point decided was that a new policy taken out under the Act in place of one not subject to its provisions enured to the benefit of the wife, where the insured, being insolvent at the time of the surrender of the original policy, was unable to pay the premiums, and the old policy was therefore really valueless. Lord Justice James thought that, even apart from the insolvency of the insured, there was nothing of substantial value taken from the creditors, because the insured might have given up or forfeited the original policy, whenever he pleased.

The Ontario statutes and those modelled upon them also make provision for the refunding of premiums paid in fraud creditors. See Rev. Stat. Ont. 1887, c. 136, sec. 22; Rev. Stat. Ont. 1897, c. 203, sec. 151 (2).

(*b*) *Holt* v. *Everall* (1876) 2 Ch. D. C.A. 266.

(*a*) *Toronto &c. Co.* v. *Sewell* (1889) 17 Ont. R. 442, per Ferguson J.

incorporated in R.S.O. 1887, c. 136, sec. 5, and can be traced in their development through the Dominion Statutes; 29 Vict., c. 17, sec. 3, and the Ontario Statutes, 35 Vict., c. 16, sec. 4; 36 Vict., c. 19, sec. 5; R.S.O. 1877, c. 13., sec. 16. It runs as follows: (1) In case a policy of insurance effected by a married (*a*) man on his life, is expressed on the face of it to be for the benefit of his wife or of his wife's children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number, or otherwise has made or may hereafter make a declaration that it is for the benefit of his wife and children or any of them, such policy shall enure, and be deemed a trust for the benefit of his wife, for her separate use, and of his children, or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or of his creditors, (*b*) or form part of his estate when the sum secured by the policy becomes payable.

The provision now in force, 60 Vict., c. 36 (Rev. Stat. Ont., 1897, c. 203), sec. 159, embodies the Act of 1887 as modified and extended by the various amendments of the Act last referred to. See 53 Vict., c. 39, secs. 4, 5; 56 Vict., c. 32, sec. 8 (*1*) (*2*); 59 Vict., c. 45, sec. 2.

Sub-sec. 1 is quite similar to sec. 5 of the earlier Act, the principal differences being that the word "married" is omitted as a characterization of the insurer, and the list of allowable beneficiaries is extended so as to include the husband, wife, children, grandchildren, and mother of the

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(*a*) In a case turning upon the meaning of this word, it was held by Ferguson, J. that an indorsement made after marriage in favour of a wife is not within the purview of the Act, as it applied only to insurance effected by men who were actually married at the time. *Toronto &c. Co.* v. *Sewell* (1889) 17 Ont. R. 442. The opinion was based on the grounds that the original Act of 1865 made special provision for indorsing policies taken out before marriage, but gave only one year for doing this; that the substance of sec. 5 first appeared in the Married Women's Property Act; and that sec. 3 presupposes the insurer to be a married man. Sec. 1, it was said, did not in any way change the meaning of sec. 5. Where the words of the certificate entitle the beneficiary to receive the specified sum absolutely and unconditionally, an obligation to elect to accept the money in satisfaction of a claim owed by the insured to the beneficiary cannot be fastened on the apparent right thus created, unless such obligation is evidenced by something as formal as the Act requires in cases where there are changes in the designation of or apportionment among beneficiaries. Oral declarations made by the insured before, at the time of, and after his application, and also after the date of the issue of the certificate, are not sufficient to countervail the Act, or convert the beneficiary into a trustee, or to place him in the position of one who was bound to receive the money as a satisfaction of a legal claim: *In re Mills* (1897) 28 Ont. R. 563.

(*b*) The declaration in the first Act, 29 Vict., c. 17, sec. 5, was simply that the moneys were to be free from the claims of "creditors." This ambiguous phrase was interpreted in Lower Canada as including the creditors both of the wife and the husband. *Vilbon* v. *Marsonin*, 18 L.C. Jur. 249. But as remarked in a recent Ontario case, the amended Act protects the beneficiary against the claims of the creditors of the assured, but not against the claims of his own creditors. *Graham* v. *Canada &c. Co.* (1894) 24 Ont. R. 607.

assured. By sub-sec. 2 these are to be known as "preferred beneficiaries," all others being considered as "ordinary beneficiaries." Sub-secs. 3-6 (53 Vict., c. 39, secs. 2, 3) have the general effect of bringing policies effected before marriage within the scope of the Act, and provide for the contingency of the marriage not taking place.

British Columbia: "The Families' Insurance Act," Revised Statutes, 1897, c. 104, sec. 7, is substantially the same as the Ontario Act.

New Brunswick: The Act of 58 Vict., c. 25, sec. 6, is substantially the same as the present Ontario Act.

Quebec: Secs. 2, 5, 6, 26 of the Act of 41-42 Vict. (now replaced by the Civil Code, secs. 5581, 5584, 5604) cover the same ground as the sections of the three Acts last referred to, and are substantially to the same effect.

Manitoba: "The Life Assurance Act," Revised Statutes, 1891, c. 88, follows in secs. 2-4, 26, the Quebec Civil Code.

7. What settlements are within the purview of the statutes.—In *Holt* v. *Everall* (*a*), Mellish, L.J., remarked that it might be doubtful whether, before the passage of the Married Women's Property Act of 1870, a simple declaration on the face of a policy that it was for the benefit of his wife and children would have been sufficient to make a trust for them. More recently still Lord Esher expressed the opinion that, apart from the provisions of the Act, a policy stating that, for the considerations therein mentioned, the insuring association made the insured a member, and promised that on his death the policy money should be paid to his wife if then living, otherwise to his legal personal representatives, did not create a trust in her favour. Fry and Lopes, L.L.J., took the same view, the former remarking that, independently of the statute, she was a stranger to the contract, that it might have been put an end to by the contracting parties with her consent, and that the breach of it would have given her no cause of action against anyone (*b*).

The essential result, therefore, of the statute in question and those which are cast in a similar mould, seems to be merely that words which, without it, would neither create an irrevocable trust

(*a*) 2 Ch. D (1876) 266.

(*b*) *Cleaver* v. *Mutual etc., Assoc'n.* [1892] 1 Q.B. 14, followed as to this point in *Gunter* v. *Williams* (1897) 1 N.B. Eq. 401, where an assignment of a policy made prior to the Act of 1895 (58 Vict., c. 25), without the wife's consent was upheld. Compare also *Fisher* v. *Fisher*, 25 Ont. App. 108, discussed infra, where the conclusion of the majority in favour of the beneficiary, under a policy resembling that in the Cleaver case, was arrived at only by construing the application, which contained the statutory terms, "for the benefit of, etc.," in connection with the certificate. (See especially the concluding paragraph of the opinion of Maclennan, J.A.).

which equity would enforce, nor a contract upon which the beneficiary could maintain an action will, by its aid, now operate so as to give the beneficiary a vested and enforceable right to the policy moneys from which neither the settlor nor his creditors can derogate (*c*).

In a case arising under sec. 5 of Rev. Stat. Ont. 1887, it was held that an endorsement in favour of a daughter on a policy which is issued by a benevolent society and declared to be payable to the "widow or orphans or personal representatives" of the assured creates a valid trust within the purview of the Act, though it is not in terms "for the benefit" of the persons there specified (*d*). And quite recently the general rule governing such cases under the Ontario Acts has been stated thus: It is not necessary that the policy or other instrument should be expressed to be made in pursuance of the Act. If it is such a policy or declaration as is mentioned in the Act, that is sufficient (*e*).

The original Canadian Act of 1865 was applicable only to policies of life insurance the proceeds of which were payable at

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(*c*) One of the points decided in *Holt* v. *Everall*, supra was that a policy expressed to have been effected by a married man on his own life and to be for the benefit of his wife was prima facie within sec 10 of the English Act of 1870. In England the common practice seems to be to refer expressly to the provisions of the Act. See, for example, *In re Davies Policy Trusts* (1892) 1 Ch. 90; *In re Adam's Policy Trusts* (1883) 23 Ch. D. 525; *In re Kuyper's Policy Trusts* (1899) 1 Ch. 38.

(*d*) *Scott* v. *Scott* (1890) 20 Ont. R. 313.

(*e*) *Fisher* v. *Fisher* (1898) 25 Ont. App. 108, per Osler, J.A. (p. 118) [referring to *Holt* v. *Everall*, supra]. In this case the certificate was in the form of a covenant with the settlor by which a friendly society was to pay the benefit "to A., his wife, or such other beneficiaries as he might in his lifetime have designated in writing endorsed on the certificate, and in default of any such designation, to his legal representatives." The theory of Street, J., 28 Ont. R. 459, was that, while three beneficiaries were mentioned, there were in effect only two, and that, in order to become a beneficiary, the wife must be endorsed as such. The view of the Court of Appeal was that the covenant was to pay the wife, or some other person, that other person to be designated by indorsement. That the certificate came within the act was held by the majority of the Court, who considered that the fact of there being no designation in writing on the face of the certificate or elsewhere, constituting the wife of the assured a beneficiary would not prevent the document from operating as an irrevocable statutory trust in her favour, inasmuch as the assured in his application stated that the money was to be paid to his wife, and the insuring society used a printed form in which the person described as the wife of the assured is designated as his beneficiary. Her rights were accordingly pronounced superior to those of creditors to whom the deceased had undertaken to assign the policy. Osler, J.A., dissented on the ground that the application could not be referred to for the purpose of construing the certificate; that the Court was bound to assume that the assured was satisfied with it in the form in which it issued, though as regards the beneficiary, it varied from the request made by the application; and that there was nothing in the Act to forbid the assured from attaching such conditions as he pleased to the settlement.

the death of the insured, endowment policies being excluded for reasons thus explained by Burton, C.J.O. in a very recent decision :

"The legislature very wisely and humanely passed an Act to secure to wives and children the benefit of life assurance, but, having regard to the interests of creditors, endowment policies were not included in its provisions, it being thought, not probably without some reason, that the Act might be used by dishonest persons as a means of protecting against creditors for a number of years a fund which might at the maturity of the policy be appropriated by them to their own use instead of the support of the wife and children, when, as originally intended, the moneys were payable at his death as a provision for them" (*f*).

But in 1877 it was held that the expanded Act of 47 Vict., c. 20, (Rev. Stat. Ont., 1887, c. 136), being applicable to all contracts of life insurance, comprehe.. led insurances effected under the Benevolent Societies Act (Rev. Stat. Ont. 1877) c. 167 (*g*).
And now by 51 Vict., c. 22, Providence and Benefit Societies are expressly brought under the provisions of Rev. Stat. Ont, c. 136 (*h*).
See also *Mingeaud* v. *Packer*, cited in sec. 12, post.

8. To what extent the common law rights of the insured are affected by these statutes. (See also sec. 8, post.)—In *Holt* v. *Everall* (*a*) Lord Justice Mellish mentioned, as a doctrine not disputed, that prior to the passage of the English Act of 1870 anyone might, either upon the policy itself or by another instrument, have declared a trust in the proceeds for the benefit of his wife for her separate use, and after her death for the use of her children (*a*). But neither in that statute nor in those which have been enacted in Canada upon the same model (sec. 6, ante) is there any express declaratory provision as to their precise effect upon this pre-existing right. Nor have we come across any case which discusses whether, and if so, how f r that right is impliedly restricted by them. It may, however, be fairly inferred that, upon the general principles which determine the proper construction of statutes which create new capacities without mentioning those which previously existed in respect to the subject-matter covered, it was not intended to cut

(*f*) *Fisher* v. *Fisher* (1898) 25 Ont. App. 108.

(*g*) *Swift* v. *Provincial etc., Institutions* (1890) 17 Ont. App. 66, (Burton, J.A., dissenting), overruling *Re O'Heron*, 11 P. R. 422.

(*h*) See *Neilson* v. *Trusts Corporation* (1894) 24 Ont. R. 517; *Fisher* v. *Fisher* (1898) 25 Ont. App. 108.

(*a*) 23 Ch. D. (1876) 266.

down the right in question. The only point, therefore, which can create any difficulty in this connection is whether, in any particular instance, the assured wished that his contract should be governed by the statutes or by the ordinary rules of equity jurisprudence. As will be seen by referring to the preceding section, *Holt* v. *Everall* is an authority, though not a very positive one, for the doctrine that any policy which is primâ facie within the Act will, in the absence of any words expressive of a different intention on the part of the assured, be presumed to raise a trust of the kind contemplated by the legislature. In view of the admitted purpose of these statutes a court would doubtless lean strongly towards this conclusion wherever, as in that case, the adverse parties claiming the fund were the beneficiary and the creditors of the assured. But it seems to be less easy to say that this inference should be drawn where there are no creditors to be considered and the assured, in making a disposition of the policy moneys which, apart from statute, would not place the fund entirely beyond his control, has not referred to the statute, and has subsequently undertaken to vary that disposition. Is such an attempt competent evidence to shew that he did not intend that the settlement originally made should be governed by the statute? Or will the primâ facie presumption that a settlement made in the words employed by the legislature was intended to be subject to the statute always hold good unless it is rebutted by something in the original declaration which indicates a contrary intention?

As regards the Ontario Acts, it would seem, that for practical purposes, though not in express terms, the courts have answered the latter of these questions in the affirmative by their decisions as to the inability of the assured to derogate from the rights of the original beneficiaries except in the manner authorized by the Insurance Acts. (See sec. 11, post). These rulings apparently take it for granted, not only that a declaration which is merely to the effect that the insurance moneys are for the benefit of a designated person, and which therefore does not, apart from the statute, create an irrevocable trust, presumptively operates so as to raise such a trust, but also that this presumption is not overborne by the subsequent action of the settlor in attempting to change the settlement. The virtual result of these cases, therefore, seems to be this:—A settlor, if he desires to avail himself of the doctrine, founded upon the provisions in these Acts and others like them,

that his common law rights to procure or to assign a policy in any other way allowed by law are deemed not to be restricted or interfered with, and that the common law and statutory rights of creditors are superseded so far as may be necessary to give effect to the Act and no further, (*b*) must make an express declaration, at the time the trust is created, that the statute is not to be applicable to the contract. It seems difficult at all events to suggest any other practical footing upon which these provisions can be reconciled with those which declare that the Acts shall be applicable to every contract of life insurance. (See, for example, sec. 1 of R.S.O. 1887, c. 136.)

Of course where a trust is valid apart from the statute, the fact that the beneficiary is not one of these persons for whose benefit it was enacted will not prevent it being upheld (*c*).

9. Retroactive effect of Statutes. (See also under sec. 26, post.) —In *Wicksteed* v. *Munro* (*a*), Ferguson, J. expressed the opinion that c. 129 of R.S.O. 1877, was applicable to a policy taken out under the Act of 1865, as it embodied the Act of 33 Vict., c. 21, sec. 6, which itself took effect upon policies issued before its passage, but the Court of Appeal declined to make a ruling on this point.

In the same case Ferguson, J. remarked that, if the Act of 47 Vict., c. 20, sec. 9, dealing with the result of the predecease of beneficiaries, (see sec. 15 post), had been applicable to a policy under the Act of 1865, it would have been conclusive in favour of the defendants' contention, but that by the repealing clause acts done or rights acquired were expressly excepted from its operation.

The provision in the Ontario Act of 53 Vict., c. 39, sec. 5 by which, if the mother of the insured is made a beneficiary in the original contract, a trust is created in her favour, was held applicable to

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(*b*) *Wicksteed* v. *Munro* (1885) 13 Ont. App. 486. See also *Fisher* v. *Fisher* (1898) 25 Ont. App. 108 (p. 117). The provisions referred to are found in 29 Vict., c. 17, sec. 6; R.S.O. 1877, c. 129, sec. 18; 47 Vict., c. 20, sec. 22; R.S.O. (1887) c. 136, sec. 23; 60 Vict., c. 36, sec. 151 (5).

(*c*) *Re Roddick* (1896) 27 Ont. R. 537, holding that the sisters of the insured, though not within the protection of R.S.O. 1887, c. 136 take, as against the creditors, where they are named in the policy as beneficiaries, and it is not shewn that the insured was not in a position to make voluntary settlement at the time he effected the insurance.

(*a*) 10 Ont. R. (1885) 283; 13 App. 486. See the statement of the case sec. 21, post.

current policies, issued before it came into force (*c*). In this instance there was no express announcement in the statute as to the retrospective effect of the section under review; but in two later decisions the meaning of a clause stating that the Act should apply to any contract of insurance heretofore issued or declaration heretofore made (*e*) has been a material question. This provision has been held to cover a case where the insured died before it came into force (*f*), but not one where not only was the insured dead, but the money had been paid out under the law as it then stood (*g*).

The theory of Meredith, C.J. in the case last cited, was that in *Videan* v. *Westover*, supra, the insurance money had not yet been paid over when the Act came into force, and that this fact furnished an adequate ground for not following the ruling of Ferguson, J. He considered that the words "any contract of insurance" meant any existing or current contract, and the words "claration heretofore made" meant a declaration in respect to such existing or current contract, not in respect to one which was altogether a thing of the past, wholly performed and ended, and so not at the time a contract at all.

It is extremely difficult, however, to admit that the circumstance relied upon can furnish an adequate basis for a distinction between the two cases. Whatever moneys the beneficiary is to receive upon the death of the insured became absolutely his own property the very moment the insured dies. The mere fact that such moneys may have remained in the keeping of the insurers after that death does not make them any the less the property of the beneficiary than if they have been paid over. The effect of a statutory provision like the one in question must, it is submitted, be precisely the same in all cases where the insured was dead before its enactment. If our contention be correct, it becomes necessary to choose between the rulings of Ferguson, J. and of Meredith, C.J., and we have no hesitation in saying that we prefer the construction put upon the Act by the latter judge. The situation is, we think, one for the application of the rule by which the intention of the legislature to

(*c*) *Simmons* v. *Simmons* (1893) 24 Ont. R. 662, per Chancellor Boyd. This construction was embodied in 59 Vict., c. 45, sec. 1 (2).

(*e*) 60 Vict., c. 36, secs. 159 (9) 160 (5).

(*f*) *Videan* v. *Westover* (1897) 29 Ont. R. 1, per Ferguson, J.

(*g*) *McIntyre* v. *Silcox* (1898) 29 Ont. R. 593.

derogate from rights already reduced to possession under an existing statute is not to be presumed in the absence of an express declaration to that effect in the substituted statute (*h*).

10. That the will of the insured is a "writing" within the meaning of sec. 5 of the Ontario Act was first laid down by Chancellor Boyd (*a*) in a judgment which, in view of the importance of the question, must be pronounced rather brief and perfunctory. The only answer which the learned judge vouchsafed to the suggestion that the statute is not satisfied by the execution of a revocable instrument, and that the declaration by the separate instrument should, like the indorsement on the policy, be final in its character, was that the declaration was made by the statute subject to variation and correction at the option of the insured within the limits prescribed (sec. 12, post). Clearly, however, the power to vary the terms of a trust is essentially different from the power to revoke it altogether, and resume entire control of the property.

In the same year as the last cited of the Chancellor's decisions was rendered, the question came before the Court of Appeal, and his views were adopted by two out of three of the justices (*b*).

Hagarty, C.J.O. candidly admitted that the decision might have "the effect of, in some cases making the trust for the wife and children of the insured revocable, which it might not be when endorsed on the policy under the statute," and that "his making the declaration in the present form was worthless, unless and until it appeared as his last will, and as an irrevocable declaration of the trust," but said that he was unable to see that in substance a revoked will differed from an ineffectual or defective attempt to declare a trust on an existing policy.

With all deference it is submitted that the difference between the supposed cases is perfectly manifest. A will creates inchoate rights, contingent upon its being left unaltered by the testator. No rights whatsoever, contingent or otherwise, can arise out of a mere ineffectual attempt to perform a legal act. An argument which assumes that the situation resulting from the invalid execution of one instrument may supply an analogy indicating the intention of the legislature with regard to the consequences which are to follow

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(*h*) Endlich on Statutory Construction, sec. 273: Dwarris on Stat. (Potter's Ed.) p. 162.

(*a*) *Re Lynn* (1891) 20 Ont. R. 475, followed without any discussion by the same judge in *Beam* v. *Beam* (1893) 24 Ont. R. 189.

(*b*) *McKibbon* v. *Feegan* (1893) 21 Ont. App. 87.

the valid execution of another instrument is not a very satisfactory specimen of judicial ratiocination.

The starting point of the argument of Maclennan, J.A., was that the word "writing" was wide enough to include a will, and that there was no reason apparent why a declaration by will should not be sufficient. The proposition contained in the first of these clauses is of course uncontrovertable, as an abstract legal statement, but we venture to think that the reasoning by which the second proposition is sustained is defective in more than one respect.

The learned judge laid special emphasis upon the fact that there was nothing in the Act which expressly forbade a revocable declaration of trust, nor anything from which a prohibition could be inferred, and continued thus: "The legislature intended to enable a husband and father to make a provision for his wife and family, for their benefit, after his death and not before. He may make it any time: may wait until he is in extremis, and if he might, as he may, make it by writing other than a will just before death, why might he not do it by will?"

This last argument which seems to be approved by Chief Justice Hagarty, as he also points out that the insured could have had the policy indorsed or made the necessary declaration before he died, proceeds upon the hypothesis that events which are so nearly simultaneous as the supposed communication of an irrevocable quality to the trust through a declaration made shortly before death and through the actual decease which brings the provisions of the will into effect, must necessarily possess the same legal significance. Even if the statute itself be alone taken into account, such a theory is, as Osler J. A. very truly remarked in the dissenting opinion which will presently be reviewed, a mere begging of the question. That this is actually the logical dilemma in which the majority of the court has involved itself is indicated by nothing more strongly than by the fact that their doctrine ignores entirely the fundamental distinction which the law makes between voluntary transfers of chattels by transactions ultra vires and by testamentary directions. That the legislature had this distinction in mind when the statute was framed, seems to us indisputable when we observe that the provisions appointing the means by which the trust can be created during the lifetime of the insured, have simply given a statutory sanction to an extension of the methods by which equity had already succeeded in practically circumventing the common law principle that the property in a

chattel does not pass without delivery of the thing itself or what is equivalent thereto (*d*). This principle is as fully applicable to an attempted transfer just before death, that is to say, to a donatio causâ mortis, as it is to an attempted transfer by a man who is in sound health and not contemplating death; but it has no application to a legacy. It seems impossible, therefore, to avoid the conclusion that the reasoning of the learned judges is here based upon a misconception of the legal situation, and that the considerations emphasized are quite irrelevant as aids to the ascertainment of the intention of the legislature.

After the passage above quoted, the opinion of Maclennan, J.A. proceeds thus: "The Act enables him to settle the whole policy, or several policies. Why should he not, therefore, be able to settle part of a policy or the whole policy for a limited time, as for a year or two years in case of his death during that period, but not afterwards?" I see no evidence in the language used that the legislature intended to limit or restrict the power of settlement on the part of the husband in favour of his wife and children. He may settle it absolutely, and as the greater includes the less, I think he may settle it without any qualification not expressly forbidden." In replying to the argument that sec. 6 of the Act and the amendments thereof by 51 Vict., c. 22, sec. 3, and 53 Vict., c. 39, sec. 6, indicated that the settlement contemplated by sec. 5 was to be an absolute and not a revocable settlement, the learned judge put upon the first-named section a construction somewhat different from that which it had received from Chancellor Boyd. He said: "I think that the answer to that is that sec. 6 is intended to enable the settlor to change and vary the settlement, even in these cases in which he has made it absolutely, and has not reserved any power of revocation or variation."

The essential links in the learned judge's chain of reasoning, considered as a whole, seem to be fairly represented by these three propositions: "(1) As the Act does not forbid the creation of trusts which are revocable, either by their express terms or inferentially, such trusts must be regarded as being impliedly authorized; (2) Revocable trusts, being authorized by the Act, are within its purview and entitled to the peculiar protection which it affords; (3) A trust created by a will, being in its nature revocable, is one of those which the Act was intended to

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(*d*) Contrast cases like *Cochran* v. *Moore*, 25 Q.B.D. (C.A.) 75, and *Jones* v. *Lock*, L.R. 1 Ch. App. 25 with such cases as *Milroy* v. *Lord*, 4 DeG.F. & J. 264, and *Richards* v. *Delbridge*, L.R. 18 Eq. 11. For a general discussion of this anomaly, an article by the present writer in the *American Law Review*, vol. 29, p. 361 may be consulted.

cover. The assumption apparently is that the logical sequence between the first and the second of these propositions, and also between the second and the third, is unbroken and manifest. With all respect, we think that this assumption is, as regards both its branches, unjustinable.

It is one thing to say that the statute does not prevent a settlor from moulding the trust into any form he pleases; indeed there is, as already noticed (sec. 8, ante), a special saving provision to this effect in the Act itself. It is quite another thing to say that the peculiar safeguards provided by it are intended by the legislature to be applicable to revocable trusts. This last proposition must still be established by independent reasoning. Nor is the third proposition a necessary or inevitable inference from the second. Even if revocable trusts which take effect in the lifetime of the insured are in the sense just mentioned directly within the purview of the Act, it may still be a question whether this can properly be affirmed of a trust which is revocable only for the reason that it is created by an ambulatory instrument, and which never goes into effect at all until the death of the settlor. The mere fact that the existence of these gaps in their argument does not seem to have been realized by either of the learned judges who constituted the majority of the court, and that they made no attempt to bridge over such very serious logical chasms renders it impossible to avoid the conclusion that the question to be determined was not discussed by them from the proper standpoint.

It remains then to be considered whether these hiatus in their reasoning can be filled in a manner favourable to their theory, or whether an examination of the statute itself, the only source from which light upon the subject can be derived, will not shew that their conclusions are erroneous. That the latter of these alternatives is the only one which can be accepted is, we think, shewn by the able dissenting opinion of Osler, J.A., who, without undertaking to deal directly with these particular dialectic weaknesses in the arguments of his colleagues, has demonstrated very satisfactorily the unsoundness of their views as a whole.

Referring to the words contained in sec. 5, he said:

"The indorsement or writing mentioned in this section appears to me to import something by which a trust is irrevocably created for the beneficiaries therein named, subject only to be varied, as by that section and section sixth is provided. . . . . The intention of the legislature

was that the policy so declared should be no longer available to the assured for his own purposes. . . . . That he had made a disposition of it by his will would be no answer to a creditor seeking the benefit of it in his lifetime, and it seems very like begging the question to say that it is only by his last will that it takes effect; for the declaration which the fifth section speaks of is evidently one which takes effect from the moment it is made, importing something which has become effectual in the declarant's lifetime, not an instrument which only becomes irrevocable by his death, and which in the meantime leaves him the benefit of the policy for his own purposes." . . . . . "The special power which the Act confers to vary and alter from time to time the apportionment made by the original declaration is also strong to shew that such declaration is something which has taken effect in the declarant's lifetime, which the Act specially permits him, but only within certain limits, to modify. It is most significant that the Act says nothing about making a declaration by will. It would have been the most natural thing to provide for had it been intended that the insured should be able to retain the policy within his own control during his life, and then by his will withdraw it from his creditors."

He also pointed out that secs. 8 and 9, providing that the insurer may reapportion the benefits in case of the death of a beneficiary, and that in case such reapportionment is not made, the share of the deceased shall pass to the survivors, contemplated a declaration inter vivos, indefeasible except with the limits specially permitted, and drew attention to the terms in which a will was mentioned in sec. 11.

It will be observed that the learned judge ascribes due weight to the fact that there is no reference to a will in sec. 5, which deals with the creation of the trust. But it is not a little remarkable that neither he nor his colleagues seem to have realized the vastly greater significance which this fact carries, owing to the mention of the will in the following section which refers only to variations of a trust already created. It is submitted that the only inference that can be drawn from this marked contrast is that the legislature, whether it did or did not intend to protect revocable trusts which have taken effect during the lifetime of the insured, certainly did not intend to protect trusts created by will

In view of the fact that the decision of the Court of Appeal was not unanimous, it is to be regretted that in the last revision of a statute, which as to other points is so exuberantly verbose, a little space was not devoted to a declaratory clause which would put its meaning in this respect beyond dispute. Any amendment which may be made will, we hope, take the shape of a categorical

withdrawal of the statutory privileges from declarations by will. The main utility of these statutes is seriously impaired by protecting settlements which leave the insured absolutely free to put the insurance moneys at hazard during his lifetime. Experience has so clearly demonstrated the disastrous consequences which in a large percentage of cases result from the almost irresistible temptation to treat as an ordinary asset a policy which the insured intends, but has not declared to be, for the benefit of his family, that, upon grounds of social expediency the execution of settlements which, for all practical purposes, fall under this description, during the lifetime of the insured, should be discouraged in every possible way.

III. SETTLOR'S CONTROL OF THE TRUST FUND AFTER THE CREATION OF THE TRUST.

11. Generally.—An irrevocable trust is of course wholly beyond the control of the trustor when it has once taken effect, and as the statutes under review impart the quality of an executed trust inter vivos to a policy expressed to be for the benefit of wife and children (*a*), the insured cannot change its terms, either as regards the persons to be benefited, or the amounts they are to receive, unless he has reserved a power of modification or the legislature has given him that power. In the statutes of England and those Canadian provinces in which the English statute is copied, there is no provision (see sec. 6, ante). Under the Married Women's Property Act of 1870, the emancipation of the policy moneys and the policy itself from the husband's control is so complete that he has no power either to appoint a trustee of the policy, or even to assign it to a trustee when appointed (*b*). This particular disability has been removed by the Act of 1882, but in other respects he remains incapable of altering or adding to the provisions of the trust instrument.

(*a*) *In re Adams' Policy Trusts* (1883) 23 Ch. D. 525, per Chitty, J. The doubt which North, J., afterwards expressed as to the correctness of this view in a later case (*Seyton* v. *Satterthwaite*, 23 Ch. D. 525), must be considered with due reference to the point under discussion (see 19, post). He could scarcely have intended to impugn the soundness of the doctrine in the text, as a statement of the effect of the policy between the settlor and the beneficiaries as a body.

(*b*) *Turnbull* v. *Turnbull* (1897) 2 Ch. 415.

The statutes of all the Canadian provinces, except Nova Scotia and Newfoundland, confer the powers of modification, which we are about to discuss. Under all these provisions it would undoubtedly be held, as it has been with regard to the Ontario Act, that no modifications are valid except those which are expressly permitted by the statute and are made in the prescribed manner (*c*). Since the declaration of the insured that the policy moneys are to be paid to the designated beneficiary is deemed to sever such moneys from his estate, (see sec. 1, ante), his subsequent directions, testamentary or otherwise cannot affect the disposition of the fund except within the limits fixed by the legislature (*d*).

12. Decisions under the Ontario Act of 47 Vict., c. 20, sec. 6.—The earliest provisions made in this province for variations of benefits or beneficiaries are found in 36 Vict., c. 19, sec. 3, (identical with Rev. Stat. Ont., 1877, c. 129, sec. 2), which empowers the insured person to allot the share of a beneficiary who dies before him to any other person, and to alter the shares and allotments of the money among the beneficiaries themselves. These were amended in sec. 6 of 47 Vict., c. 20, which appears as sec. 6 of the Rev. Stat. Ont., 1887 c. 136. Substantially their effect is as follows: "The insured, by an instrument in writing attached to or indorsed on or identifying the policy," may vary in apportionment previously made, so as to extend the benefits of the policy to the wife or children, or to one or more of these, although the prior declaration is restricted; may vary the apportionment of the insurance money; may from time to time alter the apportionment as he deems fit; and may by his will make or alter an apportionment of the insurance money.

Under this section, where one particular child had been designated as beneficiary, the settlor was held to be able by a subsequent indorsement to transfer or lir it the benefits of the policy in any manner or proportion he might deem advisable between all his children (*e*). So also he might, by his will, reduce

(*c*) As to the analogous situation (not within the scope of this article), in which the extent of the power to change the beneficiaries depends on the by-laws and constitution of the insuring society, see Bacon's Benefit Societies, sec. 306-310. That the method prescribed by these instruments must be strictly complied with, see the same treatise, sec. 307. The invalidity of an attempted substitution of a beneficiary outside the designated classes is the subject of the decisions in *Morgan* v. *Hunt* (1895) 26 Ont. R. 568; *Leadlay* v. *McGregor* (1896) 11 Man. 9. The necessity of a strict compliance with the rules of the society in regard to changes of beneficiaries is recognized in *Simmons* v. *Simmons* (1893) 24 Ont. R. 662; *Johnston* v. *Catholic Mutual* (1897) 24 Ont. App. 88.

(*d*) *Campbell* v. *Dunn* (1892) 22 Ont. R. 98.

(*e*) *Neilson* v. *Trusts Corp'n* (1894) 24 Ont. R. 317.

the share of one child and add the amount of the reduction to the share of another child (*d*). But he had no power to take away entirely the share of any single beneficiary by his will and bestow it upon another, an absolute revocation of the trust not being the same thing as a variation. In one case it was held that an endorsement in favour of a daughter on a policy which was issued by a benevolent society, and expressed to be payable to the "widow or orphans or personal representatives" of the assured, created a vested trust which would prevail against the provisions of a subsequent will bequeathing the proceeds of the policy to executors upon certain trusts (*e*). In another case, Armour, C.J., and Falconbridge, J., sitting as a Divisional Court, held that the effect of the Act of 51 Vict., c. 22, extending the provisions of R.S.O. 1887, c. 136, to beneficiary certificates issued by benevolent societies, was to modify the rules of such societies in so far as they were inconsistent with those provisions, and that a certificate issued by the United Order of Workingmen became a trust for the beneficiaries named in it, under sec. 5 of the earlier of those Acts, and ceased so long as the objects of the trust (here the children of the assured) survived to be under his control, except so far as is allowed by the provisions of the section under review. These did not permit him to revoke the certificate and replace it by one in favour of a second wife (*f*). So also it was laid down that, after having designated a daughter as a beneficiary, the insured could not revoke the direction for payment to her, and make a direction for payment to his wife alone (*g*).

13. Decisions under later Ontario Acts.—The practical futility of the distinction taken in the three cases last cited was sufficiently

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(*d*) *McIntyre* v. *Silcox* (1898) 29 Ont. R. 593.

(*e*) *Scott* v. *Scott* (1890) 20 Ont. R. 313, per Boyd, C.

(*f*) *Mingeaud* v. *Packer* (1891) 21 Ont. R. 267, reversing the judgment of Street, J. The judges of the Court of Appeal were equally divided in regard to the case (19 Ont. App. 290) Hagarty, C.J.O., and Burton, J.A., agreed with the Divisional Court, while Osler and Maclennan, JJ.A., were for restoring the judgment of Street, J., based on the theory that the rules of the society controlled the rights of the assured as to changing the beneficiary, and that these had not been complied with. The construction placed by Robertson, J., upon this case was that the will was held inoperative for the reason that the new certificate entirely ignored the beneficiaries under the first, and created a new object of the trust: *Re Cameron* (1892) 21 Ont. R. 634.

(*g*) *Nelson* v. *Trusts Corp'n.* (1894) 24 Ont. R. 517, following *Mingeaud* v. *Packer*, supra.

obvious, for there was nothing in the statute to prevent the insured from reducing the share of any beneficiary to a nominal amount. This consideration as well as others, induced the legislature to extend the power of variation still further by the amending Act of 53 Vict., c. 39.

By sec. 6 of the statute it is declared that the insured "may, by an instrument in writing attached to, or indorsed on, or identifying the policy by its number or otherwise, vary a policy or a declaration in apportionment previously made so as to restrict, or extend, transfer or limit the benefits of the policy to the wife alone, or the children, or to one or more of them" irrespective of the original scheme of distribution, and also apportion or alter the apportionment of the money; and that he may by his will "make or alter the apportionment."

Prior to the passage of this Act the testator took out two policies in Benefit societies, one payable to his wife, if she survived him, and, if not, to his children, the other payable to his wife and children. After the Act came into force he made a will bequeathing to his wife one-half of all his personal property during her life or widowhood. It was held that the effect of the will was to cut down one-half of the amount of the first policy to an estate for life leaving undisturbed the right of the wife to the other moiety which therefore went to her absolutely, while as to the second policy, the apportionment was changed from the original one, which would have given her one-sixth of the fund absolutely, so that she was now entitled to one-half, but only during life and widowhood (*a*). As the amended section made a clear distinction between what the insured may do by an "instrument in writing," and what he might do by will, it was held that he could not by his will declare that others than those for whose benefit he has declared the policy to be, should be entitled to the insurance money (*b*).

This distinction between a will and other writings was done away with by the following clause in the Act of 58 Vict., c. 34, sec. 12, which was subsequently embodied in 60 Vict., c. 39 (R.S.O. 1897), sec. 160, sub-sec. 1. "Whatever the assured may, under this section, do by an instrument in writing attached to, or indorsed on, or identifying the policy . . . by number or otherwise, he may also do by a will identifying the policy . . . by number or otherwise."

(*a*) *Re Cameron* (1892) 21 Ont. R. 634.

(*b*) *Re Grant* (1895) 26 Ont. R. 120, aff'd 26 Ont. R. (C.A.) 485, testator held not entitled to substitute his children for his wife the beneficiary of the policy.

In a recent case in the Court of Appeal it was remarked that the effect of the Ontario legislation, as a whole, is that there may be a re-distribution of the fund among those who are now styled "preferred," as opposed to "ordinary or beneficiaries," (see sec. 6, ante), but that it cannot be alienated from these preferred beneficiaries or disposed of to a stranger, except in cases where a beneficiary dies in the lifetime of the assured (*d*). (See sec. 15, post). A daughter-in-law of the assured, being an "ordinary beneficiary" only, may be deprived of her benefit by will (*e*).

14. Effect of other statutory provisions in regard to variation of trust.—For the statute of *New Brunswick*, see the Act of 58 Vict., c. 25, sec. 7.

For the provisions in force in *British Columbia*, see Rev. Stat. 1897, c. 104, sec. 8. Both these statutes are drawn in substantially the same terms as that of Ontario.

Quebec.—The provisions now in force are secs. 12, 13, of the Act of 41-42 Vict. (now printed as secs. 5586-5591 of the Civil Code).

The similar provisions of the Statute in *Manitoba* are found in the "Life Assurance Act" of that Province, Rev. Stat. 1891, secs. 8-13.

In both Provinces the powers of revocation and alteration are unlimited so long as the beneficiary of the substituted declaration belongs to the classes of persons who are within the purview of the Act.

In a case under the Quebec Act, the husband insured his life, the insurance money being expressed to be payable to his wife, should she survive him, or, failing her, for the benefit of her children, and afterwards executed a revoking instrument. In the first paragraph of this he did not mention his wife, merely stating that he desired to revoke the benefit conferred by the insurance upon his children generally, but in the second he declared his option that the insurance should be payable to a son named therein, and not to his wife. This was held to be a sufficient revocation under the statute (*a*).

By sec. 1 of the same Act "rights accrued" under the Dominion statute of 29 Vict., c. 17, the earliest of those dealing with insurance for the benefit of wives and children (see secs. 1 and 6, ante), were excepted

(*d*) *Fisher* v. *Fisher* (1898) 25 Ont.R. 108. The specific effect of sec. 159 (8) of Rev. Stat. Ont. 1897, c. 203, is to deprive the assured of the right of transferring the benefits to a stranger as long as there are any survivors of the classes of preferred beneficiaries. (See sec. 13, post).

(*e*) *Videau* v. *Westover* (1897) 29 Ont. R. 1.

(*a*) *Rees* v. *Hughes* (1894) 3 Que. Off. (Q.B.) 443.

from the operation of the provisions empowering the insured to revoke the benefits and make a reapportionment.

It was held in the case last cited that the rights acquired by a beneficiary designated under the provisions of the earlier Act are for two reasons not "accrued" within the meaning of this saving clause; first, because the original statute merely grants a permission or authorization which the law as it had previously stood, had not granted; secondly, because it was not proved that the beneficiary had not expressed his acceptance of the benefit, the consequence being that his rights were determined by Art. 1029 of the Quebec Civil Code which permits the revocation of a stipulation for the benefit of a third person, where the beneficiary has not signified his assent thereto applies to insurances for the benefit of a wife effected under the Act of 29 Vict., c. 17.

15. Rule where beneficiaries predecease the insured.—The statutes of all the Canadian Provinces, except those of Newfoundland and Nova Scotia, which in this, as in other respects, resemble the English Married Women's Property Acts of 1870 and 1882, make special provision for the contingency of the death of some or all the beneficiaries during the lifetime of the insured.

Ontario: By 33 Vict., c. 21, sec. 6 (R.S.O. 1877, c. 129, sec. 14), it was enacted simply that, subject to a declaration by the assured altering the allotment of the shares, the share of any beneficiary who should die before the assured was to be paid to the surviving beneficiaries, and, in default of any survivors, to his executors and administrators.

By 47 Vict. c. 20, (Rev. Stat. Ont. 1887, c. 136), secs. 8, 9, a marked distinction was made between a case in which an apportionment between the several beneficiaries had been made by an express declaration on the part of the assured, and a case in which he had not made any such apportionment. In the former case he was empowered to allot the share of the deceased beneficiary to the survivors or any of them, such share, in default of a new allotment, to become part of his estate at his death. In the latter case the share of the deceased beneficiary was to be divided equally among the surviving beneficiaries, and only to revert to the assured when they all died before him.

The provisions on this subject now in force are those in 60 Vict., c. 36 (R.S.O. 1897, c. 203), secs. 151 (6) and 159 (8). Their combined effect seems to be that in default of a reapportionment by the insured the fund is to be divided equally among the surviving beneficiaries, irrespective of the question whether an apportionment had originally been made or not, and that a reversion to the estate of the insured will in no case take place unless he survives all the beneficiaries.

In *New Brunswick* (58 Vict., c. 25, secs. 9, 10) and *British Columbia* (Rev. Stat. Ont., c. 104, secs. 10, 11) the provisions in force are the same as those of the Ontario Act of 47 Vict., c. 20, secs. 8, 9; (see above.)

The devolution or disposition of the shares of deceased beneficiaries is regulated exclusively by these sections. The power of making or altering an apportionment by will, which is conferred by the general provisions of the sections reviewed above, has no application to such cases (*a*).

Quebec: Under the Act of 33 Vict., c. 21, sec. 6, the policy moneys were, in the event of the beneficiaries dying before the insured, to be paid to the survivors, and, if they also died, reverted to the estate of the insured, after which he might make a new declaration for the benefit of any future wife or children.

In default of an appropriation under these sections to a second wife, a bequest to a child of the first marriage was held to be good (*b*).

By 41-42 Vict., c. 13, secs. 14, 15 (Que. Civ. Code, secs. 5592-93), the benefit of the policy reverts to the insured when the beneficiary predeceases him, and he then has the right to deal with the fund as if the insurance had been effected for his own benefit.

When a policy has, by virtue of these sections, reverted to the insured through the death of his wife, he will be presumed to have known that such reversion has occurred, and that he can deal with it as if it had been effected for his own benefit. Hence, where he has bequeathed the insurance money to a child, the fact that he continued to pay the premiums on the policy, after marrying a second time, will not be construed as an appropriation of the policy in favour of his second wife. The payment of the premiums under such circumstances is equally consistent with an intention to make the bequest which was actually made (*c*).

Manitoba: The Rev. Stat. of 1891, c. 88, sec. 11, follows the Quebec Act.

16. Where a wife, after being designated as beneficiary, is divorced, the trust fund reverts to the insured, and he may dispose of it as he pleases (*a*)

(*a*) *McIntyre* v. *Silcox* (1898) 29 Ont. R. 593.

(*b*) *In re Ætna L. Ins. Co.* (1892) 2 Que. Off. (S.C.) 392.

(*c*) *In re Ætna L. Ins. Co.* (1892) 2 Que. Off. (S.C.) 392.

(*a*) *Hart* v. *Tudor* (1892) 2 Que. Off. (S.C.) 534.

IV. CREATION AND MODIFICATION OF TRUSTS UNDER THE ENGLISH CUSTOMS ANNUITY ACT.

17. Nature and object of the fund generally.—This fund was established by the Act of 56 Geo. 3, c. 73. Its general object was to accumulate by the contributions of persons employed in the Customs House Department a fund which, upon the death of the contributor, should be available for the support of his widow, children, or relatives. The rules made by the directors from time to time were declared to have, after ratification by the subscribers and a judge of one of the Superior Courts of common law, the same force as if enacted in the statute itself (*a*). By sec. 9 of the Act the Directors were empowered to admit any person not a relative of a subscriber to be his nominee, and such nominee was to have the same interest in the fund as if he had been a relative.

It is sufficiently obvious that the establishment of a fund to be disposed of in the manner prescribed by the statute and the rules summarized in note (*a*) created as between the directors and the subscribers relations very closely resembling those which exist between benevolent societies of the modern tpye and their members (*c*). Indeed it can scarcely be doubted that the lines upon which these societies were modelled were originally suggested by the provisions of the English Act and the rules framed under it. For this reason the decisions respecting the fund are of general pertinency in the present connection.

(*a*) These rules provided substantially that the fund should be raised by subscriptions on the principle of life insurance, and be for the benefit of widows, children, relatives, and nominees of the subscribers; that the admission of a nominee by the directors should take place in the life-time of a subscriber; that the capital money forthcoming at a subscriber's death should, subject to certain regulations, be appropriated according to the directions contained in his will, or in any instrument deposited with the directors in the manner prescribed, that the widow's share should not be less than a certain proportion of the money, and that the remainder should be applied, according to the subscriber's directions, for the benefit of his widow, children, blood relations, or nominees who had been duly admitted by the directors; that, if an equivalent provision, as specified, had been made for the widow, the whole money should be subject to the directions of the subscriber in favour of his widow, children, blood relations, or nominees, as aforesaid; that if there was no widow, the whole capital should be subject to the directions of the subscriber as aforesaid; that, if a subscriber died leaving issue and without having directed the application of the capital, it should go to his children and the issue of deceased's children, and, if none, to his next of kin.

(*c*) The scope and design of the contracts entered into with benevolent societies is to enable the subscriber to designate the person for whose benefit the insurance is effected. *Johnston* v. *Catholic Mutual* (1897) 24 Ont. App. 88, Hagarty, C.J.O.

18. Decisions under the Act.—According to an unreported decision of the Court of Exchequer in 1844, a policy effected under the Act creates a particular species of property, limited as to the persons who were to enjoy it, but to a certain extent subject to the control of the purchaser (*a*). The fund is not the property of the subscriber, who has merely a right to dispose of it in certain ways (*b*). The principle of the Act is to allow the subscriber to dispose absolutely, and as he thinks fit, of two-thirds of the capital if he had a wife and children. If he does not dispose of it, it goes according to the directions contained in his will, that is, it remains his absolute property (*c*). Accordingly, the essence of the engagement entered into with the Directors is that "on certain payments being made by him during his life, he acquires a right to appoint a sum of money on his death, either for the benefit of his widow, if he had one, or if not, of his relatives or nominees, if accepted by the Directors" (*d*). Hence the claims of a subscriber, who dies leaving children but no widow, will prevail against the claims of a stranger in blood who has been named as a legatee in his will, but has not been accepted by the Directors as a nominee prior to the testator's death (*e*). But the relatives who, in default of an appointment or will, would be entitled to the share remaining after the widow of the subscriber has been provided for, are excluded from participation in the fund, where he has, by an instrument that is attested, as required by the rules, and declares the trust irrevocable, instructed the Directors to pay certain persons, and they have been accepted as nominees (*f*).

V. APPLICATION OF THE TRUST FUND AFTER THE SETTLOR'S DEATH.

19. Apportionment of the proceeds where none is specifically made by the settlor.—In a case under the English Act of 1870, in which the policy was for the benefit of a wife and children, Vice-Chancellor Malins at first decided that the money should be

(*a*) *Re Rowsell*, cited in *Attorney-General* v. *Abdy* (1862) 1 H. & C. 266 (p. 297).

(*b*) *Urquhart* v. *Butterfield* (1887) 37 Ch. D. (C.A.) 357, affirming on this point S.C. 36, Ch. D. 55.

(*c*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274.

(*d*) *Attorney-General* v. *Abdy* (1862) 1 H. & C. 266, per Bramwell, B. p. 299.

(*e*) *In re Phillips' Insurance* (C.A. 1882) 23 Ch. D. 235, reversing the judgment of Bacon, V.C.

(*f*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274.

settled on the widow for life, with remainder to her children (*a*). On the second hearing, he considered that the provision which requires that the money is to be held "in trust for the wife for her separate use," meant merely that it was to be so held as against her husband, and that, when she became a widow, she might take a part of the capital with the sanction of the Court. The applicant being in poor circumstances, he allowed the policy moneys to be distributed as in case of intestacy. Some years afterwards, Chitty, J., also intimated his opinion that, under such a policy for the benefit of wife and children, the widow took the fund for life, with remainder to her children; but, as the insured in the case was a widower at his death, it was unnecessary to decide the point, and a trustee was appointed to hold for the children as joint tenants (*b*). The question was again directly presented in *Seyton* v. *Satterthwaite* (*c*), and elaborately discussed by North, J., who held that a policy for the benefit of the wife and children of the assured, whether construed independently of or in combination with the Act, amounts to a settlement on the wife and children by creating vested interests as joint tenants in such of them as are living at the settlor's death (*d*). So far as the children are concerned, it was regarded as immaterial whether they were born before or after the policy was executed.

The ground was taken that either a trust "for the benefit of my wife and our children as joint tenants," or a trust "for the benefit of my wife for life, with remainder to our children," would be equally within the Act, and the learned judge said he could not see how the Act could supply reasons for preferring one construction rather than another. He thought that the fact emphasized by Chitty, J. (*In re Adam's Policy Trusts*, supra), that the benefit to the wife was declared by the Act to be for her "separate use," did not throw any light upon the question, since if these words were added to each of the phrases mentioned, their construction would not be in the least altered.

(*a*) *In re Mellor's Policy Trusts* (1877) 6 Ch. D. 127; 7 Ch. D. 200.

(*b*) *In re Adams' Policy Trusts* (1883) 23 Ch. D. 525.

(*c*) 34 Ch. D. 511. The judgments of Vice-Chancellor Malins were examined and explained, but were thought to have been unsatisfactorily reported.

(*d*) Compare the ruling with that under a will providing that all the testators' real and personal estate should go to his wife "for the use and benefit of herself and all my children" the wife and children took as joint tenants. *Newell* v. *Newell* (1872) 7 Ch. App. 253, rev'g 12 Eq. 432.

In a still later case (*e*) this decision was acquiesced in by Chitty, J., who retracted the opinion for which, as noted above, he had expressed a preference.

In *Ontario* by R.S.O. 1887, c. 136, sec. 7(1), and R.S.O. 1897, c. 203, sec. 159 (7), it is expressly provided that, in the absence of a specific apportionment of the fund among the beneficiaries, they take in equal shares. To the same effect is the legislation in *British Columbia:* Rev. Stat. 1897, c. 104, sec. 9; in *New Brunswick:* 58 Vict., c. 25, sec. 8; in *Quebec:* 41-42 Vict., c. 13, sec. 9; Civ. Code, sec. 5587; in *Manitoba:* Rev. Stat. 1891, c. 88, sec. 10.

20. The interest of each beneficiary in the trust fund is several, and each one may sue the company for his share of the money without joining the other beneficiaries as parties (*a*).

21. Beneficiary's interest in the fund contingent merely—It was held in a leading Ontario case that, during the lifetime of the assured, the beneficiary of a policy taken out under sec. 4 of the Canadian Act of 1865, c. 17, had no interest to bequeath, and that, if he died before the assured, a child whom he declared his legatee had no claim upon the fund either as against the creditors of the assured or against those who are entitled to his personal estate in case of intestacy (*a*). The contention of the plaintiff, the daughter of the beneficiary named, was that the case was to be considered as if an insurance had been effected by the father and assigned to or for the benefit of his daughter, thereby giving her a vested interest. But the court rejected this view, holding that her interest was contingent upon her surviving the assured. Osler, J.A., said:

(*e*) *In re Davies' Policy Trusts* [1892] 1 Ch. 90.

(*a*) *Campbell* v. *National Life &c. Co.* (1873) 34 U.C.Q.B. 35. See however *Seyton* v. *Satterthwaite*, cited in the last section.

(*a*) *Wickstead* v. *Munro* (1885) 10 Ont. R. 283, affirmed (1886) 13 Ont. App. 486. The contract here was in substance to pay the daughter of the assured the specified sum within a certain time after the death of the assured. She died before her father, leaving a child to whom she bequeathed her interest. Prior to her marriage her father married a second time, and died intestate leaving a widow and one child, and without making any other disposition of the policy. Held, that the widow was entitled to the policy money. Ferguson, J., in the lower court also thought that the meaning of the section under review was that a child, in order to take the benefit must survive the insured whether he or she was named in the policy or not. But this point was not discussed by the Court of Appeal. The effect of this case, according to McLennan, J.A., was that a declaration under the Act in favour of wife or child was not a complete disposition of the policy, and that there was a contingent reversion in the settlor, in the event of his surviving the wife or child. *Fisher* v. *Fisher* (1898) 25 Ont. App. 108 (p. 116).

"It is manifest that any other construction would go far to defeat the object of the Act, which, I take it, was to make up for the individuals or classes specified in the first section a provision at the death of the insured. It can have been no part of the design of the legislature to enable a man to vest in his wife and children property which they could dispose of and release during his lifetime, and which, though inaccessible to his creditors, would thus, during his lifetime, be available to theirs. The class of persons for whose benefit the insurance may be effected is strictly defined, but if they acquire interests transmissible during the insured's lifetime, he may continue to withdraw his property from his creditors for the benefit of his grandchildren, or other persons not within the Act." The learned judge thought that his construction was supported by the language of sec. 4, as it is provided that where no appointment is made by the insured in the policy, all parties interested in the insurance shall be held to share equally therein—a phase which could scarcely embrace the children, devisees, or other representatives of the beneficiaries—and that, where the insurance is for the benefit of children generally, without specifying the names, the word "children" shall mean all the children of the insured living at the time of his death.

Burton, J.A., said: "The provisions of this statute interfere to a great extent with the rights of creditors, and look to a provision for the widow and children of the assured, so secured as to be not only free from his control, but also from the claims of his creditors. . . . I am not at all disputing that he could have assigned the policy absolutely to her (the designated beneficiary), or have provided in the event of her death for its going over for the benefit of other parties named, but what we are dealing with is a policy under this statute, and I think its object and intent were to enable the husband or father to interfere to a certain extent with the rights of creditors so as to make provision either for the wife or children or both, to take effect after the death of the assured; and that this object would be defeated if the wife or child could assign their interest in the policy as an ordinary chose in action, and it would open the door to the practising of frauds by enabling the beneficiary to assign the policies and pay over the proceeds to the assured, thus abstracting, it may be, large sums from the creditors and defeating the object the legislature had in view, when permitting the money to be used for this humane object."

In a later case, the effect of this ruling was considered by Rose, J., with reference to the provisions in secs. 5, 6, of R.S.O. 1887, c. 136, in a case where the beneficiary had survived the assured. The conclusion he arrived at was that, although the interest of a wife in a policy was her separate estate, and might be disposed of by her without her husband's consent, the assignee would in such a case take subject to the possible exercise of the powers conferred by sec. 6 of the Act (see III, ante). The fact that

sec. 7 provided a mode by which a husband and wife could assign a policy, after which the powers conferred by sec. 6 could not subsequently be exercised, did not imply that the wife may not assign her interest otherwise than under that section (*b*).

Under sec. 5604 of the Quebec Civil Code, declaring the policies effected under the statute are not assignable either by the insured or the beneficiary, a wife for whose benefit her husband's life has been insured is entitled to claim the insurance money at his death in spite of her having made an assignment of her interests during his lifetime (*a*).

22. "Legal heirs," who are.—Under a certificate payable to the "legal heirs" of a member of a benevolent society, who has married twice, leaving two children by his first wife, these take the money to the exclusion of the second wife who survives him (*a*).

23. Return of premiums to beneficiary found not to be entitled to the insurance moneys.—Where the assured makes a fresh designation of beneficiary which is invalid as against the prior beneficiary, any premiums paid by the second beneficiary after the alteration must be refunded to him when the proceeds of the policy are paid to the party entitled thereto (*a*).

24. Application of the proceeds where the assured person is murdered by the beneficiary.—In the recent case of *Cleaver* v. *Mutual &c., Association* (*a*), the defence to an action by the executors of Mr. Maybrick, who was murdered by his wife, the beneficiary of a policy effected with the defendants, was that public policy forbade the maintenance of an action under such circumstances. The Court of Appeal, while fully recognizing the general principle that "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person," (Fry,

(*b*) *Graham* v. *Canada &c. Co.* (1894) 24 Ont. R. 607. *Wicksteed* v. *Munro* was distinguished on the ground that the beneficiary there had predeceased the assured.

(*a*) *Cusson* v. *Faucher* (1892) 3 Que. Off. (S.C.) 265.

(*a*) *Mearns* v. *Ancient Order of U. W.* (1892) 24 Ont. R. 34, the opinion being expressed that there was nothing inconsistent with this view in the provisions of Rev. Stat. Ont., ch. 136.

(*a*) *Fisher* v. *Fisher* (1898) 25 Ont. App. 108.

(*a*) [1892] 1 Q.B. 147.

L.J.), declared that it only constituted a bar to the recovery of the insurance money by the guilty beneficiary herself or anyone who claimed through her. The true legal situation, therefore, was that the trust had by the act of the cestui que trust become incapable of enforcement, the consequence being that, both under the general principles of equity jurisprudence, and by implication from the Act of 1870 (see sec. 6, ante), which provided that the moneys payable under it, should not, so long as any object of the trust remained unperformed, form part of the estate of the insured, a resulting trust as to the insurance money arose in favour of his estate. Whatever rights the children, whom the executors represented, had in the money, were derived from their father, not from their mother, and not in any way affected by her crime.

"The crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights. In my opinion, therefore, public policy prevents Florence Maybrick from asserting any title as cestui qui trust to this fund, and thereby brings into operation the resulting trust in favour of the estate of the insured, and so enables the executors to maintain an action as plaintiffs without any taint derived from the crime committed by Florence Maybrick." (Fry, L.J.). "The effect of the section of the Act is to create a resulting trust in favour of the husband's estate which takes effect when, by reason of the crime of the wife, the trust in her favour becomes incapable of being performed in consequence of the rule of public policy." (Lopes, L.J.).

25. Right of appointment, how far within the Succession Duty Act.—A testamentary gift of the sum over which a subscriber to the fund obtains a power of appointment for the benefit of his relatives, or his nominees', if approved by the directors, is a disposition of property, by reason whereof a person has become beneficially entitled to property upon the death of another person, so as to confer a succession within the meaning of the English Succession Duty Act of 1854 (*a*). On the other hand, where there has been an absolute assignment or mortgage of that sum during the

(*a*) *Attorney-General* v. *Abdy* (1862) 1 H. & C. 266; [ruling as to the Customs' Annuity Fund: See IV., ante]. The 17th section of the Act declared that "any disposition or devolution of moneys payable under such [a life insurance] policy, if otherwise such as in itself to create a succession, shall be deemed to confer a succession." The court held that the transaction under review did not differ from a case of an ordinary insurance policy, although only a part of the fund was supplied by the subscriber, and he had only a limited power of appointment over the sum assured.

subscribers' lifetime, the assignees are not liable for the succession duty (*b*).

VI. FIDUCIARY CONTROL OF THE TRUST FUND AFTER THE SETTLOR'S DEATH.

26. Generally.—Under the ordinary principles of equity jurisprudence it is clear that the fact of a settlement's being made under a statute which, like the English Married Women's Property Act of 1870, (See sec. 6, ante), contains no express provision as to the appointment of trustees of the policy moneys, will not preclude an arrangement by which these moneys are to be subject for a specified period to the control of a trustee, instead of being paid over to the beneficiary himself. That such an arrangement is also valid under the English Customs Annuity Act (sec. 14, 15, ante), which is also without any such provision, is now a well established doctrine in England, the only requirement being that the nominee should be duly accepted by the directors as the rules provide (*a*).

Provision respecting the appointment of trustees of the policy moneys by the insured have now been enacted in all the jurisdictions with which we are concerned.

England : Married Women's Property Act 1882, sec. 11.

Nova Scotia : Rev. Stat. 1884, c. 94, sec. 12.

Newfoundland : Consol. Stat. 1892, c. 81, sec. 11.

Ontario : Rev. Stat. Ont. 1897, c. 203, sec. 155, (embodying the similar provisions of the earlier Acts).

New Brunswick : 58 Vict., c. 25, sec. 12.

British Columbia : Rev. Stat. 1897, c. 104, sec. 15.

Quebec : 41-42 Vict., c. 13, sec. 16 (Crim. Code sec. 5594).

Manitoba : Rev. Stat. 1891, c. 88, sec. 16.

(*b*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274.

(*a*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274; *Urquhart* v. *Butterfield* (1887) 37 Ch. D. (C.A.) 357; rev'g S.C. 36 Ch. D. 55. In the latter case a subscriber, before he became insane, made a will, while in Scotland, giving his property to a certain legatee, but made no allusion to his interest in the fund. A curator appointed by the Scotch Court of Session procured from it an order appointing him nominee of the subscriber's interest in the fund "for behalf of the legatees under his will," and the directors admitted him in these terms, and afterwards received several annual payments from the lunatic's estate. In the course of the case it was admitted by the directors that this order had the same effect as if the subscriber, being sane, had made the nomination. Held, that the order was a sufficient nomination, and the directors could not refuse to hand over the fund to the curator, as there was a sufficient direction by an instrument, submitted to and approved by them, declaring how the application was to be made.

The provision in the English Act has been held not to be retrospective, this conclusion being based both upon the language used in the section itself and also upon the consideration that a prospective operation could not be ascribed to the provision consistently with the terms of sec. 22 of the Act, declaring that it should not affect any act done or right acquired under the Act of 1870 (*b*). Hence if no trustee has been appointed under a policy taken out prior to its enactment, the result is, not that the policy will vest in the insured and his legal personal representatives, but that upon application to the court a trustee will be appointed, excluding the husband and any person claiming under him from any control over the policy money (*c*).

Where there is no nomination of any trustee under this Act, the insertion of the name of the wife in a policy for her benefit will not be treated as the nomination of her as trustee for herself. The provision framed to meet that contingency takes effect and vests the policy in the assured and his personal representatives (*d*).

27. Security when required from trustees.—Construing the Ontario Act of 45 Vict., c. 20, (R.S.O. 1887, c. 136), sec. 12, the courts have held that a trustee appointed by the court, in default of a designation in the will of the assured, must give security (*a*), and that the clause relating to the payment of the insurance money to a guardian, contemplates a guardian who has given security, and therefore does not justify payment to a testamentary guardian (*b*), but that money payable to infants may, where no trustee or guardian has been appointed, be paid to the executors of the insured without security being given by them (*c*).

(*b*) *Turnbull* v. *Turnbull* [1897] 2 Ch. 415.

(*c*) *Turnbull* v. *Turnbull* [1897] 2 Ch. 415, following *In re Adam's Policy Trusts* (1883) 23 Ch. D. 525; 48 L.T.N.S. 727, (see the latter report more especially), where it was held that a petition by a widow to enforce a trust under a policy taken out in 1874, and expressed to be for her benefit under the Married Women's Property Act of 1870 is properly entitled only in the matter of the Act of 1870, and need not be entitled also in the matter of the Act of 1882, and disapproving *In re Soutar's Policy Trust* (1884) 26 Ch. D. 236. To the same effect see *In re Kuyper's Policy Trusts* (1899) 1 Ch. 38.

(*d*) *Cleaver* v. *Mutual &c Assoc'n.* (1892) 1 Q.B. 147, per Fry, L.J., (p. 157). As to the disposition of the policy money where the policy provides that it shall be payable as directed by the will of the insured, and the executors appointed by the will renounce, see *Merchants Bank* v. *Monteith* (1885) 10 P.R. 588.

(*a*) *Re Thin* (1884) 10 P.R. 490.

(*b*) *Campbell* v. *Dunn* (1892) 22 Ont. R. 98.

(*c*) *Lodds* v. *Ancient O.U.W.* (1894) 25 Ont. R. 570.

This provision now appears is sec. 155 (2) of the Act of 60 Vict., c. 36 (R.S.O. 1897, c. 203). Since the passage of this Act it has been held to exclude the application of the ordinary rules of law, so far as they are inconsistent with it. A tutrix appointed in the Province of Quebec is therefore not entitled to receive the shares unless she duly qualifies under the provisions (*d*).

28. Discretion of the trustees as to the disposition of the policy moneys. Under the provisions of R.S.O. 1887, c. 136, ss. 11, 13, it is held that the insured can by his will give directions as to the investment of the fund during minority, but that these directions are not to control the discretion of the lawful custodian of the fund and the beneficiary, in case the income is needed for maintenance and education, or the corpus is needed for advancement (*a*).

29. Designation of executors as payees of the policy moneys, result of.—The only cases, it seems, in which a court would be justified in overriding the explicitly stated desire of a settlor of an ordinary policy of life insurance, that one whom he has chosen as his executor should also act as trustee of the policy moneys, would be those in which he is for some special reason an improper person to administer the trust, as where his duties as executor and as trustee would be to some extent antagonistic. Thus it has been held that, where the insured has undertaken, contrary to the provisions of the statute, to derogate by his will from the vested rights of a beneficiary previously designated, and to bequeath the proceeds of the policy to executors upon certain trusts, the executors will not be allowed to act as trustees of the fund, inasmuch as the trusts under the will are repugnant to the absolute rights of the daughter (*a*).

But it would seem that a second indorsement on an endowment certificate by which it is simply declared that the executors of the insured are to be the payees of the trust fund cannot be construed as an expression of his desire that they are to take as trustees for beneficiaries previously designated. Such an indorsement will be

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(*d*) *Re Berryman* (1897) 17 P.R. 573. There are similar provisions in the other provinces, which have adopted the Ontario Act; *British Columbia*; Rev. Stat. 1897 sec. 16 (1); *New Brunswick*; 58 Vict., c. 25, sec. 14.

(*a*) *Campbell* v. *Dunn* (1892) 22 Ont. R. 98, per Boyd C.

(*a*) *Scott* v. *Scott* (1890) 20 Ont. R. 313. In this instance the guardian of the beneficiary, her mother, was appointed trustee by Chancellor Boyd. Compare *Campbell* v. *Dunn*, supra.

treated as an attempt to deal with the money as if it belonged to the estate of the insured, and therefore an invalid disposition (*b*).

Another case in which a designation of executors as payees of the trust fund was pronounced invalid, but on different grounds, was *Johnston* v. *Catholic Mutual* (*c*). Osler, J.A. with whom Burton, J.A. agreed, was of opinion that to uphold the appointment of an executor as beneficiary, so that creditors and legatees might treat the fund as assets in his hands for the payment of debts, would be inconsistent with sec. 11 (*d*) of the Benevolent Societies Act (R.S.O. 172), the object of which was to provide for the family and relatives of members, not for their creditors. He laid it down as a general rule that, where no legal appointment of a beneficiary has been made or where the designation is imperfect or inoperative, the fund does not form part of the member's estate by becoming assets for payment of his debts or subject to disposition by his will. It must be paid to the persons specified by the rules of the society, or, in case those rules so provide, revert to the general beneficiary fund. Burton, J.A. considered that even an express direction by the member that, failing the beneficiary designated and any next of kin, the fund should be for the payment of debts, would have been inoperative, as the rules provided that, in such a case, the money would revert to the fund.

(*b*) In *Neilson* v. *Trusts Corp'n.* (1894) 24 Ont. R. 517, the deceased had first designated his children as beneficiaries of such a certificate, and then, after a second marriage, had revoked that designation and substituted his wife as sole beneficiary. Upon her death he made another indorsement, directing payment to his executors and then died himself, bequeathing his estate to his children share and share alike. It was argued by counsel for the executors that, under the latest indorsement, they would take the fund merely as trustees for the legatees. This contention did not prevail, MacMahon, J., holding that the result of giving effect to the indorsement would be to throw the money into the estate of the deceased, and thus subject it to the payment of his debts in contravention of the policy of the statute.

(*c*) 24 Ont. App. 88, Maclennan, J.A., diss.

(*d*) By this section it is provided that "when under the rules of a society money becomes payable to or for the use or benefit of a member, such money shall be free from all claims by creditors, and when, on the death of a member of a society, any sum of money becomes payable under the rules, the same shall be paid to the person entitled under the rules, or shall be applied by the society as may be provided by such rules, and such money shall be, to the extent of $2000, free from all claims by the personal representative or creditors of the deceased.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

DOMICIL — INTERNATIONAL LAW — MARRIAGE — MATRIMONIAL DOMICIL — CHANGE OF DOMICIL—MOVABLE GOODS—FRENCH LAW—COMMUNITY OF GOODS.

DeNicols v. *Curlier* (1900) A.C. 21, is a case to which we have twice before referred, (see ante, vol. 34, pp. 374, 655). It is one which turns upon a question of international law, and seems to have been one of some difficulty. The facts were simple, a Frenchman and French woman were married in France without any marriage contract, so that according to the French law their rights inter se as to property were subject to the French law of community of goods. They subsequently went to England and became domiciled there, and the husband died there having amassed a very large fortune which he purported to dispose of by his will, and the question simply was, whether the wife's right to one-half the movable property under the French law of community of goods, was entitled to prevail against the dispositions made by the testator's will. Kekewich, J, held it was, (1898) 1 Ch. 403, the Court of Appeal reversed his decision, (1898) 2 Ch. 60, and now the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, Shand, and Brampton) have reversed the judgment of the Court of Appeal, and restored the judgment of Kekewich, J. The principal difficulty in the case was occasioned by a decision of the House of Lords in *Lashley* v. *Hogg*, 4 Paton 581, in which it had been determined that where a Scotchman domiciled in England married an English lady without a settlement, and subsequently removed to Scotland, and was domiciled there until his death, his estate became subject to the Scotch law of community in favour of his children, but this case their Lordships now consider did not conclude the present case, and it is distinguished; that case it is true lays down the principle that a change of domicil by the husband, will have the effect of changing the wife's rights in his *unsettled* movable property, so as to make the law of the place of domicil applicable thereto. Their lordships in the present case, however, conclude that the French marriage involved a quasi settlement of

property then or thereafter to be acquired by the spouses, on the principle of community of goods, and therefore it was not a case of marriage without a settlement as in *Lashley* v. *Hogg*.

ARBITRATION, AGREEMENT FOR—ACTION, STAYING PROCEEDINGS IN—MASTER AND SERVANT—WRONGFUL DISMISSAL—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49), S. 4—(R.S.O. C. 62, S. 6).

Parry v. *Liverpool Malt Co.* (1900) 1 Q.B. 339, was an action brought by the plaintiff to recover damages for an alleged wrongful dismissal from the defendants' employment. The defendants applied under the Arbitration Act to stay the proceedings, on the ground that the parties had agreed to refer the question in difference to arbitration. This contract for employment provided that "every dispute arising in connection with the contract" should be referred to arbitration, pursuant to the arbitration clause in the by-laws of the Liverpool Corn Trade Association. The arbitration clauses in those by-laws provided that "all disputes arising out of transactions connected with the trade" should be referred to arbitrators. And the plaintiff contended that the agreement for arbitration was therefore limited to transactions connected with the trade, and that his claim for damages for wrongful dismissal was not within the agreement; but the Court of Appeal (Lindley, M.R., and Romer, L.J.), in overruling Phillimore, J., who refused the application, decided that the proper construction of the agreement required that, for the words "arising out of transactions connected with the trade" in the by-laws, the words "arising in connection with this agreement" should be substituted. The Court of Appeal also held that the dismissal of the plaintiff did not amount to a refusal on the part of the defendants to arbitrate the question whether such dismissal was wrongful.

LANDLORD AND TENANT—PAROL ACCEPTANCE OF NEW TENANCY—SURRENDER BY OPERATION OF LAW—ESTOPPEL.

Fenner v. *Blake* (1900) 1 Q.B. 426, was an action of ejectment. The facts were simple: The defendant was tenant of the premises in question from year to year, commencing from 25th March. In December, 1898, being desirous of surrendering his tenancy at an earlier date than the following March, he entered into an oral agreement to surrender the premises at the following June. On the faith of this agreement, the plaintiff sold the premises with a

right of possession in June. The defendant in June refused to give up possession. Channell and Bucknill, JJ., affirmed the judgment of the County Court in favour of the plaintiff, on two grounds—(1) that the acceptance of a new tenancy amounted in law to a surrender of the tenancy from year to year, and (2) that the defendant, having by his conduct induced the plaintiff to sell the premises on the faith that the purchaser would be entitled to possession in June, was now estopped from denying that his tenancy had terminated. An interesting discussion of the principles involved in this case may be found in the recent issues of the *Eng. Law Times Journal*, pp. 458, 510.

SOLICITOR—COSTS BETWEEN PARTY AND PARTY—SOLICITOR EMPLOYED AT A SALARY.

Henderson v. *Merthyr Tydfil* (1900) 1 Q.B. 434, is a case in which a Divisional Court (Channell and Bucknill, JJ.) arrived at a somewhat different conclusion to that reached by the Ontario Courts in *Jarvis* v. *The Great-Western Ry. Co.*, 8 C.P. 280, and *Stevenson* v. *Kingston*, 31 C.P. 333. In this case the defendants, a municipal body, recovered a judgment against the plaintiff for costs of defence. It appeared that the defendants' solicitor was employed by the defendants at a salary of £400 per annum, inter alia, to prosecute and defend all legal proceedings on their behalf, and in addition to his salary the defendants were to pay him all out-of-pocket expenses. On the taxation of the defendants' costs the taxing officer disallowed all costs except actual out-of-pocket expenses. On appeal, this was held to be wrong, the Court (Channell and Bucknill, JJ.) being of opinion that some proportion of the £400—though what proportion they do not attempt to define—was paid in respect of the solicitor's costs, and was properly allowable; and that the onus of showing that the ordinary taxed costs would be more than an indemnity to the defendants was on the plaintiff; and, in the absence of proof to the contrary, the taxing officer should assume that the proper taxable fees was the proportion of the £400 salary properly attributable to this action.

ADMINISTRATION—LACHES—PROCEEDINGS TO COMPEL REFUNDING OF ESTATE, AFTER ADMINISTRATION BY COURT.

Mohan v. *Broughton* (1900) P. 56, was an action by the plaintiff in the Probate Court to revoke a grant of administration

and to obtain a grant to herself, on the ground that the previous grant had been made to a person who was not really next of kin of the deceased. The case was tried before Barnes, J., and his judgment, dismissing the action (1899) P. 211, was noted ante, vol. 35, p. 674. The Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) held that the action was not maintainable, because the plaintiff's object (viz., to obtain a refund of the estate) might be attained without revoking the letters of administration, by bringing an action for the purpose of following the assets into the hands of the persons who had wrongly received them; and, also, on the ground that the plaintiff was barred by laches and acquiescence, the distribution having taken place after the plaintiff had notice of the proceedings.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C.] JACKSON *v.* GARDINER. [March 31.

Judgment—Default of defence—Ex parte application—Defence filed after default note—Motion to set aside judgment—Costs—Rules 263, 358, 568.

A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 568, a motion for judgment upon the statement of claim is made ex parte, and the fact of the defence having been filed is brought to the knowledge of the judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular.

In this case, judgment having been granted ex parte, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted.

E. Taylour English, for defendant. *J. H. Moss*, for plaintiff.

Meredith, C.J., MacMahon, J.] [April 2.

YOUNG *v.* DOMINION CONSTRUCTION CO.

Writ of summons—Substituted service—Foreign corporation—Rules 146, 167—Waiver—Appearance.

The order of BOYD, C., ante 240, setting aside an order for substituted service, was affirmed on appeal.

The Court declined to consider the question whether the defendants had waived proper service by entering a conditional appearance, there having been no evidence before the Chancellor that an appearance had been entered, and he having refused to consider it.

A. M. Lewis, for plaintiff. *D'Arcy Tate* for defendants.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] BLANCHARD *v.* MUIR. [March 10.

Statute of Limitations — Transcript of judgment — County Courts Act, R.S.M. c. 33, s. 193—Real Property Limitation Act, R.S.M. c. 89, s. 24.

Held, following *Jay* v. *Johnstone*, (1893) 1 Q.B. 25, and *McKenzie* v. *Fletcher*, 11 M.R., 544, that section 24 of the Real Property Limitation Act, R.S.M. c. 89, applies to any judgment whether charged on land or not, and that no proceedings can be taken to enforce a judgment after the lapse of ten years from the date of its recovery; also that the filing of a transcript of a County Court judgment in the Queen's Bench under section 193 of the County Courts Act, R.S.M. c. 33, since repealed, had not so far the effect of making the same a new judgment as to give a new point of time for the running of the statute.

Although the filing of such transcript made the judgment a judgment of the Queen's Bench, and all proceedings might "be thereupon taken and had as on any other judgment of said last mentioned Court," there was no real further adjudication, as no notice to the debtor was necessary, and, if such a proceeding had the effect of giving a fresh point of departure of the period of limitation, the judgment by being transferred under said statute from one County Court to another might be kept alive for an unlimited

time without the knowldge of the judgment debtor, and the judgment creditor might thereby elude and defeat the provision of the Statute of Limitations.

Elliott, for plaintiff. *Aikins*, Q.C., and *Nason*, for defendant.

Dubuc, J.] [March 21.

NORTH OF SCOTLAND MORTGAGE CO. *v.* THOMPSON.

Real Property Act, R.S.M. c. 133, s. 143 —Caveat—Address and description of caveator—Signature of caveat by company—Foreign corporation claiming interest in land.

Petition under the Real Property Act:

Held—1. In case the caveator is an incorporated company, it is sufficient to state the full name of the company, although section 143 of the Real Property Act, R.S.M. c. 133, says that "Every caveat filed with the District Registrar shall state the name and addition of the person by whom or on whose behalf the same is filed." *Shears* v. *Jacob*, L.R. 1 C.P. 513, and *Woolf* v. *The City Steamboat Co.*, 7 C.B. 103, referred to.

2. The signature to the caveat, being the name of the company with "O. H. & N. Managers" underneath, without the corporate seal, was sufficient.

3. The petitioners being registered, judgment creditors had a right to claim an estate or interest in the lands in question.

4. It was not necessary for the petitioners, although a foreign corporation, to show that they were authorized to hold real estate in this province; for, unless there is some statute forbidding it, such a corporation is allowed by the comity of nations to come into the province and transact its business, to sue, obtain judgment and enforce the same in the manner provided by law, including proceedings to realize by sale of the lands of a judgment debtor, although it might not be entitled, without legislative authority, to buy or hold lands in the province.

Munson, Q.C., for petitioners. *Stackpoole*, for caveatee.